Free Trade Realism in the International Market: Towards a Sensible, Privately-Enforced Antidumping Statute

Stephen F. Moller

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COMMENTS

FREE TRADE REALISM IN THE INTERNATIONAL MARKET: TOWARDS A SENSIBLE, PRIVATELY-ENFORCED ANTIDUMPING STATUTE

I. INTRODUCTION

The unfair international trade practice commonly known as "dumping" has been and remains one of the central concerns of American international trade laws and of the General Agreement of Tariffs and Trade (hereinafter GATT).1 Dumping is the trade practice of selling a good produced in one country for a price lower than its "normal value" or cost price in a different market.2 The trade laws Congress has enacted to fight illegal dumping have thus far treated dumping either as "price discrimination which is prohibited by the antitrust statutes or as violations of tariff laws to be punished by special import duties."3 Dumping is a concern of American trade law because it injures domestic producers who must either lower their prices below the would-be market equilibrium (or margi-

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2. Id. at 1076-78. Ortwine defines dumping in international trade as follows:
   Dumping is an international trade practice whereby a product from one country is sold in another country for less than its price in its own country. The country where the item is manufactured or otherwise produced is the exporting country or country of origin. The price of the item in the domestic market of the exporting country is the item's fair market value. The country which receives the item through international commerce is the importing country or country of destination. The exporting country is said to be "dumping" its goods into the market of the importing country.
   Id. at 1077; see also Clyde V. Prestowitz, Jr., Trading Places, How We Allowed Japan to Take the Lead 38 (1988). See generally Jacob Viner, Dumping: A Problem in International Trade (1966).
nal cost price)\(^4\) to compete against the dumped goods or lose their market share.\(^6\) This form of unfair competition or pricing strategy inevitably bankrupts domestic firms.\(^6\)

This situation is similar to the "predatory" price discrimination strategies\(^7\) outlawed by our domestic antitrust laws, whereby a firm

\(\text{4. See E. Thomas Sullivan & Jeffrey Harrison, Understanding Antitrust and Its Economic Implications (1990).}\

\(\text{Demand is a schedule of prices and the quantities individuals are willing and able to purchase at each price. One might determine demand by asking individuals how many units of a good they would buy at one price. The amounts would be added to get the total amount demanded at that price. Then the same question could be asked about a series of higher and lower prices. We would have a list of prices and the amounts that would be demanded at each price.} \ldots\

\(\text{Supply is the converse of demand. It is a schedule of prices and the amounts sellers are willing to make available to consumers at each price.} \ldots\) In a competitive market, the market price of a good or service and the quantity sold are determined by the interaction of demand and supply.

\(\text{Id. §§ 2.02(A),(C).}\

\(\text{The equilibrium price is the price where both price and quantity are the same on both the supply and demand schedules or curves. This point also designates the equilibrium quantity and is the point of competitive equilibrium.} \text{Id. § 2.02(C).}\

\(\text{The term which is used to describe the way in which a firm's costs behave as it increases output is "marginal cost." Marginal cost is the additional cost to a firm of producing one more unit of output} \ldots\) On the supply side of the analysis, the firm's supply curve is the same as its marginal cost curve. The reasoning is that the number of units a firm offers at a particular price depends on a comparison of the price offered with the marginal cost of producing an additional item. It will offer a particular unit as long as the addition to total cost (marginal cost) does not exceed the price offered. Thus, the firm's marginal cost curve also indicates the number of units that will be offered for sale at each price.

\(\text{The firm's output is determined in the same manner as output was determined for the industry as a whole; it settles on the quantity where demand and supply intersect.} \text{Id. §§ 2.02(B),(C).}\

\(\text{In calculating costs of production, economists include a "normal" return to investors.} \text{Id. § 2.02(E).}\


\(\text{7. "Predatory" price discrimination is a pricing strategy that is followed, despite short-term losses, because it is expected to drive competitors out of the market place, or alternatively, to exclude potential competitors from entering the market. For information on predatory intent and a discussion of what type of pricing behavior ought to constitute predatory pricing, see Paul L. Joskow & Alvin K. Klevorick, A Framework for Analyzing Predatory Pricing Policy, 89 Yale L.J. 213 (1979); Phillip Areeda & Donald F. Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975) [hereinafter-}
with market power sells at a loss to squeeze out competitors. Once the firm monopolizes the market or acquires enough of the market to be the “price setter,” the firm raises prices to maximize profits. This practice injures the consumer because the monopolist produces less and charges a higher price. Firms that subsidize their exports (usually with government backing) follow this dumping strategy through monopoly profits gained in their home markets where antitrust laws either do not exist or are regularly ignored.

As the international analog to domestic antitrust law, the Antidumping Revenue Act of 1916 (hereinafter the 1916 Act) is inad-

9. See Sullivan, supra note 4, §§ 2.03-04; Prestowitz, supra note 2, at 38.
10. See Irwin, supra note 3, at 847-48 n.8. See generally Prestowitz, supra note 2 (Prestowitz chronicles in depth the American and Japanese trading relationship, explaining the very different understanding of open markets and free trade, as well as the organization and alliance relationship in Japan between the government and business). Professor Philip J. Jimenez commented that the Japanese have antitrust laws on their books but that in Japan these are regarded much as ceremonial swords in one’s home would be; you might take them off the wall and show them to your guests, but no one would ever contemplate actually using them. Professor Philip J. Jimenez, Lecture to the International Business Transactions class, Santa Clara University School of Law (Fall, 1991).
   It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: Provided, that such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides
or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.


13. The goal of antitrust law is to ensure competitiveness in the marketplace according to the principles of the ideal, perfectly competitive market model. See Sullivan & Harrison, supra note 4, § 1.01.

Antitrust is the study of competition. It is the body of law that seeks to assure competitive markets through the interaction of sellers and buyers in the dynamic process of exchange. For example, as a consumer, you are motivated by a desire to purchase products at the highest quality and lowest price. Through purchases you seek to maximize your satisfaction. Sellers of products, in turn, attempt to determine what consumers will buy and how to supply products at the highest quality and best prices. They also attempt to produce those products by expending the least amount of resources.

Id.

14. See infra notes 111-23 and accompanying text.


16. See infra notes 111-23 and accompanying text.
trade practices. The current legal framework greatly favors unfair dumping and largely ignores the needs of domestic producers. The American consumer-oriented, market-driven model should take into account that most people in society wear one hat as producers in the work place and another hat as consumers. Hence, when domestic producers are economically damaged, consumers also suffer in the form of lower wages or unemployment. An effective private cause of action against dumping is indispensable to protect domestic producers against foreign traders who regularly violate dumping laws in order to avoid the result of injuring and driving out of the market efficient and competitive American firms. However, it is also important to make sure that our laws do not go so far as to become protectionist, thereby reducing healthy competition.

The best solution to the current shortcomings of the antidumping legislation is to enact a new antidumping measure, to replace the 1916 Act, which would provide a meaningful private civil remedy to injured domestic producers. Primarily, this remedy should take into account the goal of antitrust law, which is to ensure a competitive market. In addition, it should take into account the unique

17. See infra note 19 and accompanying text and parts II. D-III. If we fail to protect our domestic business against unfair trade practices, efficient firms will be forced out of the market and unemployment will result. Prestowitz, supra note 2 at 38.
18. See infra part IV. A-C.
19. Dumping can have the effect of exporting unemployment. See Prestowitz, supra note 2, at 38.
20. See Prestowitz, supra note 2, at 26-70. "There can be no doubt that dumping occurs, as demonstrated by the more than sixty countervailing duty orders in effect." Irwin, supra note 3, at 847 n.8 (citing Memorandum from Chris Parlin, Deputy to Deputy Assistant Secretary, Import Administration, Department of Commerce to Michael Russell, Counsel, Senate Subcommittee on Juvenile Justice (Sept. 3, 1985) (relating to countervailing duty orders in effect) (on file at the office of LAW & POL'Y INT'L BUS).
21. See generally Prestowitz, supra note 2.
23. See infra parts IV. C-G, V..
24. Although a full discussion of the problems addressed by antitrust law is beyond the scope of this comment, an understanding of the goals of antitrust law and of the type of problems antitrust law addresses is helpful. Antitrust law seeks to maintain a competitive marketplace. One of the most important features of a competitive market is that buyers and sellers act independently. This independence allows consumers to have a choice among competing products of varying quality and price. If sellers of a product were allowed to act in concert and collectively set prices or restrict the level of the product they provided to the consumers, choice would be limited and a consumer would be forced to pay more for a product. See Sullivan & Harrison, supra note 4, §§ 1.01-.02.
problems that exist in the international marketplace.25

II. BACKGROUND

A. A Big-Picture Hypothetical26

An American firm, HyperTech, produces a technologically ad-

A major problem at the center of debate in antitrust law is whether a given antitrust law will serve its purpose of ensuring a competitive marketplace, thereby enhancing consumer welfare, or whether it will result in "judicial errors" that would reduce consumer welfare. There are basically two types of judicial errors: A false positive, or type I, error and a false negative, or type II, error. In discussing the 1916 Act from an economic perspective, Professor Sidak explains that:

A false positive, or type I, error occurs when the Act prohibits pricing behavior that, far from injuring consumers, is competitively neutral or welfare enhancing.

A false negative, or type II, error occurs when the Act fails to prohibit pricing behavior that is in fact likely to injure consumers by driving domestic producers from the market, to the point where foreign producers can then charge supracompetitive prices.


25. See infra part IV. F. See generally Daniel J. Gifford, Rethinking the Relationship Between Antidumping and Antitrust Laws, 6 Am. J. Int'l L. & Pol'y 277 (1991)(arguing for a reinterpretation of the antidumping legislation that would harmonize it with the antitrust laws). A reinterpretation of the antidumping laws would be a good start to solving some of the past problems, but it would only be a start.

26. The following hypothetical is based upon historical accounts of the television, machine tool, pager, semiconductor and other markets and industries as told by Prestowitz, supra note 2. This hypothetical is a simplified account meant to give the reader a broad picture of the overall trade problems that exist between the American and Japanese trade systems or models. This picture points out many existing problems. The focus of this comment, however, is restricted to one narrow area, that of dumping and the lack of a private cause of action against foreign dumping. This comment acknowledges that there are many trade problems, including many that are attributable to factors beyond our trade laws. However, this comment focuses on the problem of dumping because of the severe impact dumping has had on American industry.

In order to adequately understand the dumping problem, it is important to take notice of the larger trade picture. Trade between Japan and the United States is used as the model for this analysis. The reason is that behind many of America's trade problems such as a $362 billion dollar deficit (Mortimer B. Zuckerman, The Great Compression, U.S. News & World Rep., Dec. 30-Jan. 6 1992, at 107, 107) lies Japan and its non-free-trade economy. See James Fallows, Japan: Playing by Different Rules, Atlantic Monthly, September 1987, at 22; see generally Prestowitz, supra note 2. The fact that other nations are increasingly turning to Japan's government-guided economic model as a template to follow in building their own economies is a cause for great concern. Jim Impoco, With Communism Dead, Now It’s Capitalist vs. Capitalist: The United States and Japan are Competing Role Models, U.S. News & World Rep., Dec. 30-Jan. 6, 1992, at 50, 50. If American policies and laws do not address the problems created by our different economic models, our existing trade problems will get increasingly worse. This comment takes a step towards addressing the problems resulting from our differing economic models by discussing the need to protect our domestic market against dumping, one of the characteristics of Japan's economic model. See Prestowitz, supra note 2, at 58.
vanced computer flight simulator, StarJet. HyperTech has a virtual monopoly on these flight simulators in the domestic market because of its superior technology. A few small domestic competitors are catching up, however. Hypertech wants to expand its StarJet market abroad to the nation of Asiana so that it can establish a market position before its domestic competitors can compete. However, HyperTech finds that many of the foreign markets to which it wants to expand are effectively closed. To sell its StarJet flight simulator abroad, HyperTech must license its technology to foreign businesses. Reasoning that the profit potential in the foreign market of Asiana is great, that HyperTech will have a substantial market share, and that it probably will have further developed its designs and simulation technology to a higher level, HyperTech licenses its technology to

27. For an interesting discussion of the Japanese market and the lasting effects of its formerly closed nature see T.J. Pempel, Too Late for Just Free Trade, Japan: Some 'Affirmative Action' to Heal Past Wounds Would Benefit Both of Us, WASH. POST, Dec., 1991, at C5. Pempel argues that the debate over how open the Japanese market is today and discussion of the changes that have taken place in the last decade to open the Japanese market to foreign competition misses the real point.

Even if the Japanese market in 1991 is more open than that of most other major industrialized economies, from the 1950s until well into the early 1970s, it was scarcely more open than Albania's. It is absurd for advocates of "the market," whether Japanese or American, to downplay the importance of past advantages and to assume that "competitiveness" is not cumulative. Such thinking is as myopic as considering it a fair race if, after running 20 miles in a marathon, one runner is forced to race the last six miles against another who now starts "even" with him, despite having ridden the first 20 miles in a chauffeur-driven Lexus.

The closed character of the Japanese market from the end of the U.S. Occupation until at least the early 1970s is beyond question. Imports of consumer and manufactured goods were severely restricted. Government industrial policy provided special tax incentives, R&D assistance and exemption from anti-monopoly regulations to targeted industries. Cartels and oligopolies among domestic producers were officially encouraged. Foreign technology purchases underwent governmental oversight designed to lower the costs to Japanese purchasers. Land and capital were cheap. The yen was sharply undervalued, providing an implicit subsidy to Japanese exporters and an impediment to foreign imports. Thus, debate about when, and if, Japan's markets became truly opened to Western goods and investment is less important than the fact that whatever openings occurred took place long after U.S. and European firms would have had their greatest cost effectiveness in Japan. They also occurred when the exchange rate between the yen and the dollar had long since made direct foreign investment even more difficult. As a consequence of exchange rate variations alone, start-up costs in dollars—whether for land, plants or salaries—for firms trying to enter Japan in the early 1990s are three times what they would have been in 1970. What had been difficult politically in the 1950s and 1960s had become almost impossible economically by the 1990s.
AsiaTech, an Asianan firm. However, HyperTech finds that severe restrictions are put on the level of its imports in order to protect the “fragile” Asianan industry.

In the meantime, HyperTech’s licensed technology is being developed by AsiaTech with the help of its government and a government-sponsored industrial cartel. When AsiaTech starts to produce its version of StarJet, it quickly captures ninety-five percent of the Asiana market share, despite its inferior quality. Before long, with the help of government investment and government purchasing to increase production volume (and thereby lower costs), AsiaTech is manufacturing a StarJet model of equal quality to that made by

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28. In criticizing American industry for the decline of America as the world industrial leader, many have pointed to the “stupidity” of licensing technology as one factor. There is some truth to this and other criticisms. However, there is a great deal more behind both the technology story and the decline of American industry. See Prestowitz, supra note 2, at 202. In some cases the Japanese simply copied American designs. See Id. at 48. The story behind the licensing of technology is illustrated by the following example of Interlink Electronics, a small venture firm in Santa Barbara, California:

Its (Interlink’s) product is a force-sensitive resistor which is used in a variety of electronic instruments. Interlink’s founder invented the product and has patents in the United States and Europe. The patents applied for in Japan had not been issued by that time (summer of 1987). Suddenly we found that a prospective Japanese customer, the Roland Company, to whom we had given significant technical data, had asked the Toshiba Silicon Company to make our product, which it was now doing while processing a competing patent application in Japan.

What were we to do? Toshiba Silicon could object to our patent under Japan’s procedures and tie us up in litigation for years at heavy expense, which it could bear more easily than we. Meanwhile, it could sell the product in Japan. We could sue to prevent sale in the United States, but that too would entail time and expense we could little afford. After we threatened to make the case a trade issue, Toshiba Silicon expressed an interest in a licensing arrangement. We did not really want such an arrangement, but the superior strength of Toshiba Silicon made it an offer we had to consider. This scenario was played out thousands of times as the long delay in patent issuing and the lack of an effective judicial appeals system in Japan worked to the disadvantage of the United States. The system, and the lack of any U.S. government response to it, siphons off U.S. technology, particularly of small venture firms.

Id. at 207.

In some cases, the U.S. government has actually been responsible for simply giving away American technology (an incredibly stupid policy that clearly demonstrates the low status American industry has been accorded by our government). The first semiconductor, which was invented by AT&T’s Bell Laboratories (a regulated monopoly under U.S. antitrust law at the time), was made available to both domestic and foreign entities by the government. No other government follows such a technology policy. See Id. at 29. An even more striking example of the stupidity of the American government regarding the transfer abroad of technology is that its own laboratories (such as the Lawrence Livermore Laboratories) actually helped the Japanese develop and test their supercomputers. Id. at 136, 317. At the same time, U.S. supercomputer makers such as Cray Research, Inc. were closed out of the Japanese market. Id. at 136.
HyperTech.

The Asiana government and AsiaTech know that the American market is the largest consumer market in the world, and they need to capture a large share of it to generate a large enough production volume to be cost-competitive in the world market. AsiaTech launches an aggressive export campaign targeting the open and easily accessible U.S. market. Since AsiaTech is a late entrant into the American market, its start-up costs and lower production volume make its production costs higher than those of HyperTech. However, AsiaTech knows that the American consumer likes bargains and is driven by short-term gain. Hence, AsiaTech saturates the American market with extremely low-priced, Asiana-produced StarJet models. Its prices are far below current HyperTech prices or prices in its own home market (Asiana). Consumers respond as expected by buying large quantities of AsiaTech's cheap StarJets, and AsiaTech quickly captures a large segment of the American market. HyperTech loses a large share of its market, but by reducing costs and investment in new plants, equipment, and research and development (hereinafter R&D), HyperTech lowers its own prices and retains a substantial share of the market. In fact, HyperTech manages to increase sales volume in the American market because of the rapidly growing demand for StarJet flight simulators resulting from growth in the military and airline industries.

Nevertheless, HyperTech realizes that AsiaTech's extremely low prices are well below production costs and that AsiaTech is "dumping" its Asiana-produced StarJets into the American market. Dumping is illegal under various U.S. laws. The dumping is injuring HyperTech by decreasing its profit margin and eating away its market share. HyperTech complains to the U.S. government that AsiaTech is breaking U.S. trade law and violating the rules of GATT. With the exception of the ineffective 1916 Act, U.S. dumping laws are administratively enforced, so HyperTech must rely on the U.S. government to enforce them. However, because of competing political interests and misperceptions about the international economic model, the U.S. government permits the dumping to continue. The government concludes that it would be best not to enforce these laws too aggressively, since Asiana is an ally and the United States does not want to label Asiana firms "unfair."

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29. See infra part II. B.
30. For a general discussion of GATT and other international antidumping agreements see Ortwine, supra note 1 at 1080-89.
31. See infra part II. B.
more, HyperTech does not appear to be seriously injured by the dumping, because its sales have increased. Additionally, the government reasons that the dumping is actually beneficial, as it is a cheap source of StarJets for the American consumer.

Despite the fact that HyperTech had increased its sales volume and showed a profit that year, in effect, they were doomed without government action against the dumping. That HyperTech would become a memory in the StarJet industry within a few short years is explained by what is known as the experience curve.\(^{92}\) The doubling of production and sales of a product reduces the total cost of taking the product to the market place by twenty to thirty percent.\(^{89}\) Even though HyperTech has been experiencing a growth in sales and even a moderate growth in overall market share of the still-expanding market, AsiaTech is growing at a greater rate than HyperTech. Therefore, AsiaTech's costs are falling faster than HyperTech's while it increases its market share at a greater rate than HyperTech. Spurred on by its increasingly lower costs, AsiaTech continues to lower its costs until it finally overtakes HyperTech.

With a larger share of the market than HyperTech, AsiaTech has become the low-cost producer of StarJets. With AsiaTech's low prices, HyperTech must sell at lower prices and face increasingly lower profits, resulting in less capital for investment. However, any significant decrease in investment for more efficient plants and equipment, and for R&D (especially in a rapidly developing high-technology field such as that of StarJets), would result in falling behind the competition. Not only would HyperTech's StarJets become a lower quality product, but AsiaTech's higher level of research and development spending would likely enable AsiaTech to take the lead in the race to be the first to develop and produce newer and more advanced generations of StarJets, thereby eventually making HyperTech's StarJet technology and designs obsolete. HyperTech, facing pressure from investors to show a profit, and realizing that it cannot retain its StarJet market share without substantial losses, exits the StarJet market to explore new product markets.\(^{84}\)

Why did the U.S. antidumping laws not protect HyperTech against AsiaTech's illegal dumping? Various antidumping laws exist in the U.S., but they do not deter foreign firms from dumping their goods on the U.S. market.\(^{88}\) The following sections are an introduc-

32. PRESTOWITZ, supra note 2, at 40-44.
33. See id. at 40.
34. See supra note 26.
35. See infra parts II. D-II. B.
tion to the antidumping trade laws.

B. Current Dumping Measures

The 1916 Act was the first antidumping law enacted in the United States.\textsuperscript{36} Dumping is an important concern of our trade and antitrust laws (which seek to maintain a competitive marketplace)\textsuperscript{37} and is "defined as price discrimination between purchasers in different national markets."\textsuperscript{38} It was not until sixty-four years after the 1916 Act was passed that a court decided a case on the merits under the Act in \textit{Zenith Radio Corp. v. Matsushita Electric Industrial Co.}\textsuperscript{39} No claimant has ever won an action under the Act.\textsuperscript{40}

The 1916 Act is the only antidumping statute that provides for a private remedy to dumping.\textsuperscript{41} Subsequent statutes have provided for administrative imposition of duties in the amount of the price difference between the sale price of a product in the United States, the importing country, and the fair market value of the product in the exporting country.\textsuperscript{42} The first of these statutes, the Antidumping

\begin{itemize}
  \item \textsuperscript{36} See Irwin, supra note 3, at 848.
  \item \textsuperscript{37} For an explanation of a competitive market see supra note 4.
  \item \textsuperscript{38} See Viner, supra note 2, at 4. For a general discussion on dumping, see supra notes 2-9 and accompanying text.
  \item \textsuperscript{40} There have been relatively few cases involving the 1916 Act, and only a small number of actions brought by the government under the criminal provisions of the statute, "none of which has been successful or given rise to a reported judicial decision." See Kessler, supra note 11, at 487 n.11; Zenith Radio Corp., 494 F. Supp at 1212. The only case that has dealt with the substantive issues of the 1916 Act in depth is a highly complex and prolonged action brought by the Zenith Radio Corporation and the National Union Electric Corporation against a group of the biggest Japanese consumer electronics producers, including the giant Matsushita Electric Industrial, Hitachi, Sharp Electronics, Sanyo Electronics, and Sony corporations. See Kessler, supra note 11, at 491-93; In re Japanese Elec. Prods. Antitrust Litigation, D.C. MDL 189 (E.D. Pa. 1975).
  \item \textsuperscript{42} See id. at 849-51. See generally Ortwine, supra note 1, at 1076-1107.
\end{itemize}
Act of 1921 (hereinafter the 1921 Act), was passed because of the burdensome predatory intent requirement of the 1916 Act, which was extremely difficult to satisfy. Under the 1921 Act, it was unnecessary to show predatory intent, requiring only proof of injury, and violations resulted in the imposition of duties.

The 1921 Act has been repealed and replaced by the Trade Agreements Act of 1979, but it has not provided adequate relief or protection to domestic producers for most of the same reasons that the 1921 Act was inadequate.

The following sections examine the 1916 Act. Such examination is helpful both in understanding the intended purposes of a privately enforceable antidumping statute and in considering the shortcomings of the 1916 Act.

C. The 1916 Act

1. Elements of the 1916 Act

The 1916 Act provides for both criminal and civil penalties to any person “commonly and systematically” importing or assisting in the importation or sale of any goods into the United States at prices substantially below “actual market value or wholesale price” in the country of their production, plus costs of importation. These acts of importation or sale must be done with the intent of destroying or injuring an existing industry in the United States, preventing the establishment of such an industry, or restraining or monopolizing trade.

To establish a violation of the 1916 Act, a party must prove several elements. First, a party must prove that the imported articles

43. The purpose or intent of predatory or “short-run” dumping is to eliminate competitors, prevent competitors from entering the market, get an initial foothold in a new market, or prevent losing ground to a competitor in a market. See Ortwine, supra note 1, at 1077-78.
44. See Irwin, supra note 3, at 849.
45. See id.
46. See Ortwine, supra note 1, at 1076.
49. Id. § 72.
50. Id.
being sold are comparable products to those produced domestically. The imported items being sold need not be identical but must be at least "equivalent from the standpoint of 'consumer utility.'" The second element requires that the item allegedly being dumped is being sold in a market outside the United States at an "actual market value" or "wholesale price" that can be compared to the U.S. market price. The party must also prove that the U.S. price is substantially below the value of the item in the foreign market or its wholesale price. The last element is the "predatory pricing" intent requirement. It has been argued that this requires the same type of intent required under the Robinson-Patman Act and Section 2 of the Sherman Act, although no court has ever directly decided this point. To prove predatory intent, there must be price discrimination that substantially lessens competition or tends to create a monopoly. Prices below those of the home market are not predatory in intent if they reflect "an effort to meet competition, to sell off obsolete products, to get a foothold in a new market, or to account for legitimate differences in costs between selling the product in the

51. Id.; see also Kessler, supra note 11, at 486.
52. See Kessler, supra note 11, at 486.
53. See id.
54. The article being sold must be "commonly and systematically" sold at prices substantially below market value or wholesale price. Occasional instances of sales below accepted levels are not actionable under the 1916 Act. See id.

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . . .

Id.

The issues concerning predatory pricing under the Clayton Act are basically the same as those under section 2 of the Sherman Act. See Areeda & Turner, supra note 7, at 697 n.1, 724-28.
58. See Kessler, supra note 11, at 487.
United States and other markets.\textsuperscript{60}

2. Legislative History of the 1916 Act

The legislative history of the 1916 Act is of limited usefulness in understanding the intent of Congress in enacting the 1916 Act.\textsuperscript{61} The 1916 Act was one of eight provisions in the Revenue Act of 1916,\textsuperscript{62} and the House Report contains the only comment providing any insight into Congressional intent regarding the antidumping provision; "the provision was proposed so that foreign manufacturers selling in the United States 'may be placed in the same position as our manufacturers with reference to unfair competition.'\textsuperscript{63} This remark indicates Congressional awareness that foreign competitors could injure American producers if the anti-competitive behavior of foreign competitors was not restricted. Therefore, Congress sought to curtail anti-competitive or predatory dumping in enacting the 1916 Act.\textsuperscript{64}

The historical context and contemporary commentary of the 1916 Act provide further insight into the intent behind the 1916 Act.\textsuperscript{65} The political atmosphere existing before the enactment of the 1916 Act was laden with opposition toward cartels and monopolies.\textsuperscript{66} After enacting Section 2 of the Clayton Act, which prohibited anti-competitive price discrimination in the domestic market,\textsuperscript{67} Congress focused on similar anti-competitive behavior by foreign firms.\textsuperscript{68}

One reason for concern over anti-competitive behavior of foreign firms was that antitrust forces were pushing for a reduction of tariffs with the goal of increasing the level of competition for domestic cartels.\textsuperscript{69} This reduction of tariffs, however, meant that as the level of foreign competition increased, American business would be increasingly vulnerable to anti-competitive behavior of foreign firms.\textsuperscript{70} Secretary of Commerce William Redfield proposed an antidumping provision (which became the 1916 Act) because he feared that European products would be dumped on the U.S. market, de-

\textsuperscript{60} See Kessler, supra note 11, at 487.
\textsuperscript{61} See Sidak, supra note 8, at 380-81.
\textsuperscript{63} See Sidak, supra note 8, at 381.
\textsuperscript{64} See Kessler, supra note 11, at 489.
\textsuperscript{65} See Sidak, supra note 8, at 381.
\textsuperscript{66} See Kessler, supra note 11, at 488.
\textsuperscript{68} See Kessler, supra note 11, at 489.
\textsuperscript{69} See id. at 488.
\textsuperscript{70} Id.
destroying competition so “that the victor may exploit the field at will.”\textsuperscript{71}

Two of the proponents of the 1916 Act were the American dye and chemical industries, which were afraid of being injured by European dumping.\textsuperscript{72} A statement by the Secretary of the Manufacturing Chemists Association of the United States sheds some light on the probable purpose of the 1916 Act. The Secretary requested that legislation be enacted that would “prevent ‘acts of unfair competition . . . not ‘dumping’ in the ordinary sense. I do not mean the mere act of underselling, but I mean the act of importing goods into this country with the intent and for the purpose of ruining a small competitor.’”\textsuperscript{73} There is some debate as to whether the 1916 Act was meant to parallel the Sherman or the Clayton Act.\textsuperscript{74} However, what is important is that the purpose was not to protect against foreign competition, but to protect against unfair competition from predatory European cartels.\textsuperscript{75} The Act did not target legitimate price competition.\textsuperscript{76}

Following is a summary of the history of the semiconductor industry and the problems it faced from dumping computer chips from the late seventies to the mid-eighties as described by former Counselor for Japan Affairs to the Secretary of Commerce, Clyde V. Prestowitz, Jr., one of the most highly respected experts in the area of trade between the United States and Japan. This history highlights some of the problems with the current administrative antidumping enforcement framework.

D. The Administrative Framework and The Case of Semiconductors

In 1978-79, the Japanese introduced their first 16K random access memory (hereinafter RAM) chips into the global market. The Japanese had great success with their 16K chips and almost immediately gained forty percent of the market share. One of the biggest reasons for their success was that they were dumping the chips on

\textsuperscript{71} See Sidak, \textit{ supra} note 8, at 386 (citing the 1915 Secretary of Commerce Annual Report 42).

\textsuperscript{72} See Kessler, \textit{ supra} note 11, at 489-90.

\textsuperscript{73} See id. at 490 n.24.

\textsuperscript{74} For an argument that the 1916 Act parallels the Sherman Act, see Sidak, \textit{ supra} note 8, at 381-90.

\textsuperscript{75} See id. at 390; see \textit{also} Ortwine, \textit{ supra} note 1, at 1078 n.14 (Congress feared that predation by European cartels could injure or destroy smaller American firms).

\textsuperscript{76} See Kessler, \textit{ supra} note 11, at 489.
the market.\textsuperscript{77}

The Japanese knew that to become cost-competitive in this important product of the semiconductor industry,\textsuperscript{78} they needed to gain a large share of the U.S. 16K RAM market. Since the Japanese were late entrants into the market, their costs of production were higher than the production costs for American producers. To lower those costs, the Japanese needed to substantially increase production volume, since costs drop as production levels rise. The Japanese knew that the best way to increase production volume was to dump their chips on the large U.S. market, which would respond to the low prices by buying large quantities of the bargain-priced chips.\textsuperscript{79}

In 1980, when American semiconductor producers threatened to take legal action by filing a petition with the government, the Japanese raised their prices a little. By then, they had already increased their market share enough to achieve the volume needed to be cost-competitive. The Japanese also introduced their next generation of chips, the 64K RAM chip, in 1980. The Japanese were second only to IBM in introducing this new generation of semiconductor chip. Firms such as Motorola, Texas Instruments, and Intel did not introduce their 64K RAMs for another six months to a year. By the end of 1980, the Japanese had taken the lead in the semiconductor industry when they introduced the first 256K RAM prototype in the world.\textsuperscript{80} Having taken the lead in technology, the Japanese continued their aggressive dumping tactics and quickly began to take over the world RAM market.\textsuperscript{81}

The prices for American RAM chips were falling twenty to

\textsuperscript{77} See PRESTOWITZ, supra note 2, at 38.

\textsuperscript{78} The Japanese often target “key items” or what are known as “technology drivers.” For instance, the RAM is the technology driver for the semiconductor industry:

They [the Japanese] knew that the RAM is the linchpin of the semiconductor industry because, as the best-selling device, it generates not only revenue but also the long production runs plant managers use to test, stabilize, and refine their production and quality-control processes. Compared with many other chips, it is a relatively simple product, which makes it a more attractive vehicle for developing new techniques. The latest technology has always been incorporated first in RAMs, which have always been the first product to appear as a new generation. Once RAMs are refined, new generations of other products follow. Thus the 64K RAM was followed by the 64K EPROM (electrical, programmable read only memory), the 64K SPRAM (static RAM), and so forth. The Japanese knew that if they could capture the lead in RAMs, they would be well on the way to overall semiconductor superiority.

\textsuperscript{79} See id. at 40.

\textsuperscript{80} See id. 38.

\textsuperscript{81} Id. at 39.
thirty percent each year. This drop was due to the experience curve as chip production increased due to the quickly growing demand, chip costs fell. However, the prices of the Japanese 64K RAM chips dropped eighty percent in 1981. Clearly, the Japanese were not making a profit and were dumping. In fact, the Japanese lost twice as much money as the Americans in their struggle to dominate the semiconductor industry, but they would win the contest of deep pockets. American firms could not compete in this environment and quickly started dropping out of the unprofitable market. At the same time, all of the Japanese producers stayed in the market. Where was the protection of the administratively enforced antidumping laws?

1. *Semiconductors and the Administrative Fiasco*

The semiconductor industry did not file a formal complaint to have the administrative antidumping laws enforced through a lawsuit. The industry reasoned that the legal proceedings would have been costly, and more importantly, they would have taken too long to be of any help in the rapidly changing semiconductor industry. By the time a decision would have been made on the dumping of one generation of chips (i.e., 16K, 64K, etc.), that generation’s life cycle would have ended and the next generation of chips could be dumped without having any duties levied on it. Instead, the semiconductor industry opted to have the government attempt to enforce the law through negotiation with the Japanese.

In the fall of 1981, representatives of the American semiconductor industry began making trips to Washington D.C. to ask for an end to the dumping.
They got a reception as cool as the autumn weather in Washington. The lawyers, academic economists, and career bureaucrats who filled many key government positions shared a suspicion of business as protectionist and opposed to consumer interests. To them, the semiconductor industry seemed healthy: while it might have problems in one or two areas, over all it was 50 percent bigger than the Japanese industry and remained profitable, while growing much faster than most U.S. industries. Few officials understood the experience curve and that an industry could be dying even while growing rapidly if in the process it was losing market share to even faster growing competitors who were eroding its technological advantage.93

In response to the requests that the dumping stop, the Commerce Department’s Lionel Olmer, who was responsible for administering the antidumping laws, did take some action. He warned the Japanese that the Commerce Department would monitor chip prices. This warning improved the situation for a short time until the Justice Department, in an incredibly ill-conceived move illustrating the lack of cooperation and coordination between the various administrative branches, started to investigate the Japanese for violating antitrust laws. The Justice Department interpreted price increases by the Japanese firms, resulting from the warning not to dump from the Commerce Department, as collusion to raise prices in the U.S. market.94 What followed was a series of ineffectual negotiations that only enabled the Japanese to buy enough time to further erode the American semiconductor industry.95 By 1985, the Japanese had ninety percent of the world RAM market and began their conquest of the rest of the semiconductor field (such as memory devices known as “EPROMs” or electrical programmable read-only memory chips).96

2. Semiconductors and the Legal Battle

By 1985-86, the U.S. semiconductor industry, with close to two billion dollars in losses and twenty-five thousand unemployed people, was devastated. As a final desperate measure, the semiconductor industry decided to take legal action and filed a dumping action regarding EPROMs.97 The Japanese, however, knew from past expe-

93. Id. at 48-49.
94. See id. at 49.
95. See generally id. at 46-55.
96. See id. at 54.
97. See id. at 55.
rience that the State Department and the National Security Council would oppose the Commerce Department in any legal actions against them. The U.S. trade deficit hit 150 billion dollars on September 19, 1985, and with mounting political pressure to do something about the trade problem, Secretary of Commerce Malcolm Baldrige accepted a recommendation for the U.S. government to initiate its own dumping action regarding 256K RAMs. There was evidence that the Japanese were dumping 64K and 256K chips on a massive scale on the U.S. market at prices well below the cost of production. This was the first time that the U.S. government, of its own initiative, undertook to start an antidumping action. However, this action was viewed primarily as a move to gain political negotiating leverage against the Japanese, who could potentially lose billions of dollars.

There was a great deal of resistance from various administrative branches against the Commerce Department for attempting to start the dumping action:

U.S. TRADE REPRESENTATIVE'S OFFICE: Things are really popping behind the scenes in our discussions with the Japanese. We're getting all kinds of calls and we ought to handle them carefully. Let's see what emerges before we launch any missiles. [. . . (Rather than being concerned with the health of the semiconductor industry or with enforcing the antidumping laws,) The official feared Baldrige might take some of the negotiating responsibility away from the U.S. Trade Representative's office.] . . .

NATIONAL SECURITY COUNCIL: We have to keep in mind SDI [the Strategic Defense Initiative, better known as "Star Wars"]'). We think Japan will endorse SDI and we don't want to do anything that would undermine that. Besides, we are more creative than the Japanese. IBM is way ahead of them. [Of course, IBM had just told us it was not.]

STATE DEPARTMENT: Isn't it mostly the fault of our companies? I heard that they just took the wrong track in product development. If we do this, are we moving toward an industrial policy?

TREASURY DEPARTMENT I: Exactly. Dumping benefits the society receiving it. If we decide we want this industry, no matter what, we are making industrial policy.

TREASURY DEPARTMENT II: Secretary Baldrige is

98. See id. at 56.
99. See id. at 56-57.
100. See id. at 57.
right. We know Japan is predatory. The argument that we are more creative sounds like what the United Kingdom says about itself. . . . 101

However, due to mounting political pressure over the trade deficit, by January of 1986 the U.S. government had started its antidumping action regarding 256K chips, and was further pursuing two petitions from the semiconductor industry: one regarding 64K chips and one regarding EPROMs. 102 On March 17 and 19, 1986, the Commerce Department and the International Trade Commission made a formal finding that the Japanese were dumping at prices that were half of the cost of production. 103 However, instead of following through with the imposition of fines, a political solution was reached when a deal was struck on July 30, 1986, resulting in an agreement to increase Japanese market access and to prevent dumping in violation of the rules of GATT. 104 In the end, this agreement, like those before it, yielded no significant results. The Japanese ended up dominating the semiconductor industry that the Americans had pioneered. 105

III. STATEMENT OF THE PROBLEM

The 1916 Act is an impotent antidumping weapon that provides no effective means of redress to injured American producers who suffer great economic injury from the unfair trade practice of dumping by foreign producers. The administrative antidumping laws do not

101. See id. at 59-60.
102. See id. at 58-61.
103. See id. at 64.
104. See id. at 64-65.
105. See id. at 65-70. Following the example of Japan's successful dumping strategy, other countries such as Korea have tried to enter the American market through dumping. This time, however, the Commerce Department in October of 1992 stepped in and imposed dumping duties that vary from 6 to 87 percent. Rebecca Smith, DRAM Prices Jump After Firms Cited, S.J. MERCURY NEWS, Oct. 23, 1992, at 1F. How long these duties will continue to be imposed and what effect they will have remains to be seen. It appears that as the political lobby of American industry has voiced complaints of unfairness, the pendulum has swung in the opposite direction, this time from a position favoring foreign dumpers to a protectionist stance. Since 1988, 97% of dumping complaints before the Commerce Department have been successful. David Frum, Dump It, FORBES, Sept. 28, 1992, at 64. While this protectionist stance might be better than allowing all dumping to take place (putting American business out of business), it is clearly not a good solution, because moving too far toward protectionism decreases healthy competition. This decrease in competition hurts the consumer and decreases efficiency. The lesson to learn from the previous failure to protect against dumping is not that we need extreme protectionism, but that we need to remove antidumping enforcement from the hands of the politically influenced bureaucrats involved in an administrative enforcement system.
adequately fill the void left by the absence of an effective private antidumping cause of action and are themselves ineffective as a remedy to domestic producers injured by dumping. The American competitive market model recognizes that inefficient firms will not survive. However, when efficient firms, such as HyperTech in the hypothetical above, are forced to exit the market because of unfair trade practices such as dumping, the competitiveness of the American marketplace is injured to the benefit of foreign producers.

When American producers are hurt by unfair trade practices, the results are that efficient firms do not make profits and eventually go bankrupt, investors lose money, and workers lose their jobs. On a large scale, this means that the aggregate economic losses of the American producers, investors, and workers cause a decline in American productivity, an increasingly depressed economy, and a lowering of the American standard of living. This economic decline is not part of a cycle, because unlike the usual type of economic decline, it is not corrected simply by the marketplace adjusting into a more efficient posture. In effect, the American market was in its most efficient posture during the boom years before and after World War II—before it started to feel the effects of unfair competition. However, because American laws fail to protect against international monopolistic and cartel strategies, many of the most important markets have been taken out of the American marketplace. These effects will be felt many years hence. It is imperative that the United States learn a lesson from the past and act immediately to provide effective antidumping legislation against any further dumping.

IV. Analysis

A. Ineffectiveness of the 1916 Act

The 1916 Act has been completely ineffective as a legal weapon to combat dumping. This is evidenced by comparing the relatively small number of cases brought under the Act with the frequency

106. See Fallows, supra note 26, at 24. Competitive capitalism assumes that markets will continually re-adjust—through bankruptcies, new entrants into markets, job changes, unemployment, shifts into new business—in order to maintain a dynamic, competitive marketplace that will result in greater efficiency.
107. See supra notes 17-22 and accompanying text.
108. See generally Prestowitz, supra note 2.
109. Id. at 3-4.
110. See id. at 233, 3-25, 217-49, 305-11.
111. See Irwin, supra note 3, at 852-53.
that dumping occurs.\textsuperscript{112} The infrequent use of the 1916 Act does not mean that little or no dumping exists in the American import market. There is, in fact, strong evidence that dumping frequently takes place.\textsuperscript{113} The history of the 1916 Act reflects both its structural shortcomings\textsuperscript{114} and its limited focus as a predatory dumping statute as it has been interpreted under its legislative history.\textsuperscript{115} These factors, taken together, have effectively resulted in the unavailability of a private right of action against harmful and unfair dumping practices. Only three years after the 1916 Act was enacted, the U.S. Tariff Commission reported that it was ineffective as a deterrent to dumping by foreign firms.\textsuperscript{116} There are a number of reasons why the 1916 Act has been ineffective, two of which are particularly important.

One reason for the ineffectiveness of the 1916 Act is the difficulty in obtaining the necessary evidence.\textsuperscript{117} The court in \textit{H. Wagner & Adler Co. v. Mali}\textsuperscript{118} limited pretrial discovery in civil actions under the 1916 Act. It did so on the grounds that since the 1916 Act was both a criminal and a civil statute, the Fifth Amendment limited the plaintiff's discovery of evidence that would incriminate the defendant.\textsuperscript{119} Hence, the construction of the 1916 Act as both a criminal and a civil statute has severely handicapped potential plaintiffs in obtaining evidence necessary to support a private action under the 1916 Act.

The second and stronger reason the 1916 Act has been ineffective is the difficulty of proving the predatory intent element.\textsuperscript{120} This element is particularly difficult to prove and given the additional burden of the Fifth Amendment limitation on discovery discussed immediately above, it is not surprising that the 1916 Act has been ineffective in deterring dumping.

Due to the difficulty of proving the requisite predatory dumping intent required under the 1916 Act and the need to address other

\textsuperscript{112} See id. at 847 n.8.
\textsuperscript{113} Prestowitz, supra note 2; Irwin, supra note 3, citing Unfair Foreign Competition Act of 1983: Hearing Before Senate Comm. on the Judiciary on S. 127 and S. 418, 98th Cong., 1st Sess. 38 (1983)
\textsuperscript{114} See infra text accompanying notes 117-23.
\textsuperscript{115} See supra part II. C. 2.
\textsuperscript{116} See Irwin, supra note 3, at 853 n.34.
\textsuperscript{117} See Hiscocks, supra note 3, at 232.
\textsuperscript{118} H. Wagner & Adler Co. v. Mali, 74 F.2d 666 (2d Cir. 1935).
\textsuperscript{119} See Hiscocks, supra note 3, at 230-31.
\textsuperscript{120} See Irwin, supra note 3, at 853.
forms of dumping, Congress enacted the 1921 Act six years later.\textsuperscript{121} Despite the fact that the 1921 Act required petitioning the government (since it was administratively enforced), it offered a more attractive remedy to dumping because the burdensome intent requirement was removed in the 1921 Act.\textsuperscript{122} Hence, although the 1916 Act is still on the books today, the 1921 Act effectively displaced the 1916 Act.\textsuperscript{123}

However, the displacement of the 1916 Act by administratively enforced antidumping laws (first the 1921 Act and later the Trade Agreements Act of 1979) has not resolved the dumping problem. A discussion of the inadequacies of the administratively enforced legal framework points out reasons why it would be better to correct the deficiencies of the 1916 Act and return to a privately enforced antidumping framework than to continue under the current administrative system.

B. \textit{Ineffectiveness of Administrative Antidumping Measures}

When Matsushita, a Japanese firm, entered the U.S. market for pagers in the early 1980s, it decided to pursue a dumping strategy.\textsuperscript{124} Matsushita was eventually found to be dumping in the U.S. market. Nevertheless, the strategy was seen as a sound business decision by Matsushita.\textsuperscript{125} Any penalty enforced against the company for illegal dumping was simply a cost of doing business and did not stop Matsushita from following this unfair trade strategy.\textsuperscript{126} In considering the possibility of having to defend itself against an antidumping action, Matsushita may have reasoned as follows:

Motorola might initiate an antidumping case but, if so, it will cost them more money and will take more than a year to complete. In that time, we [Matsushita] can take a large share of the market, if not the whole market. If we lose the case, the worst that can happen is that we have to raise our prices and post a bond for the dumping duty, which won’t be collected because we will have raised our prices [duties are only collected on dumping which occurs after a firm is found to be dumping; there are no retroactive duties]. Since we will have gotten a large share of the market in the meantime, we won’t be un-

\begin{itemize}
\item \textsuperscript{121} See Kessler, \textit{supra} note 11, at 490.
\item \textsuperscript{122} See Irwin, \textit{supra} note 3, at 849.
\item \textsuperscript{123} See id. at 853.
\item \textsuperscript{124} See \textit{Prestowitz}, \textit{supra} note 2, at 238-39.
\item \textsuperscript{125} See id. at 238.
\item \textsuperscript{126} See id. at 237-38.
\end{itemize}
happy about raising prices. That will allow us finally to make some money. Even better, we can use the case as an excuse to tell our customers how sorry we are to increase our prices, but the U.S. government is making us do it.\textsuperscript{127}

In planning its business strategy, Matsushita realized that there were flaws in the U.S. legal framework, which it could use to its advantage and later even use as an excuse to behave like a monopoly; that is, to raise prices once it has gained a substantial market share.

Implicit in Matsushita's thinking when following a trade strategy that includes a pricing strategy of dumping is a recognition of three basic flaws in the administratively enforced legal framework. These flaws are that the legal framework works too slowly, fails to provide retroactive duties, and does not compensate the injured U.S. industries (duties imposed flow to the United States Treasury, not the industry that has initiated the action).\textsuperscript{128} The fact that there are no retroactive duties means that although a great deal of damage might be done to an industry, by the time duties are imposed for further dumping, there is no procedure available to redress past injury.

Given the nature of the international trade market and the openness of the American market, U.S. trade laws must respond quickly to dumping on American markets. Otherwise, foreign dumping will inflict irreparable damage on domestic industries before the legislature responds. The current administrative framework has been too slow in responding to sudden dumping on the American market.\textsuperscript{129} In addition, another problem with the administratively enforced legal framework is the incompetence of the administration\textsuperscript{130} in enforcing the law against violators.\textsuperscript{131} A classic example is that of the semiconductor industry discussed above.\textsuperscript{132}

C. Lessons From The Antidumping Legal Framework

As discussed above, the only antidumping statute on the books that provides for a private cause of action, the 1916 Act, requires the

\begin{flushleft}
\textsuperscript{127} See id. at 238.
\textsuperscript{128} See Irwin, supra note 3, at 849-51.
\textsuperscript{129} See id. at 849-50.
\textsuperscript{130} The term "administration" refers to the administrative framework in charge of enforcing the dumping laws.
\textsuperscript{131} See generally Prestowitz, supra note 2 (noting several examples of the incompetence of the various administrative branches with regard to enforcing antidumping laws as well as other trade laws).
\textsuperscript{132} See supra part II. D.
\end{flushleft}
plaintiff to prove predatory intent, a very difficult standard to satisfy.\textsuperscript{133} In fact, in its present condition, the 1916 Act is the equivalent of having no private cause of action at all. The administrative antidumping statutes, from the 1921 Act to the Trade Agreements Act of 1979,\textsuperscript{134} do not fill the void left by the 1916 Act. They fail to provide industries that are the victims of unfair dumping with effective relief because of the three flaws discussed above, as well as the role that politics play in the administrative framework. Domestic industries victimized by unfair trade practices are often viewed with suspicion. Pleas for help against dumping are seen as cries for protectionism.\textsuperscript{135} Why does this system put American producers at such a great disadvantage in protecting themselves from illegal dumping? A look at some of the historical background of the antidumping laws is helpful.

Enacted as a result of an anti-monopoly political sentiment, the 1916 Act was designed as part of a scheme that would both increase foreign competitive pressure on cartels in the American domestic market through the reduction of tariffs, and protect domestic business from the resulting increased exposure to foreign predatory dumping.\textsuperscript{136} The legislative history of the 1916 Act reveals that it was enacted out of concern that American business might become victimized by predatory foreign cartels.\textsuperscript{137} Yet it has not been effective in protecting American business from foreign dumping.\textsuperscript{138} The logical result is that the American market was exposed to a higher level of foreign competition due to the reduction of tariffs, but was not afforded the intended protection from foreign dumping. As mentioned previously, the inability of the 1916 Act to deter dumping led to passage of the 1921 Act, which by eliminating the intent requirement broadened the scope of U.S. antidumping laws to cover non-predatory forms of dumping.\textsuperscript{139} However, the many problems with the administratively enforced antidumping statutes have left the American marketplace unprotected from dumping by foreign competitors.

The semiconductor lesson reveals that an administrative legal framework does not work. Under the current antidumping legal sys-

\textsuperscript{133} See supra text accompanying notes 120-22.
\textsuperscript{134} See supra text accompanying notes 41-47.
\textsuperscript{135} See PRESTOWITZ, supra note 2, at 46-50.
\textsuperscript{136} See Kessler, supra note 11, at 488.
\textsuperscript{137} See supra part II. C. 2.
\textsuperscript{138} See supra part IV. A.
\textsuperscript{139} See Kessler, supra note 11, at 490.
tem, American business cannot feel that petitioning the government to take legal action will result in meaningful action. The semiconductor industry only filed a formal petition for legal action as a last resort because the legal framework was seen as too slow and costly (with no potential reward in the form of compensation to the injured industry, as the U.S. Treasury gets all damages) to be meaningful. Additionally, the process is enmeshed with political negotiations, in which there are too many participants with conflicting agendas to be effective. Furthermore, imposing duties is viewed as an unfriendly political move and is therefore avoided when dealing with nations that are seen as allies.\textsuperscript{140} It is not suggested that a hostile, protectionist stance should be taken against American trading partners. However, when foreign firms violate dumping laws, there should be an impartial and non-political means of redress available to the domestic firms injured as a result of the unfair dumping.

Another important fact that should be noted is that no action was taken under the 1916 Act. Clearly, American business does not think that there exists any meaningful private cause of action to combat dumping.

An understanding of the economic principles underlying American trade laws is important in analyzing why the current antidumping legal framework fails to deter dumping.

D. Economic Models and the Principles Behind American Trade Laws

All theoretical models are constructed as closed systems that operate according to a set of laws or principles which, in the absence of any outside interference or manipulation, achieve predictable results. The theoretical economic model upon which the American economy and its supporting trade laws are based is the free-trade competitive market model based on the theories of economist Adam Smith.\textsuperscript{141}

According to this model, it is economically beneficial to all parties if there is a high degree of trade and products are transferred from low-cost to high-cost production markets.\textsuperscript{142} The fewer restrictions there are on the flow of goods, the better off everyone in each market will be. Each market will produce the goods it makes most efficiently and export them, and import those goods it cannot pro-

\textsuperscript{140} See generally Prestowitz, supra note 2, at 239.
\textsuperscript{141} See id. at 230.
\textsuperscript{142} See Fallows, supra note 26, at 22.
duce as efficiently. In effect, trade promotes efficiency because it allocates production of goods to efficient producers so that each country produces what it makes best.

Adam Smith's economic model further assumes as one of its core principles that individuals will act as rational economic men and women seeking the greatest amount of immediate short-term consumer satisfaction based upon rational cost-benefit calculations. These economic individuals will respond to the market to get the best bargain for themselves. As a result, each market will stop making what it produces inefficiently and spend more of its resources producing the goods it makes efficiently. This increases the level of trade as consumers buy from the low-cost producers and higher-cost producers shift into businesses where they will be the low-cost producers.

This model further assumes that everyone has the same goal of getting "more." Not all consumers want the same things or quantities thereof, but each consumer will get the most of each item desired according to his or her level of satisfaction or utility maximization. Therefore, a free-trade economy is best because through the dynamics of competition, it will provide each consumer with the most at a lower cost. Finally, the perfectly competitive market assumes that there are many buyers and sellers each acting individually in uncoordinated decision-making.

Through the political process, American society has decided that markets should behave according to these principles of competition. However, as is evidenced by the existence of American antitrust laws, not everyone behaves according to the principles of the chosen theoretical models. For instance, without antitrust laws to restrict firms from acting together or colluding, the perfectly competitive model would break down. Therefore, in order to protect the expectations of individuals living in society and to ensure behavior

143. See id.
144. See id.
145. See id.
146. See id. at 22-24.
147. See id.
148. See id.
149. See id. at 24.
150. See id.
151. See SULLIVAN & HARRISON, supra note 4, § 2.02.
152. See id. §§ 1.01, 2.
153. See id.
154. See id. § 1.01.
that will be the most beneficial to society as a whole, it is necessary for laws to protect against deviations from the principles of the socially prescribed theoretical model.

Existing trade laws fail to protect adequately against violations of free trade because they and their enforcers incorrectly assume that foreign and domestic competitors have the same goal of consumer satisfaction and that those competitors follow the same rules of free trade as the American marketplace. In order to adequately resolve the problem of dumping, an understanding of the intellectual errors underlying the construction of the present legal trade framework is necessary.

E. Underlying Reasons the Legal Framework Has Failed to Adequately Protect the American Producer

One of the problems with the current legal framework is that it and those in charge of enforcement assume an economic model along the lines of our own free-trade model. Under GATT, the different economic models of Communist non-market economies were recognized because they were seen as political opponents, but the legal framework should further recognize that not all capitalist countries follow the laissez-faire trade doctrine of the United States. Most notable is the Japanese economic model. American laws do not account for the different form of capitalism that the Japanese have developed under the principles of strategic industries and industrial policy rather than individualism. It is difficult for Americans to think in economic terms other than free trade and consumer welfare. However, at the heart of the Japanese economic model lies not a desire to provide the consumer with the best bargain (a natural economic assumption for most Americans), but a desire to preserve the social status quo by maintaining the job of each Japanese citizen. This different social goal has created a different form of capitalism.

Because of the different social goals of the American and the Japanese capitalist models, trade between the two countries has led to, and will continue to result in, trade deficits for the United States.

155. See Prestowitz, supra note 2, at 237.
156. See id. at 231.
157. See id. at 237; see also Impoco, supra note 26, at 50 (discussing Japan's government-guided industrial model).
158. See Fallows, supra note 26, at 24.
159. See id.
To argue that Japan tends toward surplus does not mean that its industries, managers, and workers are the "best" in the world. Some of them may be; even so, free-trade theory assumes that trade accounts would still balance out. If Japan really were better at manufacturing than any other country, its exports would keep rising and so (because of supply-demand forces on the currency exchange) would the value of the yen. Goods from the rest of the world would become cheaper; its people, wanting "more," would recognize and seize these bargains. Equilibrium would be restored. This is essentially what happened to America in the generation after the Second World War. Our industries were world-beaters; our dollars grew strong, and we spent those dollars-and spent and spent. But the chronic trade imbalance reflects something more than Japanese manufacturing skill... The Japanese consumer's interest comes last—and therefore so does the motivation for buying from overseas.\textsuperscript{160}

In structuring its different economic model, Japan has created an economic structure that violates many of the principles of free trade.\textsuperscript{161} This has adversely affected Japan's trading partners, which have been the victims of unfair trade practices, the natural results of Japan's different economic structure. One of the unfair trade practices resulting from Japan's economic model is dumping.\textsuperscript{162}

Since American antidumping laws do not account for the Japanese model of government-guided industrial strategy, they do not deal with the problem effectively. American antidumping laws put a heavy burden on domestic producers to prove that dumping is taking place and that the dumping is causing severe injury to the producers.\textsuperscript{163} As was discussed above,\textsuperscript{164} the legal framework is ineffective in deterring dumping or providing adequate relief to the injured producers because even if the injured producers were to prevail on their claim, the legal procedures are slow, costly, and do not provide for retroactive duties. The reason the American legal framework has been formulated in this manner is that the underlying assumption is that "dumping is a gift to the consumer, unless severe injury is caused to a domestic industry ..."\textsuperscript{165} In determining the extent of injury, as seen in the example of the semiconductor industry, the administrative system has ignored and failed to understand both the

\textsuperscript{160} Id.
\textsuperscript{161} See generally PRESTOWITZ, supra note 2.
\textsuperscript{162} See id. at 58.
\textsuperscript{163} See id. at 237-38.
\textsuperscript{164} See supra part IV. A-B.
\textsuperscript{165} PRESTOWITZ, supra note 2, at 237-38.
concept of the experience curve and the fact that even a growing industry could be injured and facing eventual collapse.66

Clyde V. Prestowitz, Jr. identifies three major reasons presidents have been hesitant to use section 301, the unfair trade law.67 (These three reasons also shed some light on possible reasons the antidumping laws have been formulated in a manner that favors the dumping parties and why the administrative bureaucrats have been hesitant to enforce them.) The first is that since American laws assume a laissez-faire economic model, these laws are not prepared to address a "series of coordinated policies executed over a lengthy period for the purpose of altering the entire international industrial environment," which is the central feature of the Japanese economic model.68 Thus, because the focus of American trade law is on the behavior of individual firms attempting to monopolize markets, these laws are not prepared to address the contingency of an entire state targeting industries, as the Japanese industrial-policy economic model has done.69

The second reason is that American laws assume the "essential righteousness" of the American laissez-faire model. Therefore, American laws address violations of the law only in terms of what is right and wrong.

To obtain relief, a petitioner must first prove that his foreign competitor is a liar and a cheat. Not surprisingly, when the competitor resides in a friendly foreign country, a president [and other branches of the executive are] typically reluctant to brand it because to do so may involve branding the company's government as well.70

The last reason is that America has not viewed economic activity as being tied to matters of national security or welfare. Therefore, trade matters are often subordinated to other international political concerns.71 For instance, in the semiconductor example above, the National Security Council was more interested in the Strategic Defense Initiative than in the injury dumping was causing to the American semiconductor industry.72 However, this is clearly an incorrect approach to take because economic matters, such as losing

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66. See id. at 40-44.
67. See id. at 239-40.
68. Id. at 239.
69. See id. at 239-40.
70. Id. at 239.
71. See id.
72. See supra note 137 and accompanying text.
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technological industries, can hurt the U.S. not only economically, but also by making America lose technology useful for national defense.\textsuperscript{173}

One of the reasons American policy has made these mistakes is that after the Second World War, America enjoyed great industrial superiority over the rest of the world.\textsuperscript{174} Therefore, America gave a "handicap"\textsuperscript{176} to the rest of the world in the assumption that it would follow the American lead in opening borders by lowering tariffs and following policies of free trade. However, many countries either did not follow the American lead or did so slowly.\textsuperscript{176} As a result, America's great superiority has dwindled largely because of the policies of its own government.\textsuperscript{177}

History has shown that American trade laws must be sensitive to matters of the international marketplace and that America is vulnerable to foreign industry's unfair trade practices. The law must be reformulated under an internationally sensitive framework.

\textbf{F. Recognizing the Unique Conditions of the International Marketplace}

In formulating trade laws, Americans have assumed that the principles and trade practices of other industrialized nations are the same as those of the United States.\textsuperscript{178} The model of competitive capitalism or laissez-faire, according to the American view, is the "best" economic model; therefore, everyone should follow it or economic depression will follow.\textsuperscript{179}

Under the American model, a government hands-off policy was viewed as the best policy; it was not the place of government to give advice on strategic business decisions.\textsuperscript{180} The strongest and most innovative would prevail, while the weak and stagnant would fall by the wayside.\textsuperscript{181} The United States had grown, flourished, and enjoyed great prosperity under these principles. This prosperity had put her in a position as the world economic leader for the greater part of a century, and it is because of this great prosperity that the

\textsuperscript{173} See Prestowitz, supra note 2, at 217-49.
\textsuperscript{174} See id. at 230-31.
\textsuperscript{175} For a discussion of the historical context and other background, see id. at 230-37.
\textsuperscript{176} See id. at 231.
\textsuperscript{177} See id. at 232, 3-7.
\textsuperscript{178} See supra part IV. E.
\textsuperscript{179} See Impoco, supra note 26, at 51.
\textsuperscript{180} See Prestowitz, supra note 2, at 32.
\textsuperscript{181} See Fallows, supra note 26, at 24.
U.S. has always held its principles to be almighty. The situation that now exists in the global marketplace (with America's huge trade deficits) is a sobering one giving cause to reassess the American position. It brings to the forefront the need for a close inspection of economic policy and misperceptions of the Japanese economic model.

The world thinks of Japan as a capitalist nation, and to an extent it is. While its basic form is that of a Western capitalistic nation, its internal structure and nationalistic nature is quite different from that of other industrial countries. When the Japanese decided to enter the semiconductor industry, it was not simply the decision of an ambitious Japanese entrepreneur. It was a decision made by a coalition of Japanese businesses and the Japanese government. The decision was part of a national interest policy that is an integral part of Japan's socio-political structure:

The development of the electronics industry was not to be simply a matter of private enterprises seeking profitable new fields. That element existed too, but the Japanese government had decided that the electronics industry was too important to be left only to businessmen. The Extraordinary Measures Law made development a community effort with MITI leading the Japanese wagon train to settle a new industrial territory.

This banding together of Japanese government and business has outraged the American industrialists, who claim they are competing against an entire nation, the famous Japan, Inc. Such a coalition violates the American sense of 'fair play.' The United States has failed to realize that Japanese society does not operate under the same set of rules as does American society. What seems unfair to an American is merely business as usual to somebody from Japan. It is precisely for this reason that instead of fruitlessly trying to negotiate with the Japanese to get them to behave like Americans, the United States must adapt its rules to the international marketplace and then allow injured companies to enforce these laws in the courts. This will allow the United States to trade with nations such as Japan, that do not follow the principles of the competitive capitalistic model, without injuring its domestic producers.

182. See Prestowitz, supra note 2, at 3-4, 230-32.
183. See Zuckerman, supra note 26, at 107.
184. See generally Prestowitz, supra note 2.
185. See Prestowitz, supra note 2 at 33.
186. See id. at 33-35.
187. See id. at 33.
188. See id. at 46-47.
Having recognized that there are other types of economic models in the world, such as the Japanese government-guided, industrial policy model, the United States should take the next step and adapt its trade laws to account for these differences. American antidumping laws cannot work in the same manner as domestic antitrust laws to maintain a competitive marketplace. Since the United States cannot make foreign governments follow the American economic model by forbidding cartels and monopolies in their home markets, America must ensure that its laws prevent foreign competitors from gaining unfair advantages over its domestic industries, which are subject to domestic antitrust laws. To begin, Congress should enact meaningful, effective, antidumping law to protect domestic industries from this unfair trade practice.

G. Reconciling Domestic Antitrust Legal Concerns With A Private Antidumping Right of Action

Previous attempts to revitalize the 1916 Act have been criticized by economists as posing a threat to competitive markets. If done properly, revitalization would not threaten a competitive market and would rejuvenate the competitiveness of the American marketplace.

Joseph Sidak argued that Congress should repeal the 1916 Act because judicial determinations that erred on the side of the plaintiffs would have the effect of reducing price competition, hurting consumer welfare. However, this analysis ignores considerations other than those of the consumer. For instance, the fact that producers are injured by dumping is brushed off by the following argument:

Suppose *arguendo* that Japanese television manufacturers destroyed all American television manufacturers through prolonged predatory dumping, and thereafter significantly raised their own prices in the United States. Suppose, too, that non-Japanese foreign producers of televisions do not then shift into the production of American televisions. American consumers or entrepreneurs would, at some price, buy a non-Japanese foreign television and modify it to American technical specifications, rather than buy a television manufactured in Japan for use here. American consumers would, in essence, partially vertically integrate upward into television manufacturing . . . . The possibility of such consumer-induced supply substitution would substantially constrain the market power and monopoly profits of

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189. See, e.g., Sidak, supra note 8 (arguing that any private cause of action will impair consumer welfare).
190. *Id.* at 390-404.
This argument makes some interesting points. However, it also ignores a great deal. First of all, this argument does not address the costs of the workers who lose their jobs. Even if there was an industry to which the television workers above could easily shift, the costs of moving the worker's family to the new job location must be considered. There are also the costs of training workers for their new jobs. Other factors ignored by this analysis are the costs to society in paying unemployment compensation, stress-related health care, lost wages, family problems related to moving and unemployment, and lost tax revenues. Economists frequently forget that their theories address real people.

Sidak's arguments also ignore the fact that potential competitors might not re-enter the market if the goal of the predatory dumpers is not to later charge monopoly profits, but simply to have the market to themselves. For instance, if the goal of the Japanese is "the non-capitalist desire to preserve every Japanese person's place in the Japanese productive system" rather than to maximize profits, then the Japanese will not charge monopoly profits once they have run the Americans out of the market. Some argue that this will not hurt consumers because they will not have to pay higher prices for television sets. This logic ignores the fact that some of these consumers used to work in the American television industry. In losing their jobs, they are now poorer than before because they are not earning wages. Therefore, they are injured as consumers since they cannot afford the same level of prices they could previously afford when they were working. Also, since the new producers of television sets reside in a foreign country, the American standard of living will decline as the wages earned and the profits realized flow overseas. This is never included in Sidak's calculations. Clearly, it should be considered. Through dumping and other unfair trade practices, the Japanese have inflicted a great deal of damage to a great number of American industries.

Another factor that could keep new entrants out of the market is that potential entrants would realize that they could not compete against foreign competitors able to collude and resume dumping as

191. Id. at 395-96.
192. See Prestowitz, supra note 2, at 232-33.
193. Fallows, supra note 26, at 24.
194. See Prestowitz, supra note 2, at 306.
195. See id. at 3-70, 187-249.
soon as there was any threat of new entrants. If the foreign competitors had previously dumped with impunity in order to monopolize the market, there was nothing to stop them from dumping in order to quickly destroy a firm attempting to re-enter the market.

Additionally, Sidak ignores the fact that foreign competitors might not be following the same market model as the American competitive market model. Economists are usually skeptical about whether any firm would actually follow a predatory pricing scheme. The argument is that since unsuccessful predation is self-punishing, it is also self-deterring. However, this line of reasoning does not account for the fact that in international trade, we are not always dealing with individual firms. Japanese firms can afford to follow dumping strategies because they have the backing of their government, and firms often work together in government-sponsored cartels. Sidak’s use of a 1919 report by the U.S. Tariff Commission stating that evidence of dumping is meager does not undercut the importance of deterring dumping. The world in 1919 looked quite different than it looks today, and in the modern world there is substantial evidence that dumping takes place.

In formulating an effective private cause of action, however, we should be sensitive to considerations of reducing competition by creating an overly protective statute. It is possible to avoid creating a “protectionist” statute if the proper precautions are taken. The following proposal attempts to formulate the correct balance between these competing interests.

V. PROPOSAL

The 1916 Act should be replaced by a new antidumping statute that would not include any criminal provisions, but that would include a private civil cause of action that would provide for the following:

1) Damages from the time “dumping” (as defined in part 3) began, including the legal costs of the suit plus the market interest rate, to any party, injured as a result of:

2) The acts of any person importing any articles from any foreign country into the United States,

196. See Sidak, supra note 8, at 400.
197. See id.
198. See Prestowitz, supra note 2, at 33, 73-184.
199. See Sidak, supra note 8, at 400.
200. See Prestowitz, supra note 2, at 26-70. See Irwin, supra note 3, at 847.
3) At prices that are below the cost of production in the home market, plus any additional costs incurred in bringing them to market in the United States.

4) The calculation of the cost of production shall include all fixed and variable costs of production.

5) A finding that the sale prices of a foreign competitor's products are significantly less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries, or of the United States market,

6) Will result in a rebuttable presumption that dumping is taking place.

7) This will facilitate discovery since the party with the best access to the information on the cost of production will have an incentive to produce that evidence if in fact they are not dumping. Adequate time should be given to present such evidence, and “constructed value” that forces the foreign competitor to earn a profit higher than any domestic competitor should not be used. 201

8) Additionally, if the Plaintiff wishes to put an injunctive order on the product being allegedly dumped after a preliminary showing of prices below market value (as defined in part 5), this will be done immediately upon Plaintiff's request. This order should not preclude all sales of the product by the Defendant. Rather, it should simply force the Defendant to sell at prices equal to those of Defendant's domestic competitors until the litigation is resolved.

9) This will prevent the possible length of the judicial proceedings from being used to the advantage of the dumping party to continue inflicting injury on the plaintiff.

10) However, to prevent abuse by Plaintiffs using this statute as a weapon to protect themselves from legitimate price competition,

11) A negative determination on dumping will result in the Plaintiffs paying Defendant's reasonable attorney's fees and if injunctive relief was sought, any resulting damages provable by the Defendants.

12) In determining damages, injury will be found if any market share has been lost as a result of the “dumped” import, even if the Plaintiff's market share actually grew relative to the rest of the industry.

13) No showing of lower sales or financial problems is

201. See Frum, supra note 105, at 64.
needed as long as there has been a negative financial effect on the Plaintiff’s overall profits as a result of the “dumping.”

A private cause of action would offer the advantage of removing violations of the law from the political process. Politics are now involved in determinations under the administratively enforced scheme. Clearly, the administration is incompetent as an enforcer of the law. The above statute would discourage dumping, while preserving legitimate price competition. Additionally, a private cause of action would promote efficiency, fairness, predictability, stability, and accuracy, and would give the parties a fair opportunity to have their day in court.

The intent requirement has been removed because all dumping, whether predatory or not, is injurious to domestic producers and does not promote legitimate price competition. Even sporadic dumping done for the purpose of reducing an oversupply of inventory is not, strictly speaking, legitimate, as its purpose is to minimize losses that are then passed on to competitors. If a factory cannot efficiently run its operations, it should absorb its own losses or go out of business. That is part of competitive capitalism. However, it is probably unrealistic and unnecessary to attack this much less harmful type of dumping. On the other hand, continuous dumping is even more injurious to domestic producers and should be subject to damages. The proposition of economists that dumping benefits consumers is short-sighted because it ignores the fact that consumers derive their wealth from their role as producers.

VI. Conclusion

Past attempts to revise the 1916 Act have met with resistance from the “anti-protectionist” lobby, which has feared a chill in competition. This proposal is not in any way meant to be protectionist in the sense of being anti-competitive. It can only be labeled protectionist in the sense that it would protect the domestic system of competitive capitalism by ensuring that, when they choose to enter the American marketplace, foreign violators of free-trade principles are subject to the same type of judicial enforcement as domestic violators.

202. The injunctive provision of § 8 would provide for quick protection from dumping, even if the litigation itself would be time-consuming.
203. See Irwin, supra note 3, at 869-76.
204. See Viner, supra note 2, at 23-28.
205. See id.
206. See id.
207. See Kessler, supra note 11, at 494-96.
are under domestic antitrust laws. Currently, foreign competitors
have the advantage of not being subject to the American antitrust
laws in their home markets.

Additionally, the fear that a private cause of action may "chill"
foreign competitors from entering the American market-place is ill-
founded, as the American market is the largest and most lucrative in
the world. Forcing foreign competitors to compete using legitimate
trade practices will only invigorate competition. The enactment of an
effective private antidumping cause of action in no way advocates a
restraint of fair trade or a threat to competitive capitalism. The real-
ity is quite the opposite. The lack of a private cause of action is a
threat to the American system of free trade. A new private cause of
action against the unfair trade practice of dumping would serve to
untie the previously bound hands of American business in dealing
with non-free-traders, aid in reducing the trade deficit, and enhance
the welfare of consumers, producers, and society as a whole.

Stephen F. Moller