Antidumping Exposed

The Devilish Details of Unfair Trade Law

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Introduction

Antidumping laws allow national governments to impose special duties on ''unfairly traded'' imports. Before duties are imposed, the authorities that administer the law must make two findings: (1) that imported goods are being ''dumped,'' or sold at prices less than ''normal value,'' and (2) that the dumped imports are causing or threatening material injury to the domestic import-competing industry. Under the U.S. system, the Department of Commerce determines whether dumping is occurring, while the International Trade Commission examines whether dumped imports are injuring the domestic industry. When both the DOC and the ITC make affirmative findings, the goods under investigation are subject to duties equal to the margin of dumping—that is, the difference between the U.S. prices of the imports and their ''normal value.''

Supporters of antidumping laws argue that they are needed to create a ''level playing field'' for domestic industries that face unfair import competition. Specifically, they contend that various distortions in foreign markets—trade barriers, monopoly or collusion, government subsidies, and ''barriers to exit'' (e.g., poor bankruptcy laws, ineffective protection of creditors' rights) that prevent loss-making businesses from reducing capacity or going out of business—allow foreign producers to charge lower prices in export markets than would otherwise be possible. In one scenario, firms may enjoy supernormal profits at home (in a protected or cartelized ''sanctuary market'') and then use those profits to cross-subsidize the low-price export sales. Alternatively, subsidies or barriers to exit may allow firms to sell abroad (and at home as well) at below-cost prices without suffering the normal marketplace consequences.

According to supporters, antidumping laws ensure a level playing field by offsetting artificial sources of competitive advantage. Dumping, it is alleged, demonstrates the existence of one or more of the market distortions discussed above; antidumping duties, by making up the difference between dumped prices and "normal value," extinguish the foreign producer's artificial advantage and put the domestic industry back on an equal footing. At least that is the theory.

There is, however, a yawning gap between theory and practice. Antidumping laws, contrary to the claims of their supporters, do not ensure a level playing field. Instead, they penalize foreign producers for engaging in commercial practices that are perfectly legal and unexceptionable when engaged in by domestic companies. Such discrimination against foreign firms creates an unlevel playing field for imports. In other words, antidumping laws discriminate against imports, and that is the essence of protectionism.

Unfortunately, this particular form of protectionism enjoys the sanction of multilateral trading rules. Article VI of the original General Agreement on Tariffs and Trade authorizes national governments to impose duties on dumped imports. Today, the authority to engage in antidumping protectionism is recognized by the World Trade Organization. The WTO Antidumping Agreement, finalized in 1994 during the Uruguay Round of trade talks, specifies the standards and procedures that national antidumping regulations must follow. Although the requirements of this agreement do impose modest restraint on what WTO members can do in the name of antidumping, the sad fact is that the agreement allows wide scope for protectionist abuses. Under the present rules, antidumping is a major loophole in the free-trade disciplines of the world trading system.

For many decades, antidumping protectionism was a vice exclusive to rich industrialized nations—specifically, the United States, Canada, members of what is now the European Union, Australia, and New Zealand. In recent years, however, dozens of less-developed countries have followed the U.S. example and adopted antidumping laws. Antidumping actions worldwide have increased dramatically over levels in previous decades; in particular, American exports are increasingly encountering the same unpredictable, arbitrary, and disruptive obstacles that have long been inflicted on other countries' exports in the United States. Indeed, from 1995 to 2000, the United States was the third most frequent target of world antidumping measures.

Market access for U.S. exports is one important component of a much broader national interest in an open and prosperous international economy. That larger interest is also menaced by the recent proliferation of antidumping measures. The rapid spread of antidumping protectionism throughout the developing world threatens to undo many of the liberalizing gains made possible by the elimination of quotas and import licenses and the slashing of tariff rates. The integrity of the world trading system is being undermined by the increasing frequency and virulence of antidumping activity.

In the U.S. trade policy debate, antidumping policy has become a hot-button issue. The U.S. antidumping law has long been unpopular with countries whose exports suffer from its operation. In recent years, many of those countries have been urging the U.S. government to agree to new international rules at the World Trade Organization that would tighten the requirements that must be met before antidumping protection can be granted.

Powerful U.S. lobbying interests, and their supporters in Congress, have vehemently opposed such changes in antidumping rules. American industries that frequently seek antidumping protection—in particular, steel producers—argue that a "strong" law is needed to ensure a level playing field and to maintain public support for generally open markets. They insist that any effort to "weaken" current law through trade negotiations must be rejected out of hand.

Up to this point, antidumping supporters have had the upper hand in the U.S. policy debate. Despite the harm caused to downstream import-using industries and consumers by U.S. antidumping measures, the increasing disruption of U.S. exports by foreign measures, and the larger threat to the U.S. interest in a healthy world trading system posed by the global spread of antidumping protectionism, the U.S. antidumping law has enjoyed strong political support from Republicans and Democrats alike.

What accounts for this enduring, bipartisan popularity? In the first place, the law's rhetoric is compelling. After all, which members of Congress would like to stand up and say they favor illegal and unfair dumped imports? Who could be opposed to a level playing field? Meanwhile, the reality behind the rhetoric is obscure. The antidumping law is notoriously complicated, and its inner workings are known only to a select handful of users, targets, bureaucrats, and lawyers. As a result, most supporters of the law simply take its appealing rhetoric at face value. If it sounds good, it must be good.

In this book we attempt to cut through the fog of technical complexity that surrounds antidumping laws—to show how they really operate and to show in particular that their actual operation all too often has nothing to do with their fine-sounding rhetoric.

This task absorbs the first three chapters of the book. In them we focus exclusively on the specific rules and methodologies of the U.S. antidumping law. We do this, not because the U.S. law is uniquely abusive, but simply because data on U.S. antidumping practice are much more accessible than equivalent data from other countries. Furthermore, the United States is among the most active users of antidumping remedies worldwide, and its law has served as a model for new users as they have adopted and begun to enforce their own laws. Accordingly, the U.S. law is a good proxy for antidumping practice globally.

In these initial chapters we do not pretend to offer a comprehensive analysis or critique of the U.S. law. In particular, we do not address the ITC's analysis of whether dumped imports are causing or threatening injury to a domestic industry. Neither do we address various procedural aspects of antidumping investigations—including standing requirements, initiation standards, use of "facts available," or the distribution of duties to domestic producers under the so-called Byrd amendment.

Although much in these other elements of antidumping practice is ripe for criticism, we choose to home in on the central question of antidumping policy: What constitutes dumping? How that question is answered determines the fundamental character of antidumping practice. If it can be shown that normal, healthy competition is regularly stigmatized as dumping because of methodological flaws and biases, then the law itself is fundamentally flawed—not just according to the ivory-tower standards of economists and policy wonks, but according to the very standards upheld by the law's supporters.

This last point deserves some elaboration, since it highlights the distinctiveness of our approach. Economic analysis judges antidumping policy according to the criterion of consumer welfare. Since consumer welfare is normally served by the lowest possible prices, economists tend to regard antidumping laws—which, after all, seek to raise the prices of imported goods above "unfairly" low levels—with immediate suspicion. According to standard economic analysis, low prices are a problem in need of a remedy only if they tend to lead to higher prices in the long term. Consequently, economists generally consider antidumping remedies justified only to the extent that they combat predatory pricing—that is, pricing designed to monopolize a market by knocking competitors out of business. The consensus among economists is that antidumping laws have virtually nothing to do with addressing predatory pricing—and therefore their existence lacks any economic justification.[1]

We have no quarrel with the economists' verdict on antidumping laws—indeed, we heartily endorse it. The problem is that it is all but irrelevant to the antidumping policy debate. The leading supporters of antidumping laws freely admit that they are not designed to combat predatory pricing—or to serve consumer welfare in the economists' definition of that term. They defend antidumping, not on the grounds of efficiency, but rather on the grounds of fairness. Antidumping remedies, they claim, address pricing practices that reflect artificial competitive advantages created by market-distorting government policies abroad. Even if dumping may benefit consumers in the short term, they argue, it is unfair for producers to have to compete under such conditions.

Accordingly, the supporters and critics of antidumping laws have often talked past each other because they define the proper objectives of antidumping policy altogether differently. We seek to resolve this impasse and join the debate squarely by evaluating antidumping laws according the the standards established by their supporters. We leave aside the question of whether antidumping laws promote economic efficiency, and look instead at the more basic question of whether these laws do what their supporters say they do. In other words, do antidumping laws really uphold fair trade under any plausible definition of that term?

We tackle that question as follows. The first chapter offers a detailed overview of the complicated procedures and methodologies whereby dumping is determined and measured. The second chapter proceeds to evaluate the extent to which antidumping remedies target the effects of various market-distorting government policies. In the third chapter, we focus on what is touted by antidumping supporters as the paradigmatic scenario that gives rise to dumping: a closed or ''sanctuary'' home market enables foreign producers to engage in international price discrimination. The conclusion drawn in these first three chapters is that antidumping laws, as currently written and enforced, do not reliably target unfair trade as antidumping supporters typically define that term. Consequently, antidumping remedies routinely punish normal, healthy competition.

Having established the fundamentally protectionist nature of contemporary antidumping practice, we turn in the fourth chapter to documenting and analyzing the rapid proliferation of antidumping laws in recent years. In particular, we detail the effect of antidumping's global spread on U.S. exports.

Finally, the fifth chapter addresses what is to be done. Negotiations are now under way at the World Trade Organization to improve existing WTO antidumping rules and thereby limit the scope for protectionist abuses afforded by national antidumping laws. These negotiations, part of the larger "Doha Round" of global trade talks, offer promising opportunities for antidumping reform here and abroad. We suggest a general framework for how negotiations should proceed to make the most of those opportunities, and then follow up with detailed proposals for changes to the WTO Antidumping Agreement. Those proposals address not only the determination and calculation of dumping, but also the determination of injury as well as antidumping procedures and remedies.

The antidumping policy debate in the United States has long suffered from serious misunderstandings about how antidumping laws actually work. We hope that by exposing antidumping's devilish details, we can make some contribution toward nudging the policy debate in a more constructive direction.

1. How Dumping Is (Mis)calculated

There is no way around it: antidumping is complicated. The jargon alone—EP, CEP, POI, POR, CONNUM, FUPDOL, TOTPUDD, model match, cost test, arm's-length test, CV, facts available, DIFMER, and on and on—is enough to make a nonspecialist's eyes glaze over.

Nevertheless, it is impossible to understand how antidumping laws really operate—and thus to evaluate whether they actually do what their supporters say they do—without diving into their technical intricacies. In this chapter we introduce the intrepid reader to the basic procedures and methodologies for determining and calculating dumping under U.S. law. If it is any consolation, we have left out great reams of additional, complicating detail.

Investigations and Reviews

Dumping is defined as the sale of a commodity in an export market (i.e., the United States under U.S. law) at a price less than "normal value."[1] Normal value is based either on the price of the same or a similar product in a comparison market (normally the foreign producer's home market) or on "constructed value," the cost to produce the product plus some amount for profit.[2] The extent of dumping is called the "dumping margin," which is calculated by subtracting the export price from normal value and dividing the difference (assuming it is positive) by the export price. In other words, if a foreign producer sells widgets for 10 at home and for 8 in the United States, its dumping margin is $(10-8)/8$, or 25 percent.

For antidumping duties to be imposed, it is not enough that dumping be found to exist. In addition, the authorities must determine that the domestic industry is materially injured or threatened with material injury, or else that the development of an industry is materially retarded, by reason of dumped imports.

In the United States, an industry can seek relief under the antidumping law by filing a petition with the International Trade Commission and the Department of Commerce. Domestic producers joining the petition are thus called "petitioners." Producers accounting for at least 25 percent of domestic production (by volume) must support the petition, and opposition by other producers must constitute less than 50 percent of the total output of all producers expressing an opinion one way or the other. Petitions are required to contain some evidence of dumping and injury in order to initiate an investigation. However, the evidentiary requirements are quite modest.

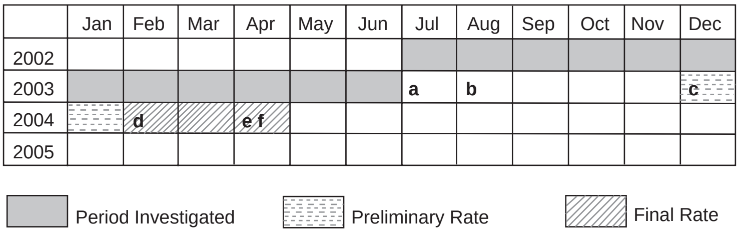
Figure 1.1 outlines the timetable for a typical antidumping investigation. Once an investigation is initiated, the ITC has 45 days after the filing of the petition to determine whether there is reason to believe that dumped imports are causing or threatening injury to a domestic industry. Affirmative preliminary findings are rendered in about 79 percent of cases.[3]

Following an affirmative preliminary finding by the ITC, the DOC issues questionnaires to "mandatory respondents"—the largest known foreign producers and exporters of subject merchandise from the countries in question.[4] Failure to respond to the DOC's questionnaire or failure to cooperate fully in the proceeding typically results in the assignment of an adverse rate of duty, which is usually based on allegations in the domestic industry's petition. If a foreign producer has any hope of maintaining access to the U.S. market, it is forced to respond to the DOC's voluminous requests for information. Responding to an antidumping questionnaire usually requires the diversion of significant company resources and retaining legal, accounting, and economic expertise.

The DOC normally makes its preliminary determination (prelim) within 160 days of the petition's filing (although the deadline can be extended by 50 days). If the DOC prelim is affirmative, liquidation (i.e., final determination of duties owed to the Customs Service) is suspended for all future subject imports, and a bond must be posted to cover possible antidumping duties at the rate announced in the prelim. The DOC then makes its final determination (final) within 75 days of the prelim (although, here again, the deadline can be extended—this time by up to 60 days). Between the prelim and the final, the DOC conducts an on-site verification of the respondents' questionnaire data and considers factual and legal arguments submitted by petitioners and respondents. After the final, assuming it

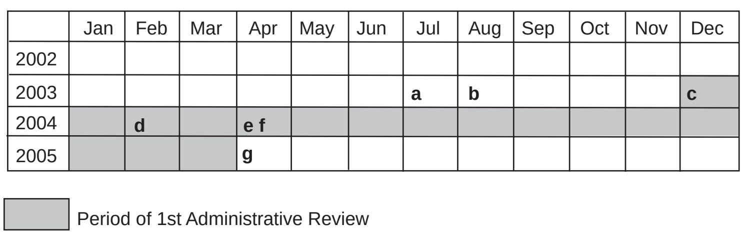
Figure 1.1
TIMING OF EVENTS IN ANTIDUMPING PROCEEDINGS

Investigation



Symbol	Date	Action	Comment
a	7/1/03	Petition Filed with ITC and DOC	
b	8/15/03	ITC Preliminary Determination	Day 45
c	12/8/03	DOC Preliminary Determination	Day 160-Deposits due on entries
d	2/21/04	DOC Final Determination	Day 235 -Revised deposit rate
e	4/7/04	ITC Final Determination	Day 280
f	4/14/04	AD Duty Order Issued	Within one week of ITC final

Administrative Review



Symbol	Date	Action	Comment
g	4/1/05	Request for Admin. Review	Still paying investigation rate until preliminary review rate established

is affirmative (an outcome that occurs about 94 percent of the time),[5] respondents must pay cash deposits on possible antidumping duties at the rate announced in the final.

Once the DOC issues its final determination, the ITC normally has 45 days to make its final injury finding. If that determination is affirmative (an outcome that occurs about 83 percent of the time),[6] an antidumping order is issued, which subjects prospective imports to antidumping duty deposits equal to the calculated rate of dumping.

The antidumping deposit rate is only an estimate of dumping liability. The rate is based on dumping margins calculated for the period of investigation, normally the four most recently completed calendar quarters before initiation—that is, a period that concludes months before duty liability generally begins (Figure 1.1).

Final liability is determined by administrative reviews conducted later by the DOC. As shown in Figure 1.1, the first period of review (POR) covers imports from the beginning of duty liability to the first anniversary of the antidumping duty order. Subsequent PORs cover imports from one anniversary date to the next. The DOC's final determination in a review settles final dumping liability for imports during the POR. If the amount of dumping found is more than the amount of cash deposits, the respondent owes the difference with interest. If, on the other hand, the amount of dumping is less, the respondent gets a refund with interest. In addition to settling final liability for past imports, the final determination in a review also establishes a new deposit rate for future imports.

Dumping margins can thus be recalculated annually through administrative reviews. The continued existence of injury, on the other hand, is revisited only once every five years in so-called sunset reviews. Under the sunset review provision, an antidumping duty order is terminated automatically after five years unless a sunset review is requested. In this review, the DOC and the ITC determine whether termination of the order would be likely to lead to the continuation or resumption of dumping and injury, respectively. If both make affirmative determinations, the order continues for another five years. Between July 1998 and August 2002, 354 sunset reviews were initiated, of which 265 were contested by petitioners. The outcomes in 2 of these 265 contested cases were still pending. The DOC made affirmative sunset determinations to continue the order in all but 4 of the 263 decided cases, while the ITC voted affirmative 72 percent of the time.[7]

The DOC Questionnaire

To conduct its dumping investigation, the DOC issues detailed questionnaires to the primary foreign producers of the ''subject merchandise,'' as the investigated imports are known. The questionnaire has four and sometimes five distinct parts—Sections A, B, C, D, and sometimes E. Section A seeks information on the company's corporate structure and affiliations, distribution process, sales process, accounting and financial practices, and the products under investigation generally.

Section B concerns the company's sales of ''such or similar'' merchandise (i.e., products that are identical or similar to the subject merchandise under investigation) in the comparison market. The comparison market is normally the foreign producer's home market, but a third-country export market may be used instead if the home market is deemed not ''viable.''[8] The DOC seeks information on products sold, selling prices, quantities sold, customer relationships, customer class (i.e., distributor, wholesaler, retailer), transportation and warehousing expenses, insurance costs, selling expenses, discounts and rebates, warranties, commissions, packing costs, and anything else related to home-market sales. This portion of the response is supplemented by a separate computer data file containing detailed information for each sales transaction made during the period of investigation and is used to calculate the ''foreign market value'' or normal value—in other words, the benchmark against which U.S. prices are compared.

Section C is analogous to Section B but covers sales made in the United States. Typically, more information is sought with respect to U.S. sales because the process of selling in an export market involves additional transportation and selling processes. Also, in many cases, the U.S. importer is related to the foreign respondent and therefore the prices to the importer are not used as the basis for the dumping calculation. In such cases—known as constructed export price transactions—the U.S. price is based on the price of the resale by the related importer to the first unaffiliated customer. When U.S. sales involve importation by a related company, expenses incurred by that related importer are required to be reported in Section C.

Section D covers the cost of producing the subject merchandise and the foreign such or similar merchandise. This portion of the questionnaire seeks to obtain data on production quantities, labor costs, materials costs, overhead, and general and administrative expenses associated with production. The computer data files supplementing the narrative response to Section D must contain detailed