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ARTICLES

RETHINKING THE RELATIONSHIP BETWEEN ANTIDUMPING AND ANTITRUST LAWS

Daniel J. Gifford*

The political and economic environment of international trade significantly differs from the environment of purely domestic trade. In addition to the risks of political instability, international traders must cope with fluctuations in the relative values of the currencies in which their goods are traded and with changing foreign economic regulations. Because international trade occurs against a backdrop of tariffs and other trade barriers, the basic rules governing domestic marketplace behavior apply in a less structured manner. Finally, many national governments attempt to protect their domestic producers selling in their home markets or to confer advantages upon them in their export trade.

Within the United States, antitrust law provides a set of ground rules the stated goal of which is to advance consumer welfare, a goal that many commentators equate with the furtherance of productive and allocative efficiency.¹ While many foreign nations also have antitrust laws, those laws are generally less oriented towards increasing efficiency.

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1. See, e.g., *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) and *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (promoting consumer welfare as an antitrust goal); see also R. BORK, *THE ANTITRUST PARADOX* 107-15 (1978) (equating consumer welfare with the furtherance of productive and allocative efficiencies).

The United States regulates international trade in part through its antitrust laws,² but also through a variety of other laws, most importantly antidumping and countervailing duty laws.³ Although Congress aimed those laws at practices it perceived as unfair, those laws are widely understood as embodying objectives inconsistent with the efficiency goals of the antitrust laws. Moreover, the standards employed to evaluate marketplace behavior under the trade laws differ significantly from the standards used to administer the antitrust laws. These conflicting sets of laws provide the United States with a schizophrenic approach to economic policy. Thus, reforming the trade laws to bring them into conformity with the efficiency policies underlying the antitrust laws is highly desirable.

This article addresses unfair and anticompetitive practices which occur in international trade. It draws heavily from the antitrust laws and the free-trade policies to which the United States has committed itself through its adherence to the General Agreement on Tariffs and Trade (GATT).⁴ First, the article reviews the historical concerns underlying the enactment of antidumping legislation. Second, it addresses the broad role that scholarship and judicial interpretation have played in construing legislation governing the analogous problem of domestic price discrimination. As a result of legal scholarship and judicial decision-making sensitive to both the historical concerns of the enacting Congress and the teachings of economics, the courts have radically revised the prevailing construction of section two of the Clayton Antitrust Act of 1914⁵ (Clayton Act) in its application to domestic price discrimination with "primary-line"⁶ effects. As recently reconstrued, this as-

2. See *Monopolies and Combinations in Restraint of Trade*, 15 U.S.C. § 6a (1988) (addressing conduct involving trade or commerce with foreign nations); see also *Antitrust Enforcement Guidelines for International Operations*, 4 Trade & Reg. Rep. (CCH) ¶ 13,109 (1988) (providing guidance for businesses involved with international operations relating to the Department of Justice's international antitrust policies).

3. See *Countervailing and Antidumping Duties*, 19 U.S.C. §§ 1671-1671h (1988) (addressing the imposition of countervailing duties); see also 19 U.S.C. §§ 1673-1673h (1988) (imposing antidumping duties); see also 19 U.S.C. §§ 1675-1677k (1988) (containing related provisions).

4. *General Agreement on Tariffs and Trade*, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

5. Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1988)).

6. See Gifford, *Primary-Line Injury under the Robinson-Patman Act: The Development of Standards and Erosion of Enforcement*, 64 MINN. L. REV. 1, 3-4 (1979) [hereinafter Gifford, *Primary-Line Injury*] (explaining that the Robinson-Patman Act addresses primary-line effects, which are those effects occurring in the market in which the discriminating seller operates, and secondary-line effects are those occurring in the market in which the seller's customers operate).

pect of the Clayton Act is fully consistent with the Sherman Antitrust Act (Sherman Act).⁷ The article suggests that a reinterpretation of existing antidumping legislation could reduce the conflict between that legislation and the Clayton and Sherman Acts.⁸ Third, the article discusses the evolution of the modern understanding of predatory pricing. Fourth, the article addresses the economic approaches that have been asserted to be incorporated in antidumping legislation. Finally, the article makes proposals for reconstruing antidumping legislation in order both to respect the congressional concerns underlying that legislation and to harmonize, so far as possible, antidumping policies with the competitive market policies underlying the antitrust laws.

I. THE UNITED STATES TRADE AND ANTITRUST LAWS: THEIR RELATIONSHIPS AND BASIC APPROACHES

Congress enacted the antitrust laws—the Sherman,⁹ Clayton,¹⁰ and Federal Trade Commission Acts¹¹—to further marketplace competition and to prevent collusive or monopolistic and exclusionary behavior.¹² Monopolistic behavior seeks to restrict the amount of goods and services entering the market, and exclusionary behavior attempts to handicap rivals or expel them from the market entirely.

Conversely, Congress designed several trade laws to protect domestic producers from the competition of foreign rivals.¹³ First, sales in the

7. *Id.*

8. *Id.*

9. Sherman Act, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1988)).

10. Clayton Act, ch. 323, 38 Stat. 730 (1914)(current version at 15 U.S.C. §§ 12-27 (1988)).

11. Federal Trade Commission Act, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-77 (1988)). Although the Federal Trade Commission Act does not fall within the Clayton Act's definition of "antitrust laws," the Supreme Court arguably regards it as an antitrust law because it condemns the same behavior as the other antitrust laws. *See* 15 U.S.C. § 12a (1988); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 463 (1941) (stating that the Federal Trade Commission has the power to suppress a combination which runs counter to the policies of the Sherman and Clayton Acts).

12. *See* 15 U.S.C. §§ 1-2 (1988) (stating that any restraint of trade or attempt to monopolize by groups or individuals is illegal under the Sherman Act); 15 U.S.C. § 45(a)(2) (1988) (empowering the Federal Trade Commission specifically to prevent unfair competition); 15 U.S.C. § 13(a) (1988) (declaring price discrimination illegal).

13. Tariff Act of 1930, ch. 337, 46 Stat. 703 (1930) (current version at 19 U.S.C. § 1337 (1988) (stating that unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale are unlawful); Trade Act of 1974, ch. 301, 88 Stat. § 2411 (1974) (codified as amended at 19 U.S.C. § 2411 (1988)) (protecting United States exporters against discriminatory and unreasonable practices); *id.* § 201 (codified as amended at 19 U.S.C. § 2251 (1988) (providing an escape clause); *see also* 19 U.S.C. §§ 1671-1671h (1988) (providing countervailing duties); *id.* §§ 1673-1677h (1988) (creating antidumping duties).

United States at prices below the foreign producers' home-market prices constitute international price discrimination, which is generally referred to as "dumping."¹⁴ Antidumping laws impose duties on foreign producers who sell their goods in the United States at below-cost prices or at a lower price than in their home markets whenever those low priced sales in the American market threaten to produce a material injury to an American industry. Second, countervailing duty laws discourage foreign government subsidies by authorizing offsetting duties whenever foreign subsidies produce a similar impact upon an American industry.¹⁵ Both antidumping and countervailing duty laws appear to conflict with the competitive market objectives of the antitrust laws.¹⁶

Despite superficial inconsistencies, however, it appears possible to reconcile trade and antitrust laws to a substantial extent. Regulators may be able to bring these laws into greater harmony by construing trade laws according to their underlying purpose to protect domestic firms from unfair behavior.¹⁷ This approach to reconciling the trade and antitrust laws is not new. Barbara Epstein formulated an early version of this argument in 1973.¹⁸ I will argue below that the legislative

14. See 19 U.S.C. §§ 1673-1673h (1988) (providing the rule regarding the imposition of antidumping duties and expanding on their administration).

15. See *id.* § 1671a-1671h (1988) (creating general rules regarding countervailing duties and expanding on their administration).

16. See *id.* § 1337 (1988) (stating that goods which, if sold within the United States, would involve sales violating United States intellectual property laws, are excludable at the border). These laws are not anticompetitive in substance, but, by affording greater protection against foreign infringement than against domestic infringement, these laws create impediments to the pursuit of free-trade objectives because they conflict with the obligations of the United States under the GATT to afford national treatment to foreign sellers. See GATT Council Decision, 6 Int'l Trade Rep. (BNA) 1466 (Nov. 15, 1989). GATT is the primary international legal mechanism designed to further the objectives of free trade.

17. See *supra* notes 9-16 and accompanying text (outlining the goals of the relevant laws).

18. Epstein, *The Illusory Conflict between Antidumping and Antitrust*, 18 ANTI-TRUST BULL. 1 (1973) (stating that antidumping regulation serves as an extension of antitrust laws). A somewhat different approach towards construing the trade laws in a more competitive direction is contained in Wood, "Unfair" Trade Injury: A Competition-Based Approach, 41 STAN. L. REV. 1153 (1989). Although the relation between the trade and antitrust laws is a source of continuing comment in the literature, most commentators conclude that the two sets of laws are in irreconcilable conflict. See, e.g., Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, 56 ANTI-TRUST L.J. 409 (1987); Victor, *Antidumping and Antitrust: Can the Inconsistencies be Resolved?*, 15 N.Y.U. J. INT'L L. & POL. 339, 348-50 (1983) (stating that the Antidumping Act of 1921 and its successor statute, Title VII of the Tariff Act of 1930, have historically been administered without the antitrust objectives of encouraging price competition); Comment, *The Antidumping Act—Tariff or Antitrust Law?*, 74 YALE L.J. 707, 713-15 (1965) [hereinafter Comment, *The Antidumping Act*]. But see Eckes, *The Interface of Antitrust and Trade Laws—Conflict or Har-*

history of the trade laws supports this position and that modern theories of interpretation provide further support.

This argument, in broad outline, is as follows: The trade laws are designed to protect domestic firms from unfair behavior. Unfairness, in business, as in other contexts, is an evolving concept. The criteria for business unfairness as a legal cause of action in the United States have generally reflected competitive market norms. Both unfair competition law and the federal and state antitrust laws generally reflect this goal. Broad reexamination of the conceptions of unfairness embodied in the trade laws may reveal either a latent consistency with the competitive market norms underlying the antitrust and unfair competition laws, or at least potential for reconciliation.

II. PRICE DISCRIMINATION AS THE SUBJECT OF THE CLAYTON AND ANTIDUMPING ACTS

A. PRICE DISCRIMINATION IN INTERNATIONAL TRADE: DUMPING

Although an historic rationale for customs duties was the discouragement of foreign "dumping", specific legislation directed against that practice dates back, at the earliest, to the Wilson Tariff Act of 1894 (1894 Act).¹⁹ Although the 1894 Act apparently applies to some behavior involving price discrimination in international trade,²⁰ it does not specifically refer to price discrimination or dumping. The Antidumping Act of 1916 (1916 Act) contains the first unambiguous statutory prohibition directed against dumping.²¹ The 1916 Act defines dumping as the sale of goods in the United States at prices lower than those prevailing in the seller's home market.²²

mony? An ITC Commissioner's Perspective, 56 ANTITRUST L.J. 417 (1987) (stating a belief in the compatibility of the long-run objectives of the antitrust and trade laws).

19. Wilson Tariff Act of 1894, 28 Stat. 570 (1894) (current version at 15 U.S.C. §§ 8-11 (1988)).

20. See *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013, 1018-19 (9th Cir.) *cert. denied* 474 U.S. 903 (1985) (supporting the proposition that conspiracies among two or more defendants to sell in the United States at prices lower than those charged by the defendants in their home markets would apparently fall under the Wilson Tariff Act); see also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1164 (E.D. Pa. 1981), *rev'd on other grounds*, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 475 U.S. 574 (1986) (holding similarly that a conspiracy by defendants to sell in the United States at low prices while selling at high prices in their foreign home market would violate the Wilson Tariff Act). The plaintiffs in the latter case were unsuccessful because they did not possess evidence of such a conspiracy. *Matsushita Elec. Indus., Co.* 475 U.S. at 595-96.

21. Act of Sept. 8, 1916, ch. 463, § 801, 39 Stat. 798 (1916) (codified as amended at 15 U.S.C. § 72 (1988) [hereinafter 1916 Act]).

22. *Id.*

Congress wrote the 1894 and the 1916 Acts as antitrust laws. Both statutes are framed in classic antitrust language. The 1894 Act forbids every "combination, conspiracy, trust, agreement, or contract . . . intended to operate in restraint of lawful trade."²³ The 1916 Act proscribes sales of goods in the United States at levels below the home-market price when the seller acts with the intent "of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of the trade and commerce in such articles in the United States . . ."²⁴ This intent to destroy or injure an industry or to prevent its establishment is, in today's language, a "predatory" intent.²⁵ Concern about predatory behavior was widespread during the second decade of this century. That concern underlay the enactment, two years before the 1916 Act, of the provisions directed against domestic price discrimination in the Clayton Act.²⁶

Unlike the 1916 Act, antidumping legislation enacted in 1921 does not require proof of predatory intent.²⁷ As a result, the 1921 Act provides a means for domestic industry to protect itself against competition that is nonpredatory and fair. Congress reenacted most of the substantive provisions of the 1921 Act in the Trade Agreements Act of 1979,²⁸ an act which tightens the decisional timetable for making antidumping determinations and elaborates the procedures required for such a determination.²⁹ The provisions of the 1979 Act can and should be reconstrued consistently with the objectives of the antitrust laws.³⁰

23. 28 Stat. 570 (1894), 15 U.S.C. § 8 (1988).

24. 15 U.S.C. § 72 (1988). The 1916 Act is widely understood as an antitrust law. See, e.g., Fourth Ann. Jud. Conf. U.S. Ct. App. Fed. Cir., 112 F.R.D. 439, 541, 544-45 (1986) (setting forth Charlene Barshefsky's remarks describing the 1916 Act as an antitrust law); see also Comment, *The Antidumping Act*, supra note 18, at 714 (addressing the similarities between the language of the 1916 Act and the Clayton Act).

25. See C. KINDLEBERGER, INTERNATIONAL ECONOMICS 276 (3d ed. 1963) (defining predatory dumping as gaining access to a market by selling at a loss).

26. Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1988)).

27. Antidumping Act of 1921, ch. 14 § 201, 42 Stat. 11 (1921), *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 162 (1979) (codified at 19 U.S.C. § 1671 (1988) [hereinafter 1921 Act]).

28. Trade Agreements Act of 1979, 93 Stat. 162 (1979) (codified at 19 U.S.C. § 1673 (1988)).

29. *Id.*

30. See Parts V and VI of this article, *infra* (proposing and justifying such a reconciliation).

B. THE MULTIPLE TRANSFORMATIONS OF THE UNITED STATES TRADE LAWS

The trade laws of the immediate post World War I period imposed tariffs to protect developing sectors of American industry from foreign competition, provide inexpensive supplies to industry, and raise revenue.³¹ Congress eventually added the rationale of protecting American workers from low-wage foreign competition.³² Gradually, the revenue-generating impact of the tariff laws declined in importance as the income tax increased in importance. In the 1930s, the United States government began pursuing a policy designed to lower trade barriers. The policy began with the Reciprocal Trade Agreements Act,³³ under which the United States granted tariff concessions to nations that made similar concessions to the United States.³⁴ The United States took a major step towards further trade liberalization when it entered the General Agreement on Tariffs and Trade.³⁵

III. PRICE DISCRIMINATION IN DOMESTIC TRADE

A. SECTION TWO OF THE CLAYTON ACT AND THE ROBINSON-PATMAN AMENDMENTS

Congress first enacted laws governing domestic price discrimination in the Clayton Act.³⁶ In 1936, the Robinson-Patman Act³⁷ (or Robinson-Patman amendments) expanded the Clayton Act. After a checkered history of interpretation, antitrust scholars and practitioners have reached a widespread consensus on the impact of domestic price discrimination on marketplace competition and on the application of the Robinson-Patman Act.³⁸ The existing consensus on domestic price dis-

31. See, e.g., Tariff Act of 1922, 42 Stat. 858, 922 (current version at 19 U.S.C. § 1202 (1988) (presenting the imported articles for which duties must be paid). The "free list" ensured that domestic industry was provided inexpensive supplies. *Id.*; see also *id.* preamble (acknowledging that a purpose of the Tariff Act of 1922 was raising revenue).

32. Tariff Act of 1930, preamble, 46 Stat. 590 (current version at 19 U.S.C. § 1337 (1988)).

33. Reciprocal Trade Agreements Act, 48 Stat. 943 (1934)(codified as amended at 19 U.S.C. §§ 1351-54 (1988)).

34. *Id.*

35. GATT, *supra* note 4.

36. Clayton Antitrust Act, 38 Stat. 730, ch. 323, § 2 (1914) (codified as amended at 15 U.S.C. § 13 (1988)) (prohibiting some kinds of price discrimination).

37. Robinson-Patman Act, ch. 592, §§ 1-4, 49 Stat. 1526 (1936) (codified at 15 U.S.C. §§ 13-13b, 21a (1988)).

38. As amended, the price discrimination provisions of the Clayton Act are generally referred to as the Robinson-Patman Act. *Id.*

crimination can assist the development of a needed reevaluation of the treatment of price discrimination in international trade.

The original version of section two of the Clayton Act focused upon predatory pricing.³⁹ Both the House⁴⁰ and Senate reports⁴¹ describe the alleged practices of the Standard Oil Company,⁴² which sold in one community at uneconomically low prices until it drove out its rivals and gained a monopoly.⁴³ After acquiring its local monopoly, Standard Oil raised prices to supracompetitive levels.⁴⁴ According to the House report, monopoly revenues generated in other markets subsidized Standard Oil's low prices.⁴⁵ Although the authors of these reports may have misunderstood Standard Oil's behavior,⁴⁶ the committee reports reveal the congressional assumptions underlying the legislation and therefore the intent of the legislation.⁴⁷ Thus, as understood by Congress, price discrimination was an essential component of predatory pricing.

In 1936, Congress, by enacting the Robinson-Patman Amendments, sought to protect small grocery and drug stores from the perceived misuse by chain stores of their greater buying power.⁴⁸ Congress believed that chain stores employed their ability to purchase in large quantities to bargain down prices from their suppliers.⁴⁹ This allowed the chain stores to sell merchandise at a lower price than their smaller rivals who lacked such bargaining power.⁵⁰ Consequently, Congress maintained, chains and other large buyers acquired competitive advantages which

39. See, e.g., P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 720 (1978).

40. H.R. REP. NO. 627, 63d Cong., 2d Sess., pt. 1, at 8 (1914).

41. S. REP. NO. 698, 63d Cong., 2d Sess. 2-4 (1914).

42. H.R. REP. NO. 627, *supra* note 40, at 8.

43. *Id.*

44. *Id.*

45. *Id.*

46. See McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958) (questioning whether the Standard Oil Company actually engaged in predatory price discrimination to achieve or maintain its monopoly). McGee contends that little or no evidence exists to support the predatory pricing claim. *Id.* at 138.

47. See H.R. REP. NO. 627, *supra* note 40, at 8-9 (finding that firms like Standard Oil and American Tobacco sold their products at low prices to drive out rivals and recoup their losses by charging higher prices in markets where they maintained a monopoly).

48. See generally Gifford, *Assessing Secondary-Line Injury Under the Robinson-Patman Act: The Concept of "Competitive Advantage"*, 44 GEO. WASH. L. REV. 48, 50-52 (1976) [hereinafter Gifford, *Secondary-Line Injury*] (discussing the concept of competitive advantage). See also F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON PATMAN ACT 8-13 (1962).

49. See Gifford, *Secondary-Line Injury*, *supra* note 48, at 50-51 (noting that Congress perceived a threat to the continued existence of smaller businesses by chain businesses unfairly using their purchasing power over their smaller rivals).

50. *Id.*

were not based upon their superior efficiencies.⁵¹ Congress sought to remedy this problem by targeting suppliers.⁵² The Robinson-Patman amendments thus added a new conditionally phrased prohibition against price discrimination designed to protect business customers.⁵³

The original Clayton Act and the Robinson-Patman amendments thus were directed towards different problems. The Clayton Act originally focused on price discrimination likely to produce injury to competition at the same level of the market in which the discriminating seller operates. This type of injury is known as "primary-line" injury.⁵⁴ The Robinson-Patman amendments, by contrast, focus upon competition at the customer level by considering the extent to which a seller's price discrimination among its customers adversely affects competition among buyers. This type of injury is referred to as "secondary-line" injury.⁵⁵ The Robinson-Patman amendments generated a plethora of activity by the Federal Trade Commission and stimulated private litigation. Moreover, the amendments temporarily instilled new life into the prohibitions against discrimination producing primary-line effects.⁵⁶

B. THE EVOLUTION IN THE UNDERSTANDING OF PRICE DISCRIMINATION PRODUCING PRIMARY-LINE EFFECTS

True to the legislative history of section two of the Clayton Act, early primary-line cases generally involved predatory intent.⁵⁷ After the revision of section two in the Robinson-Patman amendments, the courts and the Federal Trade Commission appeared to accept a construction of section two which no longer required predatory intent.⁵⁸ The Second Circuit took the lead in applying section two to forbid discriminatory pricing that results in a diversion of business to the price-cutter.⁵⁹ In the Second Circuit, a plaintiff did not need to show predatory intent or

51. *Id.*

52. *Id.* at 52.

53. See 15 U.S.C. § 13(a) (1988) (revising section two of the Clayton Act by prohibiting price discrimination).

54. See generally Gifford, *Primary-Line Injury*, *supra* note 6, (giving an in-depth analysis of the problem of primary-line discrimination and the role of the Federal Trade Commission in enforcing the Act and in formulating evaluative criteria).

55. See Gifford, *Secondary-Line Injury*, *supra* note 48, at 52 (defining the competitive harm at the buyer level which the Robinson-Patman Act sought to forbid).

56. Gifford, *Primary-Line Injury*, *supra* note 6, at 1.

57. See, e.g., *Puerto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234, 237 (2d Cir. 1929).

58. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) (suggesting that a finding of predatory discrimination is unnecessary).

59. E.g., *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir.), *cert. dismissed*, 326 U.S. 734 (1945).

predatory behavior.⁶⁰ This approach converted section two into a statute imposing a stifling price rigidity upon all sellers. This price rigidity was the antithesis of competitive-market behavior.⁶¹ So long as courts continued to construe section two in this manner, that section directly conflicted with the rest of the antitrust laws.⁶²

The zenith of this approach came in 1967 when the Supreme Court decided *Utah Pie Co. v. Continental Baking Co.*⁶³ In this case, the Court disclaimed any requirement that the plaintiff prove predatory intent as part of a primary-line case under section two.⁶⁴ The plaintiff, Utah Pie Company, while maintaining a 66.5% share of the frozen pie market in Salt Lake City, came under severe price competition from three national companies.⁶⁵ Because the national companies sold in markets other than Salt Lake City and the Utah Pie Company did not, only the national companies sold the same product simultaneously at different prices. Consequently, only the national companies engaged in price discrimination.⁶⁶ The formal issue was whether the price discrimination may have lessened competition or tended to create a monopoly within the meaning of section two.⁶⁷ The price competition in Salt Lake City resulted in the Utah Pie Company's market share falling to 45.3% although it constantly increased its sales and continued to earn profits.⁶⁸ As the Utah Pie Company's share decreased, market concentration decreased as well. According to the standards espoused in antitrust merger cases, the Salt Lake City frozen pie market became more competitive as a result of the intense price competition.⁶⁹

Despite this apparent procompetitive effect on the Salt Lake City market, the Supreme Court reversed a court of appeals decision for the defendants and asserted that the finder of fact might rationally find that price discrimination may lessen competition within the meaning of section two when it produces a "drastically declining price structure."⁷⁰ In so ruling, the Court imposed a paradoxical meaning on section two's reference to injuring competition. The Court condemned the defendants' price reductions, none of which fell below their marginal costs.

60. *Id.*

61. See Gifford, *Primary-Line Injury*, *supra* note 6, at 14.

62. See *supra* notes 1, 9-12 and accompanying text (describing provisions of the antitrust laws promoting competition).

63. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

64. *Id.* at 702-04.

65. *Id.* at 689-94.

66. *Id.* at 690-91.

67. *Id.* at 690-704.

68. *Id.* at 689-702.

69. *Id.* at 704-05 (Stewart, J., dissenting).

70. *Id.* at 703.

The conduct proscribed by the Court thus resembled, if not matched, the behavior encouraged by the Sherman Act: price cutting by firms striving to attract customers away from rivals.⁷¹ Aside from referring to the declining price structure, the court failed to explain how the behavior of all of the parties differed from the price rivalry fostered by the Sherman Act.⁷² In the immediate wake of the *Utah Pie* decision, most lawyers would probably have advised their multi-market clients to avoid intense price competition in local markets, which would necessarily involve geographic price differentials and thus the possible application of the Robinson-Patman Act.

The *Utah Pie* decision, though misguided, produced few disastrous effects. While conveying a broad antipathy towards price discrimination, the majority opinion provided little guidance to courts seeking to differentiate lawful from unlawful price discrimination. As a result, lower courts frequently distinguished *Utah Pie* and rejected claims of illegal discrimination.⁷³

Legal scholars ultimately undermined the *Utah Pie* decision. Ward Bowman launched the offensive with a scathing attack in the *Yale Law Journal* shortly after the decision was released.⁷⁴ The actual demise of *Utah Pie* as an effective legal precedent began with the publication, in the *Harvard Law Review*, of the seminal article, *Predatory Pricing under Section 2 of the Sherman Act*⁷⁵ by Professors Philip Areeda and Donald Turner. As the title indicates, the article primarily addressed predatory pricing claims under the Sherman Act. The authors argued, however, that the analysis they developed for dealing with predatory pricing claims under the Sherman Act should apply to primary-line claims under the Robinson-Patman Act as well.⁷⁶ They reasoned that

71. *Id.* at 702-04.

72. *Id.* at 703.

73. *See Borden Co. v. FTC*, 381 F.2d 175, 179 n.12 (5th Cir. 1967) (noting that competitors experienced an increase in absolute sales volume, proportionately improving their market position, and that in the past, courts received such evidence as dispelling the existence of injury); *see also Dean Milk Co. v. FTC*, 385 F.2d 696, 702, 711 (7th Cir. 1968) (interpreting the intentions of the Robinson-Patman Act as not discouraging new competitors from entering markets). The court's position did not reconcile with the Federal Trade Commission's concern, expressed in the case, about the concentration of market power. *Id.* at 702.

74. *See Bowman, Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 *YALE L.J.* 70 (1967) (attacking *Utah Pie* as being anticompetitive and apparently disregarding the promotion of a competitive market).

75. Areeda & Turner, *Predatory Pricing under Section 2 of the Sherman Act*, 88 *HARV. L. REV.* 697 (1975); III P. AREEDA & D. TURNER, *ANTITRUST LAW* 150-94 (1978) [hereinafter P. AREEDA & D. TURNER].

76. *See Areeda & Turner, supra* note 75, at 726-28 (arguing that the substantive issues raised by the Robinson-Patman Act should be interpreted no differently in pri-

Congress' concern with discrimination cases having primary-line effects manifested itself in the original 1914 Clayton Act, because its legislative history identifies unlawful discrimination with predatory pricing.⁷⁷ Congress designed the 1936 Robinson-Patman amendments to expand the language of the Clayton Act to cover price discrimination with secondary-line effects but not to modify the Clayton Act's approach towards primary-line cases.⁷⁸

Under the Areeda and Turner formulation, marginal cost plays a decisive theoretical role.⁷⁹ Areeda and Turner argue that because no business firm could maximize its profits or minimize its losses by pricing below marginal cost, such pricing indicates a long-run goal: the acquisition of future market power by driving rivals out of the market.⁸⁰ Accordingly, courts should presume pricing below marginal cost is predatory and hence unlawful.⁸¹ Conversely, Areeda and Turner propose that courts should presume pricing at or above marginal cost is lawful, largely because marginal cost pricing maximizes short-run welfare and because tests based upon long-run welfare are difficult to administer.⁸² Although they consider marginal cost as the theoretical dividing line between lawful and unlawful pricing, Areeda and Turner suggest that courts use average variable cost as a surrogate for marginal cost because of the ease of calculating average variable cost.⁸³

Scholars extensively debated the Areeda and Turner average variable cost test for evaluating predatory pricing claims.⁸⁴ Although the critics identify a number of theoretical and practical problems with

mary-line cases unless the statutory language or the legislative history dictates otherwise).

77. *See id.* at 727 (stating that the substantive issues raised by the Robinson-Patman Act's concern with primary-line injury in comparison to the Sherman Act's concern with predatory pricing are identical).

78. *See id.* (interpreting the legislative history of the Robinson-Patman Act).

79. *Id.* at 709-16.

80. *See id.* at 711 (arguing that setting prices above marginal costs would not promote the natural course of free competition by permitting the survival of less efficient firms).

81. *Id.* at 711-12.

82. P. AREEDA & D. TURNER, *supra* note 75, at 164-68; Areeda & Turner, *supra* note 75, at 711-12 (stating that forcing a firm to charge higher prices reduces industry output and wastes resources in the long run).

83. *See* Areeda & Turner, *supra* note 75, at 716-18 (stipulating that an average variable cost rule should allow a defendant to demonstrate that its price was equal to or above a "reasonably anticipated average variable cost").

84. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 868 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977); Areeda & Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337 (1978); Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981).

that test,⁸⁵ its comparative simplicity and easy applicability, together with its readily understandable rationale, have helped it to prevail in the courts. Since 1975, almost all of the federal circuit courts have adopted a version of the Areeda and Turner test.⁸⁶ Although the Supreme Court has never itself overruled *Utah Pie*, the case law in the federal circuits, by incorporating the Areeda and Turner test, has effectively rejected that case as a precedent in primary-line price discrimination cases.

The present Supreme Court approves of these post-*Utah Pie* developments. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*⁸⁷ the Court rejected claims of a predatory price conspiracy under the Sherman Act because of the economic implausibility of the claims.⁸⁸ Although it declined to endorse a particular cost-based standard, the Supreme Court indicated its awareness of contemporary predatory pricing analysis by extensive citation to Robert Bork's *The Antitrust Paradox*.⁸⁹ Since Bork vigorously criticized *Utah Pie* in that book,⁹⁰ the *Matsushita* decision suggests a complete turnaround by the Court. Moreover, the Supreme Court has also indicated that lower courts should construe the Robinson-Patman Act in conformity with the pro-

85. Williamson, *Williamson on Predatory Pricing II*, 88 YALE L.J. 1183 (1979); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing*, 89 YALE L.J. 213 (1979).

86. *Kelco Disposal, Inc. v. Browning Ferris Indus.*, 845 F.2d 404, 407 (2d Cir. 1988), *aff'd*, 492 U.S. 257 (1989); *C.E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1245 (5th Cir. 1985), *cert. denied*, 474 U.S. 1037 (1985); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1060 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 431 (7th Cir. 1980); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 598 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); *Marsann Co. v. Brammall, Inc.*, 788 F.2d 611, 616 (9th Cir. 1986); *Instructional Systems Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987). In addition, two other circuits have expressed sympathy for the Areeda-Turner approach. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 233-35 (1st Cir. 1983); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 352 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). The Eleventh Circuit, however, has rejected the Areeda-Turner proposal. *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1496 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989). The Seventh Circuit has recently disavowed the Areeda-Turner test for the Robinson-Patman Act as inconsistent with the *Utah Pie* decision. *See A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1404-06 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1326 (1990).

87. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

88. *Id.* at 598.

89. *Id.* at 589. Subsequently, the Court again showed its understanding and acceptance of current predatory pricing analysis. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119-22 & nn.15-17 (1986).

90. R. BORK, *supra* note 1, at 386-87.

competitive policies of the Sherman Act.⁹¹ The Supreme Court will probably endorse the lower courts' decisions to use similar predatory pricing standards under both the Sherman and Robinson-Patman Acts.

In summary, the prevailing interpretation of the Robinson-Patman amendments' application to primary-line price discrimination claims has undergone extensive development. The prevalent construction harmonizes the amendments with the Sherman Act. Today, the same tests apply to pricing challenged under the Robinson-Patman Act or the Sherman Act. The legislative history of the original Clayton Act provides strong support for this current interpretation of the Robinson-Patman Act.⁹²

C. THE EVOLUTION OF UNLAWFUL PRICING WITH PRIMARY-LINE EFFECTS UNDER THE CLAYTON ACT

The history of pricing under the Clayton Act reveals two interrelated lines of development. First, the prevailing understanding of the prohibition contained in section two has undergone immense change since the Clayton Act was first enacted in 1914. Initially, the Clayton Act was understood as addressing predatory pricing. After the enactment of the Robinson-Patman amendments,⁹³ the Federal Trade Commission and the courts began to use the Clayton Act against business firms when their pricing adversely affected their rivals, even when that pricing was patently nonpredatory.⁹⁴ Today, the courts have virtually returned to their original position before the Robinson-Patman amendments and apply the Clayton Act only against predatory price discrimination.⁹⁵

Second, an increased understanding of predatory pricing has shaped the current construction of the Clayton Act. Predatory pricing has always been understood as pricing at levels which were lower than optimal for short-run profit maximization purposes in order to force rivals from the market or otherwise to injure them. In the last two decades, however, large segments of the legal profession have come to appreciate the precise characteristics of predatory pricing and the contexts in which it occurs. Largely due to Professors Areeda and Turner, scholars widely recognize and accept the full scenario of predatory pricing and the limited set of conditions in which predatory pricing is plausible. A predator surrenders short-run profits otherwise available as a means for

91. *United States v. United States Gypsum Co.*, 438 U.S. 422, 458-59 (1978); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953).

92. H.R. REP. NO. 627, *supra* note 40, at 8.

93. 15 U.S.C. §§ 13, 13a (1936).

94. *See Gifford, Primary-Line Injury*, *supra* note 6, at 12-17.

95. *See supra* note 86 (citing illustrative cases).

seeking a long-run goal. That goal is the facilitation of monopoly or monopoly-like pricing in the future.

Predatory pricing must, therefore, achieve its goal either by driving rivals out of the market or by disciplining rivals sufficiently so that they will cooperate in monopoly-like pricing. A potential predator must possess sufficient market power to reduce market prices to predatory levels. The practical requirement that a predator initially possess the requisite amount of excess capacity to absorb rivals' market shares limits the cases in which a predator can seek to displace rather than merely discipline its rivals. This requirement alone eliminates many otherwise plausible predatory pricing claims. Moreover, all predatory pricing scenarios presuppose that the predator will recoup the sacrifices of present revenues with interest from the future monopoly gains. Entry barriers must exist to prevent new rivals from encroaching on the predator's market and foiling its ability to recoup its earlier losses through high monopoly prices.

As the courts' awareness of the elements of predatory pricing has risen, so has their skepticism of predatory pricing claims. Firms can practice predatory pricing only in limited situations. First, the predator must be sufficiently large to acquire market power. Second, the market itself must be protected by entry barriers. In cases in which a predator seeks to displace its rivals, it must possess the necessary amount of initially unused capacity to absorb the competitors' market shares. Predatory behavior cannot occur if these conditions are not fulfilled.

IV. A NEEDED REINTERPRETATION OF THE ANTIDUMPING ACTS

A. THE PREDATORY PRICING BACKGROUND OF THE ANTIDUMPING ACTS

Although scholars have understood the concept of predatory pricing throughout the twentieth century, only toward the end of the century have they widely agreed upon precise conditions for its use. The legislative history of section two of the 1914 Clayton Act describes the practices of the old Standard Oil Company and American Tobacco Company of lowering "the prices of their commodities, oftentimes below the cost of production in certain communities and sections . . . with the intent to destroy and make unprofitable the business of their competitors."⁹⁶ The House report depicts the low prices as "below cost or with-

96. H.R. REP. NO. 627, *supra* note 40, at 8.

out a fair profit."⁹⁷ Congress thought that Standard and American used such behavior to drive out rivals and gain local monopolies for themselves.⁹⁸

The authors of the House report did not possess a precise concept of predatory pricing that could withstand critical attack by a modern economist. They did, however, have a broad understanding of the behavior that they sought to eliminate: pricing at levels that are below cost or that do not generate a fair profit. Moreover, the House report perceives predatory pricing as closely connected with price discrimination.⁹⁹ A business firm that sells at unreasonably low prices in some locations, in the view of the House authors, "must necessarily recoup its losses . . . by raising the price of this same class of commodities above their fair market value in other sections or communities."¹⁰⁰

Although this legislative history suggests that Congress wanted to outlaw predatory pricing and provides some indication of Congress' understanding of predatory pricing, section two of the Clayton Act does not contain an explicit intent requirement. The Act forbids price discrimination whenever discrimination "may" result in a lessening of competition or a tendency towards monopoly.¹⁰¹ The identification of predatory pricing by the House committee as the focus of the legislation suggests that the Act's drafters largely equated the reduced competition referred to in the Act with predatory pricing. The Act reflects Congress' decision to define the forbidden conduct objectively rather than through a subjective intent requirement.¹⁰²

When Congress enacted the 1916 Act, which proscribed dumping when the seller intends to destroy, injure, or prevent the establishment of a domestic industry, it was probably operating with a sense of predatoriness no better defined than that underlying section two of the Clayton Act, enacted two years earlier.¹⁰³ Congress probably found that the double set of prices—the high home-market price and the low United States price—raised an inference of unfairness, just as Congress believed that domestic price discrimination raised an inference of preda-

97. *Id.* at 9.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1-2.

102. Clayton Act, 38 Stat. 730, § 2 (1914) (codified as amended at 15 U.S.C. § 13 (1988)).

103. That Congress intended the 1916 Act to be an analogue to Clayton Act § 2 is further indicated by the inclusion in the 1916 Act of an analogue to Clayton Act § 3, 39 Stat. 799 (1916) (codified at 15 U.S.C. § 73 (1988)).

tory pricing.¹⁰⁴ The cross-market subsidization analysis, which appeared in the legislative history of the Clayton Act two years earlier, was probably accepted by the Congress which enacted the 1916 Act.

Congress directed the 1916 Act explicitly at predatory pricing.¹⁰⁵ The 1916 Act creates criminal penalties for violators and permits civil actions by private plaintiffs, who may collect treble damages.¹⁰⁶ Violation of the 1916 Act requires an "intent" of "destroying or injuring" an industry in the United States or of preventing its establishment.¹⁰⁷ Although Congress directed both the 1916 Act and the Clayton Act at predatory pricing carried out in a context of price discrimination, the mechanics of the two acts differ. The 1916 Act imposes an intent requirement¹⁰⁸ whereas the Clayton Act lacks an explicit intent requirement but does require a showing of a likely impact upon the market.¹⁰⁹ This difference should not be surprising if Congress believed that predatory pricing could be established as well by showing intent as by showing probable market impact. There is, thus, reason to believe that Congress directed the 1916 Act against behavior analogous to that proscribed in section two of the Clayton Act.

Next, and more problematic, is the relation between the 1916 Act and the 1921 Act. Rather than repealing the earlier legislation, the 1921 Act merely adds its own parallel antidumping machinery.¹¹⁰ The 1921 Act omits the cumbersome judicial enforcement machinery of the 1916 Act and substitutes administrative enforcement mechanisms.¹¹¹ It also drops the intent requirements of the 1916 Act, probably because proving such an intent was too difficult in practice.¹¹² Yet the 1921 Act replaces the intent-to-injure requirement with an actual injury requirement. The statutory description of actual injury under the 1921 Act largely tracks the intent-to-injure requirement under the 1916 Act. Thus, the 1921 Act requires the secretary of the Treasury, prior to imposing antidumping duties, to find that "an industry in the United

104. See Fourth Ann. Jud. Conf. U.S. Ct. App. Fed Cir., 112 F.R.D. 439, 544 (where Ms. Barshefsky draws the same conclusion as does this author).

105. *Id.*

106. 15 U.S.C. § 72 (1988).

107. *Id.*

108. *Id.*

109. Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 13 (1988)).

110. Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11.

111. *Id.*

112. H.R. REP. NO. 479, 66th Cong., 2d Sess. 2 (1919); see also J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 244-45 (1923). Victor, *supra* note 18, at 346; Caine, *A Case for Repealing the Antidumping Provisions of The Tariff Act of 1930*, 13 L. & POL'Y IN INT. BUS. 681, 715 (1981).

States is being or is likely to be injured, or is prevented from being established"¹¹³ Under the 1921 Act, the Secretary had to find that a foreign company injured, threatened to injure, or prevented the establishment of an American industry. The 1916 Act required the plaintiff to prove that the defendant *intended* to destroy or injure or prevent the establishment of an American industry.¹¹⁴ The 1921 Act substituted an administrative finding of actual or threatened result for a judicial determination of intent to achieve results.¹¹⁵

The related phraseology of the 1921 and 1916 Acts suggests that, although enforcement methods and elements of proof differ under the two Acts, Congress nonetheless directed both against the same or similar phenomenon. There is ground for believing that this phenomenon was predatory pricing.¹¹⁶ Some elements of the legislative history of the 1921 Act corroborate this view. The House report treats the proposed legislation as complementing the Sherman Act:

Over 20 years ago, by the enactment of the Sherman antitrust law, Congress recognized the necessity of legislation to prevent unfair methods of competition and monopoly within the United States, but effective legislation to prevent discriminations and unfair practices from abroad, to destroy competition and control prices, has not been enacted.¹¹⁷

The legislation then pending would, in the view of the House committee, serve that purpose. Indeed, the committee's view of the pending antidumping legislation as a form of antitrust law draws support from a number of events familiar to the Congress of 1921 which linked price discrimination, monopoly behavior, and the antitrust laws. Geographic price discrimination had been part of a monopolization case that Standard Oil Company lost in the Supreme Court in 1911.¹¹⁸ Congress had targeted geographic price discrimination by enacting section two of the

113. Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11.

114. Antidumping Act of 1916, § 800, (codified as amended at 15 U.S.C. § 72 (1988)).

115. *Id.*

116. Ehrenhaft, *Protection against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44, 47 (1958); Comment, *supra* note 18, at 713-15. UNITED STATES TARIFF COMM'N, INFORMATION CONCERNING DUMPING AND UNFAIR FOREIGN COMPETITION IN THE UNITED STATES AND CANADA'S ANTI-DUMPING LAW 20 (1919) [hereinafter TARIFF COMM'N REPORT] (defining dumping as an unfair practice, even when predatory intent was lacking). That Report was a significant part of the background to the 1921 legislation. *But see* H.R. REP. 479, *supra* note 112, at 2 (relying heavily on the Tariff Commission Report).

117. H.R. REP. 479, *supra* note 112, at 1.

118. *Standard Oil Co. v. United States*, 221 U.S. 1, 43 (1911); McGee, *supra* note 46, at 137 (1958); Comment, *The Antidumping Act*, *supra* note 18, at 718.

Clayton Act in 1914.¹¹⁹ The 1916 Act was phrased as an antitrust law and was explicitly directed against predatory dumping. Congress designed the 1921 Act to remedy the deficiencies of the 1916 Act.¹²⁰ Finally, the committee's description of dumping as involving "unfair methods of competition" implicitly refers to the condemnation, in 1914, of "unfair methods of competition" in the Federal Trade Commission Act.¹²¹

Further support for construing the 1921 Act as directed against predatory dumping can be drawn from the Tariff Act of 1922.¹²² The 1922 Act contained provisions directed against "unfair methods of competition" and "unfair acts in the importation of articles into the United States,"¹²³ provisions widely recognized at the time as directed against predatory dumping.¹²⁴ The 1922 Act followed the recommendations of the Tariff Commission's critique of the 1916 Act.¹²⁵ The contention by the sponsors of the Tariff Act of 1922 that these prohibitions were more effective than the antidumping statutes reinforces the view that the 1921 Act was directed at predatory pricing, since the description of the 1922 legislation as more effective protection would not have

119. 15 U.S.C. § 13 (1988).

120. See H.R. REP. NO. 479, *supra* note 112, at 2 (criticizing the 1916 Act).

121. 15 U.S.C. § 45 (1988). See *supra* note 11 and accompanying text (elaborating on provisions of the Clayton Act).

122. Tariff Act of 1922, 42 Stat. 943. Similar provisions are now contained in 19 U.S.C. § 1337 (1988).

123. Tariff Act of 1922, § 316 (providing in part:

(a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

. . . .

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 percentum of the value of such articles . . . which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States . . .).

Section 316 of the Tariff Act of 1922 was the antecedent of the provisions now contained in 19 U.S.C. § 1337 (1988).

124. See J. Viner, *supra* note 112, at 147.

125. *Id.*

been accurate had the scope of that legislation been narrower than the then recently-enacted 1921 legislation.¹²⁶

In the first quarter of the twentieth century, Congress enacted several statutes that were directed against predatory pricing: Congress targeted predatory pricing in section two of the Clayton Act in 1914,¹²⁷ in the Antidumping Act of 1916,¹²⁸ and in the unfair competition provisions of the Tariff Act of 1922.¹²⁹ In addition, predatory pricing was probably within the scope of the Federal Trade Commission Act's ban on "unfair methods of competition"¹³⁰ as it was within the ban of similar words in the Tariff Act of 1922.¹³¹ There is no doubt that the 1921 Act targets predatory dumping. Whether the 1921 Act is directed against other behavior as well is considered below.

B. THE RELATIONSHIP BETWEEN PREDATORY PRICING ANALYSIS AND THE ANTIDUMPING LAWS

When Congress enacted the 1921 Act, it may have acted in the belief that the legislation would protect American business from unfair price discrimination similar to that prohibited by the Sherman and Clayton Acts.¹³² While the 1921 Act does not contain the predatory intent requirement present in the 1916 Act, it does include an injury requirement that largely tracks the intent provisions of the 1916 Act.¹³³ Moreover, the administrative enforcement machinery of the 1921 Act¹³⁴ may have been designed to limit the act's application to predatory or otherwise unfair behavior. Congress probably decided to phrase the 1921 Act broadly to avoid the procedural problems¹³⁵ impeding en-

126. *Id.*

127. 15 U.S.C. § 13 (1988).

128. Antidumping Act of 1916, § 801, 39 Stat. 798 (codified as amended at 15 U.S.C. § 72 (1988)).

129. Tariff Act of 1922, 42 Stat. 852 (codified as amended at 19 U.S.C. § 1337 (1988)).

130. Federal Trade Commission Act, 38 Stat. 717 (1914) (current version at 15 U.S.C. § 45 (1988)).

131. Tariff Act of 1922, 42 Stat. 852, *supra* note 129.

132. H.R. REP. NO. 479, *supra* note 112, at 2 (noting several objections to the 1916 Act).

133. 19 U.S.C. § 160 (1988).

134. Antidumping Act of 1916, § 803, 39 Stat. 799 (codified as amended at 15 U.S.C. § 72 (1988)).

135. See H.R. REP. NO. 479, *supra* note 112, at 2 (stating that the principal objections to the 1916 Act seem to have been that no relief could be granted under the Act unless predatory intent was established, and it was exceedingly difficult to prove predatory intent; second, the 1916 Act prohibitions ran against the importers who would be persons unlikely to possess the requisite predatory intent; and third, since it carried criminal as well as civil penalties, it was believed that the Act had to be strictly construed). Objection was also made to the 1916 Act on the ground that it covered only

forcement of the 1916 Act, but by entrusting the administration of the 1921 Act to the secretary of the Treasury, Congress hoped to constrain the scope of the Act's practical application.

The 1921 Act remained the primary antidumping law until the enactment of the Trade Agreements Act in 1979 (1979 Act).¹³⁶ Congress intended the 1979 Act to bring United States law into conformity with the then recently negotiated GATT antidumping and countervailing duty codes.¹³⁷ Congress formally repealed the provisions of the 1921 Act¹³⁸ but substantially reenacted them as an amendment adding Title VII to the Tariff Act of 1930.¹³⁹ When I refer below to the Antidumping Act, it is this reenactment to which I refer unless I state otherwise.

Several events since the mid-1970s have injected flux into the interpretation of the Antidumping Act. In 1974, Congress amended the Antidumping Act to include below-cost sales in the United States within the rubric of dumping, regardless of the price at which the product was being sold in its home market.¹⁴⁰ The Antidumping Act brought such sales within its scope by defining dumping as sales in the United States at less than "fair value."¹⁴¹ The Trade Act of 1974 (1974 Act) redefined fair value as not less than cost.¹⁴² The result was that below-cost sales within the United States fell under the sweep of the Antidumping Act even though home-market sales were made at identical, albeit below-cost, prices.¹⁴³ Proof of injury to a domestic industry as a result of

dumping "commonly and systematically" carried on. *Id.* Moreover, the burdens of proof were believed to exceed the practical abilities of most private plaintiffs to sustain. *Id.*; J. VINER, *supra* note 112, at 244-45 (1923); Tariff Comm'n Report, *supra* note 116, at 18, 20, 33.

136. Trade Agreements Act of 1979, § 106, Pub. L. No. 96-39, 93 Stat. 144.

137. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 TEXAS INT'L L.J. 265, 269 (1987).

138. Trade Agreements Act of 1979, § 106, Pub. L. No. 96-39, 93 Stat. 144, 193.

139. *Id.* § 101, 93 Stat. 162 (1979). Title VII is codified at 19 U.S.C. §§ 1671-1677g (1988).

140. Trade Act of 1974, § 321, Pub. L. No. 93-618, 88 Stat. 2043 (1974) (codified at 19 U.S.C. §§ 1671-1677g (1988)).

141. *Id.*, 88 Stat. 2044.

142. *Id.*, 88 Stat. 2043, 2046 (codified as amended at 19 U.S.C. § 1677b(b) (1988)).

143. *Id.* § 321(a) (codified at 19 U.S.C. § 1677b(b) (1988)). Under the present law, home market sales at less than the cost of production are disregarded for purposes of determining foreign market value. When below-cost home-market prices are disregarded, then home-market value must be constructed by calculating production cost plus imputed general expenses of 10% and profit of eight percent. 19 U.S.C. § 1677b(e) (1988). Below-cost sales in the United States are then compared with this constructed home-market price with the result that below-cost sales in the United States will always be deemed to be dumping sales.

such below-cost sales now justifies the imposition of antidumping duties.

The 1974 Act provisions dealing with below-cost sales appear to undercut the traditional cross-market subsidy rationale which was a premise of both the 1916 and 1921 Acts.¹⁴⁴ After all, falling demand—rather than some unfair tactic—would often be the reason why a firm would sell at below-average-total-cost prices in all markets. No business firm, however, can sell all of its products at below-cost prices indefinitely without a subsidy of some kind. In the congressional view, persistent sales below cost (including home market sales) suggest that the producer is, or has been, the beneficiary of a government subsidy. On this view, dumping, as redefined in 1974, would continue to be connected with subsidy; the 1974 Act thus recognizes, in addition to the traditional cross-market subsidy, direct subsidization from the dumping firm's government as an essential ingredient in dumping. Moreover, Congress reaffirmed its belief in the subsidy rationale when the 1974 Act extended the reach of the Antidumping Act to certain operations of multinational corporations.¹⁴⁵ Under the 1974 legislation, the Antidumping Act reaches multinationals that sell in the United States at prices lower than those in third-country markets, even though their home-country prices are not higher than the American prices.¹⁴⁶ Congress reasoned that in such situations, revenues from third countries could subsidize the low price sales in the American market.¹⁴⁷ Congress thus reaffirmed its belief in using a subsidy model of dumping injury. Accordingly, the low American prices are causally related to the higher prices abroad; it is the revenues from the latter that make the former possible.¹⁴⁸

This recent reaffirmation of the subsidy model is consistent with the view that the antidumping laws are directed not just at low United States prices charged by foreign producers but also against two sets of interrelated prices. A similar concept involving domestic price discrimination arises under the Robinson-Patman Act.¹⁴⁹ Persons complaining

144. See *supra* notes 19-28; 103-31 and accompanying text (stating the basis for the 1916 and 1921 antidumping legislation).

145. See 19 U.S.C. § 1677b(d) (1988) (outlining the special rule for multinational corporations).

146. 19 U.S.C. § 1677b(d)(3) (1988).

147. S. REP. NO. 1298, *reprinted in* 4 U.S. CONG. & ADMIN. NEWS, 93d Cong., 2d Sess. 7186, 7188-89 (1974) (noting that trade cannot be isolated from world economic influences).

148. *Id.*

149. 15 U.S.C. § 13(a)-(f) (1988). The subsidy concept first appeared in the legislative history to the original section two of the Clayton Act. See text at note 100, *supra* (discussing the legislative history of section two of the Clayton Act).

of injury under the Robinson-Patman Act must prove, in addition to the impact of the defendant's low prices, that their injury results from the discrimination which consists of a combination of high and low prices.¹⁵⁰ Under the Robinson-Patman Act, the causal connection between the injury and the combination of high and low prices may be established by showing that the revenue from the high prices financed otherwise staggering losses incurred when the firm sold at below-marginal-cost levels in another market.¹⁵¹

The history of antidumping legislation suggests that Congress has believed that a relationship exists between a dumping firm's high home-market prices and its low American prices. The close relationship between the 1916 Act and the Clayton Act suggests that the subsidy model of price discrimination underlay both acts. The subsidy model, however, is particularly adapted to legislation directed against predatory pricing, like the Clayton Act and the 1916 Act. To the extent that the 1921 Act and subsequent revisions have been directed against non-predatory behavior, a different understanding of the connection between the dumper's high and low prices must underlie that legislation.

Congressional concern that in the aftermath of World War I foreign cartels would be seeking to dispose of excess production in the United States underlay the 1921 Act.¹⁵² Concerns about the likely impact of foreign cartel pricing suggest that some congressional backers of antidumping legislation perceived a relationship between the high and low prices different from that embodied in the subsidy model. That relationship involved the use of dumping as a device to lower unit costs in industries with heavy fixed costs by producing in volume without eroding away high foreign home-market prices established through cartel behavior.¹⁵³ Although the foreign sellers might not possess predatory motives, they could, nonetheless, be viewed as drawing upon protected

150. See, e.g., *Borden Co. v. FTC*, 381 F.2d 175, 180 (5th Cir. 1967) (holding that a causal connection between the two levels of prices and the injury is necessary for recovery under the Robinson-Patman Act); D. GIFFORD & L. RASKIND, *FEDERAL ANTITRUST LAW CASES AND MATERIALS* 589-93 (1983).

151. See *Shore Gas & Oil Co. v. Humble Oil & Refining Co.*, 224 F. Supp. 922, 926 (D.N.J. 1963) (holding that distributors' self-sustained lower price attracting another distributor's customer did not violate the Clayton Act).

152. See *H.R. Rep. No. 479*, *supra* note 112; Ehrenhaft, *supra* note 116, at 45.

153. *TARIFF COMM'N REPORT*, *supra* note 116, at 19 & n.2. (noting that the Tariff Commission had pointed out that in industries with high fixed costs, dumping helps to lower unit costs). The Commission itself, however, did not emphasize a connection between dumping and cartel behavior; nor did the Commission emphasize a connection between dumping by foreign producers as a device for acquisition of market power in the importing country. *Id. Compare id.* at 19 with *H.R. REP. NO. 479*, *supra* note 112, at 2-3 (both selectively quoting a report of the Alien Property Custodian).

home-market monopoly positions to subject American rivals to persistent competition from marginal-cost pricing. The monopoly revenues in the home-market would thus be essential to marginal-cost pricing in the American market. The monopoly prices in their protected home-markets would provide coverage for fixed costs and generate profits, thereby facilitating the foreign sellers' ability to price at marginal-cost levels abroad. There is no subsidy in the sense that the export sales are incurring losses. Indeed, the export sales may be reducing the unit costs of the dumping firm by increasing sales volume in an industry with scale economies. Yet, higher prices in a protected home-market would provide the revenues that are a sine qua non for persistent marginal-cost export pricing. A focus upon this kind of connection between the high home-market prices and the low American prices would explain some of the congressional references to dumping as unfair, monopolistic, or anticompetitive, even when the dumping is being carried out without predatory motives.

The legislative history of the 1974 Act indicates that such an understanding may have been incorporated in that act. The Senate report accompanying the 1974 Act discusses the purposes of antidumping legislation.¹⁵⁴ The report seeks to justify antidumping legislation on the

154. S. REP. NO. 1298, *supra* note 147, at 7816 (reporting the following statement directed to the subject of "technical dumping"):

(1) *Technical dumping*.—The concept, underlying a number of International Trade (Tariff) Commission determinations, is wholly consistent with the basic philosophy and purpose of the Antidumping Act. This Act is not a 'protectionist' statute designed to bar or restrict U.S. imports; rather, it is a statute designed to free U.S. imports from unfair price discrimination practices. As is explained below, this distinction is of importance in the context of recent suggestions that the Antidumping Act should not be applied to imports of articles in short supply. Conceptually, the Antidumping Act is not directed toward forcing foreign suppliers to sell in the U.S. market at the same prices that they sell at in their home markets. Rather, the Act is primarily concerned with the situation in which the margin of dumping contributes to underselling the U.S. product in the domestic market, resulting in injury or likelihood of injury to a domestic industry. Such injury may be manifested by such indicators as suppression or depression of prices, loss of customers, and penetration of the U.S. market. When clear indication of injury, or likelihood of injury, exists there would be reason for making an affirmative determination. The Antidumping Act is designed to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry.

On the other hand, the Antidumping Act does not proscribe transactions which involve selling an imported product at a price which is not lower than that needed to make the product competitive in the U.S. market, even though the price of the imported product is lower than its home market price. Such so-called 'technical dumping' is not anti-competitive, hence, not unfair; it is procompetitive in effect. The Commission has recognized the concept of technical dumping and in a number of cases has made a negative determination in the circumstances of such dumping. It is to be noted that in the usual short supply situation or infla-

ground that it is directed against behavior which is unfair.¹⁵⁵ The report creates a dichotomy between fairness and competition on one hand and unfairness and anticompetitiveness on the other.¹⁵⁶ Thus, the report asserts that the 1921 Act is “not a ‘protectionist’ statute designed to bar or restrict U.S. imports” but rather was “a statute designed to free U.S. imports from unfair price discrimination practices.”¹⁵⁷ The report repeats this theme by describing technical dumping as “not anti-competitive, hence, not unfair.”¹⁵⁸ Moreover, the report states that:

[T]he Act is primarily concerned with the situation in which the margin of dumping contributes to underselling the U.S. product in the domestic market, resulting in injury or likelihood of injury to a domestic industry. Such injury may be manifested by such indicators as suppression or depression of prices, loss of customers, and penetration of the U.S. market The Antidumping Act is designed to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry.¹⁵⁹

Although this language is contained in a Senate report accompanying legislation which brought below-cost sales within the sweep of the Antidumping Act,¹⁶⁰ the analysis is concerned only with dumping in the traditional form of international price discrimination.¹⁶¹ The Senate report reveals several congressional assumptions. First, to conflict with the Antidumping Act, the lower American price must be causally related to the higher home-market price. The language referring to “the margin of dumping” as something which “contributes” to underselling in the American market reflects this requirement. Second, it is this

tionary period, imports—regardless of home market price—would normally be sold to the domestic market at a price no lower than the prevailing U.S. market price, thus indicating that when dumping exists in such situations, it is likely to be a case of technical dumping in which there is not likely to be injury to a domestic industry. In other words, importers as prudent businessmen dealing fairly would be interested in maximizing profits by selling at prices as high as the U.S. market would bear. But if there is a margin of dumping in a tight supply situation, it may be due to technical reasons, which would not be injurious to domestic industries).

155. *See id.* (stating that the Antidumping Act is aimed primarily at unfair price discrimination having a negative impact on United States industry).

156. *See id.* (noting that some forms of technical dumping are not anticompetitive).

157. *Id.*

158. *Id.*

159. *Id.*

160. *See supra* note 154 and accompanying text (stating that the Antidumping Act does not prevent the sale of an imported product at a price no lower than necessary to make it competitive in the United States market).

161. *Id.*

causal connection that the report considers "unfair." Third, it is against the use of this "unfair" price discrimination to injure, actually or potentially, an American industry at which the Antidumping Act is directed.

A fourth, less apparent, assumption is that the foreign seller is a price-maker, rather than a price-taker. This can be inferred from the report's discussion of technical dumping.¹⁶² Technical dumping, as treated in the report, involves sales in the American market at prevailing American prices where the foreign sellers' activities have no significant impact on American prices.¹⁶³ Technical dumping does not fall within the scope of the Antidumping Act because there is no causal connection between the higher home-market prices and the lower American market prices.¹⁶⁴ The two price levels are not causally related since the foreign sellers take the American price as given. Indeed, the foreign sellers do not significantly depress the American price because the foreign producers' sales in the United States are not sufficiently large to affect American supply and demand equilibrium. The innocuous nature of those sales would be recognized formally in the injury determination: since there would be no significant impact on American prices, there could be no "material injury" to a United States industry. Consequently, no antidumping duties could be imposed.¹⁶⁵

Finally, a fifth congressional assumption has been that dumping firms possess market power in their home markets. Foreign sellers cannot practice price discrimination unless their home markets are protected and they themselves possess market power in those home markets.¹⁶⁶ When proponents of antidumping legislation referred to dumping as monopolistic behavior characteristic of foreign cartels, they were referring to the market power of foreign firms in their home markets.¹⁶⁷ Thus, Congress has assumed that dumping in the American market involves producers that possess market power both in their home markets and in the American market.

162. *Id.*

163. *See supra* note 154 and accompanying text (defining technical dumping and characterizing it as instances where foreign manufacturers seek to maximize profits by selling their goods at prices not lower than needed to be competitive in the American market).

164. *Id.*

165. *See* 19 U.S.C. §§ 1673(2), 1673d(b), 1677(7) (1988) (requiring a material injury for the Antidumping Act to be imposed).

166. *See* S. REP. NO. 1298, *supra* note 147, at 7200 (noting that the United States cannot remain passive while other nations shelter their economies).

167. *Id.*

C. FORMER CHAIRMAN LIEBELER'S FIVE-FACTOR TEST: IN THE COMMISSION AND IN THE COURTS

The 1974 Senate report eventually influenced the decisions of the International Trade Commission (ITC). In *Certain Red Raspberries from Canada*,¹⁶⁸ which the ITC decided in 1985, former Chairman Susan Liebeler, then Vice Chairman, wrote a concurring opinion that developed a five-factor test for assessing dumping cases. Liebeler derived her analysis from the 1974 Senate committee report.¹⁶⁹ She construed the Senate report's discussion of "unfair price discrimination" as a reference to predatory pricing.¹⁷⁰ Pricing is predatory when it is "below the marginal cost of production."¹⁷¹ Liebeler contended that predatory behavior could exist only when the foreign sellers acquire a large and growing market share and cause price deterioration, and she suggested using these criteria as proxies for production cost data, which was unavailable.¹⁷² She also proposed that the foreign firms possess market power in the United States market, and she would use market share as an indication of market power.¹⁷³ Liebeler drew her five-factor test from the Antidumping Act's injury definition, which she interpreted as a statutory concern with predatory pricing. In summary, Liebeler's five factors are: "(1) large and increasing market share, (2) high dumping margins, (3) homogeneous products, (4) declining prices and (5) barriers to entry to other foreign producers (low elasticity of supply of other imports)."¹⁷⁴

The Antidumping Act supports Liebeler's first four factors. The first and fourth factors are components of the statute's definition of injury.¹⁷⁵ The third factor is closely tied to the injury requirement and would have to be considered in the determination of the industry which is allegedly injured.¹⁷⁶ The second factor, the dumping margin, goes to the core of the Antidumping Act. The dumping margin must be calculated in order to establish the existence of dumping; and the connection of that margin with domestic injury identified, in the collective mind of the enacting Congress, the unfairness of the offense.¹⁷⁷

168. *Certain Red Raspberries from Canada*, USITC Pub. No. 1707, Inv. No. 731-TA-196 (final) (June 1985).

169. *Id.* at 16.

170. *Id.* at 14.

171. *Id.*

172. *Id.* at 15.

173. *Id.* at 15-16.

174. *Id.* at 16.

175. 19 U.S.C. § 1677(7) (1988).

176. *Id.* § 1677(4).

177. *Id.* § 1673.

Liebeler's fifth factor, the existence of entry barriers, is only relevant when the dumping is predatory.¹⁷⁸ In the full predatory scenario, once it has driven its rivals from the market, the successful predator exploits its newly achieved monopoly power by charging supracompetitive prices. It can only do so effectively, however, if entry barriers prevent new firms from entering, and, through their competition, eroding the predator's monopoly. Although Liebeler's reading of the statute as confined to predatory dumping has support in its legislative history, the courts have rejected Liebeler's entry-barrier factor as inconsistent with the statute.¹⁷⁹

In *USX Corp. v. United States*,¹⁸⁰ the Court of International Trade rejected Liebeler's five-factor analysis. The court stated that the Antidumping Act adopts an "injury to industry" approach and not the "injury to competition" approach advocated by Liebeler.¹⁸¹ The latter approach is incorporated into the 1916 Act but not into the 1921 Act nor the 1979 reenactment. The court in *USX* did not dismiss predation as a concern of the Antidumping Act. The court accepted Liebeler's view that the Antidumping Act is directed against predatory pricing but interpreted the Antidumping Act as being equally directed against all dumping that produces an "injury to [American] industry."¹⁸²

V. THE ANTIDUMPING LAW REEXAMINED: TOWARDS A RECONCILIATION OF DIFFERING POLICY APPROACHES

A. THE ANTIDUMPING ACT AND THE PROBLEM OF INTERMITTENT DUMPING

Congress clearly directed the Antidumping Act against foreign sellers that practice predatory dumping.¹⁸³ The Antidumping Act, however, may be directed against a wider range of conduct than predatory dumping.

In the early twentieth century, commentators divided dumping into three categories: persistent, intermittent, and sporadic dumping. The Tariff Commission referred to "sporadic" dumping, and Jacob Viner, in his classic work on dumping, used all three categories.¹⁸⁴ Many legal

178. Certain Red Raspberries from Canada, *supra* note 168, at 18.

179. Trent Tube Div. v. United States, 741 F. Supp. 921, 927 (Ct. Int'l Trade 1990); *USX Corp. v. United States*, 682 F. Supp. 60, 68 (Ct. Int'l Trade 1988).

180. 682 F. Supp. 60 (Ct. Int'l Trade 1988).

181. *Id.* at 65.

182. *Id.* at 66.

183. See *supra* notes 110-67 and accompanying text (describing the concerns behind the enactment of the Antidumping Act).

184. J. VINER, *supra* note 112, at 23.

commentators continue to use these categories today.¹⁸⁵ Persistent and intermittent dumping are systematic, differing only in that the former continues indefinitely while the latter does not. Sporadic dumping involves the disposal by foreign firms of unanticipated surplus production abroad at market-clearing prices.¹⁸⁶ Because sporadic dumping occurs in response to production miscalculations or unexpected changes in market conditions and therefore does not last for extended periods, it generally does not threaten the economic viability of domestic producers.¹⁸⁷

Systematic dumping is more threatening than sporadic dumping. Although the Tariff Commission voiced some apprehension about persistent dumping in its 1919 report, the Tariff Commission nonetheless recognized its benefits.¹⁸⁸ Persistent dumping involves a firm or group of firms selling abroad indefinitely at prices lower than those in their home markets.¹⁸⁹ Such dumping benefits the importing countries by providing them with reliable and permanent low cost supplies.¹⁹⁰ For this reason, experts have long recognized that there can be no sound objection to persistent dumping. Viner expressed his concern that dumping that appeared to be persistent might not in fact continue indefinitely.¹⁹¹ The Tariff Commission report stated a similar concern.¹⁹²

Intermittent dumping forces producers in the importing countries to meet dumping prices for sustained periods. Yet, due to its impermanent nature, intermittent dumping does not provide the importing countries with a permanent source of inexpensive supplies. Instead, the older crit-

185. See, e.g., Ehrenhaft, *supra* note 116, at 46-48 (giving definitions of dumping terms); see also, C. KINDLEBERGER, *supra* note 25, at 275 (defining intermittent, sporadic, and persistent dumping); J. VINER, *supra* note 112, at 23 (providing explanations of the commonly used categories of intermittent, sporadic and persistent dumping); Note, *Economically Meaningful Markets: An Alternative Approach to Defining "Like Product" and "Domestic Industry" under the Trade Agreements Act of 1979*, 73 VA. L. REV. 1459, 1463 (1987) [hereinafter Note, *Economically Meaningful Markets*] (defining the types of dumping and citing Viner as the primary source for these terms).

186. See H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* § 13.2 (1985) (noting that sporadic price discrimination generally occurs in competitive markets).

187. See Note, *Economically Meaningful Markets*, *supra* note 185, at 1463 (stating that the effects of sporadic dumping are negligible).

188. TARIFF COMM'N REPORT, *supra* note 116, at 19-20.

189. See *id.* (asserting that while dumping is beneficial to the importing country, it is harmful to the exporting country because consumers in the exporting country are forced to pay monopoly prices).

190. See C. KINDLEBERGER, *supra* note 25, at 276 (noting that persistent dumping occurs when a producer consistently regards two markets differently in terms of overhead costs).

191. J. VINER, *supra* note 112, at 139.

192. TARIFF COMM'N REPORT, *supra* note 116, at 19.

ics argued that intermittent dumping jeopardizes the profitability of long-term investment in the importing countries, thereby threatening the ability of the importing countries to meet their long-term needs.

B. THE CONDITIONS GIVING RISE TO INTERMITTENT DUMPING: A PROTECTED HOME MARKET, OLIGOPOLISTIC PRICING, HEAVY FIXED COSTS

Sustained dumping can only occur if trade barriers protect the producers' home market from competition from rivals located in other nations. Prices in the home market for basic commodities, such as the steel and chemicals dumped by the Germans earlier in the twentieth century,¹⁹³ cannot exceed prices offered elsewhere, in the absence of government-imposed trade barriers such as tariffs or quotas.¹⁹⁴ For more sophisticated products requiring extensive backups, such as spare parts distribution and networks of repair and maintenance facilities, barriers to entry can take the form of restricted access to distribution systems.

In the absence of such trade barriers, producers from elsewhere would divert sales to the market with the higher prices, thus forcing prices in the dumping firm's home market down to prevailing world levels. A protected home market in any internationally traded good is thus a necessary, but not sufficient, condition for the development of a noncompetitive industrial structure in the home market. Because dumping involves price discrimination, the higher home-market price may reflect collusive or otherwise noncompetitive pricing in the home market. Finally, for intermittent dumping to jeopardize needed long-term investment in the importing country, the affected industry would probably bear heavy fixed costs amortized over many years. These industry characteristics, which seem to have been assumed in the dumping debates of the early twentieth century, may help to reveal Congress' intent in enacting the Antidumping Act.

C. THE VIEW OF INTERMITTENT DUMPING AS AN UNFAIR PRACTICE

During the early part of this century, dumping was widely perceived in the United States as a characteristic behavior pattern of foreign car-

193. G. VON HABERLER, *THE THEORY OF INTERNATIONAL TRADE* 315 (1936) (reporting early twentieth century German dumping of iron and steel at prices 50% below the German price). German dumping involved not sales to the United States but to Holland and England. *Id.*

194. *Id.*

tels, especially the German steel and chemical cartels.¹⁹⁵ Those cartels were seen as restricting home-market sales in order to impose supracompetitive home-market prices.¹⁹⁶ When demand slackened, the cartels would not reduce their high home-market prices. Instead, they would maintain prices in their home markets while attempting to offset the adverse effect of falling home-market demand on their unit production costs by dumping abroad.¹⁹⁷

In this view, the foreign producers operated with high fixed or "sunk" costs.¹⁹⁸ As those fixed costs were distributed over increasing units of output, the average fixed cost declined. A high fixed cost component for the initial output pressured these producers to maintain a large output in order to keep average unit cost low. Selling abroad at low prices which exceeded the marginal cost of production but did not cover average costs minimized unit costs and facilitated the exploitation of the home-market monopoly.¹⁹⁹

This view of dumping influenced the attitude in the United States that dumping is an "unfair" and "monopolistic" practice.²⁰⁰ Sustained dumping was associated with monopolistic pricing in a protected home market. Intermittent dumping carried out by protected foreign cartels could be viewed as systematically exporting to the American market excess production necessary to achieve low unit costs. The cartels could not dispose of their excess production in their home markets without drastically reducing prices there. Such dumping could thus be viewed

195. See TARIFF COMM'N REPORT, *supra* note 116, at 14; Ehrenhaft, *supra* note 116, at 51, 53; G. VON HABERLER, *supra* note 193.

196. Viner, *supra* note 112, at 51.

197. See *id.* at 95.

198. *Id.* at 112-17.

199. Indeed, it is not much of an extrapolation from the scenario described in the House and Senate Reports on section two of the Clayton Act to make the connection between foreign monopoly and discriminatorily low prices in the United States. The House and Senate Reports on section two describe domestic price discrimination by the Standard Oil Company which, as described, appears predatory. H.R. REP. NO. 627, *supra* note 40, at 8-9. Standard Oil sold at low prices in one locality in order to drive out its rivals and achieve a monopoly while it sold at monopoly prices in those regions where it already possessed a monopoly. *Id.* The extrapolation would explain Standard Oil's low prices in the competitive markets by its need to maintain production volume in order to minimize costs in a situation in which it was experiencing scale economies. If Standard Oil were able to provide a continuous and permanent source of supply to all of the regions which it was serving, then its behavior—on this view—would have been unobjectionable. Only if it were selling in the low-price regions intermittently, during periods of demand slack in the monopoly regions, while maintaining high prices in those monopoly regions, would Standard Oil be engaging in behavior resembling the price discrimination which in the international context has been called intermittent dumping.

200. *Id.*

as an incident of monopoly pricing abroad which effectively subsidized (short-run) marginal-cost pricing in the United States.

Intermittent dumping could also be viewed as unfair because similar behavior confined to the domestic market would violate accepted canons of legitimate business behavior. The antitrust laws have significantly influenced these canons of behavior.²⁰¹ Because the disposal by a regional domestic cartel of its surplus production in another domestic regional market would likely be viewed as integral to the operation of the cartel, that behavior would itself constitute an antitrust violation. Moreover, the combination of monopoly pricing and disposition of surplus production out of the regionally restricted market probably constitutes an "unfair trade practice" under section five of the Federal Trade Commission Act, providing further ground for characterizing the diversion of the surplus as "unfair".²⁰²

Whether the view just sketched had substantial basis in actual behavior is less important for present purposes than whether such a view helped to shape American antidumping legislation. To the extent that this view was influential, it is a guide to the intentions of the enacting Congress and can help to shape the administration of the Antidumping Act. Furthermore, this view helps explain the description of dumping in that Act's legislative history as involving practices which were both unfair and monopolistic.

There is a significant difference between exports to the American market of foreign production surplus created by monopolistic restrictions of home-market sales and of surplus resulting from falling demand. The surplus caused by falling demand arises solely from the operation of market forces. If American producers were as free to export surplus abroad as foreign firms were to export to the American market, all producers would be on the same footing. The more efficient producers would ultimately survive periods of low demand. By contrast, export of surplus due to monopolistic restrictions implies a protected home market, from which American producers are permanently excluded. Moreover, monopolistic restrictions in the home market of the foreign sellers increase the surplus exported to the American market. These are the historic concerns. More recently, concerns have focused on whether the dumping firms are exploiting advantages conferred upon them by their governments.²⁰³ If the dumping firms benefit from a protected

201. See *supra* notes 1-18 and accompanying text (discussing the formulation of American antitrust and trade laws).

202. See 15 U.S.C. § 45(a) (1988) (prohibiting unfair trade practices).

203. See, e.g., P. KRUGMAN, *RETHINKING INTERNATIONAL TRADE* 191 (1990).

home market, that protection may provide them with the benefits of scale economies, which in turn enable them to enter foreign markets with lower unit costs than they could attain without a protected home market.²⁰⁴ Thus, in this perspective, both foreign surplus caused by monopolistic restrictions on sales in the dumpers' home market and low dumping prices facilitated by economies attained through government protection reflect the unfairness of dumping.²⁰⁵ Dumping effectively consists of foreign governments taxing their home-market consumers to confer market-distorting advantages upon their producers.

Jacob Viner,²⁰⁶ who wrote in the 1920s, expressed views compatible with this model but which were hostile to all dumping that is not sporadic or persistent. According to Viner, neither sporadic nor persistent dumping creates problems for an importing country because the former does not seriously threaten producers and the latter benefits the importing country by providing it with a permanent source of low-cost supplies.²⁰⁷ Viner did object to intermittent dumping, however.²⁰⁸ Intermittent dumping involves sales of goods at bargain prices but only for a short, unpredictable term.²⁰⁹ Such dumping often threatens the existence of efficient and viable domestic industries that offer dependable supplies for the long run.²¹⁰ Viner's concern with the long run was the primary cause of his opposition to short-run bargains which, as he saw it, threatened efficient long-term sources of supplies.²¹¹ Thus, despite the theoretical attractiveness of permanent or persistent dumping, Viner concluded that all dumping should be presumed objectionable because there was no way of determining in advance whether an incidence of dumping would continue for a long period.²¹²

204. *Id.* at 191, 195, 197.

205. Krugman shows that government protection can provide an advantage to that nation's exporters. *Id.* The exploitation of that advantage may be perceived as "unfair" by rival producers in the importing country who lack both those advantages and access to the home market of their foreign rivals.

206. J. VINER, *supra* note 112.

207. *Id.* at 138-39.

208. *Id.* at 140.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 139. Viner states:

There is no practical means whereby an importing country can discriminate beforehand between dumping which is destined to continue indefinitely and dumping which will cease after a few months or years. In general the presumption must be that any instance of dumping will prove after the event to have been short-run, if not sporadic.

Id.

For similar reasons, Viner objected to below-cost pricing. Viner favored prohibiting foreign producers from selling at below-cost prices in the American market²¹³ even when they sell at the same below-cost prices in their home markets.²¹⁴ He argued that such pricing is always temporary because no firm can maintain below-cost prices in all markets indefinitely.²¹⁵ Accordingly, Viner believed that foreign producers who sell below-cost in all markets threaten efficient domestic producers without offering an alternative long-term supply source.²¹⁶ Restating his position in terms of free trade analysis, Viner argued that intermittent dumping and below-cost pricing are likely to divert "commerce and industry" out of "their natural channels," thereby conflicting with the objectives of free trade.²¹⁷

Viner relies on several implicit assumptions. First, the dumping practices that he is discussing are being carried out by industries with large fixed costs, where allocation per unit of output declines as output increases.²¹⁸ These industries require large investments which are committed for long periods.²¹⁹ Intermittent dumping, therefore, can wreak havoc with the return on such investments and the prospect of unpredictable intermittent dumping can, therefore, discourage investment.²²⁰ Second, Viner assumes that dumping prices are below the average unit cost.²²¹ Viner does not so state, but unless the foreign producers sell in the American market at prices below their average costs, they cannot threaten the survival of equally efficient American rivals.²²²

Viner's use of a free trade rationale to critique the practice of intermittent dumping directs attention to the home market of the dumping firms. Without protection, sustained dumping would be impossible, as would monopolistic restriction of sales in the home market of the dumping firms.²²³ Instead, their survival would be determined by their comparative efficiencies.²²⁴ Protected home markets enable producers to practice price discrimination and distort worldwide commerce, inter-

213. Viner is primarily addressing American public policy. *Id.*

214. *Id.* at 147.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 138-39.

219. *Id.*

220. *Id.* at 140.

221. *Id.* at 147.

222. *Id.*

223. See S. REP. No. 1298, *supra* note 147, at 7200.

224. J. VINER, *supra* note 112, at 140.

fering with "natural channels" in accordance with laws of comparative advantage and relative efficiencies.²²⁵

Viner incorrectly assumes that the benefits of foreign dumping, even if only intermittent, are necessarily unpredictable. If identified foreign cartels practice dumping during periods of economic recession, the impact of surplus production on the American market could be predictable, at least in the sense that foreign surplus would arrive in a cyclical fashion. American producers could thus make their investment plans accordingly and American consumers would profit from the low cost of the foreign supplies. Thus, intermittent dumping is not always unpredictable. Viner's theoretical point that the prospect of unpredictable dumping at below-cost prices can discourage long term investment in efficient production facilities nevertheless remains valid.²²⁶ As uncertainty increases, so do risk and cost, resulting in lower returns and decreased investment incentives.

Viner has been criticized for his opposition to nonpredatory intermittent dumping.²²⁷ Professor John Barcello²²⁸ argues that Viner fails to give adequate weight to the increased consumer surplus in the importing country during the dumping period. Barcello also states that Viner fails to consider that even cyclical dumping can disrupt patterns of oligopolistic pricing in the importing market. Barcello addresses the issue of investment incentives in the importing country when he questions whether prices in the importing country will have to be higher during the post-dumping period to compensate for the revenue lost during the dumping period.²²⁹ Assuming a competitive market in the importing country and prices during the dumping period at levels below production costs in the importing country, revenue would have to rise during the post-dumping period in order to maintain producers' incentive to reinvest.

Viner's basic approach to nonpredatory intermittent dumping needs revision. Yet, the selection of an optimal dumping policy is not an easy task because the impact of antidumping duties is complex and involves difficult, and often hidden, policy issues. Commentators acknowledge that the trade barriers which facilitate dumping distort commerce, en-

225. See Fisher, *Dumping: Confronting the Paradox of Internal Weakness and External Challenge*, in *ANTIDUMPING LAW: POLICY AND IMPLEMENTATION*, 1 MICH. Y.B. INT. LEGAL STUDIES 11, 23 (1979) (providing a similar argument focusing upon the distortion imposed by dumping and the trade barriers that facilitate it).

226. J. VINER, *supra* note 112, at 140.

227. Barcello, *The Antidumping Law: Repeal It or Revise It*, 1 *ANTIDUMPING LAW: POLICY AND IMPLEMENTATION*, 1 MICH. Y.B. INT. LEGAL STUDIES 53, 73-74.

228. *Id.* at 73.

229. *Id.* at 74.

gender supracompetitive prices in the home market of the dumping producers, and misallocate world resources.²³⁰ Most commentators then argue from a position that accepts the domestic monopoly of the dumping firms and the trade barriers protecting it.²³¹ In their view, the relevant issues are the costs and benefits of dumping to the importing nation.²³² These commentators argue that the consumers of the importing market ultimately benefit from the dumping, even though producers in the importing country incur a loss of sales and reduced prices.²³³ Other commentators, however, point out that when goods are sold in the importing country for prices above the marginal costs of the producers in that country, duties causing diversion of sales from the dumping producers to the importing country's producers will produce both positive and negative effects on the importing country and are likely to increase overall welfare in the importing country.²³⁴ The negative effects consist of: (1) a reduction of consumer surplus as a result of higher prices on goods purchased; and (2) a reduction of consumer surplus as a result of the reduction of the total amount of goods sold. The positive ramifications consist of: (1) an increase in producer surplus on the goods sold by domestic producers resulting from the price increase as applied to their preexisting sales volume; (2) an increase in producer surplus of domestic producers resulting from the diversion of sales from the foreign producers to the domestic producers; and (3) the increased revenues to the treasury of the importing country from duties on the imported goods. As long as the positive elements outweigh the negative, the importing country benefits from the duties.²³⁵

230. See generally Note, *Economically Meaningful Markets*, *supra* note 185.

231. See C. KINDLEBERGER, *supra* note 25, at 275-76.

232. Note, *Economically Meaningful Markets*, *supra* note 185, at 1459.

233. J. VINER, *supra* note 112, at 138.

234. C. KINDLEBERGER, *supra* note 25, at 276-77.

235. See E. HELPMAN & P. KRUGMAN, *TRADE POLICY AND MARKET STRUCTURE* 120 (1989); see also P. LINDERT & C. KINDLEBERGER, *INTERNATIONAL ECONOMICS* 168 & n.2 (7th ed. 1982). Lindert and Kindleberger provide an example in which a duty has the effect of depressing the exporters' prices. Higher consumer prices in the importing nation are more than offset by the combination of the producer price reduction and the duty paid to the importing nation's treasury. These authors state that although the importing nation benefits, the reduction in sales which results from the higher consumer prices is a welfare loss which, from a worldwide perspective, is not offset by the price reduction, since that is merely a redistribution from the exporters to the importing nation.

D. THE APPROACHES OF VINER AND LIEBELER COMPARED

Viner condemns both predatory²³⁶ and nonpredatory intermittent dumping.²³⁷ As traditionally understood, predatory dumping occurs for a sustained period, but not indefinitely.²³⁸ The dumping lasts sufficiently long to drive rivals from the market and to secure market power for the predator. Because of the sustained length of the dumping period and the impact upon the domestic firms, predatory dumping appears to meet Viner's description of intermittent dumping.²³⁹ Although actual instances of predatory dumping are difficult to identify, there is close to universal agreement that predatory dumping should be condemned.²⁴⁰

Intermittent dumping, however, need not be predatorially motivated. Although nonpredatory intermittent dumping by foreign producers is detrimental to domestic firms, the foreign producers do not intend to destroy the local firms.²⁴¹ Nevertheless, foreign producers do intend to operate in a way which is inconsistent with free competition overall. Their below-cost prices on the domestic market reflect (and are dependent upon) their intention to maintain monopoly restrictions in their home market.²⁴²

Viner argued that dumping firms violate competitive norms and are likely to distort the trade patterns that would emerge under free trade.²⁴³ Consequently, Viner condemned both predatory and nonpredatory intermittent dumping. While most commentators agree with Viner that predatory dumping is objectionable, they no longer widely condemn nonpredatory intermittent dumping.²⁴⁴ Indeed, Liebler's revisionist interpretation of the 1921 Act as focusing solely upon predatory behavior constitutes a narrower focus than Viner's and reflects a

236. J. VINER, *supra* note 112, at 146-47.

237. *Id.*

238. *Id.* at 245.

239. Although Viner describes intermittent dumping as "short-run", it is nonetheless sustained for a substantial period. Neither intermittent dumping nor predatory dumping are sustained indefinitely. Predatory dumping, therefore, appears more consistent with Viner's category of "intermittent" than "permanent" dumping. See J. VINER, *supra* note 112, at 29-31.

240. See Barcello, *supra* note 227, at 65-67. Professor Barcello observes that predatory dumping is probably rare. He argues that it should be controlled under the Sherman Act. *Id.*

241. Nonpredatory dumping, by definition, means that the dumping firms lack a predatory intent. A discussion of predatory behavior is contained in text, *supra*, at notes 95-104.

242. See text at notes 193-205, *supra* (pointing out that sustained dumping is inconsistent with competitive behavior).

243. *Id.* at 147.

244. See Certain Red Raspberries from Canada, *supra* note 168, at 17-18 (expressing then vice-chairman Liebler's view that dumping might not cause injury).

wide range of current thinking.²⁴⁵ Moreover, Liebler's view draws support from the legislative history of the Antidumping Act.²⁴⁶

It does, however, appear possible to reconcile these different approaches, at least in substantial part. Both Viner and Liebler believed that the 1921 Act is concerned with maintaining competition. Liebler contends that a predatory standard will achieve that result,²⁴⁷ whereas Viner argued for a broader standard as necessary to harmonize antidumping legislation and procompetitive marketplace results.²⁴⁸ Because the courts have rejected Liebler's predatory standard, a broader approach to competition than hers is necessary to rescue the Antidumping Act from a purely protectionist construction.

Viner correctly indicated that unpredictability and risk raise the cost of investment.²⁴⁹ Increases and decreases in the cost of investment, regardless of their causes, allocate new investments to their most productive uses.²⁵⁰ In condemning intermittent dumping because it is likely to raise investment costs,²⁵¹ Viner in effect asserted that there are some identifiable kinds of uncertainty, different from the broad range of market uncertainties affecting business behavior, which should not be permitted to increase the costs of investment. Indeed, Viner viewed the effects of intermittent dumping as equivalent to market distortions.

Viner does not seem to have condemned intermittent dumping on moral grounds. Instead, he merely argued that prohibiting dumping is justified by the long-run benefits of an adequate investment base in the affected industry.²⁵² The congressional backers of the 1921 Act, and those who have modified and reaffirmed that act, have similarly sought to protect investment against the uncertainties of intermittent dumping.²⁵³ Their position, however, carries a moral tone absent from Viner's argumentation: it seems that the uncertainties generated by dumping differ from other uncertainties because dumping is viewed as "unfair," reflecting monopolistic behavior in closed foreign markets.

245. *Id.*

246. *See supra* notes 175-82 and accompanying text (illustrating support for Liebler's view).

247. *See Certain Red Raspberries from Canada, supra* note 168, at 17-18 (noting that Congress sought to remedy only injurious dumping).

248. J. VINER, *supra* note 112, at 140.

249. *USX Corp. v. United States*, 682 F.Supp. 60, 68 (Ct. Int'l Trade 1988) (demonstrating the rejection of Liebler's approach).

250. *See, e.g., A. ALCHIAN & W. ALLEN, EXCHANGE & PRODUCTION: COMPETITION, COORDINATION & CONTROL* 304-05 (2d ed. 1977).

251. J. VINER, *supra* note 112, at 140.

252. *Id.* at 147.

253. *See supra* note 112 and accompanying text (discussing congressional views on the subject).

Strategic trade policy analysis also supports this unfairness view because it shows that in certain circumstances, a protected home market can confer a cost advantage on producers which they can exploit in their export sales.²⁵⁴ Since protected home markets and low export prices characterize dumping,²⁵⁵ a case can be made that systematic dumping behavior is a manifestation of unfair or even anticompetitive behavior.

When Congress amended the Antidumping Act in 1974 to bring below-cost sales within its scope,²⁵⁶ it may have adopted Viner's view that below-cost sales in both the home and export markets are necessarily temporary and produce the same negative effects on investment as those generated by intermittent dumping. Congress may have believed that such below-cost sales in the home and export markets reflected overcapacity due to foreign-government subsidies, protection, and other forms of encouragement. Perhaps Congress believed that foreign overcapacity should not affect investment decisions in the United States when such overcapacity does not result from pure market forces. Congress has consistently expressed its concern with foreign-government subsidies through legislation designed to identify such subsidies and to subject subsidized imports to countervailing duties.²⁵⁷ The below-cost provisions of the 1974 amendments to the Antidumping Act probably reflect the view of some members of Congress that foreign sales at below-cost levels were the result of the overcapacity caused by foreign government subsidies,²⁵⁸ and that the resulting below-cost sales in the United States constituted "unfair" behavior from which American investors deserved protection.²⁵⁹

Viner's concern about discouragement of investment engendered by the uncertainties of dumping,²⁶⁰ coupled with the congressional concern with below-cost sales in the 1974 Act,²⁶¹ suggest a broader approach to antidumping legislation than has so far prevailed. A renewed focus upon below-cost dumping prices that threaten investment in efficient

254. See *supra* notes 203-05 and accompanying text (discussing trade policy analysis).

255. *Supra* notes 193-205 and accompanying text.

256. See *supra* notes 140-51 and accompanying text (reviewing the 1974 amendment and its underlying purpose).

257. See 19 U.S.C. §§ 1671-1671h (1988) (commanding the imposition of countervailing duties).

258. See *supra* notes 144-48 and accompanying text (discussing the 1974 amendments).

259. *Id.*

260. J. VINER, *supra* note 112, at 146-47.

261. See *supra* note 144 and accompanying text (examining the 1974 amendment and the corresponding congressional response).

production facilities might be derived from Viner's historic concerns. The Antidumping Act and its legislative history can be construed as designed to encourage investment in industries with potential for long-term growth at low production costs, but which are vulnerable to two kinds of unacceptable risks. These unacceptable risks are market uncertainties resulting from: (1) monopolistic behavior of foreign firms, such as the sale in the United States of production which is made surplus because of cartel or cartel-like restrictions in their home markets; and (2) the sale in the United States at below-cost prices of the foreign production of industries plagued by overcapacity resulting from foreign-government intervention through home-market subsidies, protection, or other significant market-distorting behavior.

This article suggests that antidumping legislation should focus on those concerns long associated with the Antidumping Act. This interpretation, however, emphasizes economic issues lost in the Antidumping Act's administration. Because the Antidumping Act's creators saw dumping in the form of price discrimination as a manifestation of cartel behavior,²⁶² it is important to investigate the home-market structure of accused foreign producers. A home market protected by official or unofficial trade barriers combined with a high market concentration should be a prerequisite to a dumping determination. In the absence of such conditions, sales in the United States at prices below the foreign home-market price should be deemed as nonactionable technical dumping. This approach surely respects the spirit of the 1921 Act and its several amendments.²⁶³

Below-cost sales in the United States should be linked to foreign-government intervention before they should constitute the basis for the imposition of antidumping duties. Domestic producers have no right to be protected from the below-cost pricing of foreign or domestic rivals when such pricing reflects industry overcapacity due to changes in demand or overly optimistic projections by investors. In situations of overcapacity, periods of intense price competition at prices falling to below average-total-cost levels are the means through which the market adjusts capacity downwards. The Antidumping Act can be interpreted, however, to protect American investors from foreign overinvestment resulting from foreign-government market interventions. Such a construction of the Antidumping Act would limit the protection afforded to do-

262. See *supra* notes 132-53 and accompanying text (reviewing the Act's legislative history and amendments).

263. S. REP. NO. 1298, *supra* note 147, at 7186 (articulating congressional views on the 1921 Act).

mestic industry by a free-market standard. Domestic producers would be exposed to the risks of a truly free marketplace and would be protected only from the artificial risks imposed by the actions of foreign governments. There is support for this construction in the Senate report accompanying the 1974 Act.²⁶⁴ The report disclaims any intention to impose antidumping duties as a result of normal business practices such as the sale of "obsolete or end-of-model-year merchandise at less than cost."²⁶⁵ This recognition that the market occasionally demands selling below cost, combined with statements denying a protectionist objective for the legislation,²⁶⁶ provide some limited grounds for reading into the Antidumping Act's below-cost pricing provisions those qualifications necessary to make them broadly consistent with a free-market approach.

Finally, this slight shift of emphasis towards emphasizing foreign market distortions in the enforcement of the Antidumping Act would help to highlight the long-term United States trade goal of opening all markets rather than of protecting domestic industry. With this change of emphasis, every foreign producer accused of dumping would be forced to defend market distortions in its home market. Conversely, without those distortions in the home market, antidumping claims would fail. Such a focus would bring the Antidumping Act into closer harmony with antitrust objectives.

Thus, there is ample reason to reassess the policies underlying the Antidumping Act. Regulators and courts need not administer the Antidumping Act with a narrow protectionist intent to preserve domestic industries without considering the broader competitive contexts of the entire industry and its world-wide structure.²⁶⁷ If the Antidumping Act were administered to provide needed assurance to investors in industries where the free market identifies significant investment potential, the Antidumping Act would be consistent with the competitive-market concerns connected with the origins of antidumping legislation, with

264. *Id.*

265. *Id.*

266. *Id.*; see also *supra* note 154 (quoting Senate Report 1298 defining technical dumping). The law does, however, require the inclusion of minimum amounts for general expenses and profit in the calculation of a foreign exporter's costs, thereby increasing the likelihood that dumping will be found. 19 U.S.C. § 1677b(e)(B) (1988).

267. See S. REP. NO. 1298, *supra* note 147, at 7186 and Note, *Economically Meaningful Markets*, *supra* note 185 (urging the use of antitrust market definition standards for delineating "product" and "industry" under the Antidumping Act). The use of market definition standards would tend to broaden markets, reducing the likelihood of a finding of injury. Such standards would also assist in moving the administration of the Antidumping Act closer to the competitive-market orientation of the antitrust laws. S. REP. NO. 1298, *supra* note 147, at 7186.

the repeated congressional statements that the act is designed to rise to a higher level of social purpose than simple protectionism, and with the long-term administrative practice broadening coverage to protection against more than predatory pricing.

E. THE POTENTIAL FOR REASSESSMENT SUMMARIZED

A reexamination of the Antidumping Act in its historical context reveals that in the first part of this century, Congress was broadly concerned with monopolistic practices and price discrimination at home, and with the impact of similar practices abroad upon the American market.²⁶⁸ There is ground for believing that Congress associated price discrimination with monopoly.²⁶⁹ This history is important in assessing the compatibility of the positions of Viner and Liebler with the original congressional intent incorporated in the 1921 Act. The legislative history of the 1974 and 1979 Acts, amending the Antidumping Act, is also crucial. This data suggests that Congress has been concerned not only with predatory pricing but also with a broader range of dumping. Overall, however, the case is reasonably strong that the congressional focus in the Antidumping Act and the acts amending it has been on protecting domestic industries from below-cost sales resulting from foreign government subsidies, broadly conceived.

To the extent that the legislative history provides room for interpreting the Antidumping Act as directed against behavior which distorts the long-run workings of the international marketplace, there is opportunity for infusing that act's construction with economic analysis. Recent experience with the Clayton Act indicates that this approach possesses great potential. By evaluating certain forms of domestic price competition, economic analysis has prevented section two of the Clayton Act from impeding aggressive price competition and has encouraged an interpretation of the Clayton Act that is more compatible with the original intent of the enacting Congress. A similar approach towards the Antidumping Act may help those administering the act to rise above purely protectionist concerns to an approach which is broadly consistent with overall national policies.

268. See *supra* text at notes 96-153 (describing the background of the 1921 Act).

269. See *supra*, text at notes 36-47 (describing the background of the Clayton Act § 2).

VI. THE ANTIDUMPING ACT AND THE ANTITRUST LAWS

When the antitrust laws deal with price discrimination as a tactic of commercial rivalry they treat the issue as one of predatory pricing. Accordingly, courts now construe section two of the Clayton Act more consistently with Congress' original intent to deter predatory pricing. The generally accepted standard for determining the predatory or non-predatory nature of pricing is the Areeda-Turner standard of marginal cost, or its practical surrogate, average variable cost.²⁷⁰ Courts tend to presume that prices above marginal or average variable cost are non-predatory and those below those levels are predatory.²⁷¹

In applying the Antidumping Act, different standards for distinguishing lawful pricing from unlawful pricing are applicable.²⁷² Since the 1916 and 1921 Acts, Congress has defined dumping as sales within the United States at prices below home-market prices.²⁷³ The unstated assumption, however, is that such prices are less than average total cost.²⁷⁴ The earlier legislation assumed that the higher home-market prices of the dumping firms provided some form of subsidy to their lower export prices, a subsidy which would have been unnecessary if the export prices had covered their average total costs.²⁷⁵ The 1974 Act provided an alternative definition of "fair value,"²⁷⁶ as no less than average total cost, so that upon a showing of injury, sales in the United States at less than average total cost of production are subject to antidumping duties, regardless of the foreign producers' home-market price.²⁷⁷ The 1974 Act also seems to be premised upon a kind of sub-

270. See *supra* notes 75-86 and accompanying text (reviewing the Areeda-Turner approach).

271. See *supra* notes 75-92 and accompanying text (discussing the issue of predatory pricing).

272. See *supra* notes 168-82 and accompanying text (noting the judicial rejection of Chairman Liebel's attempt to incorporate an exclusively predatory standard into the Antidumping Act).

273. See Antidumping Act of 1916, § 72 (establishing the definition of dumping).

274. See *supra* text at notes 152-54 and 195-205 (outlining the cross-market subsidy rationale apparently underlying the Antidumping Act and its concern with below-average-cost pricing by foreign sellers). Viner also assumed dumping prices were generally below average cost. J. VINER *supra* note 112, at 147; text at notes 221-22.

275. *Id.*

276. 19 U.S.C. § 1677(b) (1988) (defining the elements used to determine foreign market value).

277. *Id.* Home-market sales at less than the cost of production are disregarded for purposes of determining foreign market value. *Id.* When below-cost home-market prices are disregarded, then home-market value must be constructed by calculating production cost plus imputed general expenses of 10% and profit of eight percent. 19 U.S.C. § 1677b(e) (1988). Below cost sales in the United States are then compared

sidy rationale: because persistent sales below cost in all markets are unsustainable, firms which engage in such behavior must be the recipient of a form of subsidy. Presently, there are two definitions of dumping: (1) price discrimination,²⁷⁸ and (2) sales below cost, with or without price discrimination.²⁷⁹

Chairman Liebler proposed to construe the Antidumping Act to reflect only a concern with predatory pricing, believing that her approach would incorporate the Areeda-Turner marginal cost standard into the Antidumping Act and bring about a broad coherence in approach between the antitrust laws and the antidumping laws.²⁸⁰ The courts that rejected Liebler's approach stated that they were following a congressional mandate to pursue an "injury to industry" approach rather than an "injury to competition" approach.²⁸¹ They thus agreed with Chairman Liebler's contention that in refusing to employ a marginal-cost standard, they were imposing a purely protectionist construction upon the Antidumping Act.²⁸²

In rejecting Chairman Liebler's attempt to move the interpretation of the Antidumping Act in a more competitive direction, courts may have overlooked the vulnerability of the Areeda-Turner standard as a measure of pricing lawfulness. As a measure of predation, the marginal cost standard has had its critics. The Eleventh Circuit has rejected the Areeda-Turner standard for predatoriness in favor of according weight to subjective intent and the amount by which prices fall below average total cost.²⁸³ Judge Richard Posner expressed his preference for a long-run marginal-cost standard.²⁸⁴ Furthermore, the Supreme Court declined to state its views on a cost-based standard to determine predation.²⁸⁵ Even the Ninth Circuit, a leader in incorporating the Areeda-Turner approach, stated that pricing below or above average variable cost creates only a rebuttable presumption of predatory pricing or non-

with this constructed home-market price with the result that below-cost sales in the United States will always be deemed to be dumping sales.

278. 19 U.S.C. §§ 1673, 1677b(a)(1) (1988).

279. *Id.* §§ 1677b(b), (e).

280. *See supra* notes 168-79 and accompanying text (reiterating Liebler's approach to pricing).

281. *See supra* notes 180-82 and accompanying text (illustrating judicial disapproval of Liebler's approach).

282. *Id.*

283. *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1496, 1503 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989) (using a sum of average variable cost and average fixed cost).

284. R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 188-93 (1976).

285. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 nn.8, 9 (1986) (illustrating the Court's reluctance to establish a standard for predatoriness).

predatory pricing.²⁸⁶ In that circuit, a plaintiff unable to prove pricing below average variable cost retains the opportunity to prove predatory intent by more elaborate evidence of market conditions and the defendant's motivation.²⁸⁷ Moreover, even Areeda and Turner now justify their standard solely on the basis of its short-run welfare effects;²⁸⁸ they do not try to assess long-run welfare effects which they regard as indeterminate.²⁸⁹ It is, however, the long term effects of predatory pricing which have been the rationale for its condemnation. An adaptation of the approach which I have identified with Viner (*i.e.*, the imposition of antidumping duties under a standard broader than a mere condemnation of predatory pricing) does not have to amount to static protectionism. The approach is consistent with the view manifested in *USX Corp. v. United States* that the Antidumping Act is concerned with more than purely predatory behavior²⁹⁰ as well as with the view that the Act is designed to further competitive goals. Such an approach could draw, *inter alia*, upon the 1974 Senate report which inspired Chairman Liebeler, but would not constitute as radical a stance as that adopted by Liebeler.²⁹¹

An approach modeled upon the one outlined here might well employ the below-average-total-cost focus of the Antidumping Act in a positive direction. The act's injury definition may be sufficiently flexible to admit an average cost criterion for determining which injuries to redress, especially if sales below cost have been an unstated assumption, even under the traditional definition of dumping. First, administrators of the act should use average cost to assess which injuries to domestic indus-

286. See *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1035-36 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) (delineating the Ninth Circuit's approach to pricing).

287. *Id.* An appreciation of how aggressive pricing can alter the dynamics of the marketplace is missing from the prevailing antitrust analysis. When major firms sell at marginal cost prices for prolonged periods, they discourage their rivals from reinvesting in the industry. Those rivals gradually leave the industry and the major firms can then recoup their previously uncovered capital charges. When the major firms are foreign producers employing only a part of their capacity in the American market, these effects are exacerbated. Foreign producers can divert production as needed to replace the sales of exiting rivals more easily than a domestic rival. Furthermore, such producers may be able to sell in the American market at marginal cost prices indefinitely, because they are covering their fixed costs from home-market revenues.

288. P. AREEDA & D. TURNER, *supra* note 75, § 715a.

289. *Id.*

290. *USX Corp. v. United States*, 682 F. Supp. 60 (Ct. Int'l Trade 1988).

291. See *supra* notes 168-79 and accompanying text (discussing Chairman Liebeler's approach). As outlined in text, this approach would harness the average cost concept as a means for providing protection for domestic investment against nonpredatory but plausibly "unfair" price discrimination while ensuring that domestic firms were not protected against competition from more efficient rivals.

tries result from more efficient foreign rivals. Second, Congress should consider legislation capping antidumping duties at the exporters' average costs. Ideally, the Antidumping Act should be administered to encourage investment in industries with future competitive potential. That will be the result when investors are protected against below-cost pricing by less efficient foreign rivals, and a cap on antidumping duties at the dumpers' average cost would achieve that goal. This aspect of my proposal could draw support from the statutory concern with the retardation of industry growth, because an industry's growth would be inappropriately retarded by exposure to below-cost pricing from less efficient producers, but would not be inappropriately retarded by exposure to fully allocated pricing of efficient producers. As pointed out above, this approach is not based upon Liebler's judicially-rejected view that the Antidumping Act is concerned solely with predatory behavior; rather it is predicated upon the Congressional intent to ensure that the so-called playing field is a level one.

Finally, concern over exploitation by foreign sellers of unfair home-market advantages to undercut fair competition from efficient American producers should be integrated into the administration of the Antidumping Act. Thus the encouragement of home-market overcapacity by a foreign government should raise an inference that the added capacity is inefficient; otherwise government assistance would have been unnecessary. Foreign rivals should also be presumed less efficient when they operate behind official or unofficial trade barriers protecting their domestic markets, for otherwise they would not need those barriers.

Using average total cost as a guidepost, the Antidumping Act could avoid the trap of encouraging investment in industries which cannot withstand competition from equally efficient rivals. This approach would incorporate the early twentieth century focus on the "unfairness" of dumping as an attribute of monopolistic behavior. A limitation on protection to below-average-total cost pricing would incorporate the statutory criteria as well as demonstrate a competitive-market based concern that no firm should be protected against competition from an equally efficient rival. Finally, the protection against dumping should be guided by the ultimate procompetitive goal of assisting the industry to achieve the level of efficiency in which it can withstand competition even from rivals selling below cost.

Such a reinterpretation—and, ideally amendment—of the Antidumping Act would achieve more than rhetorical harmony with the antitrust laws. It would provide a sound conceptual basis for distinguishing injuries which impede long-run competitiveness and investment in American industry from injuries purely traceable to the supe-

rior efficiency of foreign rivals. This reinterpretation potentially would help to refocus attention upon the type of industry, the ratio of fixed to variable cost, economies of scale, the period for investment recovery, risk, and profit as elements of an injury determination. Reorientation of the administration of the Antidumping Act would also help redirect attention to foreign market structures and the protections facilitating noncompetitive pricing in those markets.

While this reassessment of the Antidumping Act would not bring about perfect harmony between the Antidumping Act and the antitrust laws, it would be a major step in that direction. Not all violations of the Antidumping Act would necessarily constitute violations of the antitrust laws. While predatory dumping would violate both the antidumping and the antitrust laws, nonpredatory dumping would remain only within the scope of the Antidumping Act. The treatment of nonpredatory dumping, however, would be explained and justified in conceptions which were common to both sets of laws.²⁹² Such an approach has the potential to lend substantial coherence to American economic policy.

292. See *supra* note 267 and accompanying text (suggesting a way to employ antitrust market definitions in the administration of the Antidumping Act). As the administration of the antitrust and antidumping laws increasingly employs similar conceptual tools, the opportunities for incorporating antitrust influences in the administration of the antidumping law increase. This approach would set the stage for the ITC to employ analytical tools for measuring injury which are similar to those used in antitrust analysis. It would also set the stage for the Commerce Department to abandon skewed measures of dumping. N. David Palmetier, *The Antidumping Law: A Legal and Administrative Non-Tariff Barrier* 9 (Paper presented to the Conference on Procedures & Methods in the Commerce Department's Administration of the Trade Remedy Laws, Brookings Inst., Nov. 27, 1990).