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Congress should reconsider the Antidumping Act of 1921 (hereinafter the Act).[1] The Act as currently applied affords American business tarifflike relief from import competition when only minimal standards of injury are met. This relief is in the name of combating an unfair trade practice, dumping—selling at a lower price for export than for home consumption. The Act's treatment of dumping as a criterion of illegality, however, is quixotic; it is also adverse to American welfare. It is quixotic because price discrimination is a normal phenomenon in healthy international trade. It diminishes national welfare because it restricts imports excessively and, more importantly, chills price competition (as is the case with any anti-price discrimination law) from imports. It thus fuels inflation both by decreasing the supply of goods and by discouraging foreign suppliers from competing on price in the American market.

Other laws, most particularly the antimonopolization provisions in section 2 of the Sherman Act,[2] protect us better from the one possible danger of dumping—predatory pricing designed to monopolize an American market. That threat is not very real. All other arguments against dumping are either fallacious or reduce to arguments against injury from any import competition. Arguments of the latter sort have nothing to do with price discrimination. The proper remedy for mischief not unique to dumping is to be found in the "safeguard" provisions of our trade legislation: escape clause relief (trade restrictions) or adjustment assistance (domestic subsidization). Hence, the United States could very well do without an antidumping law.

The discussion which follows concentrates only on American antidumping, safeguard, and antitrust laws. The analysis, however, should have general application to any country in the western trading

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world. All such countries have antidumping and safeguard provisions patterned along the general guidelines in Articles VI and XIX of the General Agreement on Tariffs and Trade (GATT).[3] Any country which does not provide protection against predatory pricing through a general antitrust law might resort to a revised antidumping law aimed only at predatory dumping.

Although this article advocates that the United States should rely upon its safeguard law—escape clause and adjustment assistance provisions—in all cases now processed under the Antidumping Act, it does not assert that this law is ideal, as drafted or as applied. It would take us too far afield, however, to set forth a model of ideal safeguard provisions. The article assumes, however, that it is sound to provide some form of temporary protection against sudden economic dislocations caused by imports.[4]

SAFEGUARD AND ANTIDUMPING RELIEF COMPARED

The current safeguard provisions (applying to all imports from whatever source) embody a basic policy trade-off in American law between positive consumer and negative producer (and worker) effects of low-priced imports. The rationale is that protection against high dislocation costs caused by imports is perfectly sound for a temporary period, but in the long run overall national welfare is best served through gradual adjustment to import competition rather than permanent import restrictions.

Antidumping legislation, however, is said to provide an additional basis for restricting imports in special cases, but with a softer injury test. A bald pronouncement that dumping is unfair can hardly be adequate justification for this special treatment. In my view, the significantly lower injury threshold in an antidumping case is not justified and merely means that the Act functions as a mushier surrogate for escape clause relief.

Statutory Standards

Under the safeguard provisions a claimant may obtain either an escape clause remedy—increased import restrictions—or adjustment assistance—various forms of financial and technical assistance ("subsidies"). Before any relief may be granted, the ITC must find that "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."[5] If the ITC so finds, it must recommend an appropriate form of relief—either escape clause or adjustment assistance—to the President, who in his discretion must decide what relief to grant, if any. If the President acts contrary to the ITC's recommendation, Congress, by concurrent resolution, may override the President and implement the ITC's recommendation.

An antidumping proceeding, on the other hand, involves no such discretion, and includes nothing comparable to adjustment assistance as an optional remedy. If the Secretary of the Treasury first determines that imports are being sold at "less than fair value" (hereinafter LTFV)[6]—at a price for export to the United States below the home market price or a surrogate therefor—the ITC must then determine "whether an industry in the United States is being or is likely to be injured, . . . by reason of the importation of such [LTFV] merchandise. . . ."[7] A finding of injury requires Treasury to impose an antidumping duty equal to the margin of dumping.

From the face of these two statutes, a softer injury test appears to apply in antidumping cases. Nothing in the antidumping statute requires a finding of "imports in increased quantities" as under the safeguard provisions.[8] More significantly, on the important questions of substantiality of injury and degree of causal nexus between imports and injury, the safeguard provisions are far more definite and demanding. They provide that there must be "serious injury" and that the imports in question must be a "substantial cause" of that injury. Substantial cause is defined as "a cause which is important and not less than any other cause."[9] The antidumping statute merely requires "injury" and "by reason of" causation. Even if the term "injury" is read to mean "material injury" as provided in Article VI of the GATT,[10] "material" appears to be a lower standard than "serious."[11] The causation standard "by reason of" is of course altogether without restrictive content.

The Injury Test in Practice

Decisions under the two statutes are consistent with my analysis of their language. The ITC more readily finds injury in dumping than in safeguard proceedings. This can be said despite some inconsistency and sparseness of reasoning in its decisions. The difference in approach occurs in the ITC's treatment under the two statutes of such factors as market segmentation, criteria of injury, substantiality of injury, and causal nexus between imports and injury.

Under both statutes the ITC has felt free to narrow the market definition within which injury is measured to one geographic region in the country,[12] but the narrowing process has gone further in dumping cases, even to the point of characterizing the market in a single urban area as an industry.[13] Criteria of injury are also more lax in a dumping case. In a safeguard proceeding, the ITC looks to several measures of injury, including decreased sales, lower production, inability to earn reasonable profits, unemployment, and underutilization of plant capacity, with no single factor being decisive.[14] In an antidumping proceeding, although all the above criteria are sometimes mentioned,[15] only two criteria—market invasion and depression of prices—appear decisive.[16] Indeed, in some dumping cases the ITC (or its predecessor, the Tariff Commission) has found injury on the basis of a declining price structure alone.[17]

The same pattern emerges on the degree of injury required, both as to the standards articulated and the results reached. In a recent safeguard case arising under the "serious injury" language of the 1974 Trade Act, the ITC said this test requires "an important, crippling, or mortal injury; one having permanent or lasting consequences."[18] In sharp contrast, the ITC applies a *de minimis* test of injury in antidumping cases, articulated in the 1967 *Cast Iron Soil Pipe from Poland*[19] decision as follows:

> Any injury which is more than *de minimis* is material injury. When the Congress used the word "injury" in the Act without qualification of degree the only exception that one might reasonably apply to the word is the old legal maxim that "the law does not concern itself with trifles."[20]

Comparing the degree of injury in a few illustrative cases yields the expected conclusion—less injury is needed for antidumping than for safeguard relief. Two recent split decisions under the safeguard provision probably indicate the maximum quantum of business injury which will fail to result in a finding of *legal* injury. In *Asparagus*[21] half the Commissioners found lack of serious injury when market invasion was 9.1 percent and worker layoffs in the industry were significant. More strikingly, in *Cast Iron Stoves*,[22] imports had grown from 10.5 percent of the market in 1972 to 64.7 percent in 1976, employment levels were down by 44 percent, profits had fallen by 7.7 percent, and capacity utilization had decreased by nearly 50 percent; however, no injury was found.

There are no negative antidumping decisions with such high quantitative indicia of injury. Indeed, the 1921 Act itself provides that a split decision is to be treated as a finding of injury.[23] More importantly, the indicators of injury in affirmative antidumping decisions are frequently well below the figures in *Asparagus* and *Cast Iron Stoves*. In the late 1960s and early 1970s—perhaps the high point of lax antidumping decisions—injury findings were made in cases of less than 2 percent market invasion[24] apparently on the basis of declining price structure alone[25] and in some cases in which domestic profit, capacity utilization, or other indicators were even moving upward.[26] Recent findings of injury in dumping cases follow a similar pattern.[27]

There is also disparity in ITC decisions under the two statutes with respect to causation.

In one of its first decisions under the "substantial cause" language introduced in the safeguard provisions of the 1974 Act, the ITC explained that proof of "substantial cause" would require meeting a two-part test. First, imports must be an "important" cause, which means that they must be " 'significantly' more than a '*de minimis*' cause . . . ,"[28] so that "where increased imports are just one cause of many causes of equal weight, it would be unlikely that they would constitute an 'important' cause."[29] Second, imports must be a cause which is " 'not less than any other' cause,"[30] which means that "no cause is more important than imports."[31] In a number of recent safeguard decisions, the ITC has failed to find injury because—although there was some causal link between imports and economic injury—recessionary conditions,[32] increased competition from new processes,[33] or substitute products were more important causes.[34]

By contrast, the causation test in antidumping cases is extremely attenuated. In the years immediately prior to enactment of the 1974 Act, the ITC (then the Tariff Commission) developed a gossamer-thin test of causation requiring only that dumped imports contribute to injury, perhaps by a factor only slightly greater than *de minimis* in significance. In *Ferrite Cores from Japan*, for example, the Commissioners in the majority asserted that "if injury is attributable in part to the LTFV sales of the ferrite cores and such injury is more than *de minimis*, we must make an affirmative determination. The relative importance of such injury to injuries caused by other factors is irrelevant."[35] Again, in *Pig Iron from Canada, Finland & West Germany*, the majority said: "[I]t is not necessary to show that imports were the sole cause nor even the major cause of injury as long as the facts show that LTFV imports were more than a *de minimis* factor in contributing to the injury."[36] Recent decisions of the ITC have continued to apply this anything-more-than-*de minimis* test of causation.[37]

Degree of Trade Restrictiveness

Even if the standards for antidumping relief are considerably lower than those for a safeguard remedy, it could be argued that the nature of antidumping relief and it status as an unfair trade remedy diminish its interference with free trade objectives. Those who so argue might stress, first, that antidumping duties are limited to the margin of dumping, whereas escape clause relief could include, in addition to tariffs, more objectionable forms of relief, such as quotas or voluntary restraint agreements (and in whatever measure required to prevent injury).[38] Second, antidumping relief is granted only against imports from selective countries in which exporters have been found to be dumping, thus minimizing the tendency of higher tariffs to increase prices to consumers, whereas escape clause relief is applied against all imports on a Most Favored Nation basis. Third, since antidumping duties protect against "unfair" competition, they decrease pressure on trading partners to retaliate with increased tariffs of their own. Moreover, the availability of such relief tends to deflect strong protectionist pressures from the business and labor communities away from the much larger amount of "fair" trade.

Turning first to the third argument, one may wonder why protectionist forces would not exploit to the maximum all means of restricting import competition, whether fair or unfair. By the same token, it is not likely that trading partners will be so easily duped into accepting our characterizations of their trade as unfair.[39] In my view, it would be sounder to confront the problem of serious injury from import competition openly and directly by negotiating an agreement with our trading partners for the proper use of safeguard measures and then holding our own domestic interests to those guidelines.

The first two arguments are also unpersuasive. Escape clause relief, although applicable on a Most Favored Nation basis, is subject to presidential discretion, in part because resort to such action requires that an offsetting concession be granted to countries injured thereby.[40] This both inhibits resort to such a remedy and tends to prevent the average level of trade restriction from increasing.[41] Moreover, in contrast to the antidumping law, the safeguard provisions of the 1974 Act authorize adjustment assistance in place of, or as a supplement to, escape clause relief, an authority the President frequently utilizes.[42] From a welfare economics perspective, adjustment assistance is preferable to trade restrictions. It goes only to the individual firms and workers actually injured and does not impose costs on the consumer through higher prices.[43]

Furthermore, safeguard relief is temporary, and the escape clause version of it is usually reduced gradually over its life cycle, whereas antidumping duties are a permanent bar to price discrimination from a given country. Although antidumping relief is limited to the margin of dumping, in any given case that could be greater than necessary to prevent injury. If protection against injury is the mischief to be corrected, the margin of dumping standard is an irrational approach to the problem. It is worse than irrational. It strikes at the heart of competitive rivalry—price competition. Thus the message to the foreign competitor is to compete in the American market as well as he can through better service, improved product quality or increased advertising, but to be cautious about lowering his price, because if he does so he may be found to be dumping and thus be subject to the softer injury test of the antidumping law.

In summary, then, antidumping relief conflicts with the objectives of free trade policy more than safeguard relief, especially adjustment assistance. This is in part because once dumping is found, antidumping relief is available under a distinctly softer test of injury. Is there something special about dumping, not yet treated, which justifies the costs consumers must pay to combat it?

AN ECONOMIC ANALYSIS OF DUMPING

The concept of dumping or price discrimination unquestionably carries with it a pejorative connotation in the minds of many businessmen and noneconomists. There seems to be something unfair about charging one price to buyer A and a different price to buyer B, if the costs of supplying the two are equal. Normally, however, the unfairness would seem to lie in charging some customers the higher price, not the lower one. Those opposed to dumping in international trade, of course, are exercised over the low price. In the antidumper's mind, concern over the low price is probably linked to several notions which call for careful analysis: (1) the dumper may be a predator seeking to drive out competition and monopolize the target market; (2) dumping is a practice of foreign monopolists who may operate behind high protective tariffs at home, thus giving them an unfair advantage; (3) a low dumping price may be unfair, because it is not cost-justified—it does not bear a ratable share of the suppliers total costs and is in effect subsidized by the high home market prices, which bear more than a ratable share of full costs; (4) a low dumping price may be temporary, and thus may impose wasteful adjustment costs upon domestic producers without long-term benefits to consumers.

The most important misconception about dumping is that price, to be "fair" or "just," must be set at a single level based solely on cost of production—that a price, to be "fair," must bear a ratable share of the full costs of production. This completely omits from the pricing process the demand side of the law of supply and demand. A rational, nonpredatory supplier may dump merely because he is responding to different demand conditions in a genuine effort to maximize profits.

The Requirements for Dumping

Dumping technically can occur whenever two conditions are met: (1) it is possible to separate national markets; and (2) the dumper has some degree of market power at home. The first condition may exist because of tariff barriers in the home market, high transport costs, or unique design for exported products, any of which would make it infeasible to undercut the higher home market price by re-imports of the lower priced exported goods. The second condition requires that the dumper be able to affect the price in his home market by increasing or decreasing supply. A producer is commonly able to do this, for very few markets are supplied by a large number of relatively small producers, each able to sell essentially all of its output, or any foreseeable expansion of its output, at the prevailing market price—the conditions of perfect competition.

For dumping to be profitable, however, a third condition must be satisfied: the price elasticity of demand must be greater in the export market than at home. A highly elastic demand signifies that a small decrease in price will generate a relatively large increase in consumption. A highly inelastic demand signifies that consumers are strongly wedded to the product and are not affected very much by changes in price. It is not at all uncommon that demand for a product in an export market will be more elastic than home demand. The foreign product in an export market may have to compete with many alternate sources of supply, both from local production and other exporters not confronted at home; and buyer attachment to foreign products may be lessened by the greater risks, longer lead times, reduced services, and suspicions of inferior quality which sometimes accompany imports. Individual sellers often assume that foreign demand is more elastic than home demand. They expect domestic competitors to follow suit if they cut prices at home, but anticipate less reaction from sellers based in foreign markets.[44]

Given these prerequisites, one would not expect dumping to be rare. National markets are often separated by long distances, tariff or other import restrictions, and differing product specifications. Imperfect competition is common, and price elasticity of demand would often seem to be greater abroad than at home.

Profit Maximization—Equalizing Marginal Revenue in All Markets

The expected frequency of dumping is of course also related to its profitability. Given the three conditions just discussed, selling for export more cheaply than for home consumption will actually maximize a firm's profits.

If a firm may distribute its output in two separate markets with different demand characteristics, it will maximize its profit by dividing its sales between the two markets in order that the same marginal revenue is earned from the sale of the last increment of output in each market, and the common marginal revenue thus obtained equals the marginal cost of producing that total output. If marginal revenue is unequal in the two markets, greater revenue could be earned by shifting output from the lower-yielding (lower marginal revenue) to the higher-yielding (higher marginal revenue) market. This process should continue until marginal revenue in the former market rises to meet falling marginal revenue in the latter. Total output should be adjusted until a similar equality exists between marginal cost and the common marginal revenue. If marginal cost is below marginal revenue, total output must be expanded, since extra profit (revenue exceeds cost) can be earned on additional sales in both markets; the reverse of course holds if marginal cost exceeds marginal revenue.

It is less intuitive, but nevertheless true, that if marginal revenue is equal in two separate markets, price will be lower in the market with more elastic demand. Marginal revenue is always less than price at any given output, because to sell more of a product, price must normally be lowered. The marginal revenue from an extra unit of sales is never quite equal to the new selling price, because some revenue is lost on all prior output now sold at a new lower price. The more elastic the demand, however, the smaller will be the gap between marginal revenue and price. When demand is elastic, a slight fall in price causes a large increase in total sales. Thus with elastic demand, less revenue is lost on prior output (because price falls less) to generate a given amount of new sales. Since marginal revenue is equal in both markets when profits are maximized and always below the price in either market, price must be lower (closer to the common marginal revenue) in the more elastic market.

The Innocence of Dumping Below Average Cost

It is a common misconception that a low dumping price is necessarily unfair if it is below average total cost (unit cost). This view seems to underlie the 1974 Act provision rejecting home market or third country sales as a reference price for dumping determinations if these prices are "less than the cost of producing the merchandise."[45] The same notion is reflected in Treasury's new trigger price mechanism for certain steel products.[46] Under those provisions the price which triggers a Treasury dumping investigation is based on the manufacturing costs of Japanese firms, assumed to be the world's most efficient producers.[47]

Economists and businessmen would agree that a firm (at least a domestic firm), having sunk its investment but facing inadequate demand, should continue to operate in the short run as long as price exceeds average variable rather than average total cost. It would thus make at least some contribution to its fixed costs which, in the short run, would be incurred with or without production. Perhaps some would argue that this justification for below-cost pricing should be denied a foreign dumper, because the impermanence of the low price would fail to outweigh producer injury. But the argument in the dumping context often has a long-run frame of reference: that a dumper should not be allowed, as a long-run practice, to price below unit cost, because if he does so he is not covering his full costs on the low-priced sales; the earnings from the high-priced sales are being used to subsidize the dumping operations.[48]

Arguments of this kind are fallacious. If the dumper is maximizing his profits by selling his total output in two markets so that marginal cost equals marginal revenue in both markets, he is making the maximum possible contribution to fixed as well as variable costs. A higher price in the export market or a lower one in the home market would reduce his profits and hence reduce his contribution to fixed and variable costs.

Whether a given profit-maximizing firm can sustain its production and pricing patterns in the long run depends on whether its fixed and variable costs are actually being covered by the maximized net revenue being generated. This will occur if average revenue equals or exceeds average cost. If a producer charges different prices in two different markets, average revenue is not equal to price, but falls instead between the two prices. Thus the lower dumping price can fail to meet average cost, while at the same time average revenue may equal or exceed it. If a dumper's average revenue just exactly equals average cost, any price above the profit-maximizing dumping price in the export market would itself be money-losing and nonsustainable, because average revenue would have to fall and thus would fail to cover average cost.[49]

The Test of Money-Losing Sales—Price Below Marginal Cost

If cost justification is set up as the benchmark of fairness in pricing, marginal cost rather than unit cost would be the more appropriate guideline. Only if price in the dumping market falls below marginal cost can it be said that the dumper suffers out-of-pocket losses on the dumping sales, at least in the short run, for the price he receives is not even covering the incremental cost of the extra output. If the dumper already holds a substantial part of the import market (and surely if he has a monopoly position in that market), this would be alarming evidence that he may be deliberately seeking to drive out or keep out other competitors. On the other hand, if the dumper were a new entrant in an import market, even money-losing sales below marginal cost could be considered fair competition if designed for promotional purposes or to meet the temporarily low price of existing competitors.[50]

Price discrimination itself has no bearing on the appropriateness of a price in relation to cost. The "just" or "fair" price, for purposes of preserving healthy competitive rivalry, is not the highest price a dumper charges in some other market, nor even average total cost. If any limit price is relevant, it would be marginal cost, but even this should not be considered a rigid rule for all competitors.

Welfare Maximization—Price Equal to Marginal Cost

A welfare approach to fairness at least does not contradict the marginal cost standard. Economists generally agree that, in the short run, welfare within a single country is maximized when price equals marginal cost.[51] If price is held above marginal cost, or marginal opportunity cost (the value of the output which could have been produced by the committed resources in their next best employment), consumers who would be willing to purchase the next increment of output at a slightly lower price are denied that opportunity even though it would cost society less (marginal opportunity cost) than consumers are willing to pay (price). Consumer welfare is thus being sacrificed whenever price is held above marginal cost.[52]

In the dumping context, of course, if the low dumping price is set at marginal cost, the price in the home market must be above marginal cost. Thus, if welfare effects in the importing and exporting countries are aggregated, one could no longer conclude that allowing the low dumping price to fall to marginal cost would necessarily maximize welfare. Instead, the gap between price and marginal cost could widen in the high-price market by more than it contracts in the low-price market, so that on balance welfare would be diminished.

From the point of view of this article, there are two reasons for discounting the importance of aggregate welfare effects. First, we are to analyze the proper role of the American antidumping law and thus are primarily concerned with welfare effects in the United States as an importing country. From that perspective the general optimality of marginal cost pricing still holds. Imports sold at marginal cost are cheap. To the importing country it does not matter why cheap imports are cheap,[53] or that higher prices are charged elsewhere. If imports can be obtained at bargain prices, the importing country can shift resources into other lines of production and have more of both the imported product and the alternate product line than would be available at higher import prices. If these benefits outweigh the costs of adjusting to import competition (idle resources, retraining workers, social dislocation from unemployment, start-up costs for new production) when flat pricing is involved (the issue under the safeguard provisions), they will generally do so when the low price happens to involve discrimination. A dumping price *below* marginal cost might have adverse significance because of the possible inference of predation, but even here it would be the below-marginal-cost pricing and not the presence of discrimination that would compel that inference.

Second, even if aggregate welfare were relevant to antidumping policy in an importing country, there is no simple rule for determining how marginal cost dumping affects welfare in the aggregate. One cannot assume that imposing a tariff on the low-priced dumped imports will automatically shift sales to the high-price market and reduce the gap between price and marginal cost in that market. This is because a reduction in sales in the import market may also reduce total production and drive price upward in the exporting country. Indeed, economists have clearly demonstrated that the effect of dumping may be to expand production and lower the price in the high price market below the level which would prevail were dumping forbidden.[54]

In general, the effect of dumping on aggregate welfare is unpredictable. Joan Robinson has shown that whether total output expands or not as a result of dumping depends upon the elasticities and shapes of demand curves in the home and foreign markets.[55] But expansion or contraction of output is not decisive as to welfare effects even within the exporting nation alone. One must also know, for example, whether expanded production occurs within a full employment economy and whether resources are attracted away from industries in which greater distortions prevail.[56] Furthermore, to determine aggregate welfare effects, it would be necessary to counterbalance any negative effects in the exporting country with positive effects in the importing country or vice versa.[57] The upshot, then, is that aggregate welfare effects are too indeterminate to be of practical utility in assessing proper antidumping policy.

Moreover, the major source of welfare sub-optimization in the exporting country is the gap between price and marginal cost. This results from the degree of monopoly power possessed by producers in that country. Thus if improving welfare in the exporting country is the goal, policy measures should be directed at the source of the problem—at attempts to increase competition in the home market through vigorous enforcement of antitrust policy or reduction of restrictions on imports.

POLICY ANALYSIS OF DUMPING AND ANTIDUMPING LAWS

To reach a sound judgment about the wisdom and effectiveness of antidumping measures, one must have a clear vision of precisely what the mischief is that such measures are supposed to correct. The large literature on antidumping abounds with asserted reasons for opposing dumping. In my opinion only one of these reasons—opposition to predatory pricing—is sound, and even it is a dubious basis for special antidumping legislation because of the rare occurrence of predatory dumping and the protective adequacy of the general antitrust laws. The other reasons put forward are either unsound or have nothing to do with price discrimination. The arguments against dumping fall into two categories: (1) those opposed to dumping in the short run; and (2) those addressed to long term dumping. The only really sound argument against dumping involves the short-run case of predatory pricing; if an antidumping law is to be retained at all, antipredation should be its exclusive touchstone.

Short-Run Dumping—The Issue of Impermanent Low Prices

Opposition to short-run dumping is generally based on its impermanence. If dumping is short-run because it is predatory, it will be followed by high monopoly prices once all competitors are driven out. Even if it is not predatory, as the argument goes, it will impose wasteful adjustment costs upon domestic producers, not counterbalanced by short-lived consumer benefits.

Antipredation—The Proper Touchstone of Antidumping Law

In theory, predatory dumping involves a foreign monopolist who sells his product in the import market at a low money-losing price for a temporary period, while continuing to earn monopoly profits at home, until he has driven out all competitors in the target market. Thereafter, he raises his price in the newly conquered market to monopoly levels. After recouping the prior losses, he begins to enjoy a continuing stream of monopoly profits. Two elements are central to the concept: money-losing sales and predatory objectives. Theoretically, any price below the profit-maximizing point could be considered money-losing and hence an indication of predatory motives.[58] A test of money-losing which does not involve out-of-pocket losses, however, would probably be administratively unworkable because calculations of marginal revenue as well as marginal cost would be needed.[59] Similarly, an attempt by a foreign monopolist to expand his market share from 1 to 7 percent, for example, should not be defined as predatory, because if monopoly power is not the goal, there seems no reason to fear an ultimate rise in prices.[60]

A persuasive line of economic analysis suggests that predatory pricing will be rare because it is costly and the benefits are both doubtful and in any event obtainable through less costly means.[61] A monopolist contemplating a predatory attack would have great difficulty predicting both how much he must suffer in losses before all competitors are driven out and how high he could raise the price thereafter without attracting new entry. If entry barriers were low, the price could not be raised much. Even if they were high, but the changeover cost for the displaced productive facilities were low, a slight rise in price would beckon the existing plant back into the market under new management. Predatory pricing designed to induce merger on the predator's terms or collusive price setting might seem more probable because it is less costly. Ancillary predation of this kind would also discourage entry by other firms who might otherwise be attracted by the promise of a lucrative merger without a fight.[62] As Areeda and Turner point out, however, since price-fixing and monopolistic mergers are already illegal, and the tactics just described would be highly visible, predatory pricing even in this context still seems unlikely.[63] Indeed, the empirical evidence available appears to bear out these theoretical predictions that genuine predatory pricing will be uncommon.[64]

The threat of predation seems even less serious in the context of dumping. To be successful, the dumper must drive out not only local producers in the target market but also competing third country exporters. Even if the market for the product in question is regional rather than worldwide,[65] the predator must achieve a monopoly in all the countries in the region. If producers in a single country survive, they are free to export to the target market and undercut the predator's price as soon as he seeks to raise it. A strategy aimed at such a regional monopoly, or even a regional price cartel,[66] would again be highly visible and, if the United States were the target market, would surely invite prosecution under the Sherman Act or the Antidumping Act of 1916.[67] Moreover, a would-be foreign predator must confront the possibility of eight years of extra tariff protection (in addition perhaps to adjustment assistance) for American producers under the escape clause at the moment predatory tactics actually cause or threaten serious injury, not to mention further congressional reaction that might be anticipated if a creditable case of foreign predation were to emerge.

As with domestic predation, there is a similar lack of evidence that predatory dumping has occurred with any frequency since the enforcement of strong antitrust laws.[68] Nevertheless, the practice could result from miscalculation or the pursuit of personal, non-profit-maximizing objectives; and no matter how infrequent, there should be protection against it. The important question is what form that protection should take.

First-Best Solution—The Sherman Act

For several reasons, in my opinion, protection should not take the form of a special antidumping law. First, the very implausibility of predatory dumping as a genuine threat cuts against the need for special legislation. Second, the presence of price discrimination has little, if anything, to do with the threat of predation. Although a foreign producer bent on predation would probably discriminate in price to limit his losses to the target market, discriminatory pricing can also be (and usually is) an innocent response to differences in demand. Moreover, high monopoly profit at home is not the only source of the necessary financial staying power to pursue a predatory strategy. This could be found as well in past accumulated profits or in large profits from other product lines in a multiproduct conglomerate. Thus, there is no reason to single out dumping for special scrutiny.[69]

Third, the existence of a special anti-price discrimination law carries with it the cost of discouraging all price competition, even the healthy variety. This point has been made with force and cogency in the current debate over the usefulness of the Robinson-Patman Act[70] and applies with even greater force in the antidumping context, given the lesser threat of predatory dumping just mentioned and the point which follows. Fourth, American producers are already adequately protected from any import competition, including dumping, under the escape clause if there is serious injury to an American industry or under the adjustment assistance provisions if there is serious injury instead to individual firms.

Fifth, and most important, the existing domestic antitrust laws are entirely adequate to protect against the threat of predation from foreign dumpers. The domestic Robinson-Patman Act[71] would not be a good surrogate both because it is still an anti-price discrimination law and because it might not be available on jurisdictional grounds for use against predatory dumping.[72] There would be no such difficulty, however, with the Sherman Act section 2 provisions against monopolization or attempts to monopolize "any part of the trade or commerce among the several States, or with foreign nations, . . ."[73] The Sherman Act has long been applied against all forms of predatory pricing, not just discriminatory predation,[74] and there would be no difficulty in obtaining personal jurisdiction over a foreign supplier against whom a colorable case could be made of seeking through predatory dumping to monopolize an American market.[75] Moreover, as a general antimonopoly law, the Sherman Act would counter predatory dumping without chilling all price rivalry.

Second-Best Solution—Revision of the Antidumping Act

If the antidumping law is retained in American law,[76] however, Congress should at least revise the current statute to insure that it applies only to predatory dumping or threats thereof and is only minimally restrictive of healthy price competition from imports. First, and most important, the injury concept in the current statute should be revised to include only injury to competition and not injury to individual competitors. The current language of the Act, which requires the ITC to find "whether an industry in the United States is being or is likely to be injured, . . ."[77] shows no sensitivity to this problem. Even the current language of the Robinson-Patman Act which prohibits price discrimination only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . ."[78] has not restricted the application of Robinson-Patman to only genuinely predatory practices.[79] If nothing else could be achieved, however, the Robinson-Patman language would be a substantial improvement over the current Antidumping Act. It is difficult to see why the same standard should not apply to both international and domestic price discrimination.

Under whatever statutory language is used, the primary problem would be to identify when a firm is pricing predatorily. As suggested earlier, a four-part test looking to predatory intent, market structure, competitive conduct, and cost information, but with emphasis on intent, could be used to identify predatory pricing.[80] Areeda and Turner have recently rejected the "empty formulae" traditionally used by courts in predatory pricing cases, including predatory intent, and urge instead a test that would rely exclusively upon the relation between a firm's price and certain cost factors.[81] In simplified terms, they argue a price should be deemed predatory if below short-run marginal cost—or rather, the more administrable surrogate, "reasonably anticipated average variable cost."[82] Such a price would clearly involve out-of-pocket losses, since not even the variable cost of producing the output would be covered.[83]

The strengths of the Areeda and Turner approach lie in its administrability and the balance struck in favor of price competition at the seemingly slight risk of condoning some predatory tactics. On the other hand, the marginal cost test is inflexible and may carry more than a slight risk of encouraging predation because of its predictability.[84] Alternatively, it might be used to establish a presumption, with the burden of rebuttal falling on the opposing party. The rebutting evidence might include some of the elements of the four-part test mentioned above. It is not my intention here to resolve definitively how best to identify predatory pricing, but rather to indicate that there are several workable approaches for a court or agency facing that issue.[85]

Second, a revised Antidumping Act should provide explicitly for two important defenses: meeting competition and promotional pricing. The meeting competition defense now contained in the Robinson-Patman Act would provide an appropriate guideline.[86] Perhaps a dumper who had already achieved a monopoly position in the American market should be denied this defense if the meeting competition price fell below the dumper's short run marginal cost.[87] Money-losing prices would thus be charged merely to retain a monopoly position, a tactic which seems predatory. On the other hand, a defense under the proposed Antidumping Act would not imply exemption from section 2 of the Sherman Act, under which such a practice by a monopolist could still be prohibited.[88] If the dumper does not already have a monopoly position in the American market, the meeting competition defense should be applied with flexibility to take account of the likely need of a foreign supplier to charge prices below the American level to overcome consumer bias against a foreign source of supply.

The promotional pricing defense would be designed to allow dumping as a means of entering a new market, even if the low dumping price fell below the dumper's marginal cost. As long as such a tactic was truly promotional (hence temporary) and was used by suppliers with none or only a small share of the market in question, it would increase the competitive structure of the market by adding another competitor and would increase the range of choice provided consumers. The defense might appropriately be limited to dumpers with less than a given percentage, perhaps 10 percent, of the relevant American market.[89]

Third-Best Solution—
The International Antidumping Code

If Congress fails to repeal the Antidumping Act or to recast it along the lines just sketched, the question arises whether the current statutory provisions could be interpreted to apply only to predatory dumping. The legislative history of the 1921 Act contains roughly as much support for an antitrust as for an escape clause interpretation of the Act.[90] Now that the 1974 Trade Act has freed the escape clause of the former link between increased imports and trade agreement concessions and thus made of it a more general provision for protection against all seriously injurious imports, whatever their source, there is even more reason to stress the potential antitrust nature of the current Antidumping Act. Candor requires one to concede, however, that the current provisions of the Antidumping Act have an escape-clause cast—injury to competitors rather than competition.[91] The essentially neutral reaction of Congress to the International Antidumping Code,[92] which sought higher standards through escape-clause-like concepts of injury, causation, and industry, is also not a strong signal that the Antidumping Act should be given a thoroughgoing antitrust reading. Thus, under the current provisions, the most one could urge would be that the ITC adopt the Antidumping Code standards of injury, causation and industry, which, although not aimed genuinely at predatory dumping, at least reduce the potential of the Antidumping Act to eliminate all price competition in the import trade.

Nonpredatory Injurious Dumping: An Inadequate Basis for Antidumping Relief

Short-Term Dumping in General

The argument for extending antidumping relief to *non*predatory dumping if it causes serious injury to producers in the importing country traces to Viner's classic work on dumping.[93] Viner grounded his opposition to all injurious dumping upon two premises: (1) that dumping prices are generally temporary; and (2) that serious injury to producers cannot be offset by short-lived consumer benefits. Neither of these propositions rests upon reliable empirical evidence or rigorous theoretical analysis.[94]

Although Viner himself thought the presumption of dumping impermanence to be weak,[95] he wrote before the full force of marginalist analysis was well known and understood. As the previous economic analysis demonstrates, whenever a producer has some degree of market power in his home market and can prevent arbitrage—very common conditions—he will actually maximize his profits by charging a lower price in any national market with a more elastic demand than his home market. Thus there is no *a priori* reason for presuming from evidence of price discrimination alone that dumping will be impermanent. Only if money-losing sales are involved—for example, if the dumping price falls below marginal cost—would there be a basis for such a presumption. But this of course might bring the case within the predatory category and, in any event, has nothing to do with the discrimination in price.

Viner's second premise poses further difficulties. Even if we knew from reliable empirical evidence that dumping prices tend to be temporary, we could not say, by concentrating only on injury to producers, that such injury is never outweighed by benefits to consumers, even if short-lived. The longer the low prices last, even if ultimately terminated, the greater the accumulation of welfare benefits to consumers to offset the adjustment costs suffered by producers and workers. Nothing in the formula for opposing all injurious dumping takes account of these accumulating benefits. Thus, to support that formula we would need empirical evidence not only that dumping is likely to be temporary, but that it is also not likely, when it does cause serious injury, to last long enough for accumulating welfare benefits to offset that injury.

Furthermore, short-term dumping can have beneficial effects on an importing country not directly attributable to the cheapness in price. If the dumping price is for market entry purposes, even after the low promotional price is terminated, another supplier will have been added to the market, thus increasing the competitive structure of the industry and providing consumers with a wider array of goods from which to choose. A producer already supplying a foreign market might also dump temporarily to meet competition and retain his position in that market. This has similar beneficial effects on the competitiveness of market structure and the range of consumer choices. Moreover, a supplier may simply be experimenting in price to test market alternatives or may be coping as best he can with an uncertain world in which he must guess at the price his competitors will charge or when to make discount concessions to an influential importer. It is precisely this kind of competitive pricing that should be fostered, not rejected, both in the domestic and international sectors of the economy. The very foreignness of the source of supply may be a significant feature in undermining oligopolistic price discipline in the import market, since foreign producers are less easily assimilated into the culture of common expectations that underlies price discipline.[96] The unsystematic character of these pricing practices—promotional meeting competition, experimental or *ad hoc*—has a positive effect on the competitive process. More systematic pricing conduct could be adverse to competitive rivalry, because it might reflect adherence to oligopolistic price discipline or an attempt at predation.

One might question whether most of these cases would fall within an antidumping law conditioned upon the existence of serious injury caused by the dumped imports. Promotional and experimental pricing would not be likely to produce serious injury, and dumping to meet competition would probably fail the causation test. If the tests of "serious injury" and "causation" had real substance to them, this response would be more satisfying than it is, given the low standards of injury and causation the ITC now uses in antidumping cases. Since both of these standards have higher thresholds in a safeguard proceeding, this is an additional reason for favoring that form of relief for temporarily cheap imports. Indeed, the very temporariness of the escape clause and adjustment assistance remedies accords more closely with the nature of the adversity against which protection is sought—impermanent low prices from imports. Under the 1974 Trade Act, escape clause relief can be obtained for five years, with a possible extension for three additional years.[97] Low import prices which last beyond eight years could hardly be classified as temporary.[98]

Special Case of Cyclical Demand Dumping

In a recent study, W. Wares argues that antidumping laws should "prohibit dumping when it injures a domestic industry and, additionally, involves the importation of a temporary supply of goods which would not otherwise be marketed."[99] Wares' paradigm case is that of the foreign producer who would not supply the import market in times of stable demand but does so at dumping prices only during recessionary periods in his home market. The case was carefully chosen.[100] There could indeed exist a profit-maximizing producer whose marginal revenue at home during normal times would exceed marginal revenue in the import market; he would thus not normally supply the foreign market. During a recession at home, such a producer could experience a fall in marginal revenue at the optimal output (although this is not a necessary result) sufficient to make what originally seemed an inadequately low marginal revenue in the foreign market now appear attractive. If demand elasticity in the foreign market at the optimum marginal revenue point were greater than at home (not a necessary result), then the producer would begin to dump during such a recession (but not necessarily during every recession). Given these conditions, it is also true that as demand falls gradually in the home market during different recessions, a profit-maximizing dumper would begin to sell in the foreign market sooner than would a flat-pricing producer. This is because the dumper would do so as soon as falling marginal revenue at home reached the maximum price at which some quantity of goods could be sold in the foreign market,[101] whereas the flat-pricing producer would do so only when home price, always above marginal revenue, reached that point. Thus, in some cases of recession at home a dumper would supply the foreign market temporarily, whereas a flat-pricing producer would not.

Can one conclude from this that antidumping measures should be employed against such a case? I think not, for both theoretical and practical reasons. To be sound, such a conclusion must rest on the same two premises central to Viner's conclusion: (1) the low price will be temporary, and (2) a temporary low price seriously injurious to producers will lower welfare.[102]

The first premise raises more practical than theoretical problems. As explained, there are cases in which a profit-maximizing producer experiencing a recession in his home market will shift some of his output to a foreign market for the first time, will do so only for the period of the recession, and will do so only if he is allowed to dump. Nevertheless, to determine whether a given case of dumping falls into this category, one would presumably need separate findings that (1) there is dumping, (2) that the foreign producer has not traditionally supplied the import market, (3) that the foreign producer is experiencing a recession at home, and perhaps (4) that the recession is the cause of the dumping. No presumption of impermanence can arise from dumping alone. If the concurrence of dumping and recession at home were to trigger relief without further findings, we would include cases of traditional suppliers who may have been dumping all along and could continue to do so after the recession.[103] Thus the full list of findings would seem necessary, and they would clearly be administratively burdensome. How many shipments in the past and during which time periods, would lead to the conclusion that a producer is a traditional supplier? What would be the indicia of recession? Would it turn on the state of the foreign economy as a whole or the state of the given industry, or both? As to the condition of the given industry in the producer's country, how would one distinguish between a cyclical downturn in demand and a fall off attributable to the success of substitute products? For causation to be shown, how close in time must the initiation of dumping and the beginning of the recession be? Would it be possible to speak of a beginning point for a recession?

Even a positive finding on each of the issues listed would not guarantee that the dumping would be temporary. The dumper, although induced to export initially because of the recession, might discover the export market to be more profitable than anticipated and continue to sell there after the recession ends. The recession could also produce permanent changes in home demand so that the export market would become profitable in the long run.

The tests listed would also be underinclusive. A flat-pricing producer might also react to a recession at home by exporting for a temporary period. Eliminating all cases of recession-induced dumping will not necessarily eliminate even most cases of recession-induced temporary imports. Furthermore, if the mischief needing correction is the serious injury to competing producers caused by impermanent low prices, the safeguard provisions are again a far better approach to the problem.

The second premise—that a temporary low price which injures producers will lower welfare—is just as dubious when applied to cyclical demand dumping as when urged in connection with Viner's opposition to all injurious dumping. There is the same failure to take account of the welfare benefits inherent in the procompetitive effects on market structure and competitor conduct in the import market, even if the low price is temporary. Although in the cyclical demand case the meeting competition argument falls away because the foreign dumper is assumed not to have supplied the market previously, the arguments of promotional, experimental and *ad hoc* pricing still have force. Thus, a new competitor may be added to the market in any case in which, although a recession in the home market induced the exports initially, the dumper through promotional or experimental pricing discovers a permanently profitable market. Moreover, even if the new competitor eventually withdraws, so that market structure is not made more competitive, the temporary low prices will tend to disrupt any pattern of oligopolistic price discipline in the import market, either nascent or entrenched.[104]

The presumption of overall negative welfare effects also ignores the accumulating consumer benefits which derive from the low-priced imports for as long as they last. The cyclical demand case, however, raises in its most potent form the argument that there may be no consumer benefits at all, because producers, after experiencing a period of abnormally low prices during the recession-induced import invasion, will simply raise prices to higher levels during periods of normal demand. If one takes into account that firms may be risk averse to some extent, the long-run average price could actually be higher under cyclical dumping than under conditions of stable competition because risk averse firms would need some inducement to incur the risks of fluctuations in intensity of price competition.[105]

This is not, however, an inevitable result. For the parallel case of cutthroat competition among a group of oligopolistic producers, F.M. Scherer has shown that prices need not rise during periods of normal demand by exactly the amount they have fallen in periods of intense price competition to recoup losses in the latter period. Whether they must or not, disregarding the factor of risk aversion, depends on the elasticity of the short-run industry supply curve and whether the demand curve becomes more or less elastic in the trough of intense price competition. The more elastic the supply function in the range of normal equilibrium and the more elastic the demand function becomes as overall demand falls, the more likely it is that price will not need to increase during normal demand periods by as much as it falls during periods of intense price competition.[106] In industries with high fixed costs and low variable costs, it is likely that supply is indeed inelastic.[107] But when the demand curve in the import market falls because of temporary price competition from a dumper, the curve would probably become more elastic (import market producers could recoup a substantial portion of sales merely by lowering price). Scherer doubts that cutthroat competition among oligopolistic producers would become destructive and reduce overall welfare, since on the evidence available he considers the risk premia needed to attract capital to fluctuating demand industries to be small.[108] There is even further reason to doubt the cutthroat competition argument as applied to dumping because of the likely increase in elasticity when dumping causes demand to fall.

The argument that prices must rise during normal times to offset losses during periods of intense price competition also assumes that firms in the industry are not engaged in oligopolistic price discipline to earn above normal profits. Shutting out the dumper shuts out an important check on that assumption, which, if it is wrong, means that consumers may at all times pay high monopoly prices and never benefit from lower ones. Such risks hardly seem justified, especially given the availability of escape clause and adjustment assistance relief to aid any firms or industries seriously injured by import competition. Escape clause relief itself carries some of these same risks, but at least the standards of serious injury and causation have greater significance, and there is not the chilling effect on price competition that accompanies an antidumping law. If adjustment assistance becomes the preferred remedy, as I think it should, the costs to the consumer would be even further reduced.

Long-Run Dumping—Indistinguishable from Other Imports

Economists generally agree that long-run dumping cannot be distinguished from any other long-term flow of imports in its effects on the welfare of an importing nation. The low price improves welfare by expanding the real goods available for consumption in the importing country. Since the supply will continue indefinitely, there is no fear that adjustment costs will be wasteful.

Recently, however, B. Fisher has argued that this is too sanguine a view of long-term dumping. He urges two significant arguments against all forms of dumping other than the inconsequential, sporadic type. First, all dumping leads to resource misallocation on a global scale,[109] and second, failure to impose antidumping duties misses an opportunity to put pressure on countries following excessively protectionist trade policies.[110]

Fisher's first argument raises the problem of second-best. For dumping to occur, there must be monopoly power in the dumper's home market. The existence of that power leads to resource misallocation, because the monopolist restricts his output and charges a price well above marginal cost, the social optimum. A first-best world would be one without such monopoly power. But if we assume for the moment, as seems realistic, that there will be monopoly power in the home market whether dumping is allowed or not, the question becomes whether the second best solution for world welfare coincides with flat-pricing or price discrimination by the monopolist.

Put in this way, the complexity of the issue raised by Fisher's argument becomes more obvious. Indeed, most economists agree that *a priori* the global efficiency effects of dumping are essentially indeterminate.[111] This is so whether the analysis focuses on the state of welfare in the exporting country alone[112] or includes effects in the exporting and importing countries concurrently[113]; whether it focuses on resource allocation and the related question of total output expansion or contraction under dumping,[114] or incorporates a broader analysis of both production and distribution efficiency in international trade[115]; and whether it makes drastic simplifying assumptions or deals with more realistic parameters.[116] The conclusion in all of these cases is the same: from a global perspective, the overall efficiency effects are indeterminate. They depend on such factors as the shapes and elasticities of demand curves in the export and import markets,[117] whether the dumping firm faces constant, increasing or decreasing costs,[118] and even how the dumping firm's elasticity of supply compares with the ratio of demand elasticity in the import market to that in the export market.[119]

The upshot is that we cannot know as a general matter whether dumping increases or decreases global welfare. It would clearly be infeasible to devise and administer an antidumping law which required a determination of the kinds of variables just mentioned. The confusion introduced by Fisher's resource misallocation argument lies in his failure to realize, or explain clearly, that it is the existence of monopoly power in the dumper's home market that produces the basic resource misallocation, not dumping. Given this distortion as a starting point, no general conclusions can be drawn *a priori* as to whether dumping will heighten or lessen the distortion. If the objective is to improve efficiency in the world economy, then action must be taken to increase competition in the dumper's home market through, for example, vigorous enforcement of antitrust laws or elimination of restrictions on import competition.

This last point raises Fisher's second argument for opposing long-term dumping—that failure to do so misses an opportunity to put pressure on the dumper's home government to remove excessive restrictions to foreign competition in its own market.[120] If such restrictions exist, they will indeed increase the market power of foreign dumpers, allow such firms to charge higher prices at home, and hence increase the likelihood of dumping. Would an antidumping policy, however, be an effective and appropriate antidote to such a condition?

Surely we are entitled to be skeptical that a government, which by hypothesis has insufficient incentive to reduce import restrictions to benefit its domestic consumers, will do so because its trading partners are imposing antidumping duties on the exports of some of its monopolistic firms. If that government feared that antidumping actions would harm its balance of payments, it would hardly react by unilaterally lowering its own import restrictions and thus worsening its balance of payments. Certainly if the dumping firms themselves complain, they will seek of their government retaliatory increases in trade barriers, not reduced tariffs.

Moreover, if the objective is to drive the high tariff country to the bargaining table to obtain tariff concessions, there is no reason to limit the pressure to instances of dumping. A general surcharge on all imports from the country in question would be more effective. Alternatively, the surcharge could be imposed on any import from an industry which receives exceedingly high tariff protection, or its equivalent, in the high tariff country.[121]

An antidumping policy designed to induce tariff concessions would be both over inclusive and under inclusive. The ability of a dumper to prevent arbitrage is not always dependent upon the existence of a tariff wall around his home market. An effective division of markets can come about because of high transport costs or unique product specifications for a particular market. Thus, antidumping duties would be imposed in many cases of long-run dumping not attributable to excessive trade restrictions in the home market. At the same time, antidumping action would not be taken against a dumper actually benefiting from a high tariff wall at home who decides to raise his export price to eliminate the margin of dumping. Although the volume of his sales will decline, on the sales he makes the dumper will receive an extra margin of profit that would have gone to the importing country's treasury had a direct surcharge been used. The dumper could also take the opposite tack and lower his home market price, so that antidumping action would again not be taken. Again, tariff barriers would not come down. Rather, it would now be even more difficult for foreign firms to compete at the new low price in the dumper's home market.

In summary then, the opportunity to use antidumping policy to induce lower trade barriers abroad seems an opportunity well missed. Moreover, seizing that opportunity would indeed miss a more important opportunity of a different kind: the opportunity to improve competition, check tendencies toward oligopolistic price discipline, and dampen inflation in the import market by encouraging healthy price competition in the import trade.

CONCLUSION

The Antidumping Act of 1921 was enacted before the escape clause was a part of our trade legislation[122] and before the antitrust laws were regularly applied to acts outside of the United States.[123] Spurred perhaps by years of seemingly intractable inflation, economists and policymakers have increasingly recognized the deadening effect on all price competition that an anti-price discrimination law can have. There has thus been growing disaffection for the Robinson-Patman Act,[124] the domestic counterpart of the Antidumping Act. The arguments directed against the primary line provisions of Robinson-Patman apply with equal or stronger force against the Antidumping Act.[125] Furthermore, the Trade Act of 1974 has amended the safeguard provisions to make relief more easily and more generally available. In particular, the prior requirement that increased imports be linked to a trade concession has been eliminated. The safeguard provisions are now generally available whenever imports increase, for whatever reason including dumping, sufficiently to cause serious injury to American producers.

The upshot is that section 2 of the Sherman Act and the safeguard provisions of the 1974 Trade Act provide entirely adequate remedies for dealing with any genuinely adverse effects on American welfare which may be caused by dumped imports. The Antidumping Act of 1921 should be repealed. This would not simply avoid redundancy in the law or correct overly lax escape-clauselike decisions under the Antidumping Act, it would end that Act's role in discouraging healthy price competition from imports.

Should it become impossible to repeal the Antidumping Act, at a minimum it should be redrafted to apply exclusively to predatory dumping. The redrafting should be done with sensitivity to the dilemma that any law aimed explicitly at preventing predatory pricing discourages all price competition, even the healthy variety. If such redrafting were accomplished, virtually all of the cases now processed under the Antidumping Act would be denied relief under that Act, because in recent history none of the cases seems genuinely to have involved predatory dumping.[126] Of course, in any given case, relief might still be available under the safeguard provisions, if the appropriate test of injury were met.

Even if repeal or redrafting of the Act is not accomplished, Treasury and the ITC, the two agencies which administer different aspects of an antidumping proceeding, should apply the current law, where proper statutory construction permits, so as to come as close as possible to the objectives just stated. This has less significance for Treasury, which should merely be vigilant in avoiding dumping findings where adjustments for cost differences and circumstances of sale can explain away apparent price discrimination.[127] The ITC, on the other hand, should apply a substantially higher standard of dumping injury[128] in dumping cases.

NOTES

1. Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 11 (1921), *as amended,* 19 U.S.C. §§ 160–73 (1976). The 1916 antidumping provision, 15 U.S.C. §§ 71–72 (1976), is less objectionable, because it is more clearly an antitrust law. The significance of this distinction will become clear from the discussion in the "Policy Analysis of Dumping and Antidumping Laws" section in this article.
2. 15 U.S.C. § 2 (1976).
3. General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. (5)(6), T.I.A.S. No. 1700, 55 U.N.T.S. 194 (effective January 1, 1948), *as amended,* T.I.A.S. No. 1890. *See also* GATT, ANTI-DUMPING LEGISLATION ANTI-DUMPING

LAWS AND REGULATIONS OF PARTIES TO THE AGREEMENT ON THE IMPLEMENTATION OF ARTICLE VI OF GATT (1970).

4. For an economic analysis and policy discussion of safeguard provisions, *see generally* Meier, *Externality Law and Market Safeguards: Applications in the GATT Multilateral Trade Negotiations*, 18 HARV. INT'L L.J. 491 (1977). For a generally critical appraisal by two economists of the application of the current escape clause provisions, *see* Adams & Dirlam, *Import Competition and the Trade Act of 1974: A Case Study of Section 201 and Its Interpretation by the International Trade Commission*, 52 IND. L.J. 535 (1977).
5. 19 U.S.C. §§ 2251–2253 (1976). If the President opts for adjustment assistance, he is technically limited to ordering "expeditious consideration" of individual petitions to the secretaries of Labor or Commerce. 19 U.S.C. § 2252 (a)(1)(B) (1976). Adjustment assistance may also be obtained through direct petition to the secretaries of Labor and Commerce, without proceeding first before the ITC. 19 U.S.C. § 2271 (workers), 2341 (firms), 2371 (communities) (1976).
6. 19 U.S.C. § 160(a) (1976).
7. *Id.* For a detailed explanation of this standard, *see* Krauland, *The Standard of Injury in the Resolution of Antidumping Disputes, post.*
8. The safeguard statute takes some of the bite out of this requirement, however, by providing that the increase in imports may be "either actual or relative to domestic production" 19 U.S.C. § 2251 (b)(2)(C) (1976). Since the ITC is not restricted by statute to any particular time period, the "increased quantities" requirement has not been a factor in negative findings. Former ITC Chairman Will Leonard has asserted that most negative decisions are based on either lack of serious injury or lack of substantial cause. Leonard & Foster, *The Metamorphosis of the U.S. International Trade Commission Under the Trade Act of 1974*, 16 VA. J. INT'L L. 719, 739–40 (1976).
9. 19 U.S.C. § 2251 (b)(4) (1976). Although this language obviously imposes a demanding test, it was actually designed to loosen the "major factor" causation standard that had prevailed under the 1962 Trade Expansion Act. 76 Stat. 872, § 301 (b)(3). Under that test, the ITC (then Tariff Commission) had at least at one time apparently required that imports be a greater cause of injury than all other causes combined, although it had perhaps never expressly articulated the standard in these terms. *See* Wrapper Tobacco, TA-201-3, ITC Publ. 746, at 5 & n.1 (1975) (opinion of Chairman Leonard and Vice-Chairman Minchew).
10. Treasury, when it made the injury finding under the pre-1954 version of the antidumping law, and, the Tariff Commission, for a time thereafter, expressly interpreted the Antidumping Act as requiring "material injury." *Customs Simplification Act of*

1954: Hearings on H.R. 9476 before the House Comm. on Ways and Means, 83d Cong., 2d Sess. at 35 (1954) (statement of Paul Kaplowitz, General Counsel, Tariff Comm'n). *See also* Barceló, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 549–53 (1972).

11. In an analogous context (defining "market disruption" by communist country imports, 19 U.S.C. § 2436 (a)(1), (e)(2) (1976)) Congress expressly used the term "material injury" to indicate a lesser standard than the "serious injury" language of the safeguard provisions. S. REP. No. 1298, 93rd Cong., 2d Sess. 212 (1974).
12. The safeguard statute authorizes this narrowing when producers in the area "constitute a substantial portion of the domestic industry" and "primarily serve the market in such area." 19 U.S.C. § 2251 (b)(3)(C) (1976). The International Antidumping Code imposes similar restrictions on market segmentation, Code art. 4(a)(i), (ii), but the ITC has not generally followed the Code standards. *See* Barceló, *supra* note 10, at 547–49.
13. Portland Cement from the Dominican Republic, AA1921–25, USTC Publ. 87 (1963); Portland Cement from the Dominican Republic, AA1921–23, USTC Publ. 54 (1962). For a recent injury finding in which the ITC narrowed the product (as opposed to the geographic) market to the precise kinds of railway track maintenance equipment (RTME) sold at LTFV (ballast regulators and tampers) although the firms involved produced a variety of other kinds of RTME, *see* Railway Track Maintenance Equipment from Austria, AA1921–173, USITC Publ. 844 (1977). The dissenting Commissioners found no injury, in part, it seems, because they included in the market definition all forms of RTME and all firms producing such equipment. *See id.* 11–12.
14. These factors are specifically enumerated in the statute. 19 U.S.C. § 2251 (b)(2)(A), (B) (1976). *See* Leonard & Foster, *supra* note 8, at 739. Mr. Leonard was Chairman of the ITC when the article was written.
15. *See* Baier, *Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States*, 17 STAN. L. REV. 409, 417–26 (1965).
16. *See* SEN. COMM. ON FINANCE, REPORT OF THE U.S. TARIFF COMMISSION ON S. CON. RES. 38, REGARDING THE INTERNATIONAL ANTIDUMPING CODE, 90th Cong., 2d Sess. 15 (Comm. Print 1967); Comment, *The Antidumping Act—Tariff or Antitrust Law?*, 74 YALE L.J. 707, 710 (1965).
17. *See, e.g.*, Ferrite Cores from Japan, AA1921–65, USTC Publ. 360 (1971); Glass from Japan, AA1921–69, –70, USTC Publ. 382 (1971).
18. Bolts, Nuts, and Screws of Iron or Steel, TA–201–2, USITC Publ. 747 (1975), at 19 (finding no injury).
19. AA1921–50, USTC Publ. 214 (1967).

20. *Id.* at 6.
21. TA-201-4, USITC Publ. 755 (1976). Under the safeguard provisions, the Commission reports a divided decision to the President, who may accept either finding. 19 U.S.C. § 2252 (b), (c) (1976). In the *Asparagus* case, the President accepted the determination of no injury. 41 Fed. Reg. 10,976 (1976).
22. TA-201-24, USITC Publ. 826 (1977).
23. 19 U.S.C. § 160(a) (1976).
24. *See, e.g.*, Glass from Japan, *supra* note 17; Ferrite Cores from Japan, *supra* note 17.
25. *See, e.g.*, Glass from Japan, *supra* note 17; Ferrite Cores from Japan, *supra* note 17.
26. *See, e.g.*, Pig Iron from East Germany, Czechoslovakia, Romania & the U.S.S.R., AA1921-52, -53, -54, -55, USTC Publ. 265 (1968), in which capacity utilization was at its peak during the largest amount of dumping sales, and profits showed little variation; Whole Dried Eggs from Holland, AA1921-63, USTC Publ. 332 (1970), in which the price trend was sharply upward when the imports were at their peak.
27. For example, in Impression Fabric of Manmade Fiber from Japan, AA1921-176, USITC Publ. 872 (1978), the ITC found "likelihood of injury" even though the market share of total imports was declining over the dumping period 1975-77 and was less than 3 percent in 1977, dumped imports came from only one of three Japanese exporters, and the market share of the dumped imports, already obviously quite small, actually declined over the dumping period—by as much as 38 percent in 1977. Profits and employment for domestic producers were relatively stable in the early period, and actually rose 16 to 19 percent in 1977. Evidence of price suppression was, at best, weak. Similarly, in Rayon Staple Fiber from Belgium, AA1921-186, USITC Publ. 914 (1978), the Commission found injury although market intrusion from LTFV imports was no more than 1.4 percent. There was evidence of price suppression, but this could easily have been attributed to competition among domestic producers themselves and from substitute fibers. Injury seems to have been found here merely because dumped imports took some sales away from domestic producers who were well on their way to recovery from depressed conditions unrelated to dumping.
28. Wrapper Tobacco, *supra* note 9, at 6.
29. *Id.* at 6, 9.
30. *Id.* at 6.
31. *Id.* at 7.
32. *See, e.g.*, Round Stainless Steel Wire, TA-201-13, USITC Publ. 779 (1976); Live Cattle and Edible Meat Products, TA-201-25, USITC Publ. 834 (1977); Unalloyed, Unwrought Zinc, TA-201-31, USITC Publ. 894 (1978).
33. *See, e.g.*, Low Carbon Ferrochromium, TA-201-20, USITC Publ. 825 (1977).
34. *See, e.g.*, Unalloyed, Unwrought Zinc, TA-201-31, USITC Publ. 894 (1978).

35. *Supra* note 17, at 4.
36. AA1921–72, –73, –74, USTC Publ. 398 (1971), at 6.
37. *See, e.g.*, Melamine in Crystal Form from Japan, AA1921–162, USITC Publ. 796 (1976), at 6; Railway Track Maintenance Equipment from Austria, *supra* note 13, at 4. Indeed, the Senate Committe on Finance appears to approve of a less stringent causation test for antidumping than for safeguarding cases:
In short, the Committee does not view injury caused by unfair competition, such as dumping, to require as strong a causation link to imports as would be required for determining the existence of injury under fair trade conditions.
S. Rep. No. 1298, 93d Cong., 2d Sess. 180 (1974).
38. For a similar argument comparing countervailing duties used against government subsidies with escape clause relief, *see* Evans, *Subsidies and Countervailing Duties in the GATT*, 3 Int'l Trade L.J. 211, 241–42 (1978).
39. The International Antidumping Code was negotiated at the Kennedy Round in 1967 in part because of the strong objections of the European Community to the relative abandon with which the United States imposed antidumping duties. *See* Barceló, *supra* note 10, at 525–26. For the conclusion that retaliation is more likely if selective action is taken, *see* W. Wares, The Theory of Dumping and American Commercial Policy 63 (1977).
40. J. Jackson, World Trade Law and the Law of GATT 565–66 (1969); *see* GATT, art. XIX, para. 3.
41. Of course if agreement cannot be reached on an adequately compensatory concession, a country injured by escape clause relief is entitled to retaliate. GATT, art. XIX, para. 3(a). Such action would obviously raise the level of restrictions.
42. Technically the President is only able to order the secretaries of Commerce and Labor to give "expedited consideration" to individual petitions for adjustment assistance from firms, workers or communities. 19 U.S.C. § 2252(a) (1976). Since the standards of eligibility have been lowered somewhat, however, relief appears to be more forthcoming under the 1974 Trade Act than under the prior law. *See Administrative Survey: October 1975 to September 1976—I. Imports, Exports, and Related Matters*, 9 L. & Pol'y Int'l Bus. 1, 75–82 (1977); *Administrative Survey: October 1976 to September 1977—I. Imports, Exports, and Related Matters*, 10 L. & Pol'y in Int'l Bus. 1, 35–41 (1978). In roughly half of the cases in which the ITC has found injury under the safeguard provisions of the 1974 Trade Act through June 20, 1978, the President has opted for adjustment assistance. Int'l Trade Comm'n, Summary of Investigations Under Section 201 of the Trade Act of 1974 (periodically updated).
43. For a brief analysis of why domestic subsidies are generally preferable to trade restrictions for correcting internal market

distortions or pursuing noneconomic objectives, *see* Barceló, *Subsidies and Countervailing Duties—Analysis and a Proposal,* 9 L. & Pol'y Int'l Bus. 779, 790–92 (1977). The Williams Commission Report also favored a preference for adjustment assistance over trade restrictions on the ground that the former is less costly. *See* Comm'n on Int'l Trade and Investment Policy, Report to the President: United States International Economic Policy in an Interdependent World 47–69 (1971). The conclusion in the text is based on the assumption that distortions created through the tax system, which would provide the revenue for the subsidies, would be less than those accompanying a trade sector intervention. For a brief discussion of this problem in a related context, *see* A. Kahn, 1 The Economics of Regulation 130 n.15 (1970).

44. Economists indeed suggest that it is quite common. *See* R. Caves & R. Jones, World Trade and Payments 153–54 (1977).
45. 19 U.S.C. § 164(b) (1978).
46. For Treasury's notice of the initial trigger prices, *see* 43 Fed. Reg. 1,464 (1978). For the first revision of these prices, *see* 43 Fed. Reg. 20,070 (1978).
47. *See Introductory Note on the Trigger Price Mechanism,* 17 Int'l Legal Materials 953 (1978).
48. *See* Anthony, *The American Response to Dumping From Capitalist and Socialist Economics—Substantive Premises, and Restructured Procedures After the 1967 GATT Code,* 54 Cornell L. Rev. 159, 168–77 (1969).
49. For a particularly lucid discussion of the fallacies underlying fully distributed cost (including in the price of each unit of output a ratable proportion of fixed and variable costs) *see* A. Kahn, *supra* note 43, at 150–58:

    Whenever there is some separable portion of the demand sufficiently elastic that a rate below fully-distributed costs for it would add more to total revenue than to total costs, any insistence that each service or group of patrons pay their fully allocated costs would be self-defeating. It would force the firm to charge a price that would result in its turning away business that would have covered its marginal costs—in other words, would prevent it from obtaining from customers with an elastic demand the maximum possible contribution to overheads. Thus, under the guise of ensuring fair distribution of common costs and preventing undue discrimination, it would be serving the interests neither of the patrons who would be prepared to take additional quantities if prices were closer to marginal costs, nor of the customers with the more inelastic demands.

    Id. at 155.
50. *See* Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975). Areeda and

Turner reject below-marginal-cost pricing on promotional or meeting competition grounds if practiced by a monopolist, but seem to accept these defenses for a non-monopolist or for a monopolist seeking entry into a new geographical market. *See id.* at 712–16; 724–25.

51. *See generally id.;* A. KAHN, *supra* note 43, at 63–86. *See also* Areeda & Turner, *Scherer on Predatory Pricing: A Reply*, 89 HARV. L. REV. 868, 896 (1976). Whether this is so in the long run raises the question of predatory pricing, which was introduced in the text above, and which will be discussed more thoroughly *infra*.
52. For the analysis in the text to be rigorously accurate, one would have to know that price equalled marginal cost on all other lines of output. Otherwise, if resources were shifted away from an industry in which the gap between price and marginal cost were greater than that in the industry to which they were shifted, society would be worse off. This is known in economic literature as the problem of second-best: if more than one distortion from optimal conditions exists in an economy, removal of any single distortion will not necessarily improve overall welfare. Removal of the single distortion may greatly aggravate the remaining distortions so that overall welfare decreases. Despite the uncertainty which the second best problem introduces for all theoretical analysis, most economists conclude that piecemeal movement toward optimal conditions can often be justified if one analyzes the particular piecemeal movement under consideration (for probable interactive effects with the rest of the economy) and uses an ample dose of common sense. *See* A. KAHN, *supra* note 43, at 69–70. *See also* Barceló, *supra* note 43.
53. L. YEAGAR & D. TUERCK, TRADE POLICY AND THE PRICE SYSTEM 149–54 (1966).
54. *See* J. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 188–195 (1933); W. WARES, *supra* note 39, at 54.
55. J. ROBINSON, *supra* note 54, at 188–95.
56. A recent study by an economist attempting to take account of various trade-off effects within the exporting country concludes that the overall effect of dumping on welfare in that country depends upon "a wide variety of economic parameters that pertain to the firm's cost structure, the nature of home and foreign demand, and the state of the exporting nation's economy. . . ." so that no *a priori* conclusion can be drawn. W. WARES, *supra* note 39, at 54.
57. For an analysis of aggregate effects based on various simplifying assumptions, but reaching the same general conclusion about the essential indeterminancy of the issue, *see* 2 J. MEADE, TRADE AND WELFARE 245–53 (1955).
58. For a discussion which seems to include this concept within the definition of predatory pricing, *see* B.S. Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J. L. & ECON. 129 (1972).

59. *See* Areeda & Turner, *supra* note 50.
60. For a discussion which seems to include acquisition of less than a monopolistic share of the market within the definition of predatory pricing, *see* MacIntyre & Wolhard, *Predatory Pricing Legislation—Is it Necesssary?* 14 B.C. IND. & COMM. L. REV. 1 (1972).
61. *See* McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case,* 1 J. L. & ECON. 137 (1958); Telser, *Cutthroat Competition and the Long Purse,* 9 J. L. & ECON. 259 (1966); Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case,* 77 YALE L. J. 70 (1967); Elzinga, *Predatory Pricing: The Case of the Gunpowder Trusts,* 13 J. L. & ECON. 223 (1970). Koller, *The Myth of Predatory Pricing: An Empirical Study,* 4 ANTITRUST L. & ECON. REV. 105 (1971); Areeda & Turner, *supra* note 50.
62. *See* Yamey, *supra* note 58; Koller, *supra* note 61.
63. Areeda & Turner, *supra* note 50.
64. *See* Koller, *supra* note 61; DEP'T OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT 165–66 (1977).
65. *See* J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 120–21 (reprint ed. 1966); de Jong, *Significance of Dumping in International Trade,* 2 J. WORLD TRADE L. 162, 171–72 (1968).
66. Viner's fear of predatory dumping was in part based on the likelihood of its use to create or discipline a transnational price cartel. *See* VINER, *supra* note 65, at 121. He wrote, however, before the antitrust laws were regularly given extraterritorial force.
67. Pub. L. No. 64–271, § 801, 34 Stat. 798 (1916), *codified at* 15 U.S.C. § 71–72 (1976).
68. In the years before the Sherman Act was vigorously enforced, predatory tactics may have been used domestically in the United States to coerce rivals into mergers or price cartels. *See* Areeda & Turner, *supra* note 50, at 699 n.6. Such a strategy is still a possible motive for dumping in countries lacking strong antitrust laws. *Cf.* de Jong, *supra* note 65, at 172. Viner's discussion of predatory dumping in the early years of the century indicates that complaints of predation were exaggerated. He seems to suggest that where predatory dumping was used, it was either for the purpose of effecting a price cartel or ultimately had that effect. J. VINER, *supra* note 65, at 51–73. For a discussion of German predatory dumping in this early period, *see id.* at 61–64, 64 n.1.

    Fisher's suggestion that some recent dumping from Japan has been "apparently predatory" seems based on an imprecise use of the term. Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis,* 5 L. & POL'Y INT'L BUS. 84, 127 (1973). His discussion of three exemplary cases, Television Receiving Sets from Japan, AA1921–66, USTC Publ. 367 (1971); Tuners from Japan, AA1921–64, USTC Publ. 341 (1970); and Cadmium from

Japan, AA1921-93, USTC Publ. 494 (1972), merely points out that substantial market invasion and significant margins of dumping were involved. There is no discussion of whether the sales were money-losing in any sense or whether there was any reduction in the competitive vitality of the market. *See* Fisher at 118–23.

69. *Cf.* DEP'T OF JUSTICE, *supra* note 64, making the same point concerning domestic price discrimination.
70. A growing list of commentators and reports call for outright repeal of the Robinson-Patman Act, or legislative or interpretive changes to protect against the danger to all price competition inherent in an anti–price discrimination law. *See* DEP'T OF JUSTICE, *supra* note 64, at 243–47, 260–61 (1977); ATTORNEY GENERAL'S NAT'L COMM'N TO STUDY THE ANTITRUST LAWS, REPORT 164–65 (1955); C. EDWARDS, THE PRICE DISCRIMINATION LAW 530–31 (1959); F SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 499 (1970); Bowman, *supra* note 61; Note, *Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury,* 68 COLUM. L. REV. 137, 140–41 (1968); Cooper, *Price Discrimination Law and Economic Efficiency,* 75 MICH. L. REV. 962 (1977); Elias, *Robinson-Patman: Time for Rechiseling,* 26 MERCER L. REV. 689 (1975); Liebeler, *Let's Repeal It,* 45 ANTITRUST L.J. 14, 18 (1976); Neal, *Let's Reform It,* 45 ANTITRUST L.J. 52 (1976); Wolfe, *Reform or Repeal of the Robinson-Patman Act—Another View,* 21 ANTITRUST BULL. 237 (1976); REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY (1968) (the "Neal Report"); REPORT OF THE TASK FORCE ON PRODUCTIVITY AND COMPETITION (1969) (the "Stigler Report").
71. 15 U.S.C. § 13(a) (1976).
72. The jurisdictional language of Robinson-Patman has recently been construed to require that both legs of a dual pricing strategy involve goods sold "for use, consumption, or resale within the United States. . ." Zenith Radio Corp. v. Matsushita Elec. Ind. Co., Ltd., 402 F. Supp. 244 (E.D. Pa. 1975).
73. 15 U.S.C. § 2 (1976).
74. For an excellent discussion of the proper test of predatory pricing under section 2 of the Sherman Act, *see* Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act,* 88 HARV. L. REV. 697 (1975); Scherer, *Predatory Pricing and the Sherman Act: A Reply,* 89 HARV. L. REV. 868 (1976); Areeda & Turner, *Scherer on Predatory Pricing: A Reply,* 89 HARV. L. REV. 891 (1976); Scherer, *Some Last Words on Predatory Pricing,* 89 HARV. L. REV. 901 (1976). For a case concluding that the Sherman Act is a proper basis for claiming damages against a foreign supplier allegedly engaged in predatory dumping in the United States, whereas the Robinson-Patman Act is not, *see Zenith, supra* note 72, at 251.
75. In a separate opinion involving the facts of *Zenith, supra* note

72, the court held there was good venue, personal jurisdiction, and service of process in an antitrust action against an alleged foreign dumper. Zenith Radio Corp. v. Matsushita Elec. Ind. Co., Ltd., 402 F. Supp. 262 (E.D. Pa. 1975). For discussion of the Sherman Act's application to international commerce, *see generally* Kintner & Hallgarten, *Application of United States Antitrust Laws to Foreign Trade and Commerce,* 15 B.C. IND. & COMM. L. REV. 343 (1973–74). For the conclusion that the Sherman Act would be adequate protection against predatory price discrimination in the wholly domestic context, *see* DEP'T OF JUSTICE, *supra* note 64, 243–46 (1977).

76. For the argument that section 2 of the Sherman Act would not deter all predatory pricing because the courts have required of a section 2 case that there be either an existing monopoly or a "dangerous probability" of monopolization, *see* MacIntyre & Volhard, *supra* note 60; Kintner, Henneberger, & Fleischaker, *Reform of the Robinson-Patman Act: A Second Look* 21 ANTITRUST BULL. 203, 223 (1976); *cf.* DEP'T OF JUSTICE, *supra* note 64, at 295–303. The argument is that the Sherman Act does not reach monopolization tendencies in their incipiency. In my view such arguments exaggerate the danger of predatory pricing and underestimate the harm to healthy price competition that an incipiency law causes. *See id.* at 246–47.
77. 19 U.S.C. § 160(a) (1976).
78. 15 U.S.C. § 13(a) (1976).
79. *See* sources cited *supra* at note 70.
80. Barceló, *supra* note 10, at 514–15.
81. *See* Areeda & Turner, *supra* note 50.
82. *Id.* at 716–18. As an exception to the rule stated in the text, Areeda and Turner would not condemn a price below marginal cost but above average cost. *Id.* at 712–13. For the ensuing debate on this point between Scherer and Areeda & Turner, *see* the articles cited *supra* at note 74.

    Areeda and Turner also argue that the test for predatory pricing under the Sherman Act and under the primary line provisions of the Robinson-Patman Act should be identical. Areeda & Turner, 88 HARV. L. REV. at 724–28.
83. Areeda and Turner concede that a price above marginal cost might still be non-profit maximizing and predatory but consider a marginal cost floor the only administratively workable standard. *Supra* note 50, at 709–12.
84. Scherer, for example, rejects the marginal cost test advocated by Areeda and Turner in favor of a more flexible approach emphasizing long-run welfare maximization. Scherer, *Predatory Pricing and the Sherman Act: A Comment,* 89 HARV. L. REV. 868 (1976). He calls for a "thorough examination of the factual circumstances accompanying the monopolist's alleged predatory behavior," *id.* at 890, to assess such variables as "the relative cost positions of

the monopolist and fringe firms, the scale of entry required to secure minimum costs, whether fringe firms are driven out entirely or merely suppressed, whether the monopolist expands its output to replace the output of excluded rivals or restricts supply again when the rivals withdraw, and whether any long-run compensatory expansion by the monopolist entails investment in scale economy-embodying new plant." *Id.* Areeda and Turner argue that such an approach, because of its complexity, has "no operational utility for antitrust law purposes." Areeda & Turner, *Scherer on Predatory Pricing: A Reply,* 89 HARV. L. REV. 891, 897 (1976). For Scherer's final response distinguishing between the standards for private treble damage actions and suits initiated by the Justice Department, *see* Scherer, *Some Last Words on Predatory Pricing,* 89 HARV. L. REV. 901, 902–03 (1976).

85. For an attempt by the Department of Justice to draft statutory language prohibiting most instances of genuine predation while not overly inhibiting healthy price competition and the reactions of various commentators to the attempt, *see* DEP'T OF JUSTICE, *supra* note 64, at 276–307. The key provisionof the draft "Predatory Practices Act" setting out the elements of a *prima facie* case read as follows:

Sec. 2. It shall be unlawful for the seller of a commodity engaged in commerce overtly to threaten a competing or potential competing seller of the commodity with economic or physical harm, so as to cause or induce the competing seller (a) to conform to pricing policies favored by the seller; or (b) to cease or refrain from selling any commodity to any particular customer; regardless of whether any overt action is taken to fulfill such threat.

Sec. 3. It shall be unlawful for a seller of a commodity, engaged in commerce, knowingly to sell on a sustained basis such commodity at a price below the reasonably anticipated average direct operating expense incurred in supplying the commodity, where such commodity is sold for use, consumption, or resale within the United States, the District of Columbia, or any other territory under the jurisdiction of the United States. *Id.* at 277.

The test in section 3 of "reasonably anticipated average direct operating expense" is intended to codify the Areeda and Turner approach.

86. Section 2(b) of the Robinson-Patman Act contains this proviso: "*Provided, however,* That nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . ." 15 U.S.C. § 13(b) (1976).

87. *See* Areeda & Turner, *supra* note 50, at 715–16.

88. For a similar analysis of the Justice Department's draft "Predatory Practices Act" *see* DEP'T OF JUSTICE, *supra* note 64, at 277, 286–87.

89. For a similar approach in the Justice Department's draft "predatory Practices Act" *see* DEP'T OF JUSTICE, *supra* note 64, at 278, 287.
90. *See* Barceló, *supra* note 10, at 515, 516.
91. The statute requires the ITC to determine "whether an industry in the United States is being or is likely to be injured." 19 U.S.C. § 160(a) (1976).
92. *See* Barceló, *supra* note 10, at 533–38.
93. J. VINER, *supra* note 65.
94. Viner's belief that dumping would normally be short-term or intermittent was based more upon personal observation of a number of cases than on careful empirical study. *See Memorandum on Dumping* in J. VINER, *supra* note 65, at 358–59. Moreover, producers today are probably more outward-looking and more interested in maximizing profits on a multinational level than was the case when Viner formed his impressions. Thus, modern producers might be more likely to engage in long-term dumping if the practice is profit-maximizing. *See* W. WARES, *supra* note 39, at 79–80.
95. *See Memorandum on Dumping* in J. VINER, *supra* note 65, at 358–59.
96. *See* R. CAVES & R. JONES, WORLD TRADE AND PAYMENTS 153 (1977).
97. 19 U.S.C. § 2253(h) (1976).
98. The effects of hit-and-run dumping lasting one to two years with some interval between could also be remedied by escape clause action. Although 19 U.S.C. § 2251(e) (1976) provides as a general rule that one full year must elapse after an ITC report concerning a given subject matter before another investigation can begin, the case of "hit-and-run" low prices would seem to fall easily within the exception to that general rule for "good cause determined by the Commission to exist." *Id.*
99. W. WARES, *supra* note 39, at 84.
100. In selecting this case Wares eliminates two others: (i) recession in the import market and (ii) recession in the home market where the dumper ships some quantity of output to the import market both before and after the recession. *See id.* at 81–83. In the first case Wares seems to oppose antidumping action primarily because it is arguable that the recession, not the imports, caused the injury and because the dumper, as a permanent supplier, is entitled to meet the competition in the trough of a recession on an equal basis with domestic producers. At most, he seems to say, an argument might be made for reducing all import competition by some given percentage, not a disproportionate reduction of dumped imports. This parallels my argument that the escape clause should be the remedy for nonpredatory dumping.

     The only distinction between the second case and that discussed in the text seems to be an equitable notion favorable to the supplier who is there in good times and bad. In both cases the low price is assumed to be injurious and to last only for the duration of the recession. I disagree with Wares, however, not for excluding the second case above, but rather for including the case discussed in the text as a cause for antidumping action.

101. Recall that the condition for profit maximization when dumping is allowed is equalization of marginal revenue in all markets. *See id.* at 32–34.

102. This second point is given very little consideration by Wares. Speaking of the special case described in the text, he asserts: "This type of dumping will, in fact, disrupt the import market and reduce welfare whenever it injures domestic producers." *Id.* at 84. Except for a footnote (p. 77 n.e.) in which he notes the possibility that a competitive industry may well raise its prices in normal times to offset low prices in abnormal times so as to eliminate benefits to the consumer in the long run, Wares offers no analysis or empirical evidence to support this assertion. Even the footnote does not argue that a competitive industry will always or even probably react in the way he describes. He does note, however, that to the degree firms in the industry are risk averse, there would be pressure for prices in normal times to rise even higher than would be necessary merely to keep the long run average price unchanged.

103. *See* note 99, *supra*, calling attention to Wares' exclusion of the traditional supplier from his proposed antidumping rule, on the ground it seems of equity. Inclusion of the traditional supplier, however, would raise the question of why protective action should be taken only against recession-induced temporarily low prices, instead of all temporarily low prices.

104. Indeed, the American industries which generally press antidumping complaints are frequently oligopolistic in structure. *See* Barceló, *supra* note 10, at 512–13.

105. *See* W. WARES, *supra* note 81, at 77 n.e., citing A. Sandmo, *On the Theory of the Competitive Firm Under Price Uncertainty*, 61 AM. ECON. REV. 65 (1971).

106. *See generally* F. SCHERER, *supra* note 70, at 202–06.

107. *Id.*

108. *Id.*

109. Fisher, *supra* note 68, at 147; C. KINDLEBERGER & P. LINDERT, INTERNATIONAL ECONOMICS 168 (6th ed. 1978). Fisher suggests that Robert Baldwin also makes this argument. But the suggestion is misleading. Baldwin points out that monopoly power in the home market underlies dumping and that monopoly power itself implies distortions from optimal welfare goals. R. BALDWIN, NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE 143 (1970). He does not say that dumping adds to the inefficiency or that vigorous enforcement of antidumping laws is an appropriate remedy for such inefficiency. Rather he advocates "vigorous enforcement of internal antimonopoly policies and reduction of the various tariff and nontariff barriers that protect the domestic firms from foreign competition." *Id.*

110. Fisher, *supra* note 68, at 145–46. Fisher urges opposition to long-term dumping on two further grounds. He argues that long-term dumping should be opposed because it may cause unemployment. *Id.* at 146–47. This, however, is the classic fallacy of listing, as a reason for opposing dumping, consequences which have nothing to do with dumping. Hence, this is not an argument for treating dumped imports any differently than nondumped imports. Perhaps under certain circumstances action should be taken against any import which causes unemployment, but this is not an argument for differentially harsh treatment of dumping.

 Fisher also reasons that "continuous dumping is a concealed partial devaluation of the currency of the exporting country." *Id.* at 147. This is simply inaccurate. The pricing policies of private firms cannot be likened to a government decision to devalue its currency, wholly or partially. Indeed, if dumping by a group of private firms suddenly causes a large increase in exports, this action would exert pressure toward revaluation, not devaluation, of the dumper's currency. From Fisher's full discussion it appears that he has in mind the case in which the exporting country systematically offers bounties on all exports and that this in turn causes dumping. But of course in such a case the source of the "partial devaluation" is the system of export subsidies, not the dumping. Price discrimination is not even a necessary result of such a government policy. On the connection between export subsidies and price discrimination, *see* Barceló, *supra* note 43, at 783–84.

111. *See* text accompanying notes 54–57, *supra*. *But see* KINDLEBERGER & LINDERT, *supra* note 109 at 168. Kindleberger and Lindert assert that since the distortion of price above marginal cost is greater in the home than in the export market, "forcing the firm to equalize prices and shift its sales back toward the home market probably brings gains to the world as a whole even if it deprives the importing country . . . of a bargain." *Id.* If it were certain, or even highly probable, that eliminating dumping would indeed lower price in the home market, such a conclusion might be sound. But disallowing dumping could reduce the dumper's total output and cause price in the home market to increase. Indeed, even if the transfer of sales from the export to the home market were to offset the decrease in production causing a net increase in sales in the home market, there would still be conflicting effects on aggregate welfare. While lowering the high price to consumers in the home market at the expense of raising it to consumers in the low price market might improve welfare, there is still a negative production effect, because less is produced in an industry where price exceeds marginal cost. Optimum resource allocation would call for increased, not decreased, production. Thus the overall welfare effect still seems indeterminate.

112. *See* W. WARES, *supra* note 39, at 27–55.
113. *See* 2 J. MEADE, *supra* note 57, at 244–53.
114. *See* J. ROBINSON, *supra* note 54, at 188–95. Robinson argued *a priori* that output under discriminating monopoly was likely to expand, especially where low-priced export sales are involved. *Id.* at 205–06. But Scherer has noted the absence of any empirical evidence on this point. F. SCHERER, *supra* note 70, at 259.
115. *See* 2 J. MEADE, *supra* note 57, at 244–53.
116. For an analysis attempting to deal with realistic parameters, *see* W. WARES, *supra* note 39, at 27–55.
117. *See* J. ROBINSON, *supra* note 54, at 188–95.
118. *See* W. WARES, *supra* note 39, at 27–54.
119. *See* 2 J. MEADE, *supra* note 51, at 252.
120. *See* Fisher, *supra* note 68, at 145–46.
121. The President seems to have authority to take such action under section 301 of the Trade Act of 1974. 19 U.S.C. § 2411 (1976).
122. Although an escape clause was a part of several bilateral Trade Agreements before then, it became a general part of domestic law with the Trade Agreements Extension Act of 1951, (§§ 6a, 7; 65 Stat. 73, 74). *See generally* Ris, *"Escape Clause" Relief Under the Trade Act of 1974: New Standards, Same Results*, 16 COLUM J. TRANSNAT'L L. 297, 298–04 (1977).
123. After the Supreme Court in American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), refused to give extraterritorial force to the Sherman Act, the first important case departing from that doctrine was United States v. Sisal Sales Corp., 274 U.S. 268 (1927).
124. *See* authorities listed *supra* at note 70.
125. The arguments are potentially stronger because of the very weak injury test applied in antidumping cases. *See* text accompanying notes 12–37, *supra.*
126. Where predatory dumping has been alleged, *see, e.g.*, Fisher, *supra* note 68, at 118–24, the discussion has not indicated that out-of-pocket losses were involved or that monopolization of the market was a genuine threat.
127. In light of Treasury's recent affront to the Sherman Act in the new "trigger price mechanism" for certain steel imports, *see* notes 46–47, *supra,* the statement in the text is probably too charitable. For an unsuccessful case challenging the legality of the trigger price mechanism and Treasury's authority to resort to such a scheme, without directly raising the antitrust issues, *see* Davis-Walker Corp. v. Blumenthal, No. 78-0421 (D.D.C. May 25, 1978), *reprinted at* 17 INT'L LEGAL MATERIALS 992 (1978). There seems little doubt that the effect of the trigger price mechanism has been to prevent imports below the trigger price and that this was Treasury's intent. For a more critical overall view of the Treasury's role in antidumping cases, *see generally*

W. WARES, *supra* note 39, at 93–110.

128. For example, the higher standard of dumping injury could be that formulated in the International Antidumping Code. *See generally* Barceló, *supra* note 10.