Cato Institute Foreign Policy Briefing No. 11: Dump Our Anti-Dumping Law

July 25, 1991

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Americans say that they believe in competition. The rhetoric of the day in the press, the board room, and the halls of Congress has been that U.S. companies can compete with foreign companies on a level playing field, but they cannot compete, or at least should not have to compete, with foreign companies that enjoy unfair competitive advantages. Ostensibly, foreign firms that are dumping merchandise into the United States are enjoying such an unfair advantage. That argument is used to justify the U.S. anti-dumping law, which subjects dumped imports that injure U.S. competitors to indefinite anti-dumping duties that are intended to off-set the supposed injury. The argument is filled with holes.

An examination of the anti-dumping law itself, the rhetoric and the legislative history surrounding it, and the details of its application leads to a disturbing conclusion: Dumping, as described in the legislative history and the popular rhetoric of the day, is very different from the dumping that is defined in the statute, and that concept of dumping is still further removed from the one that is embodied in the law as it is applied. That ambiguity, along with the public's unfamiliarity with the mechanics of the anti-dumping law, is being exploited by protectionist domestic interests, who are using the rhetorical concept of dumping as the basis for their moral and emotional appeal to justify and even expand the existing anti-dumping law.

In 1979 when it wrote the current anti-dumping law, the Senate Finance Committee described dumping as "pernicious." The U.S. Court of Appeals for the Federal Circuit, which oversees the administration of the law, has termed dumping "predatory." In the press, dumping is often called simply "unfair," and when an affirmative anti-dumping determination is made, a representative of the domestic industry usually comes forward to claim vindication and declare that action will now be taken to curb the predatory, price-cutting behavior that has been harming the domestic industry. The use of such pejorative language is not accidental. Obviously, an unfair practice is one that we should all condemn, one that we should not permit to harm our fellow Americans.

The notion underlying the rhetorical concept of dumping is predatory pricing. Predatory pricing is the practice of charging less than the marginal cost of production in order to drive competitors out of business so that the price cutter can thereafter raise its price level and recoup its losses. Predatory pricing is harmful not only to competitors but to consumers as well. Because predatory pricing is a technique for monopolizing an industry, it is prohibited by the antitrust laws.

The statutory concept of dumping has nothing to do with predatory pricing. A foreign firm is dumping if it sells merchandise in the United States below fair market value. Fair market value is the average price of the product in its home market or, if lower, the cost of producing the product. Under that definition, a foreign firm can be dumping even if it is charging a normal, competitive price for its product in the U.S. market. The language to the contrary, dumping is economically innocent; that is why there is no parallel provision for domestic firms.

It is instructive to contrast the Robinson-Patman Act, which prohibits selling at unreasonably low prices with the intent to destroy competition, with the anti-dumping law, which subjects imports to anti-dumping duties if the dumping is having even a small impact on competing domestic producers. Because any firm would be better off if it faced less competition, that standard is easily met. Thus, whereas the antitrust laws protect competition, the anti-dumping laws protect U.S. firms from competition.

Not only is the anti-dumping law without theoretical foundation, in practice it is tilted in favor of domestic interests. In enforcing the anti-dumping law, the U.S. Department of Commerce employs a methodology that is biased against imports. The obvious way to assess whether dumping is occurring is to compare the average price of the product in the United States with the average home-market price or cost of production. That, however, is not what Commerce does. Instead Commerce compares each U.S. sale with the average price or (estimated) production cost. Dumping is found to occur if even one sale is below the average.

The averaging example is frequently used to illustrate the capture of the anti-dumping law by protectionists. Capture, a term of art used by economists and political scientists, occurs when a group that is to have its claims adjudicated by an agency gets that agency to adopt rules and procedures that increase the group's chances of winning or its benefits from doing so. A captured process is not a fair one, and there are many aspects of the anti-dumping law that are biased against importers (and therefore American consumers as well), including the basic investigatory process, which places the Department of Commerce and the International Trade Commission in the roles of both investigator and judge.

The anti-dumping law is not even an effective way of insulating labor from the shifting patterns of world trade. The protection afforded by anti-dumping duties will, in general, have no relation to the magnitude of any trade increase that is occurring. Although some form of government action may be appropriate to cushion the blow, anti-dumping law is not.

Because of the unilateral nature of the mechanism--the importing country writes and enforces its own anti-dumping law--anti-dumping duties have become a popular way of providing protection. According to the General Accounting Office, during the 1980s Australia, Canada, the European Community, and the United States initiated 1,381 anti-dumping cases, about half of which resulted in final measures. Unfortunately, more and more countries are embracing anti-dumping laws.

The aggressive and biased manner in which anti-dumping laws are enforced has been a source of irritation to many countries, especially the developed and developing countries of East Asia. That presents the United States with an opportunity at the Uruguay Round of multilateral trade negotiations.

The four-year-old series of talks under the General Agreement on Tariffs and Trade, which derailed last December because of a deadlock over agriculture, appears ready to start up again and tackle a broad range of issues. Accordingly, the United States should offer to accept substantial limitations on existing anti-dumping laws, or even better eliminate those laws, as part of a comprehensive package that would include increased protection for intellectual property and improved market openings for trade in services.

Unfortunately, the United States has not been a consistent advocate of expanding trade at the GATT. Its zeal for market-opening reform does not extend to existing forms of U.S. protection, including (but definitely not limited to) the anti-dumping law.

Any suggestion that would make the imposition of U.S. anti-dumping duties more difficult is not likely to be popular on Capitol Hill either. Last year 60 senators wrote to President Bush urging him not to weaken the trade laws. It is fashionable to see that effort as a plea by savvy but disingenuous elected officials to distribute pork to constituents who fund reelection campaigns. I do not subscribe to that view. I think most, if not all, of those senators truly believe that dumping is an unfair trade practice harmful to the United States and that the current trade laws are an appropriate response. If so, they are wrong.

Eliminating its anti-dumping duty mechanism would reap several benefits for the United States--increased competition, lower prices for consumers, more efficient production, and higher national income--and those advantages have been brought to the attention of policymakers many times. What makes this an especially opportune time to

reconsider the issue is that we might be able to get even more by watering down the anti-dumping law--the elimination of some of the barriers facing U.S. companies abroad.

The United States must be willing to reduce its own protectionist measures if it expects other countries to reduce theirs. The alternative may be a proliferation of protectionist measures and a breakdown of the world trading system that has generated enormous benefits for all countries.