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BACKGROUNDER

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U.S. Antidumping Law Needs a Dose of Free-Market Competition

Alden F. Abbott

Abstract

Imports strengthen the United States economy. American purchasers and the overall economy benefit when free-market forces determine the prices charged for imported goods and services. U.S. antidumping law, however, raises the price of many imported products, harms American buyers of those commodities and ultimate consumers, and undermines the competitive process. In effect, antidumping is a form of cronyism in which politically connected industries have lobbied successfully for the legal right to impose unnecessarily high prices on American businesses and consumers that buy their products. A simple legal reform, drawn from American antitrust law, would reorient antidumping law in a pro–free market direction and could also be cited by U.S. trade negotiators to encourage foreign regimes to reform their own dumping laws, which have proliferated worldwide and are harming American exporters.

Key Points

- While tariffs generally are imposed on entire categories of goods without regard to the specific practices of particular exporters, special additional tariffs are sometimes added at the behest of particular domestic industries (and their unions).
- Perhaps the best-known category of special tariff is an "antidumping duty," assessed to counteract export prices allegedly set at "unfairly lower" rates than the prices for the same products sold in their domestic market.
- Adapting an antitrust-based predatory pricing standard for use in antidumping cases would require a few targeted statutory and regulatory changes that need not displace the roles of the Department of Commerce and the U.S. International Trade Commission.
- U.S. antidumping law should be reformed so that it is subject to a predatory pricing test drawn from American antitrust law. Such a standard would strengthen the American economy and benefit U.S. consumers while precluding any truly predatory dumping designed to destroy domestic industries and monopolize American industrial sectors.

Imported goods and services provide great benefits to the American economy. According to the 2015 *Economic Report of the President*:

> [I]nternational trade helps U.S. households' budgets go further. Because our trading partners also specialize in the goods and services for which they are relatively more productive, the prices for those goods and services in the United States are lower than if we could only consume what we produce. Trade also offers a much greater diversity of consumption opportunities, from year-round fresh fruit to affordable clothing.[1]

A May 2015 Heritage Foundation *Issue Brief* on the benefits of imports[2] described research showing that:

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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- Imports contribute to American job creation on a large scale (for example, half a million American jobs are supported by imports of clothes and toys from China alone);

- Imports provide key components incorporated by U.S. manufacturers into the products they make (between 1997 and 2006, such imported inputs used in American manufacturing accounted for 23 percent of manufacturing labor productivity growth and 14 percent of overall labor productivity growth); and

- Imports raise the purchasing power of American consumers (reductions in U.S. tariffs since World War II contributed an additional 7.3 percent to U.S. GDP, or approximately $1.3 trillion in 2014).

In other words, imports are of great value to Americans and should not lightly be impeded. As the late Nobel Laureate in Economics Professor Milton Friedman put it:

> [E]xports are the cost of trade, imports the return from trade, not the other way around.... What we send abroad we can't eat, we can't wear, we can't use for our houses. The goods and services we send abroad, are goods and services not available to us. On the other hand, the goods and services we import, they provide us with TV sets we can watch, automobiles we can drive, with all sorts of nice things for us to use.[3]

Antidumping Tariffs: Raising the Cost of Imports

Despite the benefits of imports, well-organized domestic industries have long sought to protect themselves from import competition by convincing governments to impose import restrictions, either quantitative restraints that directly limit the number of imported items or tariffs (usually calculated as a percentage of the value of the imported item) that raise the costs of imported goods and thus reduce the demand for imports.[4] While tariffs generally are imposed on entire categories of goods without regard to the specific practices of particular exporters, special additional tariffs are sometimes added at the behest of particular domestic industries (and their unions) that claim to be the victims of "unfair" foreign trade.

Perhaps the best-known category of special tariff is an "antidumping duty," assessed to counteract export prices that allegedly are set at "unfairly lower" rates than the prices for the same products sold in their domestic market. Thus, for example, dumping of steel bars would occur if Korean steel producers set "unfairly lower" prices for their steel bar exports to the U.S. than they did for steel bars sold in Korea, and an antidumping duty would be assessed on each imported steel bar to raise the import sales prices and counteract the alleged unfairness.

Economists define dumping as international "price discrimination"—the charging of lower prices (net of selling expenses and transportation) in a foreign market than in a domestic market for the same product.[5] Despite its bad-sounding label, price discrimination, whether foreign or domestic, is typically a perfectly legitimate profitable business practice that benefits many consumers.[6]

1. "The United States in a Global Economy," Chapter 7 in *Economic Report of the President: Together with the Annual Report of the Council of Economic Advisers*, The White House, February 2015, p. 291, https://www.whitehouse.gov/sites/default/files/docs/2015_erp_chapter_7.pdf (accessed May 20, 2015).
2. Ryan Olson and Anthony B. Kim, "Congress Should Recognize the Dynamic Benefits of Imports," Heritage Foundation *Issue Brief* No. 4404, May 11, 2015, http://www.heritage.org/research/reports/2015/05/congress-should-recognize-the-dynamic-benefits-of-imports (accessed May 20, 2015).
3. Milton Friedman, "Free Trade: Producer Versus Consumer," Landon Lecture, April 27, 1978, http://ome.ksu.edu/lectures/landon/trans/Friedman78.html (accessed May 20, 2015).
4. See, for example, "Import Restrictions," in *Globalization 101*, State University of New York, Levin Institute, 2015, http://www.globalization101.org/import-restrictions/ (accessed May 14, 2015).
5. The following discussion of dumping and the history of U.S. antidumping law draws heavily on Daniel J. Ikenson, "Protection Made to Order: Domestic Industry's Capture and Reconfiguration of U.S. Antidumping Policy," Cato Institute *Trade Policy Analysis* No. 44, December 21, 2010, http://www.cato.org/publications/trade-policy-analysis/protection-made-order-domestic-industrys-capture-reconfiguration-us-antidumping-policy (accessed June 16, 2015.
6. For an overview of how price discrimination affects producers and consumers, see Louis Phlips, *The Economics of Price Discrimination* (Cambridge and New York: Cambridge University Press, 1983; digital version 1999).

For example, a firm may decide to charge a lower price for a product to boost its success in a new market where it has not yet developed a strong reputation. Or a firm may decide to sell excess inventory in a product (perhaps to make way for next year's model) at a bargain price in a market where it is seeking to expand. In both cases, buyers in the new market benefit. Moreover, price discrimination allows a producer to sell to additional numbers of price-sensitive consumers in the low-priced market, to their benefit: Those consumers would have bought nothing at all if faced with a uniformly applied higher price.

In reality, harmful "predatory" dumping occurs seldom if ever. Despite this fact, however, antidumping law is a widely invoked staple of U.S. trade policy because it is based on legal standards that have nothing to do with true economic predation.

Dumping harms domestic consumers and the overall economy only when the foreign seller successfully drives domestic producers out of business by charging an overly low "predatory" import price, monopolizes the domestic market, and then raises import prices to monopoly levels, thereby recouping any earlier losses. In such a situation, domestic consumers pay higher prices over time due to the domestic monopoly, and domestic producers that exited the market due to predation suffer welfare losses as well.

In reality, harmful "predatory" dumping occurs seldom if ever. In the words of one leading commentator, although "U.S. antidumping law is ostensibly concerned with the kind of international price discrimination that stems from" predation, "one would be hard-pressed to find any real-world example of dumping causing competitive markets to become monopolistic."[7] Despite this fact, however, antidumping law is a widely invoked staple of U.S. trade policy because it is based on legal standards that have nothing to do with true economic predation. Rather, dumping reflects a set of arcane rules, unmoored from free-market principles, that are designed to shield domestic producers from competitive forces at the expense of American consumers rather than promote competition on the merits.

Antidumping is in fact a form of special-interest cronyism that imposes high costs on Americans and thwarts beneficial competition. As summarized by two renowned economists:

> [A]ntidumping [is] little more than an excuse for special interests to shield themselves from competition at the expense of both American consumers and other American companies.... Rather than promote fairness and competition, the American producers who petition for antidumping tariffs—a powerful and often unrecognized lobby—use them to thwart foreign competition. In essence, "antidumping" means little more than "antibargain." If a foreign firm sells its product in the U.S. market at too attractive a price, domestic firms can threaten it with an antidumping suit that will lead to hefty tariffs and higher prices.[8]

A Brief History of U.S. Antidumping Law

A bit of history illustrates how U.S. antidumping law was transformed into a protectionist vehicle. The first national law directed specifically at dumping behavior was enacted by Canada in 1904, authorizing a tariff on imports equal to the difference between the "fair market value" and the "selling price."[9] The United States followed suit in 1916, including antidumping language in the Revenue Act of 1916.[10] Before then, such practices were covered

7. Ikenson, "Protection Made to Order," p. 3.

8. N. Gregory Mankiw and Phillip L. Swagel, "Antidumping: The Third Rail of Trade Policy," *Foreign Affairs*, July/August 2005, pp. 107–108, http://dash.harvard.edu/bitstream/handle/1/2961701/Mankiw_Antidumping.pdf?sequence=2 (accessed June 16, 2015). Mankiw is Professor and Chairman of the Economics Department at Harvard University and served as Chairman of the Council of Economic Advisers under President George W. Bush. Swagel is Professor of International Economic Policy at the University of Maryland and served as Assistant Secretary of the Treasury for Economic Policy under President George W. Bush.

9. Ikenson, "Protection Made to Order," p. 5.

10. Ibid.

under the Sherman Antitrust Act of 1890 and the Wilson Tariff Act of 1894, the focus being on collusion by foreign firms to drive out domestic competitors and thereby monopolize American industries.[11]

The Anti-dumping Act of 1921, however, turned from an antitrust emphasis to an explicit focus on dumping practices that would harm American industries.[12] Injury to business replaced injury to competition as the primary motive for antidumping statutes.[13]

After World War II, the United States and other major nations sought to strengthen the global economy by reducing high international trade (particularly tariff) barriers through negotiations carried out under a framework known as the General Agreement on Tariffs and Trade (GATT).[14] Despite the general effort to lower tariffs, U.S. GATT negotiators successfully advocated retention of antidumping provisions on political grounds, arguing that prohibitions on dumping enabled liberalization of global trade by quelling opposition from domestic industries.[15]

Domestic U.S. industries increased their influence on antidumping policy through the Trade Act of 1974, which included provisions that were designed to raise the likelihood that dumping would be found in matters under investigation. In particular, the 1974 Act eliminated consideration of sales made below full production cost in the home market and promoted the use of "constructed value" calculations for home-market sales that included approximations for the cost of production, selling, general and administrative expenses, and an amount for profit. This methodology, compared to the traditional approach of comparing actual net foreign product prices with net U.S. prices,[16] tended to favor domestic producers by yielding higher margins of dumping.[17]

The 1974 Act also transferred authority over dumping determinations from the U.S. Treasury to the pro-business U.S. Department of Commerce (DOC), "reflect[ing] a Congressional desire for more zealous enforcement of the [antidumping]...laws and for less concern about their being used in a protectionist manner."[18] Coupled with this was the establishment of an advisory committee system that "provided [pro-dumping] private sector stakeholders with direct channels of access to staff-level decisionmakers throughout...[the DOC's] international trade bureaucracy."[19]

There has been a significant increase in the number of U.S. antidumping cases filed and the number of affirmative injury findings. Also noteworthy is the proliferation of foreign antidumping laws since 1980. Overall, the economic impact of antidumping law on the American economy has grown substantially.

The favoring of domestic industries continued with the Trade Tariff Act of 1984, which compelled the United States International Trade Commission (USITC), the independent agency charged with determining whether a domestic industry has been "materially injured" by dumping and other "unfair" foreign practices, to use a "cumulation" analysis that could subject multiple countries to anti-dumping penalties if one county's product was found to cause material injury to the establishment of a domestic industry.[20] More specifically, under cumulation, if multiple countries are being investigated for

11. Ibid.
12. Ibid., p. 6.
13. Ibid.
14. See "GATT/WTO," Duke University School of Law, J. Michael Goodson Law Library, *Research Guide*, June 2014, https://law.duke.edu/sites/default/files/lib/gatt.pdf (accessed June 16, 2015).
15. Ikenson, "Protection Made to Order," p. 6.
16. Ibid., p. 7.
17. Ibid., p. 10.
18. Ibid.
19. Ibid.
20. Ibid., p. 14.

dumping the same particular product and if exports from any one of those countries, or all in combination, are found to cause material injury, then *all* exports are made subject to an antidumping order. Thus, imports from individual countries that individually could not be shown to cause material injury face a price increase—an anti–American consumer outcome that lacks any legitimate rationale.

These and other developments have further encouraged American industries to invoke dumping as a protectionist mechanism. Thus, it is not surprising that in recent decades, there has been a significant increase in the number of U.S. antidumping cases filed and the number of affirmative injury findings.[21] Also noteworthy is the proliferation of foreign antidumping laws since 1980,[22] which harms American exporters. Overall, the economic impact of antidumping law on the American economy has grown substantially.

International Standards for Antidumping Law

The World Trade Organization (WTO), which came into being in 1995, replaced the GATT negotiating framework and broadened the scope of trade law while retaining existing GATT agreements in force, including a GATT Antidumping Agreement that tolerates national antidumping laws while not endorsing or requiring them.[23] The United States and other nations that have antidumping laws are parties to this agreement.

A brief review of the Antidumping Agreement demonstrates that it confers broad discretion on countries to develop antidumping methodologies that they prefer, a discretion that U.S. trade enforcers have applied to maximize the likelihood that dumping will be found and that antidumping tariffs will be imposed.

The Antidumping Agreement provides that the "normal value" rule for calculating the "home market" price for dumping purposes is "the price of the product at issue, in the ordinary course of trade, when destined for consumption in the exporting country market." If sales in the home market are deemed to be of "insufficient magnitude" for purposes of a fair dumping comparison, alternative methods of calculation are allowed, including constructed value and comparable price of the like product when exported to an "appropriate" third country (one whose price is "representative," an inherently arbitrary standard). The Antidumping Agreement also allows member countries significant discretion in calculating the "normal value" at home of exports from "non-market economies" where the government monopolizes trade or fixes prices—in effect, a license for arbitrary methodologies.

For dumping comparisons and calculations, the Antidumping Agreement establishes an "export price" based generally on the transaction price at which the foreign producer sells the product to an importer in the importing country. However, as is the case with normal value, the agreement recognizes that this transaction price may be unreliable for purposes of comparison (for example, due to an association or compensatory arrangement between the exporter and the importer or a third party or other factors). In such circumstances, an alternative method may be used to determine a "constructed export price," calculated on the basis of the price at which the imported products are first resold to an independent buyer. If the imported product is not resold to an independent buyer or is not resold as imported, the authorities may determine a reasonable basis on which to calculate the export price.

The Antidumping Agreement requires that when antidumping duties are imposed, a dumping margin must be calculated for each exporter. However, in cases where this is not possible, the agreement allows investigating authorities to limit the number of exporters, importers, or products individually considered and to impose an antidumping duty on uninvestigated sources on the basis of the weighted average dumping margin established for the exporters or producers that are actually examined.

21. See ibid., pp. 14–18.

22. See, for example, Hylke Vandenbussche and Maurizio Zanardi, "What Explains the Proliferation of Anti-dumping Laws?" *Economic Policy*, Vol. 23, Issue 53 (January 2008), pp. 93–138 (noting that 97 nations had antidumping laws in 2003 compared to 37 in 1980, with the proliferation spurred by new adopting nations' interest in retaliating against other countries' antidumping regimes).

23. See World Trade Organization, "Technical Information on Anti-dumping," 2015, https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed May 19, 2015).

U.S. Antidumping Law Procedures

U.S. antidumping investigations are undertaken by the DOC and the USITC, in response to a petition from a U.S. producer, a group of U.S. producers, or a U.S. labor union. (Those procedures are discussed in greater depth in Appendix I to this memorandum.) The DOC will assess antidumping tariffs if two conditions are met:

- The DOC finds dumping and
- The USITC determines that dumping has materially injured or threatens to materially injure a U.S. industry.

By their nature, U.S. antidumping law standards and procedures, which are consistent with (but not required by) the GATT Antidumping Agreement, are geared to encourage findings of dumping and injury without regard to whether the import pricing under question actually helps or harms the overall American economy.

Economic Impact of U.S. Antidumping Law

Since Adam Smith, protectionism has generally been seen as undesirable, harming efficiency and stifling specialization that would benefit each trading nation. In theory, using the threat of protectionism might be useful in keeping other countries from taking more protectionist measures or when one trading country has a monopoly on a specific industry, but in practice, these justifications are found wanting.[24]

In reality, few countries have true monopolies on any particular industry, and there is always a risk of retaliation from targeted countries.[25] (In fact, as U.S. reliance on dumping has risen in recent years, more jurisdictions—Mexico, for example—have brought dumping cases that harm American exporters.) Relatedly, protectionist regulations would likely be captured by politically connected domestic industries, to the detriment of consumers and the economy in general.[26] There is no truly principled basis for limited special-case "targeted" protectionism—including antidumping law.

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Firms may legitimately employ a non-predatory dumping strategy (one not aimed at monopolization) to maximize profits in competitive foreign markets, even selling products below what it costs to produce them. Predictable cycles of reduced demand may lead firms to sell products at prices that are high enough to cover their variable costs (costs that vary based on the number of units produced) and possibly part of their fixed costs (costs that are incurred without regard to output levels, such as the building of a factory) when they would not be able to sell at higher prices and would be left with the entirety of their fixed costs.[27]

Even taking into account domestic industrial interests, prohibiting dumping may not even have a positive effect on domestic industry as a whole. Antidumping restrictions on imported raw materials and industrial products used by U.S. firms make it difficult for these firms to compete internationally. In fact, the USITC is statutorily barred from considering their impact on consuming industries.[28] These consuming industries are often a larger part of the U.S. economy than the industries benefitting from antidumping regulation,[29] and producers of upstream products have become reliant on

24. Jagdish Baghwati, "Protectionism," in *The Concise Encyclopedia of Economics*, Liberty Fund, 2008, http://www.econlib.org/library/Enc/Protectionism.html (accessed June 16, 2015).
25. Ibid..
26. Ibid.
27. Ikenson, "Protection Made to Order," p. 8.
28. Daniel Ikenson, "Economic Self-Flagellation: How U.S. Antidumping Policy Subverts the National Export Initiative," Cato Institute *Trade Policy Analysis* No. 46, May 31, 2011, pp. 2, 14, http://www.cato.org/publications/trade-policy-analysis/economic-selfflagellation-how-us-antidumping-policy-subverts-national-export-initiative (accessed June 16, 2015).
29. Ibid., pp. 7–11.

restricting customer access to foreign goods rather than better responding to their customers' needs.[30]

One economic model estimated that these forgone efficiencies cost the U.S. economy $209 million annually, based on antidumping duties observed in 1993. If, however, antidumping recalculations undertaken through administrative reviews are accounted for, the cost to the United States ranged from $2 billion–$4 billion each year.[31] Given the increase in U.S. antidumping cases in recent years, one would expect these costs to be higher today.

Furthermore, these costs do not incorporate the economic impact of other effects of antidumping—specifically, the disincentive to produce more efficiently and the incentive to collude and compete less vigorously. Non-predatory dumping spurs home-market firms to produce more efficiently (at lower costs) so that they can reduce prices and compete with imports in order to remain in the market. To the extent that some home-market firms exit from the market due to heightened import competition, their resources are reallocated to more efficient uses in other sectors of the economy.

The truth is that when domestic industries complain that non-predatory dumping is "unfair," they are really objecting to competition on the merits—competition that raises overall long-term American economic welfare. (The short-run harm to some domestic companies' bottom line is part of the winnowing process by which greater long-term efficiencies are achieved.) Finally, the existence of antidumping law may encourage implicit collusion among domestic firms and foreign firms to soften price competition. This may happen through a "suspension agreement," in which "the exporters and producers...agree to modify their behavior so as to eliminate dumping...or the injury caused thereby. If the Secretary [of Commerce] accepts a suspension agreement, the Secretary will 'suspend' the investigation and thereafter will monitor compliance with the agreement."[32]

A suspension agreement, when authorized by the DOC, has precisely the same economic effect (though not the same legal effect) as an anticompetitive cartel agreement among private producers to raise prices, an agreement that harms consumers, eliminates competition, and violates U.S. antitrust law. Relatedly, the very threat of facing an antidumping complaint by domestic producers may "discipline" foreign exporters and dissuade them from engaging in vigorous price competition in the first place.

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In short, by establishing conditions that discourage price competition, antidumping law counteracts U.S. antitrust policy, harming American consumers and undermining the competitive process.

An American Antitrust Standard for Assessing Dumping

Aggressive price competition by foreign producers benefits American consumers, enhances economic efficiency, and promotes competitive vigor—net benefits to the American economy. Only below-cost "predatory dumping" by a foreign monopolist that allows it to drive out American producers and then charge monopoly prices to American consumers should be a source of U.S. policy concern and legal prohibition.

A test for predatory dumping can be drawn directly from a standard developed by U.S. courts and scholars for determining illegal price predation under American antitrust law. Applying that test in antidumping cases, antidumping tariffs would be imposed only when two conditions were satisfied.[33]

First, the government would have to determine that the imports under scrutiny were priced at a

30. Ibid., p. 16.
31. Bruce A. Blonigen and Thomas J. Prusa, "The Cost of Antidumping: The Devil Is in the Details," *Policy Reform*, Vol. 6, No. 4 (December 2003), pp. 233, 237, http://econweb.rutgers.edu/prusa/cv/29%20-%20devil%20in%20detals%20%28blonigen,%20prusa%29.pdf (accessed June 16, 2015).
32. 19 Code of Federal Regulations § 351.208(a).
33. For a more detailed discussion of the standard for determining dumping, see Appendix II.

below-cost level that caused the foreign producer to incur losses on the production and sale of those imports. This would be a price below "average avoidable cost," which includes all the costs that a firm could have avoided incurring by not producing the allegedly dumped products.

Second, if it met the first test, the government would have to show that the firm allegedly doing the dumping would be likely to "recoup"—that is, charge high monopoly prices for future imports that more than make up for its current losses on below-cost imports.

Recommendations for Reform

Adapting an antitrust-based predatory pricing standard for use in antidumping cases would require a few targeted statutory and regulatory changes, but these changes need not displace the roles of the DOC and the USITC. One possible approach might be the following:

- Antidumping petitions would have to allege (1) that products are being dumped at prices below an appropriate measure of incremental cost (preferably short-term average avoidable cost or, when that is not readily available, short-term average variable cost) and (2) that there is a dangerous probability that the dumping party will recoup its investment in below-cost prices.

- The DOC would investigate only whether foreign producers engaged in dumping below average avoidable cost and would apply dumping findings only to foreign producers that met this criterion. There would be no cumulation.

- The USITC would determine whether there is a dangerous likelihood of recoupment, weighing the likelihood of exit and reentry by domestic producers and other economic factors relevant to such an analysis. The USITC has a strong economics staff that could carry out these determinations.

- If both dumping below average avoidable cost and a dangerous likelihood of recoupment were found, the DOC could set antidumping tariffs, preferably in an amount calculated to raise import prices to average avoidable cost. Dumping margins higher than that would not promote competition and should not be authorized.

- Consistent with current practice, the DOC and the USITC should conduct reviews every five years to determine whether revocation of an antidumping order would likely lead to the continuation or recurrence of dumped imports and material injury to the domestic industry.

- Both domestic industries and parties subject to an antidumping order could petition the DOC and the USITC for revocation or alteration of an existing antidumping order, based on a showing of changed economic circumstances that would alter the result obtained from application of the two-part test for actionable dumping.

This proposed new antidumping methodology would be administrable. Indeed, because it focuses narrowly and solely on certain readily ascertainable costs and data on domestic industry viability, it should be easier (and thus less costly) to apply than the broad and uncertain methodologies under current law.

Of perhaps greater significance, it could serve as a sign that the U.S. government favors competition on the merits and rejects special-interest cronyism—a message that could prove valuable in international negotiations aimed at having other nations' antidumping regimes adopt a similar approach. To the extent that other jurisdictions adopted reforms that emulated the new American approach, U.S. exporters would benefit from reduced barriers to trade, a further boon to the U.S. economy.

Thus, a coalition of American firms (both input buyers and exporters) and consumers that would benefit from the proposed reforms might be organized to counteract efforts by entrenched domestic interests to preserve the anticompetitive features of current antidumping law. Better dissemination of public information on the harm of crony-capitalist regulations, including antidumping law, could also help. Antidumping law will not be improved overnight—building support for legislative and regulatory change takes time—but there may well be serious prospects for economically sensible reform in this important area.

Conclusion

U.S. antidumping law should be reformed so that it is subject to a predatory pricing test drawn from American antitrust law. Application of such

a standard would strengthen the American economy and benefit U.S. consumers while precluding any truly predatory dumping designed to destroy domestic industries and monopolize American industrial sectors.

*—**Alden F. Abbott** is Deputy Director of and John, Barbara, and Victoria Rumpel Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.* *The author gratefully acknowledges the research assistance of Heritage intern Joseph Tabor.*

Appendix I

Summary of U.S. Antidumping Procedures[34]

A U.S. antidumping investigation generally is triggered by a petition to the DOC and the USITC from a U.S. producer, a group of U.S. producers, or a U.S. labor union. After the case is initiated, an investigation will involve the following five stages:

- **USITC Preliminary Injury Determination.** The USITC must decide within 45 days after receipt of the petition whether there is a "reasonable indication" of material injury or threat thereof as a result of dumped imports. Material injury is measured by such factors as lost sales, price suppression, layoffs, increasing inventories, decreasing shipments, low capacity utilization, and reduced profits (or losses). The U.S. petitioner normally has an advantage because it generally will have prepared reports citing such factors well before it filed the petition. In addition, these indicia of "injury" focus on potential loss of business, which is a normal byproduct of vigorous competition, not on whether a domestic industry is truly threatened with destruction due to below-cost predation. The case ends if the USITC finds no material injury; otherwise, it continues.

- **DOC Preliminary Dumping Determination.** Within 140 days after the case is initiated, the DOC must make its preliminary dumping determination, although a 50-day extension is possible in a "complicated" case. The DOC bases its preliminary determination on information contained in responses to detailed dumping questionnaires that are sent to the major foreign producers of the investigated merchandise. If the DOC preliminarily finds that a particular company is dumping, the U.S. Customs Service will suspend liquidation of all entries of merchandise produced by that company entered on or after the date on which the preliminary determination is published in the *Federal Register*. At that time, the importer of the merchandise must post a cash deposit to cover potential antidumping duties that may be assessed later.

- **DOC Final Dumping Determination.** The DOC must make its final determination of dumping within 75 days after its preliminary determination, although a 60-day extension is possible. If the DOC's final dumping determination is negative, the investigation ends. If its final determination is affirmative, the DOC sets company-specific estimated dumping margins, and the USITC conducts a final injury determination.

- **Final USITC Injury Determination.** If the DOC's final determination is affirmative, the USITC holds a hearing to determine whether the U.S. industry is being materially injured (or threatened with material injury) by reason of the dumped imports. If the DOC's preliminary determination was affirmative, the USITC must make its final determination of injury before the later of 120 days after an affirmative preliminary determination by the DOC or 45 days after an affirmative final determination by the DOC. If the DOC's preliminary determination was negative, the USITC's final determination is due 75 days after the final affirmative determination by the DOC.

- **Post-Investigative Proceedings.** If both the USITC and the DOC issue final affirmative determinations concerning injury and dumping, then the DOC will publish an antidumping order in the *Federal Register*. The order requires importers of the investigated merchandise to post a cash deposit equal to the estimated dumping/countervailing duty margins set in the DOC's final determination. On the fifth anniversary of the antidumping order, the DOC and the USITC must determine whether revocation of the order would likely lead to the continuation or recurrence of dumped imports and material injury to the domestic industry. The order is revoked if both the DOC and the USITC make negative findings.

34. This summary of U.S. antidumping law procedures draws on DrinkerBiddle, "Summary of Antidumping and Countervailing Duty Investigation Procedures," http://www.drinkerbiddle.com/files/ftpupload/MemosandNewsletters/Summary-of-Antidumping-Countervailing-Duty-Investigation-Procedures.pdf (accessed May 22, 2015).

Appendix II

An Antitrust-Based Standard for Application in U.S. Antidumping Cases

American antitrust law already has in place a standard to deal with the special situation of socially harmful dumping: the test for predatory pricing established by the U.S. Supreme Court in the 1993 *Brooke Group* case, which involved a cigarette company's allegation that another cigarette maker had engaged in anticompetitive price discrimination.[35] The plaintiff in that case did not allege that the scheme was designed to drive it from the market.

In rejecting the plaintiff's claim, the Court emphasized that the antitrust laws were designed "to protect competition, not competitors."[36] More specifically, the Court held that to prevail in a predatory pricing claim under antitrust law, a plaintiff must prove that the prices were "below an appropriate measure" of the defendant's costs in the short term[37] and that the defendant had "a dangerous probability of recouping its investment in below-cost prices."[38] Thus, the Court created an antitrust safe harbor for above-cost pricing.

With respect to recoupment, the Court concluded that an antitrust "plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it."[39] In other words, the Court viewed recoupment evidence as a showing that a firm's short-term losses due to price cuts would be more than outweighed by greater future profits secured from monopoly price increases.

In the years since *Brooke Group*, there has developed a general understanding that "the appropriate measure of cost in any price-cost test for predatory pricing is 'some kind of incremental cost.'"[40] A firm that prices its goods at its incremental cost earns just enough to just cover the cost of making the final units of product that are sold.

In a 2008 report,[41] based on an extensive record of public hearings, case law, and relevant literature, the U.S. Department of Justice found an emerging consensus that the best incremental cost measure to evaluate predation claims is average avoidable cost, "which consists of all costs, including both variable costs and product-specific fixed costs, that could have been avoided by not engaging in [a] predatory strategy."[42] The report pointed out that average avoidable cost "is easier to calculate and theoretically more appropriate than either marginal cost—with its [focus on an] abstract 'single, last unit' [produced]—or average variable cost—with its difficult separation of variable from fixed costs."[43]

35. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 214 (1993).
36. Ibid., p. 224.
37. Ibid., p. 222. The Court did not explain what it meant by "an appropriate measure" of costs, leaving it to commentators and future cases to flesh out the meaning of this concept.
38. Ibid., p. 223.
39. Ibid., p. 225.
40. U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, September 2008, p. 61, http://www.justice.gov/atr/public/reports/236681.pdf (accessed June 16, 2015).
41. See esp. "Price Predation," Chapter 4 in ibid., pp. 49–75. The Obama Administration withdrew this report in 2009; see news release, "Justice Department Withdraws Report on Antitrust Monopoly Law," U.S. Department of Justice, May 11, 2009, http://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law (accessed June 16, 2015). It gave no indication, however, either then or subsequently, that it disavowed in any way the report's analysis of predatory pricing, which was strongly rooted in Supreme Court precedent and academic commentary. (The 2008 report dealt with many forms of single-firm conduct in addition to predatory pricing and suggested a default standard for such other forms of conduct that was far more controversial than its treatment of predatory pricing.)
42. U.S. Department of Justice, *Competition and Monopoly*, p. 64.
43. Ibid., p. 66. As the report concluded: "[A]verage avoidable cost typically will most accurately reflect the incremental cost of the alleged predatory output increase, and therefore will most accurately depict whether sales are beneficial to the firm, apart from any exclusionary effect, and whether the pricing strategy could cause the exit in the short run of an equally efficient competitor. Furthermore, average avoidable cost tends to be a more administrable standard than the other available cost measures and business-decision makers readily understand the concept." Ibid., p. 67.

If, however, average avoidable cost is not readily calculable (because the predatory increment of production is hard to determine), the report concluded (based on existing scholarship and ease of application) that average variable cost of production (costs that vary when there is a change in the quantity of a particular good produced, divided by the total quantity of the goods produced) is typically is the next best alternative.[44] This reasoning applies equally well to alleged dumping, which should be a concern only if it is likely to harm competition. To promote a procompetitive approach, average variable cost should be viewed as the "second best" alternative to average avoidable cost in dumping cases as well.

Likelihood of recoupment is an important "reality check"[45] to help ensure that courts do not mistakenly diagnose aggressive, short-term, procompetitive discounting as anticompetitive predatory pricing aimed at destroying a domestic industry. Indeed, "the recoupment requirement, when properly applied, serves as a valuable screening device to identify implausible predatory-pricing claims" and "may help ensure that procompetitive price discounting is not unduly chilled."[46] Fortunately, the *Brooke Group* Court set out at length an analytic framework for deciding whether a firm could recoup short-term losses, holding that an assessment of recoupment "requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market."[47]

44. Ibid.
45. Ibid., p. 68.
46. Ibid., p. 69.
47. Quoted in ibid., p. 68.