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Toward Convergence of Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman

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Toward Convergence of Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman

Cover Page Footnote

*I am grateful to Professor William T. Lifland for reading an initial draft of this Note.

NOTES

TOWARD CONVERGENCE OF ANTITRUST AND TRADE LAW: AN INTERNATIONAL TRADE ANALOGUE TO ROBINSON-PATMAN

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TABLE OF CONTENTS

Introduction	2048
I. Existing Antitrust and Trade Law	2052
A. Antitrust Law	2052
1. Introduction: The Economic Foundations of Antitrust Law	2052
2. The Sherman Antitrust Act	2055
a. Section 1 of the Sherman Act	2055
b. Section 2 of the Sherman Act	2058
i. Predatory Pricing	2059
(a) The Areeda-Turner Test	2061
3. The Robinson-Patman Act	2063
B. Trade Law: The Antidumping Statutes	2066
1. Varieties of Dumping and the American Statutory Response	2067
2. The Antidumping Act of 1921	2068
II. Problems with Existing Antitrust and Antidumping Laws in Defining and Deterring Unfair Trade	2071
III. Why Promote Convergence of Antitrust and Trade Law? ...	2085
A. Principles of Convergence	2086
B. An Illustration: The Japanese Laptop Computer Screen Dispute	2087
IV. Moving Toward Convergence: An International Trade Analogue to Robinson-Patman	2089
A. Application of An International Trade Analogue to Robinson-Patman	2089
B. Significant Benefits Follow From Applying Robinson- Patman To Trade Cases	2090
C. The Counterarguments Are Unpersuasive	2091
Conclusion	2094

* I am grateful to Professor William T. Lifland for reading an initial draft of this Note.

INTRODUCTION

American antitrust and trade laws currently operate at odds:¹ while antitrust protects consumers by promoting vigorous competition between producers, the trade laws protect domestic industry from the effects of unfair foreign trade. Though antitrust and trade laws both address price discrimination² and predation³ in the marketplace, each defines the term "unfair" differently.⁴ Numerous works have explored the extent to

1. Numerous works have examined the extent to which antitrust and trade law operate at odds. See, e.g., Mario Marques Mendes, *Antitrust in a World of Interrelated Economies: The Interplay Between Antitrust and Trade Policies In The US and the EEC (1991)* (discussing the conflict between antitrust and trade policy in the United States and the EEC); American Bar Ass'n, Section of Antitrust Law, *Task Force Report on the Interface Between International Trade Law and Policy and Competition Law and Policy*, 56 *Antitrust L.J.* 461 (1987) (reporting on the findings of a special committee appointed to explore the inherent tension between antitrust and trade policy); Harvey M. Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, 56 *Antitrust L.J.* 409 (1987) (contending that antitrust and trade laws, which have fundamentally different policy objectives, cannot realistically be reconciled); Ronald A. Cass, *Price Discrimination and Predation Analysis in Antitrust and International Trade: A Comment*, 61 *U. Cin. L. Rev.* 877 (1993) (noting that antitrust and trade law each address price discrimination and predation, though the extent to which economic analysis informs the judicial and administrative decision-making process marks the principle difference between the two areas); Kenneth G. Elzinga, *Antitrust Policy and Trade Policy: An Economist's Perspective*, 56 *Antitrust L.J.* 439, 439 (1987) (noting that "there typically is a conflict between antitrust policy and trade policy which stems from the difficulty of administering the latter in a procompetitive fashion"). Elzinga's article concludes with a telling metaphor:

The tack that trade policy often takes is the protection of the dinosaur. Trade policy consistently bets on the wrong horse. Not because it doesn't know horses, but rather because [protectionists] will promote the horse that cannot win in the open market. The antitrust, by contrast, applauds the entrepreneur who welcomes the competitive fray.

Id. at 444; see also A. Paul Victor, *Task Force Report on the Interface Between International Trade Law and Policy and Competition Law and Policy: Introduction*, 56 *Antitrust L.J.* 463 (1987) [hereinafter *Task Force Report*] (noting that the American economy has long been driven by a policy of encouraging competition from both domestic and foreign sources, but that a recent infusion of foreign goods, coupled with the internationalization of competition, has encouraged greater application of American trade laws to impede the flow of new competition); A. Paul Victor, *Antidumping and Antitrust: Can the Inconsistencies Be Resolved?*, 15 *N.Y.U. J. Int'l L. & Pol.* 339 (1983) (urging greater sensitivity to competition policy in trade law enforcement).

2. Price discrimination is the pricing of a good or service at different levels in different markets. It is possible whenever a seller is able to identify separate markets for its product and charge higher prices to consumers who are willing to pay more for the product. See Cass, *supra* note 1, at 877. A classic example of price discrimination is the sale of airline tickets, where the airline provides the same basic service with minor variations, to different customers at different prices, by selling first class, business class, and economy class tickets.

3. Predation is the pricing of a commodity below cost to drive competitors out of the market. See *id.*

4. See *id.* (noting that the principal difference between the two bodies of law lies in the extent to which economic analysis defines the limits of acceptable behavior in the marketplace).

which these two areas of law operate at cross-purposes.⁵

Existing American trade laws satisfy neither free trade advocates nor domestic producers seeking protection from unfair foreign competition. On the one hand, domestic producers claim that current trade laws fail to deter injurious below-cost imports, a practice known as dumping.⁶ Domestic producers claim that well-financed foreign cartels subsidize continuous dumping, despite existing American antidumping laws, which impose a duty on dumped imports.⁷ At issue are the prices of

5. See *supra* note 1.

6. Dumping has been defined as "[t]he act of selling in quantity at a very low price or practically regardless of the price; also, selling goods abroad at less than the market price at home." Black's Law Dictionary 502 (6th ed. 1990); see also Joseph E. Pattison, Antidumping and Countervailing Duty Laws § 1.02[1], at 1-3 (1st ed. 8th release, Mar. 1994) (defining dumping as a form of price discrimination between national markets). Trade laws define dumping as sales at "less-than-fair-value" ("LTFV"), that is, sales of a commodity in the American market at prices below those offered for a "like product" in the country of origin (the producer's "home market"), or in some instances, on the market of a third country. See *infra* text accompanying notes 127-31. Dumping is considered one of the two principal unfair trade practices in the world. The other is the export of subsidized goods. These goods may be sold at a fair price, but the government of the exporting country distorts competition in international trade by granting subsidies to the producer. Countervailing duty laws address this practice by levying a duty on the goods to offset these government benefits. See Pattison, *supra*, § 1.02[2], at 1-6. American countervailing duty laws will not be discussed in this Note.

7. See, e.g., Daily Report for Executives; Regulation, Economics and Law, *International Trade: Antitrust Solutions Urged For U.S. Steel Makers' Trade Woes*, 1993 Daily Exec. Rep. 189, at A-21 (Oct. 1, 1993) (reporting allegations by domestic steel producers that foreign steel manufacturers, including producers from the European Community, Japan, Korea, and Southeast Asia, are involved in widespread cartel activity). These complaints assert that foreign steel manufacturers meet regularly to set prices and output and that they have organized effective self-policing mechanisms for their restraint agreements and even common accounts for payment of resulting penalties. See also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578 (1986) (reinstating summary judgment for Japanese television manufacturers). In that case, domestic television producers alleged a conspiracy, beginning as early as 1953, of fixing and maintaining artificially high prices for television receivers in Japan, while maintaining low prices for televisions exported to the United States, to produce losses for American manufacturers. See *id.*

These claims have spurred several legislative proposals targeted at predatory dumping by foreign firms. See, e.g., S. 99, 103d Cong., 1st Sess., 139 Cong. Rec. S195-02 (daily ed. Jan. 21, 1993) (sponsored by Sen. Metzenbaum) (proposing The International Fair Competition Act, an amendment eliminating the specific intent element in the Antidumping Act of 1916). The 1916 Act, a moribund statute, provides for a limited private right of action for dumping violations, allowing treble damages for predatory dumping. It is seldom pleaded because it requires a high standard of proof. See Spencer Weber Waller, *International Trade and U.S. Antitrust Law* § 12.03, at 12-3 to 12-7 (1992). In recent years, Congress has considered many proposals to provide a viable private right of action for dumping. An evaluation of these bills is beyond the scope of this Note; many commentators, however, have opined that such laws would lead to protectionist abuses, violate international law, and promote an increase in litigation. See, e.g., Jeffrey L. Kessler, *The Antidumping Act of 1916: Antitrust Analogue or Anathema?*, 56 Antitrust L.J. 485 (1987) (contending that the 1916 Act is essentially an antitrust law in current form, and amended versions would chill legitimate price competition from abroad and create a conflict with antitrust policy); Roger P. Alford, Note, *Why A Private Right of Action Against Dumping Would Violate GATT*, 66 N.Y.U. L. Rev. 696 (1991) (arguing that these recent

many imported goods, such as minivans, 3.5-inch computer diskettes, cellular mobile telephones, steel rails, forged steel crankshafts, oil drilling equipment, color picture tubes, porcelain and steel cookware, chemicals, frozen concentrated orange juice,⁸ and laptop computer screens.⁹

Conversely, antitrust commentators and other free trade advocates argue that American antidumping laws are overprotective. They argue that the antidumping laws: (1) harm consumers by denying them access to competitively priced imported goods¹⁰ and (2) in some cases precipitate violations of antitrust laws.¹¹ Further, free trade advocates contend that current antidumping laws harm producers because the antidumping laws raise the cost of imported raw materials and component parts.¹² These critics also characterize the antidumping regime as a procedural minefield¹³ that is biased against foreign competitors in form and in application and thus runs counter to fundamental principles of economics and free trade.¹⁴ While there is no absolute consensus on the proper

proposals, which would give American litigants direct access to federal courts to seek damages and injunctive relief, are incompatible with our obligations under the General Agreement on Tariffs and Trade ("GATT").

8. See Richard Boltuck & Robert E. Litan, *America's "Unfair" Trade Laws, in Down in the Dumps: Administration of the Unfair Trade Laws 1*, 22 (Richard Boltuck & Robert E. Litan eds., 1991) [hereinafter *Down in the Dumps*].

9. See Daily Report for Executives; Regulation, Economics and Law, *International Trade: Japanese Flat-Panel Manufacturers Challenge U.S. Dumping Allegations*, 1991 Daily Exec. Rep. 132, at A-2 (July 10, 1991). See *infra* Part III.B.

10. See, e.g., James Bovard, *The Fair Trade Fraud 3-4* (1991) ("The U.S. government does not penalize foreign companies for charging high prices—only for charging low prices."); Elzinga, *supra* note 1, at 440-41 (contending that the trade laws enable a small group of domestic producers to extract supracompetitive prices from American consumers); Robert W. McGee, *The Case to Repeal The Antidumping Laws*, 13 Nw. J. Int'l L. & Bus. 491 (1993) (calling for a repeal of the antidumping laws); Diane P. Wood, "Unfair" *Trade Injury: A Competition-Based Approach*, 41 Stan. L. Rev. 1153 (1989) (applying antitrust concepts to injury determinations under the trade laws to promote convergence of antitrust and trade law and increase consumer welfare).

11. See Pierre F. de Ravel d'Esclapon, *Non-Price Predation and the Improper Use of U.S. Unfair Trade Laws*, 56 Antitrust L.J. 543 (1987) (noting that there are antitrust problems implicit in the antidumping laws, because it is often desirable, even necessary, for domestic industry collectively to pursue a case, requiring the exchange of pricing and other market information and that informal settlement agreements often restrain trade in direct violation of section 1 of the Sherman Act); see *infra* Part II.H.

12. See Boltuck & Litan, *supra* note 8, at 6-7; *The Interface of Trade Competition Law and Policy: Questions and Answers*, 56 Antitrust L.J. 457, 459 (1987) [hereinafter *Questions and Answers*] (reporting the remarks of Terry Calvani, Commissioner, Federal Trade Commission) (referring to protection of the steel industry and the consequent cost increases to producers of other goods who use steel in their production).

13. See Bovard, *supra* note 10, at 119-31, 134-39; see *infra* note 131; Part II.E.

14. See, e.g., John J. Barceló III, *The Antidumping Law: Repeal It or Revise It*, in *Antidumping Law: Policy & Implementation*, 1 Mich. Y.B. Int'l Legal Stud. 53 (1979) (noting the relatively low injury threshold under the antidumping laws, the beneficial aspects of price discrimination in international trade, and urging the application of antitrust concepts to trade actions); Bovard, *supra* note 10 (noting that though the trade laws are enacted under the guise of fairness, they are laden with procedural abuses and foster protectionism); *Down in the Dumps*, *supra* note 8 (analyzing procedural abuses inherent in the antidumping laws and contending that most of the biases may be removed merely

roles of antitrust¹⁵ and trade policy, domestic consumers and producers clearly benefit from low prices resulting from competition among domestic and foreign producers.¹⁶ Ideally, antitrust and trade laws should both encourage such competition as well as simultaneously deter foreign producers who exploit market power¹⁷ or government subsidies to injure efficient domestic producers. Achieving this balance requires a consistent definition of "unfair" for domestic and international trade.

This Note suggests a framework for the convergence of antitrust and trade laws to achieve such a balance. Specifically, this Note advocates modifying or replacing the current antidumping laws with a trade law resembling the Robinson-Patman Act,¹⁸ which does not currently apply

through changes in administrative practice, without the need for Congressional approval); William J. Davey, *Antidumping Laws: A Time For Restriction*, 1988 Fordham Corp. Law Inst. 8-1 (Barry E. Hawk ed. 1989) (finding that the antidumping laws have no economic justification, are applied to protect concentrated industries, and should be repealed); J. Michael Finger, *The Meaning of "Unfair" in United States Import Policy*, 1 Minn. J. Global Trade 35 (1992) (arguing that politics and injury to domestic producers, rather than objective evaluations of whether trade is unfair, govern application of the trade laws against imports).

Indeed, antidumping laws are considered a form of non-tariff barrier, and their application was debated at the recently-completed multilateral negotiations of the General Agreement on Tariffs and Trade ("GATT") at the Uruguay Round. See Asra Q. Nomani & Lawrence Ingrassia, *Breakthroughs in Trade Talks are Announced*, Wall St. J., Dec. 13, 1993, at A3; Bob Davis, *From "Fast Track" to French Films, Making Sense of World Trade Talks*, Wall St. J., Dec. 13, 1993, at A16. The GATT was organized in Geneva in 1947 to devise rules for international trade. See *id.* It has sponsored seven rounds of trade talks through which tariffs have been significantly decreased. See *id.* The GATT negotiations involved 117 nations. See *id.* The latest round of negotiations began in Punta del Este, Uruguay, in September 1986. See *id.* On December 12, 1993, negotiators tentatively reached agreement on procedures for handling of dumping complaints. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1 (1994) [hereinafter GATT 1993].

15. See *infra* note 237.

16. See *infra* Part I.A.

17. Market power is the ability of a single firm to affect the market-wide price for a given commodity. See Lawrence Anthony Sullivan, *Antitrust* § 8, at 30 (1977). The producer's individual share of the relevant product market, see *infra* note 25, is directly proportional to its market power. See Herbert Hovenkamp, *Economics & Federal Antitrust Law* § 3.2, at 59 (1985). The reaction of buyers to a seller's price changes also dictates the degree to which that seller possesses market power. See Sullivan, *supra*, § 8, at 30. This, in turn, depends on the availability of substitutes for the seller's product. See *id.* § 8, at 31; Department of Justice and Federal Trade Comm'n, 1992 Horizontal Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,103, at 20,551 (Apr. 2, 1992) [hereinafter Merger Guidelines] (defining market power as "the power profitably to restrict output and raise prices"). Definition of the relevant product market is essential to determining whether a firm possesses market power. See Sullivan, *supra*, § 12, at 41; see *infra* note 25 (summarizing the relationship between the relevant product market, market power, and market concentration).

18. Act of June 19, 1936, ch. 592, § 1, 49 Stat. 1526 (codified at 15 U.S.C. § 13 (1988)). The first section of the Act is an amendment to § 2 of the Clayton Act, ch. 323, § 2, 38 Stat. 730, 730-31 (1914) (current version at 15 U.S.C. § 13 (1988)). The Robinson-Patman Act punishes price discrimination, see *supra* note 2, where the effect is substantially to lessen competition or tend to create a monopoly in any line of commerce. See *infra* Part I.A.3.

to the international transactions covered by the antidumping laws.¹⁹ Adopting the current judicial construction of the Robinson-Patman Act provides a consistent definition of "unfair" for domestic and international trade, and thus promotes the convergence of antitrust and trade laws. Enactment of such a law fulfills several objectives. It (1) introduces into trade laws the accepted predatory-pricing tests developed under Sherman Act jurisprudence, (2) balances deterrence of trade law abuse with the incentives for domestic industries to bring trade actions where viable claims of predation by foreign cartels exist, (3) bypasses the existing jurisdictional hurdles associated with applying antitrust laws to penalize predatory imports, and (4) allows competitive foreign producers the benefit of currently unavailable defenses to frivolous or bad-faith antidumping claims.

This Note has four parts. Part I of this Note provides background information on existing antitrust and antidumping laws. Part II discusses the extent to which these two bodies operate at odds and the weaknesses of antitrust and antidumping policy in defining and deterring injury from unfair foreign trade practices. Part II also examines several aspects of the antidumping regime that commentators criticize as protectionist. Part III analyzes a recent trade dispute to illustrate the merits of harmonizing antitrust and trade law. Part IV of this Note suggests a model trade law that reduces the disharmony between antitrust and antidumping laws. This Note concludes that Congress must modify or replace our current antidumping laws with an analogue to the Robinson-Patman Act to provide a consistent definition of "unfair" for domestic and international trade.

I. EXISTING ANTITRUST AND TRADE LAW

This Part summarizes basic principles of the antitrust and antidumping laws.

A. *Antitrust Law*

This overview of antitrust law begins with a summary of the underlying principles of economics. A discussion of the Sherman Act follows, with an emphasis on attempted monopolization through predatory pricing. This section concludes with an outline of black-letter Robinson-Patman law.

1. Introduction: The Economic Foundations of Antitrust Law

Market economics assumes that consumers are "best off if they can make voluntary exchanges of goods and services in competitive markets."²⁰ If all exchanges are voluntary, then each consumer will continue

19. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 723 F.2d 238, 316-17 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

20. Hovenkamp, *supra* note 17, § 1.1, at 1.

to exchange goods and services "until he can make himself no better off by an exchange that is voluntary for both parties to the transaction."²¹ Further, so long as all exchanges take place at competitive prices, society also will be wealthier than it would have been if some exchanges occurred at higher or lower prices.²² Thus, the overriding goal of antitrust law is to ensure the competitiveness of markets.²³

Antitrust law accepts a single business firm as the basic economic unit.²⁴ A firm's competitive behavior vis-a-vis other firms in the same market (the "relevant product market"²⁵), in which all firms endeavor to

21. *Id.*

22. *See id.*

23. *See id.*; *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (noting that the antitrust laws were enacted for "the protection of *competition*, not *competitors*"); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984) (Posner, J.) ("The purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process . . . rather than to promote the welfare of particular competitors."), *cert. denied*, 472 U.S. 1018 (1985).

24. *See Phillip Areeda & Louis Kaplow, Antitrust Analysis: Problems, Text, Cases* 187 (1988).

25. A relevant market for a product is defined by reference to the substitutability of one product for another. *See Hovenkamp, supra* note 17, § 3.2, at 59-61. "A 'relevant market,' then, is the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market." Sullivan, *supra* note 17, § 12, at 41. Firms compete with one another for sales in the same market—the "relevant market."

Proper determination of the relevant market is crucial to any antitrust litigation because it is the first step in measuring a firm's market power. *See id.*; *see supra* note 17. Prior to 1982, defining the relevant market in an antitrust proceeding was, in one commentator's words, "a game of creative market definition." Kenneth Kelly, *Empirical Analysis for Antitrust and International Trade Law*, 61 U. Cin. L. Rev. 889, 893 (1993) (referring to *Brown Shoe*, the leading merger case of the day). Since 1982, the Merger Guidelines have influenced calculation of market definition. The Guidelines provide an economic methodology to the definition of relevant markets. Under the Guidelines, a market is first defined "as a group of products and a geographic area such that a hypothetical firm" would possess market power in that area. Merger Guidelines, *supra* note 17, ¶ 13,103, at 20,551 (June 14, 1984). A firm would not possess market power if an attempt to impose "a 'small but significant and nontransitory' price increase" would cause buyers to switch to other products or result in the entry of competing sellers. *Id.* The Guidelines apply these principles to a standard known as the "five-percent test." *Id.* This test provides for the construction of an economic model, in which the prices of each product of each merging firm increase by five percent. The likely competitive responses of buyers and competing sellers are then analyzed. If these competitive responses would render the price increase unprofitable (because competitors would enter the market and purchasers would substitute competing products), then the area and group of products are expanded to encompass additional substitutes until it would be profitable to impose the price increase. The relevant market is defined as that market in which it would be profitable for the seller to impose the five-percent price increase. *See id.* at 20,551-552. Even under the Guidelines, notes Professor Kelly, market definition is still a point of contention in antitrust cases and the subject of an enormous amount of literature. *See Kelly, supra*, at 896 & n.20.

No such economic methodology is employed in trade cases to define a relevant market. The divergence in the methodology used to define a relevant market in antitrust and trade cases is of critical importance to understanding why the antidumping laws are, in the opinion of many commentators, deficient in causal analysis, and consequently restrain

set a profit-maximizing price,²⁶ is the premise underlying competition

competition in the international trade context. See *infra* Part II.C. (discussing the inadequate causal analysis in evaluating a dumping claim); Kelly, *supra*, at 892-97.

Market concentration is a function of the number of firms in the relevant market and their respective shares. See Hovenkamp, *supra* note 17, § 11.3, at 300-01. A market is said to be concentrated if a relatively small number of firms possess a large share of that market. See *id.* Concentration relates to market power, see *supra* note 17, because in a concentrated market, an individual firm has greater potential to affect the market-wide price of the commodity through its own pricing and output decisions, though this is not always so (if, for example, a firm in a concentrated market controls a relatively small share of the market).

The "four-firm concentration ratio" ("CR4") is one measure of market concentration. The CR4 is computed by adding the market shares of the four largest firms in the relevant market. For example, a market in which the four largest firms have market shares of 30%, 25%, 15%, and 5% has a CR4 of 75. See Hovenkamp, *supra* note 17, § 11.3, at 300. Most economists today prefer to measure market concentration with the Herfindahl-Hirschman Index ("HHI"), which is the sum of the squares of every firm in the market. See *id.* § 11.4, at 301-04. Thus in a market composed of four firms with market shares of 40%, 25%, 20%, and 15%, the HHI would be 2850 ($40^2 + 25^2 + 20^2 + 15^2 = 2850$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). See *id.* The Department of Justice and Federal Trade Commission calculate market concentration in evaluating horizontal mergers, because market concentration is a useful indicator of the likely potential competitive effect of a merger. The Government began using the HHI method in 1982. Under current policy, a post-merger HHI below 1000 designates an unconcentrated market, a post-merger HHI between 1000 and 1800 is regarded as moderately concentrated, and a post-merger HHI above 1800 is considered highly concentrated. See Merger Guidelines, *supra* note 17, ¶ 13,104, at 20,573-5 to 20,573-6 (Apr. 7, 1992); Hovenkamp, *supra* note 17, § 11-5, at 304.

26. In a perfectly competitive market, every good is priced at the cost of production, leaving producers and sellers only enough profit to maintain investment in the industry, and every person willing to pay this price will be able to buy the good. See Hovenkamp, *supra* note 17, § 1.1, at 1 to 2. In such a market, firms are all "price takers"; that is, individually, they cannot affect the market price. See *id.* § 1-1, at 9. All sellers manufacture a perfectly homogeneous product, and thus the consumer is completely indifferent as to from whom he buys. See *id.* § 1-1, at 2. Each seller is so small that its entry into or exit from the market has no effect on the decisions of other sellers. Further, all sellers have the same access to needed inputs and all participants have complete knowledge of price, output, and other information about the market. In such instances, a firm's profit-maximizing price is equal to its marginal cost of production. See *id.* § 1.1, at 13. Marginal cost is the incremental cost a firm incurs in producing one additional unit of output. See *id.* § 1.1, at 10. Another producer in the perfectly competitive market will undercut any firm that attempts to set a price greater than marginal cost because the individual competitor faces an infinite elasticity of demand—any increase in price, however slight, will induce consumers to switch to substitute products, which other suppliers will readily offer in response to a competitor's price increase. A firm that raises prices above marginal cost will thus lose all sales. See *id.* § 1.1, at 9.

A monopolist, however, is not a "price taker." A monopolist is the only firm selling in a particular market, and has one power that the perfect competitor does not: the monopolist can control the entire output of the market. See *id.* § 1.1, at 14. This is so because there are no competitors to respond to the monopolist's decline in output with an offsetting output increase. Therefore, by reducing output, the monopolist can obtain a higher price per unit, provided that demand remains unchanged. See *id.* § 1.2, at 14-15. Though both the monopolist and the perfect competitor maximize revenue by equating marginal revenue with marginal cost, see *id.* § 1.2, at 16, for the monopolist, marginal revenue is always below price. Accordingly, the output at which marginal cost equals marginal revenue will generate a price exceeding marginal cost. See *id.* Marginal reve-

under the antitrust laws.

2. The Sherman Antitrust Act

The Sherman Antitrust Act²⁷ (the "Sherman Act"), coined the "Magna Carta of free enterprise,"²⁸ does not prohibit specific types of anticompetitive conduct. The Act essentially grants general authority to courts to define and deter anticompetitive activity. Thus, courts applying the Sherman Act sit as common law courts, developing antitrust law through judicial reasoning.²⁹

The Sherman Act seeks to promote competition between firms within the relevant market by preventing firms from combining or agreeing with one another to function as a single economic unit, also known as a trust or cartel.³⁰ Absent such legal restrictions, firms could exchange price and output information or join together to eliminate competition among themselves. Absent competition, these firms could act as a single-firm monopolist to restrict output and thereby raise consumer prices.³¹

a. Section 1 of the Sherman Act

To prevent such abuses, section 1 of the Sherman Act proscribes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."³²

Much of the case law under the Sherman Act focuses on defining what constitutes an agreement and what evidence is sufficient to prove the existence of such an agreement between firms.³³ Thus, the case law has

nue is the gain from producing a single additional unit of output. Thus, compared to the firm in a perfectly competitive market, the monopolist achieves a higher profit-maximizing price, at a lower rate of output. See *id.* § 1.2, at 14 to 17.

Most firms operate in neither a perfectly competitive market, nor a market in which they have no competition (a monopoly). More common is the oligopoly, a market populated by a small number of producers. Behavior of an oligopolist falls between that of a monopolist and a perfectly competitive firm. See Areeda & Kaplow, *supra* note 24, at 18-19.

27. Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7) (1988)). The elements of a Sherman Act § 1 violation are: (1) joint action that (2) unreasonably restrains trade, and (3) affects interstate or foreign commerce. See *Standard Oil Co. v. United States*, 221 U.S. 1, 5-6 (1910).

28. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

29. See Areeda & Kaplow, *supra* note 24, at 51.

30. See Sullivan, *supra* note 17, § 59, at 152-55.

31. See Areeda & Kaplow, *supra* note 24, at 188.

32. 15 U.S.C. § 1 (1988).

33. An agreement can be express, see, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331-32, 341-42 (1897) (holding that "memorandum of agreement" between eighteen railroads for setting uniform freight rates had violated the Sherman Act), or inferred from circumstantial evidence. See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946) (finding conspiracy from circumstantial evidence, where prices of competing brands of cigarettes increased on the same day, where there was no economic justification for the increase); *id.* at 809 ("No formal agreement is necessary to constitute an unlawful conspiracy."); *Eastern States Retail Lumber Dealers'*

discussed whether concerted refusals to deal,³⁴ geographic divisions of a market between competitors,³⁵ mergers and joint ventures in certain cir-

Ass'n v. United States, 234 U.S. 600, 612 (1914) (upholding trial court's finding that retail lumber dealers had agreed to withhold patronage of wholesalers who had sold directly to consumers in competition with the retailers, where conspiracy was inferred from the dealers' circulation of lists of offending wholesalers among themselves); *Ambook Enter. v. Time, Inc.*, 612 F.2d 604, 616 (2d Cir. 1979) (holding that evidence of conscious parallelism could be joined with other circumstantial evidence of coercion by other participants "in further support of an inference of agreement"), *cert. dismissed*, 448 U.S. 914 (1980); *Overseas Motors v. Import Motors Ltd.*, 375 F. Supp. 499, 535 (E.D. Mich. 1974) ("[C]onspiracy may be inferred where the surrounding circumstances make it unlikely that the parallelism of action was purely coincidental."), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975). *But see* *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954) (finding that uniform action of defendants was attributable to revenue-maximizing individual business judgment). There the Court held:

The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. . . .

Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

34. Any agreement affecting competitive behavior arguably is the equivalent of an understanding that the collaborators will not buy or sell on any other terms. Thus, it is often difficult to distinguish a concerted refusal to deal, commonly known as a boycott, from a refusal to sell except on condition. Boycott cases, however, are distinguishable from price-fixing cases: the former involve an agreement to refrain from competition within a group to exploit, but not destroy, customers or suppliers, whereas the latter often involve collective activity among a group of competitors to weaken a rival. Boycott cases are actionable under both § 1 of the Sherman Act, as combinations in restraint of trade, and under § 2, as combinations and conspiracies in an attempt to monopolize. *See Areeda & Kaplow, supra* note 24, at 364-65; *Aspen Highlands Skiing Co. v. Aspen Skiing Corp.*, 472 U.S. 585, 608-11 (1985) (finding liability from defendant's abrupt refusal to continue cooperating in group ticket plan, where there was no procompetitive justification for doing so); *Eastern States*, 234 U.S. at 614 (finding that defendant retail lumber dealer had conspired to boycott wholesalers who made direct sales to consumers, thus competing with member dealers) ("An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited. . . ."); *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 465-68 (1941) (finding defendant Guild and designer manufacturers and sellers of garments in violation of the Sherman Act for maintaining policy of boycotting retailers who also accepted for sale lower-priced copies of designer-labelled fashions); *Lorain Journal Co. v. United States*, 342 U.S. 143, 149-54 (1951) (holding illegal defendant newspaper's unilateral refusal to accept advertising from merchants who also advertised with a newly-formed radio station that threatened the newspaper's monopoly of local advertising market). *But see* *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588, 601-06 (1925) (finding that no unlawful restraint of commerce occurred where defendant cement manufacturers exchanged credit and other information regarding buyers to protect themselves from fraud).

35. Several competitors might agree to divide a market geographically among themselves such that there will be no competition between them in their respectively allocated areas. This is essentially a form of cartel, actionable both as an unlawful agreement in restraint of commerce under § 1, and as attempted monopolization under § 2. *See, e.g., United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) (finding liability under § 1) ("This Court has reiterated time and again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.'") (citations omitted).

cumstances,³⁶ cartels,³⁷ and combinations formed for influencing governmental bodies to act in a manner that suppresses competition,³⁸ are illegal under the Sherman Act.

Within section 1 case law, courts have held that some horizontal³⁹ agreements are *per se* violations of the Sherman Act, while other agreements have been analyzed under the *rule of reason*.⁴⁰ Numerous Sher-

36. See, e.g., *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 106-08 (1984) (condemning joint venture as an unreasonable restraint of trade for restricting competition and limiting live broadcasts of college football); *Areeda & Kaplow*, *supra* note 24, at 793-921 (mergers).

37. See *Areeda & Kaplow*, *supra* note 24, at 188-89. A cartel exists when all competitors in a given market join together to act as a single firm, eliminating competition between themselves and setting a restricted output for each member (a quota), thereby raising prices. Most cartels, however, are imperfect; members face problems in reaching agreement between one another. Individual members of a cartel have natural incentives to cheat other members by selling over their individually allocated output quotas.

Cartels often set an output restraining price in lieu of a quota. In that case, members also have incentives to violate the agreement with other cartel members. "[T]he effect of fixing a price well above costs is to induce each collaborator to try to win additional sales." *Id.* at 189. This may result in individual expansion of output to the point where the market will not bear the cartel price. See *id.* Individual members may cheat even with knowledge that an increase in individual output will affect the market price. Member firms may also set, and then conceal, their own lower prices, to increase their profits at the expense of the cartel. Once discovered, however, cheating may spread and lead to the collapse of the cartel. See *id.* Cartel members may also engage in certain non-price competition to increase sales above allocated limits, for example, by offering additional services to consumers without charge. See *id.*

38. A trilogy of Supreme Court cases establish that a firm may petition the government for relief, either at the judicial, executive, or administrative level, with limited fear of liability under domestic antitrust law. This is so even when the petitioner's intent is to eliminate legitimate competition. This is commonly known as the *Noerr-Pennington* doctrine. See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-40 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509-11 (1972). Under *Noerr-Pennington*, however, the right to petition the U.S. government is not absolute. An antitrust violation occurs when a petition is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. . . ." *Noerr*, 365 U.S. at 144. Later cases elaborate on the doctrine and the "sham" exception. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424-25 (1990) (distinguishing *Noerr* and declining to extend immunity to boycotts designed to exact higher fees); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-502 (1988) (declining to extend *Noerr* immunity to attempts to influence a private association's product standards, which were routinely adopted by state and local governments).

39. A horizontal restraint of trade pertains to an agreement between competitors at the same level of distribution. See *Black's Law Dictionary* 737 (6th ed. 1990).

40. Earlier interpretations of the Sherman Act held that any agreement between firms to cooperate in setting prices or output constituted a *per se* violation of the Sherman Act, regardless of actual effects on competition. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 329-31 (1897) (rejecting a defense claim that § 1 prohibited only unreasonable price-fixing agreements, as was the case under the common law. The Court also rejected the argument that Congress intended to exclude the railroads from § 1 because of the impossibility of covering fixed costs when subject to unfettered competition.). Courts have long held, however, that certain forms of collaborative activity should be permitted, even though some limits on prices or competition may result. Courts have distinguished these types of restraints under the doctrine known as the *rule of reason*. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1910) (establishing the

man Act cases address the reasonableness of an agreement between competitors.⁴¹

b. *Section 2 of the Sherman Act*

Section 2⁴² of the Sherman Act punishes persons or firms who "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."⁴³

A pure monopoly exists where only one firm supplies the entire market.⁴⁴ A monopoly, however, may occur where there is more than one producer in the relevant product market,⁴⁵ provided that one firm—the monopolist—dominates output; that is, the monopolist must possess market power.⁴⁶ The elements of monopolization are "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or his-

rule of reason in holding that the Sherman Act did "not specify[] but indubitably contemplat[ed] and requir[ed] a standard, [and] it follows that [Congress] intended that the standard of reason which had been applied at the common law . . . was intended to be the measure . . ." for determining violations under § 1).

Some agreements immediately fall within the *per se* rule. *See, e.g.,* United States v. Trenton Potteries Co., 273 U.S. 392, 397-402 (1927) (refusing to evaluate the defendant's argument that the prices at issue were reasonable in holding that price-fixing agreements are *per se* violative of § 1 of the Sherman Act). *But cf.* National Soc'y of Professional Eng'g v. United States, 435 U.S. 679, 692-95 (1978) (following a *rule of reason* analysis and holding that petitioner's canon of ethics prohibiting members from submitting competitive bids for engineering services amounted to an agreement restraining trade under § 1); Board of Trade v. United States, 246 U.S. 231, 238-41 (1918) (applying the *rule of reason* in determining that regulation restricting members' grain trading after the closing bid on the exchange (the "Call") to the "Call price" did not violate the Sherman Act). The Court found that every agreement necessarily restrains trade in some manner, and the issue was whether the restraint reduces or enhances competition: "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.* at 238. There it was apparent that the rule at issue was not aimed at manipulating prices. *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 219-24 & n.59 (1940) (holding conspiracy to maintain gasoline prices was unlawful *per se*, whether or not conspiracy was successful or other factors may have contributed to the stability of the spot price under manipulation and declining to consider a defense that the price-fixing scheme was intended to alleviate competitive abuses inherent in that market.).

41. *See, e.g.,* National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 98-113 (1984) (holding that college athletic association's plan for televising college football games of member institutions was an illegal combination in restraint of trade under § 1); United States v. Topco Assocs., 405 U.S. 596, 606-12 (1972) (holding territorial restraints violated § 1); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465-68 (1941) (holding that manufacturing association's policy of boycotting retailers that accepted competing goods violated § 1).

42. *See* 15 U.S.C. § 2 (1988).

43. *Id.*

44. *See* Hovenkamp, *supra* note 17, § 1.2, at 14.

45. *See supra* note 25.

46. *See supra* note 17.

toric accident."⁴⁷

Section 2 also forbids attempted monopolization.⁴⁸ Attempted monopolization requires proof of (1) a relevant product market and geographic market that the defendant seeks to monopolize, (2) exclusionary conduct manifesting a specific intent to monopolize,⁴⁹ and (3) a dangerous probability of success.⁵⁰

i. *Predatory Pricing*

A paramount concern of Sherman Act drafters was attempted monopolization through predatory pricing.⁵¹ During the late eighteenth century⁵² it was widely believed that large trusts could afford short-term, below-cost price cuts. Smaller competitors, unable to meet these price cuts, would eventually lose all sales to the larger predatory competitor. Once the predatory pricer eliminated competition in this fashion, it could raise prices to monopolistic levels.⁵³

Predatory pricing presupposes high barriers to entry; that is, production must require a substantial capital base.⁵⁴ If a market has low barriers to entry, start-up competitors quickly can enter the market as soon as

47. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

48. *See* 15 U.S.C. § 2 (1988).

49. *See Lorain Journal Co. v. United States*, 342 U.S. 143, 153-57 (1951); Sullivan, *supra* note 17, § 51, at 135.

50. *See Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946) ("The phrase 'attempt to monopolize' means the employment of methods, means, and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it. . . .") (quoting with approval the trial court's jury instructions); Sullivan, *supra* note 17, §§ 50 & 51, at 134-38; *see also United States v. Empire Gas Corp.*, 537 F.2d 296, 305 (8th Cir. 1976) (holding that the dangerous probability of success requirement, which makes both definitions of the relevant market and proof of the defendant's market share essential elements of the case, could not be met, even accepting the government's argument that the defendant firm held a 50% market share, since the record did not indicate that competitors would be susceptible to intimidation by defendant), *cert. denied*, 429 U.S. 1122 (1977); *accord International Distrib. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 792-93 (2d Cir.) (dangerous probability that market would be monopolized did not exist where defendant firm did not have significant market power and would not acquire that power even if it succeeded in driving competitor out of business), *cert. denied*, 482 U.S. 915 (1987); Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 292 (1977) (at least 60% share necessary); Phillip Areeda & Donald F. Turner, *Williamson on Predatory Pricing*, 87 Yale L.J. 1337, 1348 (1978) (60% share not enough).

51. *See* Waller, *supra* note 7, § 2.06, at 2-14.

52. The Sherman Act was enacted on July 2, 1890.

53. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 (1986) (restating plaintiffs' allegations that foreign television manufacturers conspired to price television sets below cost in the United States and drive American manufacturers out of business, then restrict output and raise prices to monopoly levels); Waller, *supra* note 7, § 2.06, at 2-14.

54. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2589 (1993); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 698-99 (1975).

the predatory pricer has driven out competition and raised prices.⁵⁵ New entrants compete by setting lower prices to frustrate the predatory pricer's attempted monopolization.⁵⁶

Confusion has characterized predatory-pricing law, despite numerous predatory-pricing claims. Predatory-pricing law remains unsettled, though the Supreme Court recently clarified the elements of a prima facie predatory-pricing claim.⁵⁷ There is currently no consensus among courts and commentators regarding the appropriate cost test⁵⁸ for predatory pricing. Price reductions constituting genuine competitive responses to market conditions are permissible.⁵⁹ "Pricing is predatory only where the firm forgoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits. . . ."⁶⁰ Many commentators have offered specific price-cost tests to define the difference between competitive and anticompetitive price reductions.⁶¹

In *Brooke Group Ltd. v. Brown & Williamson Tobacco*,⁶² the Supreme Court held that to plead a prima facie predatory-pricing claim, a plaintiff must demonstrate (1) that the prices complained of are below an appro-

55. See *Matsushita*, 475 U.S. at 588-89 (stating that predatory-pricing conspiracies are by nature speculative since conspirators must have reasonable expectations of recouping more than their losses through monopoly profits, and monopoly profits encourage new entrants).

56. See *id.*

57. See *Brooke Group*, 113 S. Ct. at 2587-88 (setting out the elements of a prima facie predatory-pricing claim, though declining to resolve the dispute among circuit courts concerning the proper cost measure of predatory pricing, after the parties stipulated that sales above average variable cost ("AVC") should not be considered actionable).

58. See *infra* notes 61-78 and accompanying text.

59. See *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1031 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

60. *Id.* (quoting *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 856 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978)).

61. See, e.g., Areeda & Turner, *supra* note 54, at 709-16; Richard A. Posner, *Antitrust Law: An Economic Perspective 190-93* (1976) (positing that "average balance-sheet cost" provides the proper inquiry in predatory-pricing analysis); F. M. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976) (criticizing the approach of Professors Areeda and Turner, and arguing that long-run allocative efficiency is maximized in some cases where a monopolist's price exceeds marginal cost and in other cases where marginal cost is undercut); Phillip Areeda & Donald F. Turner, *Scherer on Predatory Pricing: A Reply*, 89 Harv. L. Rev. 891 (1976) (admitting the theoretical desirability of long-run welfare maximization, but arguing that the factors required to determine long-run consequences are inherently speculative and indeterminate); F. M. Scherer, *Some Last Words on Predatory Pricing*, 89 Harv. L. Rev. 901 (1976) (reiterating that long-run allocative efficiency should be the focus of predation analysis and arguing that the requisite variables can be determined with sufficient accuracy); Richard Schmalensee, *On the Use of Economic Models in Antitrust: The Realemon Case*, 127 U. Pa. L. Rev. 994 (1979) (arguing that standard economic models do not always explain market behavior or lend themselves to logical conclusions in predatory-pricing cases); Williamson, *supra* note 50, at 289-90 (eschewing reliance on marginal costs and analyzing predatory pricing targeted at established firms differently from the inquiry where new entrants are targeted); Areeda & Turner, *supra* note 50 (criticizing Professor Williamson's analysis as administratively complex and questionable in total welfare gains).

62. 113 S. Ct. 2578 (1993).

priate measure of its rival's costs,⁶³ and (2) "that the competitor had a . . . dangerous probability[] of recouping its investment in below-cost prices."⁶⁴ The Court emphasized the recoupment requirement as "the ultimate object of an unlawful predatory-pricing scheme,"⁶⁵ because recoupment is the means by which the predatory pricer recognizes the profits of the price-cutting behavior. The dispute over "appropriate measure[s]"⁶⁶ of a defendant's costs of production, however, is still unresolved.⁶⁷

(a) *The Areeda-Turner Test*

Professors Phillip Areeda and Donald Turner developed the seminal antitrust price-cost test.⁶⁸ It has proved influential in courts⁶⁹ and has influenced at least one Justice Department decision to withdraw a suit in progress.⁷⁰ One of their primary concerns is that predatory-pricing claims, absent a price-cost test, could be employed to stifle legitimate price competition and protect inefficient producers.⁷¹ Areeda and Turner argue that pricing at or above a firm's marginal cost⁷² of production is presumed non-predatory.⁷³ Conversely, under their model, any price that falls below the marginal cost of production is considered predatory.⁷⁴ Under the Areeda-Turner test, when a firm prices at marginal cost, only less-efficient firms will suffer larger losses per unit of output at

63. Both parties had stipulated that the relevant measure of cost is average variable cost of production. Accordingly, the Court declined to resolve the conflict among the circuit courts over the appropriate measure of cost. *See id.* at 2587-88 & n.1.

64. *Id.* at 2588 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)); *see id.* ("For the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.") (quoting *Matsushita*, 475 U.S. at 588-89) (alteration in original); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15 (1986).

65. *Brooke Group*, 113 S. Ct. at 2588.

66. *Id.* at 2587 n.1.

67. *See supra* note 63.

68. *See Areeda & Turner, supra* note 54, at 709-16. The test proposed by Professors Areeda and Turner has spawned considerable commentary. *See supra* note 61; Hovenkamp, *supra* note 17, § 6.11, at 184-86.

69. *See, e.g., Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt.*, 845 F.2d 404, 408 (2d Cir. 1988) (affirming jury verdict of attempted monopolization through predatory pricing where evidence indicated that AVC was \$81 per haul, and defendant had set fee at \$65 per haul), *aff'd*, 492 U.S. 257 (1989); *see infra* note 78.

70. Former Assistant Attorney General Thomas E. Kauper explained the Antitrust Division's decision to dismiss the government's case against two major tire companies on the ground that the government could not prove that defendants set prices below marginal or average variable cost. *See Williamson, supra* note 50, at 285 n.5 (citing Memorandum for Attorney General Edward Levi, February 23, 1976, *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,259 (Feb. 23, 1976) (relating to *United States v. Firestone Tire & Rubber Co.*, Civ. No. C-73-836, and *United States v. Goodyear Tire & Rubber Co.*, Civ. No. 73-835 (N.D. Ohio 1976))).

71. *See Areeda & Turner, supra* note 50, at 1337-38.

72. *See supra* note 26 (discussing marginal cost).

73. *See* 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 711d (1978).

74. *See id.*

that price.⁷⁵ Moreover, marginal cost pricing encourages efficient allocation of resources because the product's price reflects the true social cost of the product.⁷⁶ Recognizing that business records rarely reflect marginal costs of production, the Areeda-Turner model suggests the use of average variable cost ("AVC") as an evidentiary surrogate.⁷⁷ Many courts have adopted variations of the Areeda-Turner AVC test.⁷⁸

75. See Areeda & Turner, *supra* note 54, at 711.

76. See *id.*

77. Average variable cost ("AVC") is an effective substitute for marginal cost and may be readily determined from records of cost data kept by most companies. See *id.* at 716; *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 87 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). AVCs are defined as "the costs that vary with changes in output divided by the output." *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 n.27 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). See *infra* notes 284-90 and accompanying text.

78. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2587 n.1 (1993) (parties stipulated to AVC as the appropriate cost measure, adhering to the Areeda-Turner test); *Irvin Indus., Inc. v. Goodyear Aerospace Corp.*, 974 F.2d 241, 245 (2d Cir. 1992) (presuming occurrence of predatory pricing when seller prices below "reasonably anticipated average variable cost"); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 483 (1st Cir. 1988) (finding that "ordinarily the measure of a 'predatory price' is price below 'incremental cost' . . . [where] the addition to total cost . . . of producing and selling additional output would exceed the return from selling that additional output") (citing *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-33 (1st Cir. 1983)), *cert. denied*, 488 U.S. 1007 (1989); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1346 (8th Cir. 1987) (finding sales above AVC are legal *per se*, and that AVC is "the marker for rebuttable presumptions, with plaintiff holding burden above and the defendant below"); *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 889-90 (5th Cir. 1984) (holding that plaintiff must demonstrate that the competitor is either (1) charging a price below AVC, or (2) charging a price below short-run profit-maximizing price where high barriers to entry exist), *cert. denied*, 469 U.S. 1160 (1985); *D.E. Rogers Assocs. v. Gardner-Denver Co.*, 718 F.2d 1431, 1436-37 (6th Cir. 1983) (holding that though AVC is generally a reliable test for predation, there are situations where a competitor can be held liable for predatory pricing even if sales are above AVC), *cert. denied*, 467 U.S. 1242 (1984); *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1388 (9th Cir.) (finding that price above AVC creates rebuttable presumption in favor of defendant, and price below AVC creates rebuttable presumption in favor of plaintiff), *cert. denied*, 464 U.S. 955 (1983); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980) (holding that sales above AVC show that the firm has "acted in an economically rational manner," but non-cost factors may be also considered); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.) (holding that prices above AVC were not predatory, though declining to adopt an entirely cost-based test), *cert. denied*, 434 U.S. 879 (1977). Cf. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335, 339-40 (4th Cir. 1992) (holding judgment notwithstanding the verdict properly granted to defendant because 12% market share made recoupment impossible), *aff'd sub nom. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1496 (11th Cir. 1988) (holding that test for predatory pricing must consider subjective evidence and should use average total cost as the cost above which no inference of predatory intent can be made), *cert. denied*, 490 U.S. 1084 (1989); *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1255-56 (5th Cir.) (reasoning that predatory pricing requires ability to recoup losses after eliminating competitors by raising prices above competitive levels), *cert. denied*, 488 U.S. 890 (1988).

3. The Robinson-Patman Act

The Robinson-Patman Act of 1936⁷⁹ ("Robinson-Patman") expressly forbids price discrimination⁸⁰ where such conduct may⁸¹ substantially lessen competition or tend to create a monopoly in any line of commerce.⁸² Robinson-Patman case law is divided into two categories, which are based on the injured competitor's position in the product's chain of distribution.⁸³ First, Robinson-Patman prohibits primary-line violations—discriminatory pricing policies that injure a competitor.⁸⁴ Second, Robinson-Patman bars secondary-line violations—discriminatory pricing policies that injure a seller's customers.⁸⁵ The majority of

79. See 15 U.S.C. §§ 13-13(b) (1988). The Robinson-Patman Act reads in pertinent part:

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, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . 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 with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

The Robinson-Patman Act is an amendment to § 2 of the Clayton Act, ch. 323, § 2, 38 Stat. 730, 730-31 (1914) (current version at 15 U.S.C. § 13 (1988)).

The Clayton Act arose from dissatisfaction with early twentieth-century interpretations of the Sherman Act, lack of confidence in the Justice Department's ability to enforce antitrust, and a perceived need for an administrative body to enforce the law and keep American businesses apprised of which restraints of trade would be considered actionable under the Sherman Act. See Earl W. Kintner & Joseph P. Bauer, 3 Federal Antitrust Law § 18.2 (1983).

The Clayton Act of 1914 places limits on price discrimination (see *supra* note 2), defined as sales of the same product at different prices to similarly situated buyers (§ 2, as amended by the Robinson-Patman Act). See *id.* § 18.4. The Clayton Act also prohibits exclusive dealing arrangements, and tying—making a sale of one product conditional on the purchase of an additional or "tied" product (§ 3); see *id.* § 18.5. The Act places limits on acquisitions of competing companies (§ 7); see *id.* 18.6; and prohibits interlocking directorates—common board members among competing companies (§ 8); see *id.* § 18.7. The Act contains several other provisions relating to procedure and enforcement. See *id.* § 18.8.

80. See *supra* notes 2 & 79; Hovenkamp, *supra* note 17, § 13.1, at 338.

81. See *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 742 (1945) (holding that liability under the Robinson-Patman Act does not require that price discrimination must cause injury to competition, only that it "may" have such effect).

82. See *supra* note 79.

83. See Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 *Fordham L. Rev.* 1113, 1133 (1983).

84. See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993) (holding, after taking the unusual step of reviewing the sufficiency of evidence, that the plaintiff failed to prove that defendant's volume sales to distributors at discount constituted a Robinson-Patman violation); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 702 (1967) (holding that "[s]ellers may not sell like goods to different purchasers at different prices if the result may be to injure competition").

85. See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37, 39-44 (1948) (holding quantity

Robinson-Patman causes of action are secondary-line claims.⁸⁶

Because Robinson-Patman prohibits price discrimination that injures competition,⁸⁷ a firm may be required to charge the same price to all customers in a given market to avoid liability under the Act. This makes predatory-pricing activity far more expensive, since a firm contemplating predatory price cuts must lower prices equally in all markets, not just in the market encompassing the competitors that the predator wishes to eliminate.⁸⁸

The Robinson-Patman Act recognizes three types of injury to competition: (1) a deliberate and substantial lessening of competition,⁸⁹ (2) a tendency toward creating a monopoly,⁹⁰ and (3) injury to, or prevention or destruction of, competition with any person who either grants or knowingly receives the benefit of the discrimination.⁹¹

Courts today, guided by *Brooke Group Ltd. v. Brown & Williamson Tobacco*⁹² and the Areeda-Turner test,⁹³ apply various price-cost⁹⁴ analyses to evaluate injury claims under the Robinson-Patman Act.⁹⁵ In

discounts to large buyers illegal because of a reasonable probability of harm to buyers' smaller competitors).

86. See Hansen, *supra* note 83, at 1134.

87. See *supra* note 79.

88. The Robinson-Patman Act has been criticized as harmful to consumers, because a firm fearing liability under the act takes the course of least resistance: it sets prices at the same level for all customers, rather than promoting competition through selective price cuts. See Hansen, *supra* note 83, at 1190-93. For this reason, critics of the Act assert that it promotes price rigidity among competitors within any particular market. See *infra* text accompanying notes 281-83.

89. See *supra* note 79.

90. See *id.*

91. See *id.*

92. 113 S. Ct. 2578 (1993).

93. See *supra* text accompanying notes 68-78.

94. See *supra* notes 61, 67-78 and accompanying text.

95. The Supreme Court's decision in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), was for many years the leading precedent for primary-line Robinson-Patman claims. There the Court inferred injury to competition from a finding of predatory intent without regard to price-cost analysis. See Hansen, *supra* note 83, at 1137. Though not expressly overruled, *Utah Pie* is honored now only in the breach. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2586-87 (1993). Courts were applying traditional Sherman Act predatory-pricing analysis to Robinson-Patman claims even before the *Brooke Group* decision. See, e.g., *D.E. Rogers Assocs. v. Gardner-Denver Co.*, 718 F.2d 1431, 1439 (6th Cir. 1983) (holding that "principles behind proof of predatory intent in Sherman Act claims are equally applicable . . . in a Robinson-Patman suit") (internal quotations omitted), *cert. denied*, 467 U.S. 1242 (1984); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1040-41 (9th Cir. 1981) (equating predatory-pricing analysis in primary-line Robinson-Patman cases with attempted monopolization claims under § 2 of the Sherman Act), *cert. denied*, 459 U.S. 825 (1982); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 346-47 (3d Cir. 1981) (holding that competitive injury under the Robinson-Patman Act may be proven (1) directly through market analysis, or (2) by proving predatory intent from which injury could be inferred. "In defining the scope of liability under the Robinson-Patman Act, the larger goals of antitrust law must be considered."), *cert. denied*, 455 U.S. 1017 (1982); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir.) ("As it applies to primary-line injury . . . the Robinson-Patman Act should be interpreted no

Brooke Group, the Supreme Court equated primary-line competitive injury under the Robinson-Patman act with predatory pricing actionable under section 2 of the Sherman Act.⁹⁶ Accordingly, like section 2 analysis, price discrimination is permitted under the Robinson-Patman Act where price-cost analysis demonstrates the absence of predatory intent.⁹⁷

The Robinson-Patman Act also provides three substantive defenses: (1) "cost justification," (2) "meeting competition," and (3) "changing conditions." The "cost-justification" defense expressly permits otherwise unlawful price differentials where the costs of servicing one customer exceed the costs in servicing customers in different geographic markets,⁹⁸ provided that the differentials "result[] from the differing methods or quantities" in which the products are "sold or delivered."⁹⁹ Differences in transportation costs, for example, may make it unrealistic for a producer to service all markets at equal prices.¹⁰⁰ This defense reflects the economic premise that a seller should not be required to charge an artificially high price to a particular buyer if it actually costs less to sell to that buyer than to others.¹⁰¹

"Meeting competition" is another defense. Under section 2(b) of the Act,¹⁰² price differentials are justified if they are made in good faith¹⁰³ to meet the equally low price of a competitor. This defense balances "the restrictive provisions of the Robinson-Patman Act [with] the Sherman Act's mandates for vigorous competitive pricing by sellers."¹⁰⁴ Although

differently from the Sherman Act."), *cert. denied*, 434 U.S. 879 (1977); *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 720 n.10 (5th Cir. 1975) (noting that the basic substantive issues raised by the Sherman and Robinson-Patman Acts "are identical" with respect to defining primary-line injury), *cert. denied*, 424 U.S. 943 (1976).

96. See *Brooke Group*, 113 S. Ct. at 2586-87.

97. See *id.* at 2587.

98. See 15 U.S.C. § 13(a) (1988). The statute reads in pertinent part:

[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

99. *Id.*

100. See, e.g., *American Motors Corp. v. FTC*, 384 F.2d 247, 251 (6th Cir. 1967) (finding discrimination justified based on selling and delivery cost savings), *cert. denied*, 390 U.S. 1012 (1968).

101. See Hansen, *supra* note 83, at 1145.

102. See 15 U.S.C. § 13(b) (1988). The statute reads in pertinent part:

That nothing herein . . . shall prevent a seller rebutting the prima-facie case . . . by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made *in good faith* to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. (emphasis added).

103. Under the good faith standard, it is unnecessary to show that the price reduction at issue actually met a competitive price so long as the seller can show a reasonable basis for believing that it did. See *Falls City Indus. v. Vanco Beverage*, 460 U.S. 428, 439 (1983).

104. Frederick M. Rowe, *Pricing and the Robinson-Patman Act*, 41 Antitrust L.J. 98, 98 (1971); see also Earl W. Kintner, *A Robinson-Patman Primer* 193 (2d ed. 1979) ("This defense has the effect of sanctioning certain instances of discriminatory concessions and

courts traditionally expressed hostility to the "meeting-competition" defense,¹⁰⁵ the Supreme Court has favorably viewed the defense in recent decisions.¹⁰⁶ Nevertheless, much discretion is left to the trier of fact in evaluating the "good faith" of the seller in lowering prices to meet the competition.¹⁰⁷

Finally, the "changing-conditions" defense¹⁰⁸ permits a seller to implement a differential pricing policy where a change in market conditions¹⁰⁹ or in the marketability of the product occurs.¹¹⁰ The latter justification for the defense has enjoyed more success than the former one.¹¹¹

B. Trade Law: The Antidumping Statutes

This next section provides background on dumping and examines the substance and procedure of the American antidumping statutes, with emphasis on the Antidumping Act of 1921.

constitutes a congressional resolution to encourage 'hard competition'—lower prices—in certain competitive situations even though, by definition, adverse competitive effects continue.").

105. See Hansen, *supra* note 83, at 1151-52.

106. See, e.g., *Vanco Beverage*, 460 U.S. at 441 (holding that "the standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity") (internal quotations and citations omitted); *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 82 (1979) ("The test for determining when a seller has a valid meeting-competition defense is whether a seller can show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.") (internal quotations and citations omitted); *United States v. United States Gypsum Co.*, 438 U.S. 422, 451-53 (1978) (holding that a good faith belief, rather than absolute certainty, that the price cut is being offered to meet a competitor's equally low price, is the touchstone of the "meeting-competition" test). See generally Angela Nwaneri, Note, *The "Good Faith" Meeting Competition Defense to A Section 2(A) Violation of the Robinson-Patman Act: Area-Wide Pricing As A Valid Response to Competition*, 14 Wm. Mitchell L. Rev. 859 (1988) (evaluating the evidentiary requirements for applying the "meeting-competition" defense where a seller confronts a competitor by reducing prices in the entire area invaded or threatened). The author indicates a trend toward more favorable judicial construction of the "meeting-competition" defense.

107. See Hansen, *supra* note 83, at 1150-51.

108. See 15 U.S.C. § 13(a) (1988). The statute provides in pertinent part:

That nothing herein shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonable goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

109. Though this exception is no longer strictly limited to the specific provisos within the statute itself, the defense is limited to circumstances which are similar to those named in the statute. See *Moore v. Mead Serv. Co.*, 190 F.2d 540, 541 (10th Cir. 1951), *cert. denied*, 342 U.S. 902 (1952).

110. See Hansen, *supra* note 83, at 1154.

111. See *id.* at 1154 & nn.216-18. The few reported cases ruling on this defense usually involve discontinued items. See, e.g., *Comcoa, Inc. v. NEC Tel., Inc.* 931 F.2d 655, 661 (10th Cir. 1991) (holding technological obsolescence of goods or introduction of new product model constitute changed conditions).

1. Varieties of Dumping and the American Statutory Response

Dumping takes three forms.¹¹² The first, sporadic dumping, generally entails the disposal of an unexpected oversupply of merchandise in a foreign market as an alternative to a "fire sale" in the home market.¹¹³ The second type of dumping, intermittent, or short-term, is a more regular practice than sporadic dumping, but it is nonetheless confined to a relatively short period of time.¹¹⁴ Producers may engage in intermittent dumping to create customer goodwill, maintain foreign market share during a recession in the home market, discourage or eliminate competition in the market, or retaliate against foreign competitors who dump products in the producer's home market.¹¹⁵ The third type of dumping, continuous or long-term dumping, is defined as an ongoing practice to maximize economies of scale¹¹⁶ by maintaining full production.¹¹⁷ It is sometimes referred to as predatory dumping, though that term often refers to continuous dumping through which the producer intends to injure, eliminate, or prevent competition in a foreign economy.¹¹⁸ Predatory dumping, of course, may also be intermittent.¹¹⁹

The American antidumping laws seek to restrain foreign predatory behavior involving price discrimination between national markets.¹²⁰ The Antidumping Act of 1916¹²¹ provides a private right of action for victims of trade dumping. The law rarely has been pleaded, however. In fact, it was invoked only once, and unsuccessfully, during the first fifty years following its passage,¹²² though pending legislation may revitalize it.¹²³ The Antidumping Act of 1921,¹²⁴ also a source of considerable debate, is

112. See Pattison, *supra* note 6, §§ 1.02[1][a]-[c], at 1-4 to 1-5.

113. See *id.* § 1.02[1][a], at 1-4; N. David Palmeter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier*, in *Down in the Dumps*, *supra* note 8, at 64, 72 (describing "targeted dumping" as "an isolated, rifle-shot export sale at a very low price").

114. See Pattison, *supra* note 6, § 1.02[1][b], at 1-4 to 1-5.

115. See *id.*

116. In some cases an increase in production lowers cost per unit of output because production at a higher level may be more efficient. An increase in efficiency accompanying higher output is known as an "economy of scale." See Hovenkamp, *supra* note 17, § 1.1, at 2.

117. See Pattison, *supra* note 6, § 1.02[1][c], at 1-5.

118. See *id.*

119. See *id.*

120. See *supra* note 6.

121. Act of Sept. 8, 1916, c. 463 § 801, 39 Stat. 798 (codified at 15 U.S.C. § 72 (1988)).

122. See McGee, *supra* note 10, at 492 n.5 (citing Michael S. Knoll, *United States Antidumping Law: The Case For Reconsideration*, 22 *Tex. Int'l L.J.* 265, 268 n.22 (1987)).

123. Congress has recently considered proposed changes in the 1916 Act to encourage its implementation. See *supra* note 7 (discussing Sen. Metzenbaum's proposed "International Fair Competition Act").

124. Pub. L. No. 67-1, ch. 14, tit. II, 42 Stat. 11 (1921) (codified as amended at 19 U.S.C. §§ 160-71 (1976) (repealed 1979)). The 1921 Act was reincorporated into the Trade Agreements Act of 1979, § 2, Pub. L. No. 96-39, 93 Stat. 144, 147-48 (1979) (codified at 19 U.S.C. § 2503 (1988)), as amended by Pub. L. No. 98-573, 98 Stat. 2948 (1984).

the principal statute addressing dumping in the United States. Because dumping is condemned as an unfair practice under the GATT, the United States antidumping laws have a basis in international law.¹²⁵

2. The Antidumping Act of 1921

The Antidumping Act of 1921 ("Antidumping Act") addresses the dumping of merchandise¹²⁶ into the United States. The statute requires the complainant to plead two elements: (1) sales by foreign producers in the United States of commodities at "less-than-fair-value" ("LTFV"),¹²⁷ and (2) material injury,¹²⁸ the threat thereof,¹²⁹ or material retardation¹³⁰ of the establishment of a domestic industry by the LTFV sales. The law contains no intent requirement. Application of the Act involves elaborate procedural guidelines.¹³¹

Antidumping provisions are codified at 19 U.S.C. §§ 1673-1677k (1988 & Supp. III 1992) ["Antidumping Act"]. The Antidumping Act of 1921 was enacted amidst a national xenophobic spirit. At the time of passage, shortly after World War I, concerns abounded that Germany would launch an economic war to gain market share. See Bovard, *supra* note 10, at 112-13 ("Congressmen declaimed that there was flotilla of merchant ships loaded with German goods lurking a few miles outside of U.S. coastal waters, waiting to deluge the American market with cheap goods. In reality, no such flotilla existed.").

125. See Waller, *supra* note 7, § 12.01, at 12-7 to 12-8. Antidumping provisions are governed by Article VI of the GATT, which was substantially revised during the Uruguay Round of negotiations. See GATT 1993, *supra* note 14.

126. See 19 U.S.C. § 1673 (1988); Patrick Sullivan, *Antidumping Law & the Dumping of Services*, 24 N.Y.U. J. Int'l L. & Pol. 1677 (1992) (documenting the growth in the service sector of the global economy, arguing that the current antidumping laws do not address the dumping of services, and suggesting revisions in the law to address services provided by foreign firms at predatory prices).

127. 19 U.S.C. § 1673 (1988).

128. See 19 U.S.C. § 1673(2)(A)(i) (1988); 19 U.S.C. § 1677(7)(A) (1988) (defining "material injury" as "harm which is not inconsequential, immaterial, or unimportant").

129. See 19 U.S.C. § 1673(2)(A)(ii) (1988); 19 U.S.C. § 1677(7)(F) (1988) (defining threat of material injury).

130. See 19 U.S.C. § 1673(2)(B) (1988); Dong Woo Seo, *Material Retardation Standard in the U.S. Antidumping Law*, 24 Law & Pol'y Int'l Bus. 835 (1993).

131. PROCEDURE UNDER THE 1921 ACT

To initiate a dumping investigation, the complainant must simultaneously petition the International Trade Administration ("ITA") of the Department of Commerce and the International Trade Commission ("ITC"). See 19 U.S.C. § 1673a(b) (1988). The ITA may also self-initiate an investigation. See 19 U.S.C. § 1673a(a) (1988 & Supp. IV 1992). Nearly all cases begin by private petition. See Pattison, *supra* note 6, § 2.03, at 2-6. Any "interested party" may bring a complaint before the ITA. See 19 U.S.C. § 1677(9) (1988) (defining "interested party"). Complaints are commonly brought by unions, representatives of domestic manufacturers, and trade associations.

Within twenty days of the filing of the petition, the ITA must determine whether the petition supports a preliminary finding of sales at LTFV. See 19 U.S.C. § 1673a(c) (1988); 19 C.F.R. §§ 353.12-13 (1993). The ITA must determine whether the petition contains information reasonably available to the petitioner supporting the allegations. See *id.* If the determination is affirmative, the ITC formally commences an investigation. See 19 U.S.C. § 1673a(c)(2) (1988). If the determination is negative, the petition is dismissed. See 19 U.S.C. § 1673a(c)(3) (1988). The ITC then has forty-five days to make a preliminary determination whether a domestic industry has been injured, threatened with material injury, or the establishment of a domestic industry has been materially retarded

Determining fair value¹³² under the Act requires a direct comparison of the American sale price¹³³ of a product with the price charged for that product, or a "like product,"¹³⁴ in the producer's home market, or, in some cases, with the sale price of the product in the market of a third country.¹³⁵ The dumping margin is calculated by subtracting the price of

as a result of the importation of the merchandise allegedly being dumped. See 19 U.S.C. § 1673b(a) (1988). If at this time the ITC makes a negative determination, the investigation is terminated. See *id.* Following a positive injury determination, the ITA has 160 days to make a preliminary determination, based on the "best information available," whether sales have been made at, or are likely to occur at, LTFV. 19 U.S.C. § 1673b(b)(1)(A) (1988). At this time a preliminary dumping margin is calculated. See *id.* The time period may be shortened to as little as 100 days for repeat offenders, see 19 U.S.C. § 1673b(b)(1)(B)(ii) (1988), and may be extended to 210 days for complex investigations if the petitioner makes a timely request for an extension. See 19 U.S.C. § 1673b(c)(1) (1988). The ITA then has seventy-five days to render a final determination of dumping margins. See 19 U.S.C. § 1673d(a)(1) (1988). The time allotted for final determination may be extended for up to 135 days. See 19 U.S.C. § 1673d(a)(2) (1988). The ITC has forty-five days from this date to make a final injury determination. See 19 U.S.C. § 1673d(b)(2)(B) (1988). In any event, the ITC must make this final injury determination within 120 days of its own preliminary injury findings. See 19 U.S.C. § 1673d(b)(2)(A) (1988). After a final affirmative determination, relief is granted in the form of duty, equal to the dumping margin, imposed on the incoming product. The importer must then post a cash deposit. See 19 U.S.C. § 1673e(a)(3) (1988). Posting of a bond or other security is permitted in certain instances. See 19 U.S.C. § 1673e(c) (1988).

The Customs Department collects imposed duties. See 19 U.S.C. § 1673e(a)(1) (1988 & Supp. IV 1992). The dumping order issued governs incoming merchandise at least until the foreign shipper can demonstrate two years of no LTFV sales. See 19 U.S.C. § 1675(b)(1),(2) (1988). Under the 1921 Act, dumping does not give rise to a private right of action, so an aggrieved domestic producer is not directly compensated after a final affirmative dumping determination. See *supra* note 7 (noting a recent proposal to provide a viable private right of action for dumping).

132. See 19 U.S.C. § 1673 (1988).

133. See 19 U.S.C. § 1677a (1988) ("United States price"); Harvey M. Applebaum & David R. Grace, *U.S. Antitrust Law and Antidumping Actions Under Title VII of the Trade Agreements Act of 1979*, 56 Antitrust L.J. 497, 502-07 (1987) (providing an overview of Commerce Department "fair value" investigations). The U.S. sale price of a commodity is determined in one of two ways: "purchase price" is used when the exported commodity is purchased by an unrelated buyer prior to importation into the United States. See 19 U.S.C. § 1677a(b) (1988 & Supp. 1994). When the foreign producer and U.S. importer are related, the price at which the related party sells the commodity in the United States is used. See 19 U.S.C. § 1677a(c) (1988); 19 C.F.R. § 353.10(c) (1993). This is known as the "Exporter's Sales Price" ("ESP"). *Id.* In both cases, the relevant price is "that of the first arm's length transaction with respect to the merchandise under review." Applebaum & Grace, *supra*, at 503. "The essential distinction between purchase price and ESP sales price is whether that arm's length transaction takes place before or after importation" into the United States. *Id.*

134. 19 U.S.C. § 1677(10) (1988 & Supp. 1994) (defining "like product"). See *infra* Part II.C. and accompanying text, discussing problems in causation under the antidumping laws, stemming in part from ITC analysis in making "like product" determinations.

135. See Applebaum & Grace, *supra* note 133, at 503-06 (reviewing "foreign market value"). The "home market price" is not used in the comparison when the volume of sales in the home market is "so small in relation to the quantity sold for exportation to [countries other than the United States] . . . that it is an inadequate basis for [determining foreign market value]." 19 C.F.R. § 353.48(a) (1993). The cut-off point is 5%—when home market sales equal less than 5% of the volume of exports to the United States, the "home market" price is replaced in the comparison with the price of the commodity on

the product on the American market from the home market price and expressing the result as a percentage. For example, if Fuji sells film in New York for \$1 per roll and sells the same product in Tokyo for \$1.50 per roll, it has made LTFV sales under current law.¹³⁶ A related issue in determining fair value is the appropriate timing for making price comparisons because every dumping complaint necessarily relies on a foreign exchange rate to establish the home market price in dollars.¹³⁷ Because exchange rates fluctuate daily, the same comparison may result in a LTFV finding on one date and not on another.¹³⁸ An antidumping complaint also must assert material injury, or threat thereof, to an entire industry; injury to a single producer is insufficient.¹³⁹ Where a violation of the Antidumping Act is found, the remedy under the Antidumping Act, a duty equal to the "margin of dumping,"¹⁴⁰ may be imposed.¹⁴¹

the markets of third countries. *See id.* In the absence of adequate sales in the United States or third countries, fair value is instead based on a "constructed-value" analysis of the producer's costs. *See infra* Part II.G.

Under the trade laws, below-cost sales by a foreign producer are not essential elements of the dumping inquiry, unlike predatory-pricing analysis under the antitrust laws. *See supra* notes 51-78 and accompanying text; 19 U.S.C. § 1677b(b) (1988 & Supp. 1994) ("Sales at less than cost of production"); 19 C.F.R. § 353.51 (1993) (providing that such sales are disregarded in calculating foreign market value).

The trade laws also include provisions for determining fair value when the foreign producer exports from a country with a non-market economy. *See* 19 U.S.C. § 1677b(c) (1988 & Supp. 1994); 19 C.F.R. 353.52 (1993).

136. Thus: (home market price - United States price) ÷ United States price = margin of dumping, which is expressed as a percentage. Therefore, where the home market price is \$1.50 and the United States price is \$1.00, the margin of dumping equals fifty percent. This calculation, however, is biased in favor of finding a positive dumping margin: the home market price is expressed as an *average* of sales over a six-month period. This average price is then compared with *individual* sales prices in the United States, instead of the *average price* of these sales over the same period. *See infra* Part II.D. (discussing this statistical bias). *See also* John H. Jackson, *Dumping in International Trade: Its Meaning and Context, in Antidumping Law and Practice, A Comparative Study 2* (John H. Jackson & Edwin A. Vermulst ed., 1989) ["Comparative Study"].

137. *See* 19 U.S.C. § 1677b(a)(1) (1988 & Supp. 1994) (providing that the "foreign market value" is the price in the home market at the time the merchandise is first sold in the U.S.); *see infra* Part II.F.

138. *See, e.g.,* James P. West, Comment, *Currency Conversion in Antidumping Investigations: The Floating Exchange Rate Dilemma*, 16 N.C. J. Int'l L. & Com. Reg. 105 (1991) (focusing on the adaptations of the antidumping laws' currency conversion provisions to a system of floating exchange rates and offering an alternative currency conversion methodology); *Steel: AIIS President Sees Uncertainty For U.S. Steel Trade, MSA Chances*, 10 Int'l Trade Rep. (BNA) No. 47, at 2008 (Dec. 1, 1993) (stating that at the Multilateral Steel Agreement, negotiations discussions included the possibility of applying rolling averages to neutralize the effects of volatile exchange rates on dumping margins).

139. *See* 19 U.S.C. § 1673 (1988 & Supp. 1994). Since dumping petitions often result in a finding of sales at LTFV, the success of a petition usually turns on the petitioner's ability to prove injury—harm to domestic producers. *See* J. Michael Finger & Tracy Murray, *Policing Unfair Imports: The United States Example*, 24 J. World Trade, August 1990, at 39; Finger, *supra* note 14, at 37.

140. Pattison, *supra* note 6, § 1.03[3], at 1-12.

141. *See* 19 U.S.C. § 1673 (1988).

II. PROBLEMS WITH EXISTING ANTITRUST AND ANTIDUMPING LAWS IN DEFINING AND DETERRING UNFAIR TRADE

This Part examines the extent to which the antitrust and antidumping laws operate at odds, and the weaknesses of each in defining and deterring injury from unfair foreign trade practices. This Part also illustrates several aspects of the antidumping regime that have been criticized as protectionist.

A. *Jurisdictional Obstacles Inhibit Effective Application of Antitrust Laws to Foreign Producers*

The antitrust laws apply well-settled principles of economics to define unfair trade. They employ price-cost tests and definitions of relevant markets and market power to identify unfair trade practices.¹⁴² Yet, the application of American antitrust laws to foreign predatory activity poses significant jurisdictional obstacles. "Few subjects in international law raise such incorrigible conflicts of interest as the exercise of extraterritorial jurisdiction in the antitrust context."¹⁴³ In recent years, the United

142. See *supra* Part I.A.

143. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 Va. J. Int'l L. 1, 1 (1992).

Application of the Sherman Act to anticompetitive activity abroad is predicated on the Commerce Clause of the Constitution, which provides Congress with the power to regulate commerce with foreign nations. See U.S. Const. art. 1, § 8, cl. 3. In interpreting the constitutional limitations on application of the Sherman Act, the Supreme Court has held that the Act extends to the full reach of the Commerce Clause. See *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329 n.10 (1991) ("It is firmly settled that when Congress passed the Sherman Act, it 'left no area of its constitutional power [over commerce] unoccupied.'") (citations omitted). The full scope of the Sherman Act has never been applied to international trade, however, because of concerns for the potential impact on international law, comity considerations, and possible retaliation by foreign governments against American businesses operating abroad. See Waller, *supra* note 7, § 5.01, at 5-2. Thus far, only one international tribunal has directly considered the extent of extraterritorial jurisdiction, and that decision did not delineate any clear boundaries. See S.S. "Lotus" (*Fr. v. Turk.*), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).

The Supreme Court has gradually expanded the jurisdiction of the Sherman Act over foreign anticompetitive conduct. Compare *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-59 (1909) (holding that the antitrust laws do not reach conduct occurring outside the United States); *Id.* at 356 ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.") with *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (holding that conduct occurring partly within the United States could form the basis of an antitrust suit, though conspirators were aided by discriminatory legislation abroad) and *United States v. Aluminum Co. of Am.* ["*Alcoa*"], 148 F.2d 416, 443-44 (2d Cir. 1945) (Hand, J.) (abandoning the situs requirement altogether and instead choosing as the jurisdictional test the intended effects in the U.S. market of the complained-of pricing and production decisions). In *Alcoa*, Judge Hand reasoned that agreements made outside of the United States have the same effect as similar agreements entered into within the American border. Since "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends," *id.* at 443, he concluded that Congress intended to apply the Act to conduct abroad so long as the intended effect of that conduct is prohibited by the Act; that is, economic effects within the United States

States Department of Justice has increasingly asserted jurisdiction over

are indistinguishable from actual conduct within the nation's boundaries. Successive courts interpreted the *Alcoa* "intended effects" test expansively, paying little attention to intent. See Waller, *supra* note 7, § 5.03, at 5-4 n.14. Foreign governments then retaliated through legal and diplomatic channels and enactment of blocking statutes. See *infra* text accompanying note 146.

The Second Restatement of Foreign Relations Law addressed perceived abuses of the intended effects test. Section 18 of the Second Restatement held that a state has jurisdiction to apply a rule of law attaching legal consequences to conduct occurring outside its borders that has effects within its territory, if either (a) other states with reasonably developed legal systems recognize the conduct and its effect as constituent elements of a crime or tort, or

(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Restatement (Second) Foreign Relations Law § 18 (1965). Recognizing that more than one state may have jurisdiction over a dispute, the American Law Institute opined that a court should apply a balancing of interests test to avoid conflict between possibly contradictory legal rulings. See *id.* § 40.

The court in *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976) ["*Timberlane I*"], on appeal following remand, 749 F.2d 1378 (9th Cir. 1984) ["*Timberlane II*"], cert. denied, 472 U.S. 1032 (1985), adopted a comity analysis based on a balancing of American and foreign interests. The court rejected the intended effects test for its failure to consider the interests of other nations. See *Timberlane I*, 549 F.2d at 611-12. In its place, the court proposed a three-part test: (1) there must be a restraint affecting or intended to affect foreign commerce of the United States, see *id.* at 613, (2) a restraint of sufficient magnitude "to present a cognizable injury" to the plaintiff, *id.*, and (3) the court must consider the propriety of asserting extraterritorial jurisdiction as a matter of international comity and fairness. See *id.* The court then set out several factors for determining whether to exercise jurisdiction. See *id.* at 614-15. See also *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (setting out a variation of the *Timberlane* test, using a ten-factor balancing of interests test); Restatement (Third) Foreign Relations Law § 402 (1987) (codifying a variation on the *Timberlane* test). The Third Restatement holds that a balancing of U.S. and foreign national interests is required as an affirmative element of jurisdiction, and not merely as an exercise in comity. See *id.* § 403(3). It provides for jurisdiction over conduct intended to produce significant effects within a jurisdiction, or that in fact produced such effects, if such jurisdiction is "reasonable." See *id.* §§ 402, 403(1). In addition, several factors are set out to measure the reasonableness of jurisdiction in a given case. See *id.* § 403(2). Courts have not universally endorsed the balancing of interests approaches set out in *Timberlane*, *Mannington Mills*, and the Restatement. See, e.g., *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981) (adopting a variation of the *Alcoa* intended effects test, requiring proof of an actual anticompetitive effect "upon American commerce, either foreign or interstate,") to confer jurisdiction over conduct occurring outside the United States); *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1254 (7th Cir. 1980) (rejecting a defense under the act of state doctrine and applying the *Alcoa* intended effects test); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 945-53 (D.C. Cir. 1984) (rejecting both comity and interest balancing approaches, the reviewing court affirmed the jurisdiction of the district court, finding that U.S. and British courts shared concurrent jurisdiction). The defendants, instead of actively raising all jurisdictional defenses in U.S. District Court, chose to initiate suits in foreign tribunals solely to impede the district court's adjudication of the litigation. The case highlights the United Kingdom's historical antipathy to U.S. antitrust policy affecting businesses based in the U.K. One commentator has noted that the *Laker* case "suggests the inherent limitations of a comity approach" to extraterritorial jurisdiction. Waller, *supra* note 7,

foreign defendants whose conduct produces adverse economic effects in the United States.¹⁴⁴ Moreover, the Supreme Court has held that the antitrust laws may be applied to anticompetitive acts occurring abroad even where a foreign state condones or openly encourages the activity at issue.¹⁴⁵ Foreign sovereigns have reacted to this aggressive enforcement of American antitrust laws by enacting retaliatory laws designed to thwart the application of American antitrust laws to their nationals. These statutes either restrict the production of documents ("discovery blocking statutes") or the satisfaction of judgment ("judgment blocking statutes").¹⁴⁶ Accordingly, faced with a choice between bringing an antitrust action or a trade complaint, a plaintiff will almost invariably choose to file a trade complaint to avoid such jurisdictional obstacles.¹⁴⁷

B. The Antidumping Laws, However, Are Inexact in Determining Intent to Injure, and Injury to, Competition

The trade laws escape the jurisdictional problems inherent in the extra-territorial application of antitrust laws.¹⁴⁸ "Injury," as defined under the antidumping laws, however, has no basis in economic theory,¹⁴⁹ because

§ 5.08, at 5-12. See also Jeffrey L. Snyder, *International Competition: Toward A Normative Theory of United States Antitrust Law and Policy*, 3 B.U. Int'l L.J. 257 (1985) (reviewing the *Laker Airways* decision and offering proposals for resolving international antitrust conflicts); Marques Mendes, *supra* note 1, at 94-98 (discussing the defenses of foreign sovereign immunity, act of state, and foreign sovereign compulsion).

144. See Waller, *supra* note 7, § 5.09, at 5-15 to 5-18. In fact, on April 3, 1992, the Department of Justice ("DOJ") announced a change in antitrust enforcement policy: extraterritorial enforcement of U.S. laws would be extended to foreign business activity occurring abroad which harms U.S. exporters, if such conduct would have violated U.S. law had it occurred domestically. See Lori B. Morgan & Helaine S. Rosenbaum, *U.S. Department of Justice Antitrust Enforcement Policy*, 34 Harv. Int'l L.J. 192, 192 (1993) (discussing the change in DOJ policy, likely reactions of foreign sovereigns, and the potential diplomatic costs and deleterious long-run effects on foreign trade negotiations and U.S. trade). This marked a departure from DOJ policy between 1988 and 1992, which had precluded DOJ antitrust prosecutions of foreign business activity unless the anticompetitive conduct directly harmed consumers in the United States. See *id.*

Pilkington plc, a British manufacturer, was the first foreign target of the change in DOJ policy. Pilkington, which dominates the world's \$15 billion-a-year flat glass industry, settled accusations of closing off foreign markets to U.S. rivals and strictly limiting the use of commercial glass technology by American rivals, according to the proposed consent decree, filed in the U.S. District Court for The District of Arizona. See *British Glass Manufacturer Settles Case Attacking Restrictions on U.S. Exporters*, 66 Antitrust & Trade Reg. Rep. (BNA) No. 1666, at 617 (June 2, 1994).

145. See, e.g., *Hartford Fire Ins. Co. v. Ca.*, 113 S. Ct. 2891, 2910 (1993) ("[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct.") (quoting Restatement (Third) Foreign Relations Law § 415, cmt. j (1987)).

146. See Waller, *supra* note 7, § 5.03, at 5-4 to 5-5 & n.15.

147. See Marques Mendes, *supra* note 1, at 166.

148. Under the trade proceedings, the ITA determines whether sales have fallen below LTFV, the ITC determines injury, and the Customs Department assesses a duty on goods as they arrive in the United States. See *supra* note 131.

149. See *supra* notes 17, 25, 51-78 and accompanying text; Cass, *supra* note 1, at 877

the Commerce Department arrives at LTFV determinations without regard to price-cost relationships.¹⁵⁰ Under the antidumping laws, a petitioner need not demonstrate that the respondent has either a specific intent to monopolize,¹⁵¹ a dangerous probability of success, or the ability to affect market prices or to recoup losses from below-cost pricing,¹⁵² even though predatory dumping is analogous to attempted monopolization by predatory pricing, actionable under section 2 of the Sherman Act.¹⁵³ Thus, the current antidumping regime permits a domestic producer to obtain relief from *efficient* foreign competitors that encroach upon the domestic producer's market power, a result clearly prohibited under antitrust law.¹⁵⁴ The antidumping laws also allow for affirmative findings when the prices of goods imported into the United States are below the average *total* cost of production, whereas an antitrust court does not allow such a result without proof of predatory intent.¹⁵⁵ Despite the efforts of the Justice Department and Federal Trade Commission to encourage the Commerce Department to apply antitrust analysis in trade cases, the Commerce Department has failed to do so.¹⁵⁶ Thus, a

(noting that the primary difference between the antitrust and trade law approaches to price discrimination and predation is the extent to which economic analysis informs their respective processes); Davey, *supra* note 14, at 8-2, 8-4 to 8-17 (suggesting that the antidumping laws have no basis in economic theory or under generally accepted principles of international trade law); Elzinga, *supra* note 1, at 443 (referring to the "fair value" test under the antidumping laws, Elzinga comments that "trade policy has an abiding concern with costs economists perceive as bygone"); Thomas J. Schoenbaum, Dean Rusk Center for International and Comparative Law, Antidumping and Countervailing Duties and the GATT: An Evaluation and a Proposal for a Unified Remedy for Unfair International Trade 2 (1987) (declaring the antidumping laws an obstacle to efficient operation of markets).

150. See *supra* notes 127-39 and accompanying text.

151. See, e.g., Applebaum, *supra* note 1, at 412 ("We should next put to rest the media concept that predatory dumping exists. It may exist, but none of the trade laws require any showing of predatory intent whatsoever." (citation omitted)). Applebaum notes that when the ITC makes injury determinations, it does not consider the motives of foreign producers, nor does the Department of Commerce consider motive in LTFV calculations. See *id.* at 412-13.

152. See Cass, *supra* note 1, at 879-80 & n.7.

153. See *supra* notes 51-78 and accompanying text.

154. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-90 (1977) (finding that where defendant's acquisitions did not produce anticompetitive result, plaintiff could not recover under antitrust laws for potential profits lost due to competitor's entry into market and subsequent deconcentration of that market); Davey, *supra* note 14, at 8-33 to 8-36 (noting that dumping complaints are almost invariably applied in the United States to protect heavily concentrated industries).

155. See Richard Boltuck & Robert E. Litan, *America's "Unfair" Trade Laws, in Down in the Dumps*, *supra* note 8, at 1, 10; Cass, *supra* note 1, at 879 n.7 (noting that dumping may be found under current procedure even where prices of imported goods are conclusively above the average variable cost of production).

156. See Applebaum & Grace, *supra* note 133, at 515-16 & n.82 (noting that the Antitrust Division of the Department of Justice appeared in at least nine antidumping investigations between 1969 and 1975, urging the application of antitrust concepts in weighing injury, particularly where the complaining U.S. industry was concentrated. These efforts were largely in vain.). Applebaum and Grace also note that FTC attorneys have recently appeared, to no avail, before the ITC and Commerce Department. See *id.* at 516-17.

foreign producer may be penalized for injury to domestic producers even though a foreign producer's pricing policy might reflect a legitimate reaction to competition under well-settled principles of microeconomics.¹⁵⁷ Not surprisingly, many commentators assert that the antidumping laws reflect an overriding concern with discouraging injury to specific competitors in the marketplace. This is a result directly at odds with antitrust law, which is concerned with injury to competition in general, rather than injury to specific competitors.¹⁵⁸

C. *The Antidumping Laws Employ Inadequate Causation Analysis*

The antidumping laws employ inadequate causation analysis in assessing the effects of price discrimination on American producers of competing commodities.¹⁵⁹ Such deficient analysis follows from the International Trade Commission's failure to take a fact-driven, empirical approach¹⁶⁰ to defining the relevant market,¹⁶¹ which consists of the producers in the domestic industry affected by the complained-of dumping. Just as defining the relevant market is a crucial step in antitrust analysis,¹⁶² defining the relevant market in a dumping investigation is equally essential.¹⁶³ Market definition under the antidumping laws is performed on an ad-hoc basis,¹⁶⁴ in contrast to antitrust market definition under the Merger Guidelines.¹⁶⁵

In an antidumping investigation, the injured domestic industry is defined as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."¹⁶⁶ The term "like product" is then defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation. . . ."¹⁶⁷ This definition is circular.¹⁶⁸ Accordingly, a foreign producer may be sanctioned and duties may be levied

157. See Cass, *supra* note 1, at 879-80 & n.7.

158. See *supra* note 23 and accompanying text; Finger, *supra* note 14, at 38 (noting that "an objective definition of 'unfair' neither is nor ever has been the basis for determining when the U.S. government will act against imports").

159. See Cass, *supra* note 1, at 881.

160. See *id.*

161. See *supra* note 25; see also Merger Guidelines, *supra* note 17, ¶ 13,103, at 20,551-552.

162. See *supra* note 25.

163. See Cass, *supra* note 1, at 881-84.

164. See Kelly, *supra* note 25, at 892-97. Kelly analogizes the current ITC methodology for defining the aggrieved domestic industry to antitrust definitions of "relevant market" prior to 1982, governed by *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

165. See Merger Guidelines, *supra* note 17, ¶ 13,103, at 20,551-552.

166. 19 U.S.C. § 1677(4)(A) (1988).

167. 19 U.S.C. § 1677(10) (1988). Compare market definition under the Merger Guidelines, applying the "five-percent" test. See *supra* note 25.

168. See N. David Palmeter, *Injury Determinations in Antidumping and Countervailing Duty Cases—A Commentary on U.S. Practice*, 21 J. World Trade L., Feb. 1987, at 14-15.

against that producer's products, even though the foreign producer is not competing with the petitioning domestic industry at all. Hence, the ITC's determinations of "domestic industry" and "like product" may cause illogical and unjust results.¹⁶⁹

D. *The Less-Than-Fair-Value Calculus Raises Numerous Concerns*

As previously discussed, the Commerce Department computes a dumping margin on an individual sale in the United States by subtracting the price of the commodity to a customer in the United States from its foreign market price. The result is expressed as a percentage of the United States price.¹⁷⁰ These calculations, however, are replete with statistical biases in favor of finding that dumping has occurred.¹⁷¹ For example, two elements of the Commerce Department's measurement rules substantially increase the probability that foreign producers will be found to have made sales at LTFV. First, in arriving at LTFV calculations, the Commerce Department discards the offsetting effect of a foreign producer's American sales at prices *exceeding* the foreign market price (a "negative dumping margin").¹⁷² Second, in arriving at the foreign pro-

169. One commentator illustrates the problems associated with defining "like product":

A galvanized carbon steel sheet is not "like" an ungalvanized carbon steel sheet, but a galvanized carbon steel wire nail is "like" an ungalvanized carbon steel wire nail.

Carbon steel wire rope and stainless steel wire rope are like products, as are galvanized and ungalvanized wire rope, but a porcelain-coated carbon steel cooking pan is not "like" a stainless steel cooking pan—yet all stainless steel pans are "like products", even though they may be combined with other metals such as copper or aluminum. Carbon steel wire rod and stainless steel wire rod, however, apparently are not "like products."

Pipe that is welded is not "like" pipe that is seamless, unless the pipe is for use by the oil industry. In the pipe industry the contrasts indeed are extreme. Circular *standard* pipes are not "like" circular *line* pipes. But all pipes destined for the oil industry are considered one "like product." Thus, "oil well tubing", which is used to conduct oil or gas to the surface of the earth; "drill pipe", which is used to transmit power from the surface to the drilling point below the surface; "casing" which surrounds these and prevents the sides of the hole from collapsing during the drilling; and a semi-finished product called "green tube" all are one "like product."

Id. at 15-16 (citations omitted). See also Bovard, *supra* note 10, at 119-20 (illustrating some absurdities resulting from some of the Commerce Department's past "like product" determinations, citing, for example, a decision that equated new forklifts sold in Japan with three-year old forklifts sold in the United States).

170. See *supra* note 136 and accompanying text.

171. See *generally* Down in the Dumps, *supra* note 8 (documenting the litany of procedural abuses inherent in the Commerce Department's investigations). The authors note that these procedures are biased toward finding higher margins of dumping, and therefore higher import duties, and that, in some cases, such biases violate the GATT. These authors contend that many of these biases can easily be removed through changes in administrative practice, without legislative change.

172. Several commentators have documented this procedural bias. See, e.g., N. David Palmetter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier*, in Down in the Dumps, *supra* note 8, at 64, 71; Schoenbaum, *supra* note 149, at 13-14.

ducer's "home market price," the Commerce Department calculates an average of the price of the product in the home market over a six-month period.¹⁷³ This *average* is then compared with the prices for *individual* sales of the like product in the United States over the same period.¹⁷⁴ Since any negative margins are discarded in the analysis, and the six-month *average* price of the commodity in the home market is compared with the price on *individual* sales to customers in the United States, the Commerce Department may find positive dumping margins even where the average price charged by an importer to American consumers meets or exceeds the average price charged in the home market.¹⁷⁵ A simple example illustrates these biases in favor of finding positive dumping margins.¹⁷⁶

E. *The Best-Information-Available Provision Is Prejudicial to the Foreign Respondent*

The best-information-available provision is a default rule governing

173. See 19 C.F.R. § 353.42(b) (1993) (declaring that antidumping investigations encompass an importers's sales in the United States and in the home market for the previous six months); N. David Palmeter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier*, in *Down in the Dumps*, *supra* note 8, at 64, 71 (demonstrating, through specific examples, statistical biases in LTFV calculations).

174. See Cass, *supra* note 1, at 880-81.

175. See Applebaum & Grace, *supra* note 133, at 506; N. David Palmeter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier*, in *Down in the Dumps*, *supra* note 8, at 64, 72 (noting that the Commerce Department may overcome this bias in computing the dumping margins simply by comparing averages of home-market sales prices with averages of U.S. sales prices, but that opponents of this revision argue that it does not deter "targeted dumping," also known as "spot," or "rifle-shot" dumping. This practice is described as "an isolated, rifle-shot export sale at a very low price."). *Id.* at 72. U.S. producers trading solely in the domestic market, however, often engage in price discrimination for legitimate reasons, for example, to respond to fluctuations in supply and demand. See Richard Boltuck & Robert E. Litan, *America's "Unfair" Trade Laws*, in *Down in the Dumps*, *supra* note 8, at 1, 14; Bovard, *supra* note 10, at 120-22 (demonstrating, through specific examples, the bias in the Commerce Department's averaging). Revisions in Article VI of the GATT disallow comparisons of average sales prices with individual sales prices in most cases. See GATT 1993, *supra* note 14.

176. The "weighted-average dumping margin" is calculated by dividing the total dollar value of the producer's margins by the total dollar value of its U.S. sales. "Negative margins," however, are disregarded in the analysis. For example:

Foreign Market Value	U.S. Sales/U.S. Price	Dumping Margins
\$100/unit*	10 units at \$75 each	33% (\$25/unit)
	10 units at \$100 each	0% (\$0/unit)
	10 units at \$125 each	-20% (-\$25/unit)

* In this example, the foreign market value of \$100/unit is the *average* of thirty sales in the home market over a six month period: ten at \$133/unit, ten at \$100/unit, and ten at \$67/unit. This average is then compared to the prices of *individual* U.S. sales.

The weighted-average dumping margin is thus calculated:

Total dollar value of margins = $10 \times 25 = \$250$

Total dollar value of U.S. sales = $750 + 1000 + 1250 = \$3,000$

Weighted-average dumping margin = $250/3000 = 8.34\%$

See Applebaum & Grace, *supra* note 133, at 506.

antidumping investigations. It provides that when a foreign producer refuses or is unable to provide information requested by the Commerce Department during an antidumping investigation, the Commerce Department will rely upon the best information otherwise obtainable.¹⁷⁷ In practice, this means that the Commerce Department will use the information provided by the complaining domestic industry,¹⁷⁸ which is naturally most unfavorable to the foreign producer. Several commentators have recognized the onerous burden¹⁷⁹ on a foreign producer in defending an antidumping claim, noting that investigations require massive amounts of data to be presented in an extremely short amount of time in accordance with demanding rules of form.¹⁸⁰ In recent years, the Commerce Department has significantly raised the documentation requirements of responding to antidumping complaints.¹⁸¹ In fact, several recent cases demonstrate the inability of major multinational companies to meet the document demands of the Commerce Department.¹⁸² Consequently, foreign respondents find that the Commerce Department adopts the complaining domestic industry's information simply because the respondent cannot produce all the required information within Commerce Department deadlines. This provision has attracted considerable criticism,¹⁸³ and the now-completed negotiations of the GATT at the Uruguay Round, if implemented by Congress, would limit its use.¹⁸⁴

177. See 19 U.S.C. § 1677e(c) (1988).

178. The Commerce Department has stated that "[t]he best information available may include the factual information submitted in support of the petition or subsequently submitted by interested parties." 19 C.F.R. § 353.37(b) (1993).

179. See *supra* note 131 and accompanying text, documenting the elaborate procedural framework of the Antidumping Act and strict statutory time limits.

180. See N. David Palmeter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier*, in *Down in the Dumps*, *supra* note 8, at 64, 67-69 & nn.9-12 (noting that, among other requirements, all sales data must be submitted on nine-track computer tape, specifically coded with "either EBCDIC or BCD alphanumeric," capabilities which are not available to every foreign respondent). Some companies, simply because of their own in-house record-keeping procedures, find these requirements impossible to meet. See *id.* at 70 & n.16. Respondents who cannot comply with these requirements risk having the Commerce Department reject their responses and make decisions based on the "best information available."

181. See *id.* at 70 (noting that some respondents find that "[t]he administrative burden simply of furnishing the required information within the required time in the required form . . . [is] overwhelmingly difficult").

182. Many commentators view the Commerce Department's deadlines as unreasonable. See *id.* (noting that Matsushita, Mitsui, SKF, and Toshiba were unable to meet Commerce's information requirements).

183. See, e.g., Schoenbaum, *supra* note 149, at 1.

184. See *Latin America: Brazil's Government Lauds Uruguay Round; But Private Sector Reaction Remains Mixed*, 10 Int'l Trade Rep. (BNA) No. 50, at 2140 (Dec. 22, 1993) (noting that the provision was frequently applied against Brazilian steel exporters in 1993, with damaging (and arguably unfair) consequences). Revisions in Article VI of the GATT place limits on applying the "best information available" provision. See GATT 1993, *supra* note 14.

F. *Current Commerce Department Procedures Permit a Finding That a Foreign Producer Is Liable for Dumping Solely on the Basis of Exchange Rate Fluctuations*

The LTFV determination requires a direct comparison of domestic and home market sales prices of the "like product."¹⁸⁵ Fluctuations in the exchange rates affect this determination¹⁸⁶—a decline in the value of the dollar on world currency markets can create an apparent increase in the home market price.¹⁸⁷ Accordingly, a foreign producer may be liable for dumping when the dollar declines in value, though neither the American nor the foreign sales price has changed.¹⁸⁸

In dumping investigations, the Commerce Department adopts the exchange rates set quarterly by the Federal Reserve Bank.¹⁸⁹ The Commerce Department does not depart from the Federal Reserve quarterly exchange rates unless, on any particular day, the daily rate¹⁹⁰ varies more than five percent from the Federal Reserve quarterly rate.¹⁹¹ In that case, the Commerce Department applies the daily rate.¹⁹² The Commerce Department exchange rate policy, however, may cause some un-

185. See *supra* text accompanying notes 132-36.

186. See *supra* notes 137-38 and accompanying text. Proposed changes in the GATT at the recently completed Uruguay Round would curtail such abuses.

187. See Keith Bradsher, *Kodak Asks 275% Tariffs on Some Fuji Imports*, N.Y. Times, Sept. 1, 1993, at D1 (noting that Kodak's request for steep tariffs is one of the first major cases where an American competitor argues that a Japanese producer should raise prices to reflect the yen's rise against the dollar, and that petitions by other major American manufacturers may follow).

188. The following example illustrates how fluctuations may artificially create the appearance of dumping: dumping is currently determined by comparing the price of a commodity in the United States with its "home market" price.

$$\frac{\text{home market price}}{\text{units of foreign currency per } \$\text{US}} = \text{equivalent } \$\text{US price}$$

SCENARIO A (NO DUMPING VIOLATION):

\$1 = 100¥

1 roll *FUJI* film, in Tokyo, costs 100¥, the equivalent of \$1.

1 roll of *FUJI* film is sold for \$1 on the US market.

The US price, \$1, is not less than 100¥, the "home market" price. Therefore, under current law, no dumping has occurred.

SCENARIO B (DUMPING VIOLATION):

\$1 = 50¥

1 roll *FUJI* film, in Tokyo, costs 100¥, now equivalent to \$2.

1 roll of *FUJI* film is sold for \$1 on the US market.

The US price, \$1, is less than 100¥, the "home market" price. Therefore, under current law, dumping occurs simply when the dollar falls relative to the yen, though neither the U.S. nor the home market price has changed.

189. See N. David Palmeter, *Exchange Rates and Antidumping Determinations*, 22 J. World Trade, Apr. 1988, at 73, 74.

190. The daily rate is the rate determined on world currency exchanges by market forces. These rates fluctuate daily, and are quoted in financial newspapers. Thus the daily rate will often differ from the Fed's established quarterly rates.

191. See Palmeter, *supra* note 189, at 77.

192. See *id.*

warranted findings of dumping: the Commerce Department departs from the quarterly Federal Reserve rate only if the fluctuation between the pre-set quarterly rate and the daily rate exceeds five percent. To be considered evidence of dumping, however, a foreign producer's sale price on the American market need be only 0.5% lower than the home market price, or one-tenth of the exchange rate fluctuation necessary to trigger an adjustment of the rate that the Commerce Department applies to evaluate a dumping petition.¹⁹³ Accordingly, the Commerce Department may find a foreign producer liable for dumping solely on the basis of exchange rate fluctuations.¹⁹⁴

G. *Bias Is Implicit in the Commerce Department's Constructed-Value Analysis*

The Commerce Department's constructed-value¹⁹⁵ analysis is a method of estimating the equivalent of the home-market price of a product by approximating the product's cost of production. The Department applies constructed-value analysis as a surrogate when it finds that home-market or third-country sales are insufficient to determine accurately the sale price of the product in the home market. Constructed-value analysis, however, is biased against foreign respondents. For example, the regulations governing constructed-value determinations presume that the foreign producer has administrative costs of at least ten percent of production costs, and a profit of at least eight percent of total production costs, on any sales in the United States.¹⁹⁶ By presuming an eight percent profit for a foreign producer's sales in the United States, the constructed-value analysis declares a foreign firm liable for dumping simply for earning a low profit on the American sales. Ironically, the ITC's own studies indicate that average pre-tax profits for American corporations are six percent of sales.¹⁹⁷ Further, by presuming that foreign producers have administrative costs of at least ten percent of total production costs, the constructed-value analysis actually punishes a foreign producer for being efficient.

H. *The Preparation of an Antidumping Petition Raises Antitrust Concerns*

It is often desirable, even necessary, for a domestic industry to pursue an antidumping case collectively as a class constituting all producers in

193. See *id.* (noting that any weighted-average dumping margin of less than 0.5% is disregarded as *de minimis*).

194. See Bovard, *supra* note 10, at 116-19 (describing specific cases where foreign producers were found liable for dumping on the basis of exchange rate fluctuations or hyperinflation in the home market). See also GATT 1993, *supra* note 14. (providing that exporters must be allowed at least 60 days to adjust export prices to reflect exchange rate fluctuations).

195. See 19 U.S.C. § 1677b(a)(2) (1988); 19 C.F.R. § 353.50 (1993).

196. See 19 C.F.R. § 353.50(a)(2) (1993).

197. See Bovard, *supra* note 10, at 126-31.

the relevant market. Such collective action requires domestic producers to exchange pricing and other sensitive market information.¹⁹⁸ Yet, information exchanges may be a *per se*¹⁹⁹ violation of section 1 of the Sherman Act, unless precautions are taken to ensure that individual firms do not have access to the information required to complete the industry-wide antidumping petition.²⁰⁰

In fact, the mere filing of an antidumping complaint itself is considered a form of *Noerr-Pennington*²⁰¹ abuse in certain circumstances.²⁰² The filing of petitions may produce a powerful chilling effect on imports. A domestic industry's initiation of proceedings costs foreign producers substantial out-of-pocket expenses.²⁰³ The documentation necessary to respond to an antidumping petition is formidable.²⁰⁴ Further, foreign producers cannot assess their total potential liabilities until the termination of proceedings or the end of an administrative review, a process that may take as long as two years.²⁰⁵ Faced with such costs, a foreign producer may cease exports voluntarily, regardless of the merits of the domestic producer's antidumping petition.²⁰⁶ Not surprisingly, unfair trade cases "have become the usual first choice for industries seeking protection from imports into the U.S."²⁰⁷ Indeed,

[a]nti-dumping suits are emerging as the chemical weapons of the world's trade wars. Invisible, compounded of apparently innocuous industrial trading policies, and, in their current use, deadly, they have become a favourite way of protecting domestic industries against Japanese and South Korean imports. . . . The mere threat by a government of an anti-dumping investigation, GATT officials reckon, can often be enough to persuade exporters to acquiesce in bilateral price-rigging or trade-restraining deals of dubious legality.²⁰⁸

Settlement of antidumping disputes has antitrust implications as well:

198. See d'Esclapon, *supra* note 11, at 551.

199. See *supra* note 40 and accompanying text.

200. See d'Esclapon, *supra* note 11, at 551 (noting that producers filing joint petitions must appoint an independent party to collect necessary sales and price information).

201. See *supra* note 38 and accompanying text.

202. See d'Esclapon, *supra* note 11, at 549-51 (noting that improper use of the antidumping laws through the filing of baseless petitions may fall within the sham exception to the *Noerr-Pennington* doctrine).

203. See *id.* at 549; Schoenbaum, *supra* note 149, at 2 ("Defense of an antidumping . . . action typically is expensive and requires years of effort. For all but the larger foreign exporters, the threat of becoming entangled in such an action is a formidable barrier to entering the American market. Domestic industries can easily use these laws for protectionist purposes and to harass competitors.").

204. See *supra* Part II.E.

205. See d'Esclapon, *supra* note 11, at 548.

206. See *id.* at 548-49; Schoenbaum, *supra* note 149, at 2 & n.15 (noting that foreign chemical, steel, textile, and color television industries have been the objects of harassment by continuous filings).

207. Gary N. Horlick & Geoffrey D. Oliver, *Antidumping and Countervailing Duty Law Provisions for the Omnibus Trade and Competitiveness Act of 1988*, 23 J. World Trade, June 1989, at 5.

208. *The Anti-Dumping Dodge*, *The Economist*, Sept. 10, 1988, at 77.

such negotiations often involve the exchange of price and output information between producers. Industry groups and trade negotiators, aware of the antitrust implications inherent in settlement of trade disputes, often seek Department of Justice Antitrust Division opinion letters or advice on the extent to which they may participate in such negotiations.²⁰⁹

I. *Commentators Criticize the Antidumping Regime on Numerous Other Grounds*

In addition to recognizing the antidumping laws' potential for abuse, some argue that the antidumping law remedies waste administrative and legal resources²¹⁰ in a manner disproportionate to the benefits of the available remedy—the imposition of a duty affecting a relatively low volume of trade.²¹¹ Further, consistent with existing LTFV analysis, the foreign respondent easily may evade a duty simply by lowering prices in the home market until they are equal to the price of the product in the United States, an approach that has absolutely no effect on price levels in the American market.²¹² Finally, the Supreme Court and some commentators have maintained that the success of foreign predation—or any predation, for that matter—is remote in the long run.²¹³ Thus, under this theory, the “antidumping laws have become, at least in part, guises for protectionism,”²¹⁴ products of power politics,²¹⁵ and smoke screens for rent-seeking²¹⁶ activity. Similarly, others argue that dumping causes

209. See Applebaum, *supra* note 1, at 415.

210. Responding to an antidumping petition involves significant costs. See Bovard, *supra* note 10, at 134-38. Naturally, a respondent will weigh the cost of preparing all requested documents and securing counsel in deciding whether to remain in the U.S. market at all. For example, Matsushita Electric reportedly abandoned over \$50 million in telephone system exports during the Commerce Department's 1989 investigation of small business telephone systems. See *id.* at 135-36. “The straw that reportedly broke Matsushita's back occurred when Commerce officials commanded the company on a Friday afternoon to translate 3,000 pages of Japanese financial documents and present investigators with English versions on the following Monday morning.” *Id.* at 136. Of course, barring full compliance, Matsushita would fall prey to the “best information available” rule. See *supra* Part II.E. Matsushita's experience is yet another example of the administrative burdens in answering an antidumping complaint and the consequent “chilling effect” on competition, even where the petition lacks a factual basis.

211. See Schoenbaum, *supra* note 149, at 2-3 (noting that “[m]ost of the actions initiated are in a narrow range of industries who have repeatedly invoked them: ferrous metals, textiles, chemicals, rubber and plastic materials”).

212. See Applebaum, *supra* note 1, at 413 (noting the inconsistency between this result and the concept of predatory intent).

213. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986); Davey, *supra* note 14, at 8-10 to 8-12.

214. Sullivan, *supra* note 126, at 1707 (internal citation omitted); Bovard, *supra* note 10, at 1 (arguing that “fair trade,” a favored buzzword among legislators, is synonymous with “one of the greatest intellectual frauds of the twentieth century”).

215. See Finger, *supra* note 14, at 43.

216. See Elzinga, *supra* note 1, at 439. Rent-seeking, as Elzinga defines the concept, is the use of state power to increase one's own wealth at the expense of another. In this context, it means that a domestic producer with market power may reap supracompeti-

only negligible effects on domestic industries²¹⁷ or the economy as a whole.²¹⁸

Many commentators assert that the antidumping laws are irreconcilably at odds with antitrust laws and should be revised or eliminated completely.²¹⁹

J. *Current Antidumping Statutes, However, Fail to Deter Predation by Well-Funded Foreign Trusts*

Domestic industries continue to lobby for a private right of action for dumping.²²⁰ American manufacturers claim that foreign producers exploit market power at home and expand their presence abroad by dumping commodities into other markets.²²¹ Government protection from foreign competitors and under-enforcement of competition law at home purportedly allow concentrated²²² industries to maintain market power in the home market, impose monopoly prices, and reap supracompetitive profits.²²³ This phenomenon is well-documented.²²⁴ In turn, supracompetitive profits at home fund below-cost sales of excess supply in the

tive profits at the expense of (1) consumers, a relatively diffuse group, and (2) foreign producers, which, as politically disenfranchised groups, may be unable to exert the same amount of influence on policymakers as the domestic producers. *See id.* at 439-40.

217. *See* Morris E. Morkre & Kenneth Kelly, *Perspectives on the Effects of Unfair Imports on Domestic Industries*, 61 U. Cin. L. Rev. 919, 944 (1993).

218. *See* Schoenbaum, *supra* note 149, at 3 ("Because the volume of trade affected [is] minor in aggregate terms, the abolition of these laws would hardly be noticed in macroeconomic terms.").

219. *See, e.g.*, Barceló, *supra* note 14, at 78 (arguing that the antidumping laws are unnecessary because § 2 of the Sherman Act and the Trade Act of 1974 together adequately deter predatory dumping); Davey, *supra* note 14, at 8-41 (suggesting that application of dumping laws should be applied only where the complaining domestic industry is unconcentrated, should be only a temporary remedy, and ideally, should be abolished by international agreement); Schoenbaum, *supra* note 149, at 3 ("The proper solution would be to eliminate these laws entirely and merge their beneficial aspects into a new, single unified remedy for unfair international trade practices."); Wood, *supra* note 10, at 1155.

220. *See supra* notes 6-7 and accompanying text; Raymond M. Galasso, Note, *The Conspiracy of Below-Cost Sales—Wake Up America, Take the Offensive, and Start Suing Unfair Foreign Competitors*, 70 U. Det. Mercy L. Rev. 409 (1993) (encouraging increased litigation under § 2 of the Sherman act against foreign competitors who engage in below-cost sales to gain market share in the United States).

221. *See supra* note 7 and accompanying text.

222. *See supra* note 25.

223. *See supra* note 7 and accompanying text (describing allegations by domestic steel producers that foreign steel manufacturers, including producers from the European Community, Japan, Korea, and Southeast Asia, are involved in widespread cartel activity).

224. *See* Robert L. Cutts, *Capitalism in Japan: Cartels and Keiretsu*, Harv. Bus. Rev. 48 (Jul.-Aug. 1992). Cutts documents the proliferation of cartels in Japan, built upon tightly-woven interrelationships between businesspeople, bureaucrats, and political parties, a phenomenon known as *keiretsu*. Cutts also notes that "[h]undreds of cartels established to set prices, rationalize industries, and respond to depressed markets . . . have been permitted by law and even supervised by the government." *Id.* at 49. Naturally, consumers suffer with higher prices. *See id.* at 50 (noting, for example, that Japanese farmers pay 30% to 40% more than they would in a free market for equipment and supplies); Galasso, *supra* note 220, at 409-12, 420-21.

American market. Below-cost sales enable these sellers to gain more of the American market at the expense of American producers.²²⁵ Consequently, American trade laws are justified as an attempt to harmonize differing economic systems between nations.²²⁶

The antidumping laws partially compensate for the shortcomings of antitrust law in policing foreign predation.²²⁷ Antitrust law was established at a time when American firms competed only with other domestic producers.²²⁸ Today, American firms face widespread competition from European and Asian producers. Antitrust law has been relatively unsuccessful in deterring predatory activity by these recent entrants into the American market.²²⁹ Thus, antidumping laws may be the only currently viable remedy available to American companies confronting anticompetitive behavior originating overseas.²³⁰

Absent effective policing of foreign predatory activity, some commentators suggest that foreign oligopolies might eventually replace competitive American firms. This alarms proponents of strict antidumping laws:

The random working of the theory of comparative advantage in a highly unstable family of nations can lead to industrial imbalances with serious geopolitical implications.

The real question, therefore, is not whether the antidumping laws inhibit competition, but whether they are adequate, in their current form, to respond to anticompetitive behavior by foreign producers.²³¹

Proponents of strict antidumping laws note that the consumer's short-term interest in buying low-priced products conflicts with the longer-term national interest in ensuring healthy domestic industries.²³² A preoccupation with low consumer prices, they assert, encourages an ulti-

225. See *Questions and Answers*, *supra* note 12, at 457-59 (debating the extent to which foreign predation may have caused the demise of the domestic dynamic-random-access-memory ["DRAM"] semiconductor industry. DRAMs are a key component in computers today.).

226. See Gilbert B. Kaplan & Susan H. Kuhbach, *The Causes of Unfair Trade: Trade Law Enforcers' Perspective*, 56 *Antitrust L.J.* 445, 450 (1987).

227. See John D. Ong, *The Interface of Trade/Competition Law and Policy: A Businessman's Perspective*, 56 *Antitrust L.J.* 425, 427-29 (1987) (arguing that the trade laws guard against a realistic threat of monopolization of domestic markets by foreign entities, and that they provide a viable short-term deterrent to such activity until trade-related changes can be made in the antitrust laws).

228. See *id.*; Victor, *Task Force Report*, *supra* note 1, at 463-64 (noting that the nation's economy has long been driven by encouraging competition, both domestic and foreign, yet domestic industries were unable to contend with the sudden infusion of foreign goods beginning in the mid-1960s).

229. See *supra* notes 143-147 and accompanying text (discussing extraterritorial application of U.S. antitrust laws); Ong, *supra* note 227, at 427-29.

230. See Ong, *supra* note 227, at 429.

231. *Id.* at 430.

232. See Alfred E. Eckes, *The Interface of Antitrust and Trade Laws—Conflict or Harmony? An ITC Commissioner's Perspective*, 56 *Antitrust L.J.* 417, 423-24 (1987) (noting that dumping contributes to misallocation of resources between economies, and that subsidies promote inefficiency in the export market and "export" unemployment, and that low consumer prices in the short run precede high prices in the long run).

mate reduction in the pool of domestic competition, thus stifling domestic industrial development and the profitability and cash flow required to generate new products.²³³ Eventually, consumers are also injured because competition in a given product market declines and prices rise as market concentration²³⁴ increases.²³⁵ Further, as foreign producers gain domestic market share at the expense of domestic producers, unemployment may rise.²³⁶

K. Trade Laws Serve Many Vital Functions

The overriding policy objective of antitrust law is to ensure the competitiveness of markets.²³⁷ Trade laws, however, serve several different functions, only one of which is the promotion of free and fair competition. Trade laws assist in preserving national security, enhancing American economic power, promoting foreign policy objectives, protecting American producers in the domestic market, enhancing the competitiveness of American firms in international markets, preserving and expanding domestic employment opportunities, protecting and promoting domestic advantages in technology, regulating international trade practices perceived as unfair, and promoting free trade and competition when not injurious to American interests.²³⁸ Antidumping laws play a particularly important role in encouraging other nations to open their markets, especially where non-tariff barriers currently limit entry by American producers.²³⁹

III. WHY PROMOTE CONVERGENCE OF ANTITRUST AND TRADE LAW?

This next Part discusses the benefits of harmonizing antitrust and an-

233. See *id.*

234. See *supra* note 25 (discussing market concentration).

235. See Galasso, *supra* note 220, at 415 (noting the "consumer welfare justification" for policing foreign predatory activity).

236. See *id.* But see *GATT Director Says Success of Talks Would Help Consumers*, 10 Int'l Trade Rep. (BNA) No. 33, at 1370-71 (Aug. 18, 1993) ["Talks Would Help Consumers"] (quoting Peter Sutherland, Director General of the GATT, who, referring to trade law protectionism, noted that "[u]nfortunately the reality is that the cost of saving a job, in terms of higher prices and taxes, is frequently far higher than the wage paid to the workers concerned").

237. There is a substantial body of literature reflecting vast differences of opinion on the appropriate goals of antitrust. Compare Posner, *supra* note 61, at 4, 18-22 (arguing that antitrust law should emphasize the efficient operation of markets and that restricting freedom of action by large business firms in favor of promoting small business is an inappropriate application of antitrust) with Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 Colum. L. Rev. 377, 383-84 (1965) (arguing that though antitrust should ensure efficient allocation of resources rather than protection of small, inefficient firms, expanding the range of consumer choice and entrepreneurial opportunity by encouraging the formation of markets with many buyers and sellers are equally important goals).

238. See Waller, *supra* note 7, § 11.01, at 11-2.

239. See Eckes, *supra* note 232, at 422.

tidumping laws, using a recent trade case to illustrate the merits of convergence.

A. Principles of Convergence

Antitrust law encourages low consumer prices by promoting vigorous competition between producers.²⁴⁰ Conversely, the antidumping laws protect domestic producers from foreign predatory dumping.²⁴¹ As a result, these two areas often conflict.²⁴² Initially the harmonization of antitrust and trade law appears to require an election between promoting either consumer or producer welfare. The lines between producer and consumer welfare, however, are not as clearly delineated as they once were. Today, in an increasingly globalized marketplace, domestic producers have greater opportunities to purchase component parts and raw materials from abroad.²⁴³ A trade policy that increases costs of these intermediate goods may injure domestic producers,²⁴⁴ as well as consumers. American producers who pay higher prices for intermediate goods must pass these increased costs along to consumers. Not only does this injure American consumers,²⁴⁵ but it also injures domestic producers since they become less competitive than foreign firms producing similar products abroad. Not burdened by the antidumping duties levied on components imported into the United States, such foreign producers can keep costs of production comparatively low.

Use of the trade laws to insulate domestic producers from *efficient* foreign competitors has other consequences—it causes trade and budget deficits. Such consequences are evident in other national economies.²⁴⁶ In

240. See *supra* Part I.A.

241. See *supra* Part I.B.

242. See *supra* note 1; Parts II.B., C., G., H. & I.

243. According to one report, one-half of all Japanese exports to the United States are intermediate goods. See Robert Neff, *The Japanese Are Hardly Heading for the Bunkers*, Bus. Wk., Feb. 28, 1994, at 29.

244. See *Talks Would Help Consumers*, *supra* note 236. Peter Sutherland, Director General of the GATT, noted that, “[v]irtually all protection [from imports] means higher prices. And someone has to pay; either the consumer or, in the case of intermediate goods, another producer.” See *id.*

245. See Bovard, *supra* note 10, at 108 (“While many people consider dumping an arcane subject, dumping penalties have forced Americans to pay more for photo albums, pears, mirrors, ethanol, cement, shock absorbers, roof shingles, codfish, televisions, paint brushes, cookware, motorcycle batteries, bicycles, martial art uniforms, computers and computer disks, telephone systems, forklifts, radios, flowers, aspirin, staplers and staples, paving equipment, and fireplace mesh panels.”).

246. See Stewart A. Baker, Panel Discussion, *EEC Trade Law and the United States*, 1987 Fordham Corp. L. Inst. 527, 531 (Barry E. Hawk ed., 1988). Mr. Baker noted that a change in prevailing attitudes toward the trade laws might soon occur among lawmakers. He continued:

I have practiced trade law in one country that used to lead the world in applying the antidumping law strictly. Perhaps as a result, perhaps not, that country ultimately found that it had a well-protected manufacturing sector at home but very few manufacturing exports; it found itself relying on agricultural and raw material exports *and running big trade and budget deficits*; when peo-

sum, harmonization of antidumping and antitrust laws (1) minimizes, to the extent possible, protectionist abuses of trade laws so that consumers and producers may benefit from increased competition and lower prices, and (2) concurrently protects domestic industries from foreign predatory activity. Any such reform, however, must provide a consistent standard for both domestic and international trade.

B. *An Illustration: The Japanese Laptop Computer Screen Dispute*

Japanese manufacturers are an important source of the flat-panel screens found in laptop and notebook-type computers today.²⁴⁷ These screens, known as "active-matrix liquid crystal displays,"²⁴⁸ were invented in the United States, though they received their greatest commercial development in Japan.²⁴⁹ In recent years, these laptop and notebook-type computers have been "the fastest-growing segment of the personal computer market."²⁵⁰ Apple, Compaq, and IBM have all used flat-panel screens in their laptop and notebook computers, relying on Japanese sources for these components.²⁵¹ In fact, Japanese producers currently control ninety-five percent of the \$4 billion world market for these screens.²⁵²

The Advanced Display Manufacturers Association of America²⁵³ filed an antidumping petition against Japanese manufacturers of flat-panel screens in July 1990.²⁵⁴ The Commerce Department determined that Japanese manufacturers were dumping these flat-panel screens on the American market²⁵⁵ and recommended a 62.7% dumping duty.²⁵⁶ The

ple began to believe the deficits were permanent, it suffered a collapse in foreign investor confidence. In the ensuing devaluation-cum-recession, the government began to rethink much of its trade law.

The United States is most of the way down a road already traveled by Australia.

Id. (emphasis added).

247. See Daily Report for Executives; Regulation, Economics and Law, *Technology: Pentagon Announces \$580 Million Plan to Develop Flat-Panel Computer Screens*, 1994 Daily Exec. Rep. 81, at A-1 (Apr. 29, 1994) ["\$580 Million Plan"]. Hosiden Electronics, Matsushita Electric, Sharp Corporation, and Toshiba Corporation all produce flat-panel screens for American laptop computer manufacturers. Flat-panel displays are also used in medical instruments, industrial controls, commercial avionics, and there is potential for their application in high-definition television. See Daily Report for Executives; Regulation, Economics and Law, *International Trade: ITA Preliminarily Finds That Japan Is Dumping Computer Screens*, 1991 Daily Exec. Rep. 32, at A-4 (Feb. 15, 1991).

248. Stuart Auerbach, *U.S. Rules Japan 'Dumping' Advanced Computer Screens*, Wash. Post, July 9, 1991, at C1, C3.

249. See *id.*

250. *Id.* at C1.

251. See *id.*

252. See *\$580 Million Plan*, *supra* note 247.

253. See Andrew Pollack, *Duties Sought From Japan On Some Computer Screens*, N.Y. Times, July 9, 1991, at D1 (noting that the organization consists of seven fledgling American flat-panel screen manufacturers).

254. See *id.*

255. See Certain High-Information Content Flat Panel Displays and Display Glass

American screen manufacturers were then relatively small companies and the United States Government was their only customer.²⁵⁷ At the time, the American screen manufacturers did not produce the color version of these screens,²⁵⁸ nor were they designing their screens for computers when they filed their complaint.²⁵⁹ American manufacturers of laptop computers did not use the American screen manufacturers as a source of the flat-panel screens because they felt that the domestic screen producers could not provide screens or services suitable for their laptops.²⁶⁰

Not surprisingly, American laptop computer manufacturers opposed the duty on the imported screens.²⁶¹ They argued that high duties on such a vital component part would increase retail prices for their computers and make them uncompetitive against imported Japanese laptops.²⁶² Since the duties would apply only to the screens and not to fully assembled computers, the American computer manufacturers feared that the duties would force them to manufacture computers overseas,²⁶³ where the American antidumping duty on the screens would not apply. According to one source, the proposed duty on the screens prompted Apple Computer to abandon its plans to manufacture laptops in Colorado, and choose to manufacture in Ireland.²⁶⁴ IBM reportedly considered moving its production of laptops out of the United States.²⁶⁵ Toshiba closed its production facility in Irvine, California, and moved back to Japan.²⁶⁶ This case demonstrates the potential negative effects of dumping duties on American producers, consumers, and laborers. Not surprisingly, the flat-panel screen case has been characterized as "a textbook illustration of what is wrong with the dumping law."²⁶⁷

Therefor from Japan, USITC Pub. 2413, Inv. No. 731-TA-469, at 1-3 (1991) (final) ["Flat-Panel Display Report"].

256. See McGee, *supra* note 10, at 537.

257. See *id.* at 538. Currently, American producers hold less than three percent of the world market for flat-panel screens. See *\$580 Million Plan*, *supra* note 247.

258. See Daily Report for Executives; Regulation, Economics and Law, *International Trade: Japan Set to Appeal To GATT On U.S. Antidumping Ruling For Flat-Panel Screens*, 1991 Daily Exec. Rep. 210, at A-3 (Oct. 30, 1991).

259. See Auerbach, *supra* note 248, at C3.

260. See McGee, *supra* note 10, at 538.

261. See Daily Report for Executives; Regulation, Economics and Law, *International Trade: U.S. Manufacturers Threatened By Duties On Japanese Computer Displays*, 1991 Daily Exec. Rep. 113, at A-7 (Jun. 12, 1991) ["U.S. Manufacturers Threatened"]; Flat-Panel Display Report, *supra* note 255, at B-37 to B-38 (noting that Apple, Compaq, IBM, Tandy, and Texas Instruments opposed the duty on imported screens).

262. See Auerbach, *supra* note 248, at C1.

263. See *id.*

264. See McGee, *supra* note 10, at 537.

265. See *id.*

266. See *id.*

267. *U.S. Manufacturers Threatened*, *supra* note 261.

IV. MOVING TOWARD CONVERGENCE: AN INTERNATIONAL TRADE ANALOGUE TO ROBINSON-PATMAN

Harmonization of antitrust and trade law is imperative. Several commentators have offered proposals for convergence.²⁶⁸ This Part argues that an international trade analogue to Robinson-Patman effectively accommodates the competing concerns of trade and antitrust law, thus protecting American consumers and producers alike.²⁶⁹

A. *Application of an International Trade Analogue to Robinson-Patman*

Congress must modify or replace the antidumping laws with a law modeled on the Robinson-Patman Act.

This proposal lends itself to the antidumping context because the Commerce Department can administer the Robinson-Patman analogue in the same manner as it applies the current antidumping laws. Thus, under the proposed statute, a domestic industry petitions the Commerce Department when a foreign producer is suspected of dumping products on the American market. Under the proposed law, however, rather than undertake separate LTFV and injury determinations, the Commerce Department evaluates the foreign producer's behavior using established predatory-pricing tests from Sherman Act jurisprudence—the same tests that Robinson-Patman courts have applied.²⁷⁰

Consistent with current trade policy, the proposed statute does not permit a private right of action. Rather, the Commerce Department applies predatory-pricing tests to evaluate dumping complaints and tariff assessments follow from affirmative findings of product dumping.²⁷¹

268. See, e.g., Davey, *supra* note 14, at 8-40 to 8-41 (suggesting elimination of biases in procedures for calculating dumping margins, a restriction on the application of the antidumping laws to concentrated industries, and automatic expiration of antidumping orders after a period of several years); Schoenbaum, *supra* note 149, at 23 (suggesting either the elimination of the antidumping laws or merging the most effective provisions of § 301 of the Trade Act of 1974 with § 337 of the Tariff Act of 1930 as a unified remedy for all unfair trade practices); Wood, *supra* note 10, at 1196-98 (proposing to limit antidumping remedies where the complaining domestic industry is concentrated).

269. Several commentators have compared the Antidumping Act to the Robinson-Patman Act. See, e.g., Applebaum & Grace, *supra* note 133, at 507-12 (noting the differences in injury standards between the two statutes and the lack of defenses under the Antidumping Act); Davey, *supra* note 14, at 8-19 to 8-21 (noting the difference in injury standards under the Robinson-Patman Act and the Antidumping Act).

270. See *supra* note 95 and accompanying text.

271. As an additional disincentive for abuse by concentrated domestic industries, remedies could be tied to the concentration level of the complaining domestic producer. See Wood, *supra* note 10, at 1196-98 (arguing that antidumping remedies should be inversely proportional to the Herfindahl-Hirschman Index ("HHI") of market concentration of the complaining industry). Professor Wood advocates continued application of the existing antidumping procedure, and would allow for tariffs in the full amount of the dumping margin where the relevant HHI is below 1000. For complaining industries with higher HHIs, the amount of tariff imposed would proportionally decrease. She would disallow any tariffs where complaining industries have HHIs above 4000. Accordingly, injury to

B. *Significant Benefits Follow From Applying Robinson-Patman to Trade Cases*

An international trade analogue to Robinson-Patman has several advantages over the current Antidumping Act.

First, the proposed statute promotes convergence between trade and antitrust policy by introducing into trade law accepted predatory-pricing tests from Sherman Act jurisprudence²⁷² and, in so doing, promotes consistency between trade law and normative economics.

Second, an antidumping law modeled on Robinson-Patman properly balances deterrence of frivolous antidumping petitions with incentives to bring trade actions where viable claims of foreign predation exist. The Robinson-Patman Act, as currently interpreted, requires a substantial lessening of competition²⁷³ before relief may be granted. Adopting this standard in antidumping actions discourages abuse of the antidumping laws by domestic industries seeking protection from foreign competition. This approach is preferable to a private right of action, particularly an action with such incentives as treble damages²⁷⁴ for successful petitioners. At the same time, the proposed statute allows domestic consumers the benefits of competitively priced goods and lowers the cost to domestic producers of some imported intermediate goods.

Third, application of Robinson-Patman principles to antidumping cases bypasses existing jurisdictional hurdles and foreign policy concerns in litigating predatory-pricing claims against foreign defendants. Significant jurisdictional hurdles impede application of the antitrust laws to foreign anticompetitive activity.²⁷⁵ In trade proceedings, however, upon a finding of dumping, the Customs Department assesses a duty as the commodities arrive in the United States.²⁷⁶

Finally, the proposed statute provides Robinson-Patman defenses—"cost justification," "meeting competition," and "changing conditions"²⁷⁷—in trade cases. These defenses enable the Commerce Department to separate well-founded claims of foreign predation from frivolous claims, at an early stage in the proceedings. These defenses have been applicable to trade cases in the past.²⁷⁸ Notably, the Justice Department

the U.S. producers would be recognized and compensated only to the extent that a firm is unable to survive marginal cost pricing.

272. See *supra* Parts I.A.2.b.i. & I.A.3.

273. See *supra* note 79.

274. See *supra* note 7 (discussing Senator Metzenbaum's pending proposal to amend the Antidumping Act of 1916, to create a private right of action for victims of predatory dumping by foreign producers).

275. See *supra* Part II.A.

276. See *supra* note 131; Marques Mendes, *supra* note 1, at 166 (noting that, for those seeking protection from foreign predatory activity, resort to the trade laws avoids some of the jurisdictional problems associated with extraterritorial application of the antitrust laws).

277. See *supra* notes 98-111 and accompanying text.

278. See, e.g., 64K Dynamic Random Access Memory Components from Japan, USITC Pub. 1862, Inv. No. 731-TA-270, at 17-18 (1986) (final) (imports found to have

has argued, without success, that importers should be entitled to meet competition with domestic producers without being sanctioned for selling at less-than-fair-value.²⁷⁹ Currently, where an industry can choose between bringing an antitrust suit and an import relief proceeding against a foreign competitor, it will invariably choose the latter because the antitrust defenses do not apply.²⁸⁰

C. *The Counterarguments Are Unpersuasive*

Critics have asserted that Robinson-Patman creates inflexibility in price movements by discouraging producers from charging a profit-maximizing price in all markets.²⁸¹ This criticism, however, is not well-founded. The current antidumping laws sanction price discrimination between national markets, but do not allow for the defenses available under Robinson-Patman. Moreover, domestic producers advocating antidumping law reform indicate that the current laws have had negligible deterrent effects on international price discrimination.²⁸² Thus, it is unlikely that Robinson-Patman would create any rigidity in price movements greater than that already present under the current antidumping regime. Finally, the availability of treble damages may be responsible for any inflexibility of price movements under Robinson-Patman.²⁸³ Importantly, the proposed law does not provide a private right of action for dumping and thus treble damages remain unavailable.

A second criticism is that disputes over the characterization of costs as fixed or variable have often arisen in the antitrust context. One court approaches the variable/fixed cost inquiry by noting that wherever true predatory pricing exists, there is an expansion in output to satisfy the increased demand that a lower price creates.²⁸⁴ Because this expansion in output is attributable to the allegedly predatory price cut, the costs that increase as a result of the expanded output are treated as variable.²⁸⁵ If the per-unit price of the good is below the average of these increased/variable costs, then the price reduction may then be considered predatory.²⁸⁶ At present, characterization of legitimately disputed costs as fixed or variable may be "a matter for the jury under appropriate

caused material injury even though the price cutting in question was initiated by a U.S. producer).

279. See Applebaum, *supra* note 1, at 413.

280. See Marques Mendes, *supra* note 1, at 166.

281. See Hansen, *supra* note 83, at 1190-93.

282. See *supra* note 7 and accompanying text.

283. See Harry L. Shnideman, *The Robinson-Patman Act: A Critical Appraisal*, 55 Antitrust L.J. 149, 152 (1986).

284. See *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1037 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

285. See *id.* at 1037.

286. See *id.* The *Inglis* court also considered other factors, holding that, although AVC is generally a reliable indicator of predatory intent, there are market situations where it would be prudent for a firm to sell below AVC. See *id.* at 1035 n.32. Conversely, it acknowledged that in certain instances, a firm could be liable for predation where it was

instructions."²⁸⁷

Disputes between parties in characterizing costs as fixed or variable are particularly likely in the international trade context, due to socio-economic differences between nations. For example, in Japan, where employment has been traditionally characterized as a life-long entitlement, producers often view labor as a fixed cost.²⁸⁸ American producers, however, treat labor as a variable cost.²⁸⁹ The Commerce Department might address this issue by setting its own definitions of fixed and variable costs to ensure uniform application of price-cost tests in antidumping disputes.²⁹⁰

Critics also contend that acquiring evidence of a foreign producer's costs to prove sales at less than average variable cost or marginal cost is difficult.²⁹¹ While this argument is itself debatable,²⁹² the current antidumping laws already authorize the Commerce Department to engage in a complex constructed-value analysis of a foreign producer's costs when insufficient sales of the product in the exporting country leave the home market price incalculable.²⁹³ In contrast, antitrust courts have widely applied variations of the Areeda-Turner test.²⁹⁴

Finally, some commentators argue that predatory pricing may be nearly impossible to prove,²⁹⁵ particularly in light of the Supreme

pricing above AVC. *See id.* at 1035. Consequently, it focused "on what a rational firm would have expected its prices to accomplish." *Id.* at 1034.

287. *Id.* at 1038. *See also* Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt., 845 F.2d 404, 408 (2d Cir. 1988) (concluding that jury could have reasonably characterized depreciation of heavy equipment as a variable cost), *aff'd*, 492 U.S. 257 (1989).

288. *See* John H. Jackson, *Dumping in International Trade: Its Meaning and Context*, in *Comparative Study*, *supra* note 136, at 21-22.

289. *See* Alan V. Deardorff, *Economic Perspectives on Antidumping Law*, in *Comparative Study*, *supra* note 136, at 31-33.

290. *See, e.g.*, Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 858 & n.11 (9th Cir. 1977) (allocating categories of fixed and variable costs as a matter of law), *cert. denied*, 439 U.S. 829 (1978); 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* 173-74 (1978) (characterizing all costs as variable except capital costs, property and other taxes unaffected by output, and depreciation of plant life). Some courts, however, have rejected the Janich and Areeda-Turner approach of arbitrarily categorizing costs. *See, e.g.*, William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1037 (9th Cir. 1981) (comparing costs before and after increases in output to determine whether costs are fixed or variable), *cert. denied*, 459 U.S. 825 (1982); D.E. Rogers Assocs. v. Gardner-Denver Co., 718 F.2d 1431, 1437 (6th Cir. 1983) (declining to follow the Areeda-Turner classification of fixed and variable costs, noting that "it is impossible to determine in advance and outside the specific factual context the variability of any particular expense"), *cert. denied*, 467 U.S. 1242 (1984).

291. *See* Galasso, *supra* note 220, at 413 & n.32.

292. *See* Elzinga, *supra* note 1, at 442 ("[T]he Areeda-Turner test is both a breeze to apply and a breath of fresh air compared to the exercise of determining [LTFV]" under the Antidumping Act.).

293. *See supra* Part II.G.

294. *See supra* note 78 and accompanying text.

295. *See, e.g.*, Barceló, *supra* note 14, at 65 ("A persuasive line of economic analysis suggests that predatory pricing will be rare because it is costly and the benefits are both doubtful and in any event obtainable through less costly means."); Robert H. Bork, *The Antitrust Paradox* 155 (1978) ("[P]redatory price cutting is most unlikely to exist and . . .

Court's decision in *Matsushita*.²⁹⁶ Commentators argue that courts tend to view price cuts as procompetitive²⁹⁷ and dismiss predatory-pricing cases on grounds that predatory pricing is very rarely attempted and, when attempted, is rarely successful.²⁹⁸ Indeed, some commentators believe that *Matsushita* heralds the demise of successful predatory-pricing suits.²⁹⁹ This skepticism, however, is not apparent in the case law.³⁰⁰ In fact, since *Matsushita*, even the Supreme Court has acknowledged that predatory pricing occurs.³⁰¹

attempts to outlaw it are likely to harm consumers more than would abandoning the effort.”).

296. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (granting summary judgment for defendant in suit alleging conspiracy to eliminate competitors through below-cost pricing).

297. *See id.* at 594 (“[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”).

298. *See id.* at 588-89 (“A predatory-pricing conspiracy is by nature speculative. . . . [T]here is a consensus among commentators that predatory-pricing schemes are rarely tried, and even more rarely successful.”).

299. *See, e.g.*, Brenda S. Levine, *Predatory Pricing Conspiracies After Matsushita Industrial Co. v. Zenith Radio Corp.: Can an Antitrust Plaintiff Survive the Supreme Court's Skepticism?*, 22 Int'l L. 529, 541 (1988) (noting that the *Matsushita* decision raised the standard of proof necessary to infer a predatory-pricing conspiracy, encouraged competitors to engage in predatory pricing, and discouraged redress in the courts for such predation).

300. *See, e.g.*, *Irvin Indus., Inc. v. Goodyear Aerospace Corp.*, 974 F.2d 241, 245 (2d Cir. 1992) (holding that defendant seller's bid, which was below reasonably anticipated AVC, was presumptively predatory); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1496 (11th Cir. 1988) (reversing summary judgment for defendant in holding that test for predatory pricing must consider subjective evidence and should use average total cost as the cost above which no inference of predatory intent can be made), *cert. denied*, 490 U.S. 1084 (1989); *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt.*, 845 F.2d 404, 408 (2d Cir. 1988) (affirming jury verdict of attempted monopolization through predatory pricing), *aff'd*, 492 U.S. 257 (1989); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 646, 648 (10th Cir. 1987) (distinguishing *Matsushita* as applicable only to § 1 conspiracy claims and reversing summary judgment for defendant in holding that “sales above [AVC] do not preclude a finding of predatory pricing if other factors are present indicating unreasonably anticompetitive behavior”); *Marsann Co. v. Brammall, Inc.*, 788 F.2d 611, 613-15 & n.1 (9th Cir. 1986) (distinguishing *Matsushita* as applicable only to § 1 claims and maintaining its pre-*Matsushita* position that a predatory-pricing plaintiff need not prove pricing below any measure of cost to survive summary judgment); *But see Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 483 (1st Cir. 1988) (stating that plaintiff had not introduced evidence that defendant priced below AVC in affirming summary judgment for defendant), *cert. denied*, 488 U.S. 1007 (1989); *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1255-56 (5th Cir.) (summarily dismissing a predatory-pricing claim pursuant to *Matsushita*), *cert. denied*, 488 U.S. 890 (1988). *See also* Martin S. Simkovic, Comment, *Judicial Tests to Determine Predatory Pricing Before and After Matsushita*, 44 U. Miami L. Rev. 839, 862-63 (1990) (arguing that *Matsushita* has had little influence on those courts of appeals that view predatory-pricing claims more favorably than the Supreme Court, whereas courts already skeptical of predatory-pricing claims tend to summarily dismiss such cases, citing *Matsushita*).

301. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121 & n.16 (1986).

CONCLUSION

"It is high time that governments made clear to consumers just how much they pay—in the shops and as taxpayers—for decisions to protect domestic industries from import competition."³⁰²

A change in the current antidumping laws is imperative. Congress must modify or replace the antidumping laws to check abuses of trade laws by domestic industries. A trade statute modeled on the Robinson-Patman Act, by applying price-cost analysis and permitting appropriate defenses in trade cases, provides a consistent definition of unfair trade for domestic and international trade. Such reform properly balances producer protection from foreign predation with gains to consumer welfare from competitively priced imports. Though the political climate inside the Beltway today is decidedly against such a change, the need for convergence of antitrust and trade law is becoming ever more apparent in an increasingly globalized economy.

302. See *Talks Would Help Consumers*, *supra* note 236 (quoting Peter Sutherland, Director General of the GATT).