

# Michigan Journal of International Law

---

Volume 1 | Issue 1

---

1979

## The Antidumping Act: Comments for Business

John Cutler

*Heller, Ehrman, White and McAuliffe*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Trade Law Commons](#), and the [Legislation Commons](#)

---

### Recommended Citation

John Cutler, *The Antidumping Act: Comments for Business*, 1 MICH. J. INT'L L. 115 (1979).

Available at: <https://repository.law.umich.edu/mjil/vol1/iss1/6>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

---

# The Antidumping Act: Comments for Business

---

JOHN CUTLER

After several decades of disuse, the Antidumping Act has been rediscovered in recent years by domestic producers. However, even as American manufacturers have resorted to the Act with increasing frequency, they have criticized it as being ineffective.<sup>1</sup> The following comments of Richard P. Simmons, president of Allegheny Ludlum, reflect typical criticisms made by domestic producers:

Many of the members of this committee recognize the weakness of the existing law, particularly with regard to the length of time necessary to prosecute antidumping cases; the fact that the burden of proving injury after dumping has been established is generally difficult; the fact that the Treasury Department can broaden the scope of the investigation to include products or product sizes not included by the petitioner; the fact that the petitioner does not have access to the facts used by the Treasury Department in making its determination; and while there are many other weaknesses in the existing law—the fact that penalties are imposed far too late to provide relief to companies and employees, who by this time have been injured for well over a year at the shortest.<sup>2</sup>

Although American producers undoubtedly would be better served if the Antidumping Act were to be amended in response to these criticisms, the Act, as presently written and administered by the Treasury Department, can even now provide benefits for domestic producers that are frequently overlooked.

An American manufacturer who initiates a proceeding under the Antidumping Act is usually seeking to force up prices for imported goods that compete with his own products, to reduce the flow of competing imported merchandise into his traditional domestic market

---

John Cutler is a member of the California Bar and a partner in the law firm of Heller, Ehrman, White and McAuliffe, San Francisco, California.

areas, or both. If the facts are right—that is, if the manufacturer can win his dumping proceeding, and if the manufacturer's injuries are sufficiently severe to justify the significant time and expense required to bring the proceeding to a successful conclusion, then the manufacturer will usually achieve his goals.

In addition, the manufacturer will usually begin to derive benefits from the Antidumping Act long before the dumping proceeding is concluded. Furthermore, the Antidumping Act is frequently preferable to other options open to the manufacturer for combating import competition.

#### INTERIM AND LONG-TERM BENEFITS TO DOMESTIC PRODUCERS

Assuming a winning case, which results in favorable action by the governmental agencies involved at all stages of an antidumping proceeding, the procedures and interim events that occur in the course of the proceeding can have a chilling effect on the importation of low-priced foreign merchandise long before dumping duties are finally assessed or collected.

Thirty days after a domestic manufacturer's dumping complaint is received by the Treasury Department in acceptable form, the Department publishes an Antidumping Proceeding Notice which signals the commencement of a full scale dumping investigation.<sup>3</sup> Up to this point, the foreign producers and importers of the merchandise identified in the Notice have not yet become formally involved in the proceeding. However, the Department's commencement of an antidumping investigation usually receives wide publicity in trade circles, and publication of the Notice frequently results in a slowdown of import volume and firming of prices for the foreign merchandise. This is because foreign producers and importers look ahead to the issue that will arise later in the dumping proceeding as to whether their activities have injured domestic industry. Typically, they attempt to neutralize the domestic manufacturer's inevitable accusation that they have been engaging in predatory pricing and marketing practices.

The investigation undertaken by the Treasury Department after publication of the initial Notice draws the foreign producers and importers into the mainstream of the proceeding.<sup>4</sup> Departmental and Bureau of Customs investigators pry into pricing and marketing practices of the foreign producers and importers. Customers may be contacted. Foreign producers and importers must complete lengthy and detailed questionnaires prepared by the Bureau, and provide backup sales and shipment documentation, frequently on short notice. If the investigation is based upon alleged below-cost selling by

the foreign producers,<sup>5</sup> the investigators will also require foreign producers to divulge their production costs to United States government officials. The Freedom of Information Act<sup>6</sup> prevents the Treasury Department from giving meaningful assurances that this highly confidential data will be kept from the foreign producers' American competitors. Should importers and foreign producers refuse to cooperate in the investigation, they face the risk that the Treasury Department will reach a determination on the basis of such information as is available.<sup>7</sup> This may well be the very materials provided by the complaining American manufacturer to establish whether less than fair value (hereinafter LTFV) sales have occurred. Obviously, such information is likely to support the domestic manufacturer's complaint. The sensitivity of the information sought by the investigators, the burden of compiling data requested by them, the general strains and scrutiny of the investigative process, and the stigma that flows from being labeled as having dumped often lead foreign producers and importers to begin considering means of settling the dumping complaint of the American manufacturer and terminating the investigation, e.g., by price assurances to the Treasury Department.<sup>8</sup>

Within six months after the Treasury Department commences its full scale investigation (unless the Department extends the period to nine months due to the complexity of the case), the Department publishes a Withholding of Appraisalment Notice.<sup>9</sup> The Notice contains Treasury's tentative determination of sales at less than fair value and sets forth the dumping margins that have been tentatively found. It directs Customs officials throughout the United States to withhold appraisalment on all shipments of the merchandise identified in the Notice thereafter arriving in this country, and requires the importers thereof to post bonds to cover future possible dumping duties on all shipments arriving after the Notice is published.<sup>10</sup> Thus, if the merchandise in question is later found to have been dumped, importers become vulnerable to the imposition of dumping duties retroactive to the date when the Withholding of Appraisalment Notice is published. Since importers are precluded from passing on dumping duties to their customers,<sup>11</sup> the combination of the retroactive risk feature embodied in the withholding of appraisements, the requirement that bonds be posted to cover dumping duties, and the identification of potential dumping margins in the Treasury Department's Withholding of Appraisalment Notice results, in almost all cases, in a dramatic and immediate drop in imports, an increase in import prices, or both, at the time the Notice is published.

Furthermore, if the procurement of the foreign merchandise involves any lead time, domestic prices may be expected to firm prior to, and in anticipation of, the publication of the Withholding of Appraisalment Notice. Appraisements are withheld on all goods entering

the United States after the Notice is published—even those ordered well in advance of such publication. The longer the lead time between order and delivery of imported merchandise, the sooner the threat of publication of the Withholding of Appraisal Notice is likely to be felt in the marketplace. For example, in the case of goods requiring a four-month lead time, import orders may be expected to begin falling off as early as two months after the Treasury Department commences its investigation.<sup>12</sup>

Within three months after publishing the Withholding of Appraisal Notice, Treasury makes its final Determination of LTFV Sales confirming its tentative finding.<sup>13</sup> It then refers the case to the ITC for a determination as to whether a domestic industry is being or is likely to be injured as a result of the importation of the merchandise in question at less than fair value. The ITC must make its injury determination within three months, after which Treasury publishes a formal dumping finding and begins assessing dumping duties retroactive to the date of the publication of the Withholding of Appraisal Notice.<sup>14</sup> However, in most cases, the complaining American manufacturer has by then realized the benefits of the Antidumping Act for six months, as discussed above. Further, dumping duties assessed and collected by Treasury typically are small, compared with the tentative dumping margins earlier announced by the Department. This is because importers have raised prices to avoid dumping duties, or foreign producers have decided to seek other, friendlier markets.

Although American manufacturers have bitterly charged the Treasury Department with failing to assess or collect dumping duties,<sup>15</sup> affirmative dumping findings have been effective weapons against LTFV imports. Moreover, dumping findings tend to remain effective for many years. At the time this article was written, findings dating back to the early 1960s were still extant.<sup>16</sup>

#### DETERRENTS TO USING THE ANTIDUMPING ACT

Despite the benefits flowing from a successful dumping case, relatively few complaints under the Antidumping Act have been filed in the past by American manufacturers. There are several reasons for the traditional reluctance.

##### *Legitimate Price Competition versus Dumping*

Not all sales of imported merchandise at prices which undercut those of competing domestic products are at less than fair value, so as to be actionable under the Antidumping Act. Dumping involves price discrimination across international borders—the sale of foreign merchandise in the United States at prices below its home market

prices for the same merchandise (or, if sales at home are below cost, at prices less than cost of production plus general expenses and profit). Thus, dumping occurs when a foreign producer undersells himself in this country, not necessarily when he undersells an American manufacturer of the same product. The Antidumping Act does not provide a remedy for an American manufacturer whose products are being undersold by a more efficient foreign producer.

By the same token, if a domestic manufacturer is not sufficiently cost-competitive, even if the foreign producer were to be required under the Antidumping Act to sell in the United States at fair value, the resultant elimination of dumping margins may not erase or sufficiently narrow the price differential between the domestic and foreign goods so as to enable the domestic manufacturer to compete effectively with the imports. In the context of a dumping proceeding, this phenomenon surfaces if competitive margins by which foreign goods are underselling their domestic counterparts significantly exceed the dumping margins found by the Treasury Department. When this occurs, importing interests frequently and successfully argue that LTFV sales have not injured domestic industry.

#### *Remoteness of Injury from Remedy*

A dumping case takes thirteen months from the time a domestic manufacturer files a complaint with the Treasury Department to the promulgation of a formal dumping finding by the Department following an injury determination by the ITC. As noted earlier, the Treasury Department may extend a complex case by an additional three months.<sup>17</sup> To this period must be added the time that an aggrieved domestic manufacturer must expend preparing and compiling material for an effective dumping complaint.<sup>18</sup> If the domestic manufacturer plans to rely upon section 205(b) of the Act (sales below cost in the country of origin), the investigative work and economic research needed to substantiate such a claim may consume a year or more.<sup>19</sup> Thus, as domestic producers frequently note, the remoteness between the time of injury and the imposition of dumping duties under the Act can be a very real problem, even though the benefits of the Act often accrue months before a formal dumping finding is published.

#### *Cost*

The out-of-pocket costs to a domestic manufacturer who initiates a dumping proceeding are substantial—frequently well in excess of six figures. This is ironic. The Antidumping Act empowers the Secretary of the Treasury to commence a dumping investigation on his own initiative if he has reason to believe that foreign merchandise is

being sold to this country at less than fair value.<sup>20</sup> Moreover, the Act does not require an injured domestic producer to initiate a dumping complaint or to become involved in a dumping proceeding if he files a complaint.<sup>21</sup> In practice, however, the Treasury Department has refused to initiate dumping investigations on its own motion, on the theory that if a domestic producer has not been sufficiently injured by dumping practices to file a complaint, injury to domestic industry probably does not exist. Moreover, the Department encourages active participation by interested domestic parties, and in the past has requested them, for example, to submit legal briefs refuting points raised by the importing interests in the course of a dumping proceeding. Departmental proceedings are usually held in Washington, D.C., which may compound costs for injured domestic producers located in the hinterlands. The end result is that the same domestic producers who must suffer injury before they have standing to complain under the Antidumping Act—as administered by the Treasury Department—must incur substantial costs in order to have those injuries redressed, even though the Act would allow the Treasury Department to avoid this anomaly.

#### *Disruption of Internal Operations*

A domestic manufacturer must make a major commitment of company personnel if he intends to submit an effective complaint initiating a dumping proceeding and to participate effectively in the dumping case which follows. Knowledgeable company officials are needed to compile and analyze the data establishing injury to the domestic manufacturer, to document the less than fair value import activities in question (at least to a sufficient extent to induce the Treasury Department to proceed with a formal investigation), to analyze the work product of expert witnesses and the defenses raised by the importers and foreign producers in the proceeding, and to complete questionnaires and compile data requested by the Treasury Department. The involvement of internal personnel in dumping cases can and does disrupt ongoing operations, occasionally to a serious extent, especially when the complaining domestic producer is a small business.

#### *Lack of Damages*

In marked contrast to the plaintiff in a private antitrust lawsuit, a domestic manufacturer who initiates a dumping proceeding that is ultimately successful does not recover damages, awards, penalties, attorney's fees, costs, or any other direct form of monetary relief if and when a dumping finding is made. He does not share in dumping duties collected from the foreign producer, and receives no

recompense for his time and efforts. His sole "award" is the reduced import activity and increased import prices.

### *Difficulty of Proving Injury*

Finally, and perhaps most significantly, complaining domestic manufacturers frequently have experienced great difficulty convincing the ITC that LTFV sales of foreign merchandise in the United States have injured domestic industry. There are numerous legal and practical obstacles to proving injury. For example, domestic industry must demonstrate a causal link between import sales at less than fair value and the alleged injury. If an American manufacturer is beset by problems, other than LTFV imports, which adversely affect its profits or capacity utilization rates, or if the manufacturer is not cost-competitive, the Antidumping Act will not afford relief. Moreover, the Act requires injury to an "industry"—an American manufacturer experiencing operating losses while domestic competitors are showing profits must look beyond the Antidumping Act for assistance. There are problems in defining the industry in question, and it is not always clear whether the ITC will equate injury to a regional industry with injury to "an industry" under the Act. Uncertainty also exists as to the degree of injury that must be shown; on some occasions, the ITC appears to require material injury, but at other times, any injury more than *de minimis* will suffice. The published ITC injury determinations are unreliable as precedent, since a given decision is merely reflective of a majority vote of the Commission members then sitting, and no single Commissioner seems to regard himself as bound by prior decisions of other past or present Commissioners.

The historic reluctance of the ITC and its predecessor, the United States Tariff Commission, to find injury is a frequently discussed topic among practitioners familiar with the Antidumping Act. In fact, for many decades, domestic manufacturers have viewed the Commission as strongly favoring free trade and as regarding the Act as a symbol for protectionism. This fear has been especially prevalent when a majority of incumbent Commission members were appointees of a Democratic president. However accurate, the very existence of this perception has discouraged domestic manufacturers from initiating dumping cases.

### THE ANTIDUMPING ACT VERSUS OTHER REMEDIES

Opponents of the Antidumping Act have suggested that private anti-trust actions and import relief provisions under the Trade Act of 1974 provide viable substitutes for the Antidumping Act.<sup>22</sup> I believe, however, that the Antidumping Act is preferable to these alternatives.



As costly and time-consuming as a dumping proceeding may be, such costs and time are dwarfed by the enormous expenses and many years required to commence and win a private antitrust action, even against domestic defendants. The fact that the potential defendant in such antitrust litigation would be an overseas producer—most of whose records and personnel are located thousands of miles away, who communicates in a language other than English, and who likely maintains business records in accordance with practices unfamiliar to United States courts—would vastly compound the time and expense required to see such antitrust litigation through to a successful conclusion. Difficulties involved in discovery—obtaining documentation to substantiate antitrust claims as well as the sworn testimony of key witnesses—would be formidable. Moreover, an American manufacturer contemplating a private antitrust action would face serious problems in proving the requisite intent by the foreign defendants, either under state statutes directed at below-cost or other predatory sales practices or under federal antitrust law. In the *Gilmore* case,<sup>23</sup> a small domestic steel manufacturer initiated a dumping proceeding against the five largest Japanese steel producers and their related trading companies; the proceeding was ultimately successful. However, it would have been almost inconceivable for Gilmore to have undertaken a private antitrust battle against these foreign giants. Moreover, if Gilmore had done so, the result which it obtained in approximately eighteen months (five months preparation plus thirteen months of proceedings) utilizing the Antidumping Act today would still be many years from realization.

Other import relief measures embodied in the Trade Act of 1974 likewise present poor alternatives to the Antidumping Act—assuming that an antidumping proceeding could be “won”. Ultimately, the granting of such relief is subject to legislative, administrative, and presidential discretion.<sup>24</sup> Although the administration of the Antidumping Act is not entirely free from political pressures, the Act nonetheless contains relatively clean and clear-cut criteria for isolating instances of proscribed international price discrimination and for imposing the resulting duties. This is in marked contrast to relief measures found in the Trade Act. An American businessman utilizing the Antidumping Act is invoking a right, embodied in law, to have his government interdict LTFV sales if injury to domestic industry can be shown. In contrast, under the Trade Act, a businessman must seek a dole in Washington, D. C., requesting discretionary relief or succor from his government. The numerous instances to date in which the President has denied relief under the Trade Act on purely discretionary grounds underscore the fact that the protection afforded by that Act to domestic businesses injured by imports may well be illusory.

NOTES

1. Ch. 14, tit. II, 42 Stat. 11 (1921), as amended, 19 U.S.C. §§ 160-73 (1976). I do not here attack or defend the Antidumping Act, or advocate changing it, on policy grounds (*but see* Barceló, *The Antidumping Law: Repeal it or Revise it, ante*; Hemmendinger, *The Antidumping Act: Proposals for Change, post*). Rather, I view the Act as it is written and administered, and attempt to assay its efficacy, in practical terms, for a United States producer facing competition from imported goods.
2. *See* American Metal Market, Oct. 26, 1978, at 18, col. 1.
3. 19 U.S.C. § 160(c) (1976).
4. 19 C.F.R. § 153.31 (1977).
5. 19 U.S.C. § 164(b) (1976).
6. 5 U.S.C. § 552 (1976).
7. 19 C.F.R. § 153.31(a) (1977).
8. 19 C.F.R. § 153.33 (1977). Direct settlement negotiations between the complaining United States manufacturer and foreign producers are an infrequent occurrence, due to the parties' concern that an agreement (or even discussions) between them, as competitors, concerning price levels or import volumes for the foreign merchandise might violate United States antitrust laws.
9. 19 U.S.C. § 160(b), (d) (1976).
10. 19 C.F.R. §§ 153.35, 153.48, 153.50, and 153.51 (1977).
11. 19 C.F.R. § 153.49 (1977).
12. However, a temporary reverse trend must be noted. Occasionally, a flurry of import activity occurs in the initial stages of a dumping proceeding, as importers and their United States customers attempt to build up inventories before import prices firm and volumes dwindle. The same phenomenon has taken place periodically under the Trigger Price System; when higher trigger prices for a subsequent calendar quarter have been announced by the Treasury Department, import sales (at the current lower prices) have escalated temporarily.
13. 19 U.S.C. § 160(b)(3) (1976).
14. *Id.*; 19 C.F.R. § 153.53 (1977).
15. The Japanese TV case is a glaring example. 19 C.F.R. § 153.46 (1977).
16. 19 C.F.R. § 153.46 (1977).
17. 19 U.S.C. § 160(b)(2) (1976).
18. 19 C.F.R. § 153.27 (1977).
19. 19 U.S.C. § 164(b) (1976).
20. 19 U.S.C. § 160(c) (1976); 19 C.F.R. §§ 153.25, 153.26 (1977).
21. 19 U.S.C. § 160(c) (1976).
22. Pub. L. No. 93-618, 88 Stat. 1978 (1975).
23. 42 Fed. Reg. 16,883 (1978). *See* Rodriguez, Gilmore: *An Antidumping Action as Cost-Price Comparison, post*.
24. *E.g.*, §§ 202, 223 of the 1974 Trade Act, codified at 19 U.S.C. §§ 2252, 2273 (1976).