The U.S. Antidumping Law
Rhetoric versus Reality

by Brink Lindsey

Executive Summary

The U.S. antidumping law, according to its supporters, ensures "fair trade" by offsetting market distortions caused by foreign governments. Specifically, it allegedly targets "unfair" pricing practices—price discrimination and below-cost sales—that reflect protectionism, cartelization, subsidies, and other structural defects in foreign markets.

To evaluate those claims, the author of this study reviewed all U.S. Department of Commerce final determinations through the end of 1998 in original antidumping investigations initiated since January 1, 1995—a total of 141 company-specific dumping findings in 49 different cases. In addition, for particular companies it was possible to examine highly detailed price and cost data from the confidential case record.

The evidence reviewed in this study shows that there is a disconnect between the rhetoric of antidumping supporters and the reality of antidumping practice. The law as currently written and enforced does not reliably identify either price discrimination or below-cost sales. Of the five different calculation methodologies used by the Commerce Department to measure dumping, only one has any relevance to detecting market-distorting price discrimination; only 2 of the 107 affirmative dumping findings reviewed in this study relied exclusively on this methodology. None of the calculation methodologies measures whether sales are below cost; the one that comes closest merely determines whether profits are below an often arbitrary and inflated benchmark.

Furthermore, the law lacks any mechanism for determining whether the pricing practices it condemns as unfair have any connection to market-distorting policies abroad. Although price discrimination and below-cost sales can result from government interventionism, they can also be due to perfectly normal marketplace behavior. Consequently, the antidumping law frequently punishes foreign firms for unexceptionable business practices routinely engaged in by American companies.

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Introduction

The U.S. antidumping law protects American industries from supposedly unfair import competition.[1] Specifically, it imposes extra duties on goods from a particular country or group of countries if two conditions are met: first, the Department of Commerce must find that the goods are being sold in the United States at "dumped" prices; second, the International Trade Commission must determine that the imports in question are causing or threatening "material injury" to domestic producers of the "like product."[2]

Antidumping advocates hail the law as a bulwark against unfair trade practices abroad. They argue that dumping—which they define as either international price discrimination or export sales at prices below the cost of production—results from interventionist government policies and structural differences between national economies. Those market distortions allegedly give foreign firms an unfair competitive advantage in the U.S. market by allowing them to charge lower prices than would be possible under normal market conditions. Antidumping duties are needed to offset that unfair advantage and thereby ensure the proverbial level playing field.

The claims of the antidumping law's supporters raise basic questions about the proper objectives of U.S. trade policy. Assuming that the antidumping law does indeed target market-distorting practices, does it really make sense to respond to those practices by protecting particular American companies from the competitive consequences of those practices? Granted, cheap imports are capable of injuring specific import-competing firms; those same cheap imports, however, just as clearly benefit the American companies that buy and use them, not to mention the millions of consumers who buy from those companies. So why is it appropriate to sacrifice the interests of some Americans to the interests of others? Are the interests of import-competing firms really a valid proxy for the broader national economic interest?

Those questions go to the heart of the ongoing debate over free trade versus "fair trade." Any complete assessment of antidumping policy must ultimately grapple with them. Before reaching those fundamental issues, though, it is necessary to examine whether the antidumping law does in fact uphold some plausible notion of fair trade. This is the narrow and specific focus of this paper: does the antidumping law really target market distortions caused by foreign governments? In other words, does the antidumping law really do what its supporters claim it does?

An examination of those questions reveals a disconnect between the rhetoric of antidumping supporters and the reality of antidumping practice. The antidumping law as currently written and enforced does not reliably identify either price discrimination or below-cost sales. Furthermore, the law lacks any mechanism for determining whether the pricing practices it condemns as unfair have any connection to market-distorting policies abroad. Although price discrimination and below-cost sales can result from government interventionism, they can also be due to perfectly normal marketplace behavior. Consequently, the antidumping law all too frequently punishes normal marketplace behavior that has nothing to do with "unfair trade" under any plausible definition of that term.

Targeting Artificial Advantages

Advocates of antidumping claim that dumping is an unfair trade practice that takes two different forms: price discrimination and below-cost sales. Both types of dumping allegedly reflect underlying market distortions caused by foreign government policies. Those distortions confer an artificial advantage on foreign producers when they are selling in the United States—they can sell at lower prices than would otherwise be possible.

Thus, price discrimination (i.e., selling at lower prices in the United States than at home) supposedly signals the existence of a protected "sanctuary" home market. According to Greg

Mastel, formerly a trade policy analyst with the Economic Strategy Institute and a firm supporter of the antidumping law:

> If a company engages in dumping in foreign markets and its home market is open, the price differential will induce the company's competitors or other resellers to reexport dumped products to the dumper's home market. These reexports would quickly pull the home market price down to the dumped price and erase home market profits. Thus, a closed or restricted home market is also a virtual precondition to a successful dumping strategy.[3]

This situation gives the foreign producer an arguably unfair competitive advantage over U.S. rivals. "A closed home market allows companies to charge high prices at home because they face no foreign competition," Mastel explains. "Foreign companies can then use the profits from these domestic sales to cross-subsidize export sales at dumped prices."[4]

As to sales below cost, the contention is that the foreign producer could not sustain its losses in the absence of market-distorting government policies back home. Here again, a domestic sanctuary market could be the culprit: supranormal profits at home could allow a company to take losses abroad. Alternatively, government subsidies could prop up a company in spite of its losses. The subsidies might take the form of explicit grants or soft loans, or they might be considerably more subtle. Under "crony capitalism," for example, a politicized banking system can allow a well-connected but money-losing company to receive financing without regard to commercial considerations.

Another possibility is that loss-making export sales reflect basic structural flaws in a foreign country's economic policies. For example, the absence of functional bankruptcy laws could allow money-losing companies to continue in existence simply because their creditors have no better remedy than to keep them afloat and hope for a turnaround. In another possible scenario, hyperinflation or other severe monetary disorder may reduce companies to barter operations in which concepts of profit and loss no longer obtain.

Note that dumping as described above is not anticompetitive in the sense that economists use the term. Although politicians and protectionist business leaders may rail against "predatory dumping," the more sophisticated supporters of antidumping shy away from such rhetoric. They recognize that true predatory pricing—aggressive underselling of rivals in the hope of driving them out of business and eventually establishing a monopoly—is rarely attempted and even more rarely succeeds. "There are only a handful of cases in recent history," Mastel concedes, "in which it reasonably can be argued that such a systematic predatory strategy was being followed."[5] Furthermore, it is clear that antidumping policies do not follow competition policy standards for dealing with predation. "The antidumping rules are not intended as a remedy for predatory pricing practices of firms," states a U.S. submission to the World Trade Organization that staunchly defends the U.S. law, "or as a remedy for any other private anticompetitive practices typically condemned by competition laws."[6]

The primary justification for the antidumping law is really more political than economic. The guiding precept is *legitimacy* rather than *efficiency*. Specifically, the argument is that international competition should be subject to certain agreed-upon "rules of the game" according to which some sources of competitive advantage—trade barriers, subsidies, and other market-distorting government policies—are condemned as unfair. In this conception, the legitimacy of international trade flows—and ultimately, political support for maintaining those flows—is contingent upon denying competitors the benefits of any unfair advantage and thereby ensuring the much-invoked level playing field.

The U.S. WTO submission is very explicit in that regard:

> The focus of the antidumping rules . . . is not consumer welfare or allocative efficiency. Rather, consistent with other

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> WTO agreements, the Antidumping Agreement implicitly recognizes that there is an accepted norm for the behavior of governments in the broad multilateral trade context, *i.e.*, a government should not pursue industrial policies which distort market structures or processes and thereby provide artificial advantages to domestic producers to the detriment of producers in other countries. The Antidumping Agreement also recognizes that there should be a remedy for certain harms caused when different economic systems interact.[7]

It is beyond the scope of this paper to explore whether such rhetoric makes sense—whether the distinction between "natural" and "artificial" competitive advantages is intellectually coherent, and whether erecting trade barriers against imports that enjoy those advantages characterized as artificial constitutes sound trade policy or indeed promotes fairness in any meaningful sense of that term.[8] The aim here is narrower: it is simply to examine whether the reality of antidumping practice matches its rhetoric. Are antidumping duties, for better or worse, really offsetting the effects of market-distorting government policies?

This question needs to be answered in two stages. First, it is necessary to determine the effectiveness of current antidumping methodologies at targeting the supposedly unfair pricing practices of price discrimination and selling below cost. Second, to the extent that the antidumping law does indeed find its targets, it must be ascertained whether those pricing practices are reliable indicators of underlying market distortions.

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How Dumping Is Calculated

The first step in this inquiry is to examine how dumping is actually calculated under U.S. law. In general, the Commerce Department compares the prices of imported merchandise sold in the United States to some measure of "normal value." There are, however, a number of different ways to perform such comparisons—and in particular, a number of different benchmarks for determining normal value.

In the most familiar method, Commerce compares "net" U.S. prices to "net" home-market prices. To arrive at net values, Commerce subtracts freight charges, brokerage and handling fees, commissions, and various other selling expenses; the idea here is to compare prices on an "ex factory" basis.

The antidumping statute indicates that comparing U.S. and home-market prices is the preferred method of calculating dumping margins.[9] If specified conditions exist, though, the Commerce Department will employ alternative methodologies. Thus, if the foreign producer does not sell the subject merchandise in the domestic market, or its total domestic sales are less than 5 percent of its U.S. sales, the home market is considered not viable.[10] In that case the Commerce Department will select another export market to serve as the comparison market; U.S. prices are then compared to prices in some third-country market.[11] If there are no viable third-country markets, Commerce will compare U.S. prices to "constructed value"—which is equal to the company's total cost of production plus some amount for profit.[12]

The Commerce Department can deviate from normal price-to-price comparisons even when there is a viable domestic or third-country market. Within the broad category of merchandise under investigation, there may be many different specific product types or models. For each model sold in the United States, Commerce tries to identify sales of identical or similar products in the comparison market; if it cannot find any such sales, the U.S. sales of that model will be compared to constructed value.[13]

More important, Commerce examines comparison-market prices to determine whether they are below the full cost of production. If more than 20 percent of comparison-market prices of a particular model are below cost, Commerce will exclude all the below-cost sales of that model from its calculations on the ground that they are "outside the ordinary course of trade." In that case, U.S. prices are compared to above-cost comparison-market prices only; if there are no above-cost sales of

Table 1
Antidumping's Poor Aim

Calculation Methodology	Relevance to Price-Discrimination Dumping	Relevance to Below-Cost Dumping
U.S. prices to home-market prices	overinclusive	none
U.S prices to third-country prices	none	none
Constructed value	none	overinclusive
NME surrogate-country-based normal value	none	overinclusive
"Facts available"	none	none

identical or similar merchandise, U.S. prices are compared to constructed value.[14]

The Commerce Department employs another methodology altogether for imports from "nonmarket economies" (NMEs), that is, China and members of the former Soviet bloc.[15] In NME cases, Commerce rejects home-market prices as unreliable, since they are not the product of genuine market transactions. Constructed value is also rejected on the ground that the company's costs are likewise not market based. Instead, Commerce obtains the company's "factors of production"—the physical quantities of all the inputs used in producing the merchandise—and values those inputs on the basis of prices in a "surrogate country." Surrogate countries are market economies judged to be at a level of economic development similar to that of the NME country in question. Commerce then compares U.S. prices to a cost-based normal value derived from company-specific factors of production and surrogate-country prices of those factors (including surrogate-country averages for selling, general, and administrative expenses and profit).[16]

Finally, the Commerce Department sometimes calculates dumping on the basis of "facts available" rather than actual company data.[17] Determinations are based on facts available when a foreign producer fails to provide all the price and cost information requested by the Commerce Department, or when the information provided is judged to be inaccurate or incomplete (an ever-present possibility given the byzantine complexity of documentation that foreign companies are required to provide). In those situations, the facts available used by the Commerce Department are generally derived from the allegations contained in the domestic industry's antidumping petition.[18]

Missing the Target

What do the various calculation methodologies have to do with finding either price discrimination or sales below cost? As it turns out, not very much. As to price discrimination, only one methodology even attempts to measure relevant international price differences; and none of the methodologies seeks to determine whether sales below cost are occurring (Table 1).

Of all the different ways that the Commerce Department measures dumping, only the straightforward comparison of home-market and U.S. prices is capable of identifying price discrimination that reflects a protected sanctuary market. On the other hand, the apparent price discrimination may be nothing more than an artifact of imperfect price comparisons.

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When constructed value is used because there are no above-cost sales, the available evidence weighs *against* the existence of a sanctuary market.

In the typical antidumping investigation, the Commerce Department compares home-market and U.S. prices of physically different goods, in different kinds of packaging, sold at different times, in different and fluctuating currencies, to different customers at different levels of trade, in different quantities, with different freight and other movement costs, different credit terms, and other differences in directly associated selling expenses (e.g., commissions, warranties, royalties, and advertising). Is it any wonder that the prices aren't identical?

Admittedly, the Commerce Department's dumping calculation methodologies try to adjust for some of the differences, but the adjustments are necessarily imprecise. For example, when the Commerce Department compares physically different merchandise, it adjusts for differences in materials, direct labor, and variable overhead costs.[19] While this makes a certain amount of sense, in a real-world commercial context it goes without saying that actual price differences may be more or less than the differences in variable manufacturing costs. And in many cases, the Commerce Department makes no adjustment. Thus, prices of goods sold in the United States may be compared to prices of goods sold many months earlier or later in the home market without any adjustment for market fluctuations over the intervening time. And although unit prices typically decline with larger order quantities, the Commerce Department rarely adjusts for quantity discounts.

Critics of antidumping have focused considerable attention on asymmetries in the Commerce Department's methodologies that produce a bias in favor of finding price differences.[20] Without a doubt, such asymmetries exist.[21] But the more fundamental and too often neglected problem is that the practice of comparing each and every U.S. sale to some sale in the home market will produce spurious price differences that are purely the product of "apples-and-oranges" comparisons.

Whatever the problems associated with comparing home-market and U.S. prices, at least such comparisons bear directly on the question of international price discrimination and possible sanctuary markets. By contrast, the other methodologies have nothing to do with finding relevant international price differences.

Thus, a comparison of U.S. and third-country prices can possibly show international price discrimination, but it cannot reveal a sanctuary market. Any foreign producer under investigation is an "outsider" as far as all third-country markets are concerned; it is hindered, not helped, by any government barriers that block access to its export sales. If for some reason the company is earning higher prices in that third country, the reason clearly is not that government-imposed barriers are shielding it from competition. On the contrary, it had to overcome any barriers that were present in that third-country market to be selling there at all. Meanwhile, prices charged in a third country indicate nothing about whether a firm's *home* market is closed.

Comparison of U.S. prices to a cost-based normal value—whether it is derived from the company's own costs (in constructed-value cases) or from surrogate-country prices (in NME cases)—cannot show price discrimination, for the simple reason that price data are not used for one side of the comparison. Furthermore, a finding of dumping using constructed value offers no evidence of the existence of a sanctuary home market. All such a finding can show is that *U.S. sales* are being made *below* some baseline level of profitability; it cannot show that *home-market sales* are *above* any similar baseline, since home-market sales are excluded from the dumping calculation.

Indeed, when constructed value is used because there are no above-cost sales of identical or similar merchandise in the home market, the available evidence weighs *against* the existence of a sanctuary market. A sanctuary market is one in which a foreign company is making supranormal profits due to government intervention; here, though, the company is apparently losing money at home. The supposed source of unfair advantage—namely, the opportunity to cross-subsidize low-price export sales—is missing.

The situation is similar when U.S. sales are

compared to above-cost home-market sales only. A dumping finding based on such comparisons tells us nothing about the existence of international price discrimination, since the comparisons are skewed: low-price sales have been excluded from the home-market side, but not the U.S. side. And here again, as in constructed-value cases, the evidence affirmatively rebuts claims of a sanctuary market. Below-cost sales are excluded only when they constitute at least 20 percent of home-market sales; such widespread losses are inconsistent with the supposedly supranormal profits of a sanctuary market.

Finally, a dumping finding based on facts available provides no evidence of either price discrimination or a sanctuary market. The facts available are generally taken from the domestic industry's antidumping petition, hardly a source of objective analysis. Indeed, it is expressly recognized that determinations on the basis of facts available are punitive; it is the threat of such determinations that is used to compel foreign producers' cooperation with the Commerce Department's often onerous information requests.[22] In any event, the dumping allegations in antidumping petitions are often based on estimates of constructed value, and thus are incapable of substantiating the existence of price discrimination or a sanctuary market.

If the antidumping law takes poor aim at price discrimination, it fires completely blindly when it comes to sales below cost. Not one of the methodologies employed by the Commerce Department measures whether imported merchandise is sold at a loss. Commerce does determine whether home-market or third-country sales are below cost in deciding whether to exclude them as "outside the ordinary course of trade." That inquiry, though, is irrelevant to the issue of whether *U.S. sales* are below cost.

The closest the Commerce Department comes to determining whether U.S. sales are made at a loss is in constructed-value and NME cases. In those cases, Commerce does calculate the production costs of the merchandise sold in the United States,[23] but then it adds an amount for profit before the resulting normal value is compared to U.S. sales prices. Thus, the criterion for deciding whether imports are unfairly traded under this methodology is, not the existence of losses, but insufficient profitability. Sales at a loss are considered dumped, but so are profitable sales if the profit rate is too low.[24]

That overinclusiveness is exacerbated by the specific way in which dumping margins are calculated in cost-based cases. The Commerce Department compares average U.S. prices of specific models to a single product-wide or industry-wide profitability rate. Sales below the profitability benchmark are considered dumped; sales above the benchmark are deemed to have dumping margins of zero. Consequently, even if U.S. sales average a "normal" profit, dumping will be found simply because profit rates vary by model.

Finally, there is an additional layer of methodological distortion in NME cases. In those cases, the cost data used are not those of the firm under investigation; instead, surrogate values from another country are applied to that firm's factors of production. This methodology is fraught with potential for gross inaccuracy.[25] The extent to which the end result bears any relation to market-based costs is open to serious question.

Examining the Case Record

To evaluate the problems with current antidumping practice in fuller detail, the author of this study examined all Commerce Department final determinations through December 31, 1998, in original antidumping investigations initiated since January 1, 1995—the effective date of the Uruguay Round Agreements Act (see Appendix). This sample is large enough to allow generalizations about patterns of antidumping practice and has the further virtue of including only determinations under the law as it currently exists.[26] It includes 141 company-specific dumping determinations in 49 different antidumping investigations.[27] Commerce made affirmative dumping

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Table 2
Summary of Antidumping Investigations, 1995-98

Calculation Methodology	Determinations (affirmative only)	Avg. Dumping Margins (affirmative only)
U.S. prices to home-market prices	4 (2)	4.00% (7.36%)
U.S. prices to third-country prices	1 (0)	0% (0%)
U.S. prices to mixture of home-market prices, above-cost home-market prices, and constructed value	31 (25)	14.59% (17.95%)
U.S. prices to mixture of third-country prices, above-cost third-country prices, and constructed value	2 (2)	7.94% (7.94%)
Constructed value	20 (14)	25.07% (35.70%)
Nonmarket economy	47 (28)	40.03% (67.05%)
"Facts available"	36 (36)	95.58% (95.58%)
Total	141 (107)	44.68% (58.79%)

findings for 107 of the 141 companies investigated and in 48 of the 49 investigations. The average dumping margin in the sample, including all the zero and *de minimis* dumping findings,[28] is 44.68 percent.

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The most striking fact that emerges from a review of this case record is how few antidumping determinations have anything to do with targeting—or even attempting to target—price discrimination associated with possible sanctuary markets. Price discrimination bulks very large in antidumping rhetoric[29] but commands much less attention in actual antidumping practice.

Of the 141 total determinations, 36 are based on facts available rather than actual company data.[30] Another 47 of the determinations are from the 14 NME investigations included in the sample. In 16 of the determinations, constructed value was used either because there was no viable comparison market or because there were no identical or similar products sold in the comparison market. For 37 determinations, at least 20 percent of the sales of some or all comparison products were below cost, so the Commerce Department compared U.S. prices to some combination of comparison-market prices, above-cost comparison-market prices only, and constructed value. And one determination is based purely on a comparison of U.S. and third-country prices.

That leaves only 4 determinations in which the Commerce Department calculated dumping strictly on the basis of comparisons of U.S.

and home-market prices. Furthermore, in 2 of the 4 determinations in question, the Commerce Department concluded that there was zero or *de minimis* dumping. Thus, in only 2 of the 107 total affirmative determinations (both of which were made in the same investigation) did the Commerce Department find dumping by relying exclusively on the only currently used calculation methodology that bears any *possible* connection to the existence of market-distorted price discrimination (Table 2).

Another 31 determinations, encompassing 17 different investigations, relied partially on comparisons of U.S. and home-market prices.[31] In all of those determinations, however, Commerce skewed at least some of the comparisons by using only above-cost home-market sales, or by substituting constructed value for actual price data. In those mixed cases, Commerce found dumping in 25 of the determinations. For those determinations, however, it is impossible to tell from the public record how much of each dumping margin is attributable to normal comparisons of U.S. and home-market prices, how much to comparisons of U.S. prices and above-cost home-market prices only, and how much to comparisons of U.S. prices and constructed value. In other words, there is insufficient publicly available information to distinguish between the "signal" of international price differences and the "noise" of dumping margins generated by methodologies that do not detect price differences.

There are good grounds for assuming that the "noise" is considerable. Mixing methodologies tends to increase dumping margins above what would be found if only normal price-to-price comparisons were made. Comparing U.S. sales to only above-cost home-market sales always exaggerates dumping margins, since all the lowest-price home-market sales are excluded from the comparison. And resort to constructed value often exaggerates dumping margins because of the artificially high profit rates that are frequently used.

To illustrate the kinds of distortions that can be created by mixing methodologies, the author of this study gained access to the full confidential record of one of the mixed determinations in the sample. The investigation in question was of static random access memory (SRAM) semiconductors from Taiwan, and the specific company examined was Integrated Silicon Solution, Inc (ISSI).[32] The actual company data submitted in the investigation and the dumping margin calculation program employed by the Commerce Department in the final determination were used to recalculate ISSI's dumping margin; the computer program was altered so that only normal price-to-price comparisons were made.[33] As a result, the company's dumping margin fell by almost two-thirds, from 7.56 percent to 2.74 percent (Table 3).

In sum, a review of the actual case record confirms that the antidumping law as currently written and implemented is miserably ineffective at identifying price discrimination caused by sanctuary markets. In only 27 of the 107 affirmative determinations, or 25.2 percent of that total, did Commerce make at least some use of the only methodology relevant to detecting price discrimination, and all but 2 of those determinations were distorted by resort to other methodologies. Meanwhile, in the other 80 affirmative determinations, or 74.8 percent of the total, there is absolutely nothing in the Commerce Department's findings that in any way points to the existence of price discrimination.

What about the antidumping law's track record with respect to the other form of dumping—below-cost sales caused by market distortions? In as many as 100 of the 141 determinations in the sample, Commerce relied fully or partially on cost-based analysis. Nearly half of the determinations—67 of 141—depend exclusively on comparisons of U.S. prices to some cost-based benchmark of normal value. In 20 of those cases, Commerce used the foreign producer's own cost information to calculate constructed value;[34] the remaining 47 were NME cases in which Commerce calculated costs using surrogate-country values. In an additional 33 determinations, Commerce made at least some use of constructed value in its calculations, although perhaps not in every determination.[35]

In only 27 of the 107 affirmative determinations did Commerce make at least some use of the only methodology relevant to detecting price discrimination.

Table 3
How Dumping Margins Are Inflated

Company	Investigation	Methodological Distortion	Commerce's Result (%)	Corrected Result (%)
ISSI	SRAMs from Taiwan	Mixing cost-based and price-to-price methodologies	7.56	2.74
Dieng/ Surya Jaya	Preserved mushrooms from Indonesia	Inclusion of profit in below-cost investigation	7.94	4.88
		Comparison of model-specific profits to product-wide profit benchmark	7.94	0
		Failure to examine whether sales are above variable costs	7.94	0.04
Liaoning	Cut-to-length steel plate from China	Inclusion of profit in below-cost investigation	17.33	5.43
		Failure to examine whether sales are above variable costs	17.33	0

The most obvious problem with all of the cost-based determinations is that they do not attempt to measure whether U.S. sales are below cost. As discussed above, they measure instead whether U.S. sales are below some measure of cost plus profit. Because of the inclusion of profit, sales can be considered dumped even when they are above cost, and the dumping margins of below-cost sales are exaggerated.

For specific examples of how this methodological distortion affects dumping margins, access was gained to the confidential case records of two cost-based determinations: PT Dieng Djaya/PT Surya Jaya Abadi Perkasa (Dieng/Surya Jaya), a respondent in the investigation of preserved mushrooms from Indonesia,[36] and China Metallurgical Import & Export Liaoning Company (Liaoning), a respondent in the investigation of cut-to-length steel plate from China. For both determinations, the dumping margin was recalculated by setting profit equal to zero.[37] Dieng/ Surya Jaya's dumping margin fell from 7.94 percent to 4.88 percent, and Liaoning's rate plunged from 17.33 percent to 5.43 percent (Table 3).

Even if subnormal profitability, rather than sales below cost, is taken to be the appropriate threshold indicator of "unfair" trade, current antidumping practice still exaggerates dumping margins. The Commerce Department's calculation methodologies are biased in favor of finding U.S. sales to be insufficiently profitable.

Most obviously, the profit rates used by Commerce in constructed-value and NME cases are frequently much higher than any conceivable industry norm. Table 4 gives a few examples taken from case records. It compares the profit rates actually used by Commerce (but expressed as a percentage of sales)[38] to the average profit rates of the equivalent U.S. industries during the year the respective investigations were initiated.[39] In these cases the profit rates used in the Commerce Department's antidumping investigations were grossly excessive. Inflated profit rates translate directly into inflated dumping margins.

Even when Commerce uses more reasonable profit figures, its practice of comparing model-specific prices to product- or industry-average profit rates is skewed in favor of higher dumping margins. Consider a hypothetical antidumping investigation of widgets, in which Commerce determines the "normal" profit rate to be 5 percent. The foreign producer in the case had equal sales of three different models of widget—Models A, B, and C. It averaged a 1

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Table 4
Comparison of Profit Rates

Company/ Investigation	Commerce Rate (%)	U.S Industry Rate (%)
Chen Hao Taiwan/ Dinnerware from Taiwan	25.77	5.23
Brake drums and rotors from China	12.50	5.93
Cut-to-length steel plate from China	10.14	3.43
PT Multi Raya/ Dinnerware from Indonesia	22.61	5.23
Collated roofing nails from China	20.50	7.20

percent profit on U.S. sales of Model A, a 4 percent profit for Model B, and a 10 percent profit for Model C. Its average profit margin was thus 5 percent, or equal to the Commerce benchmark. Nevertheless, Commerce determines dumping model by model and treats "negative" dumping margins (i.e., instances in which the U.S. price is higher than normal value) as equal to zero. Accordingly, it concludes that sales of Models A and B are dumped.

The case of Dieng/Surya Jaya, the Indonesian producer of mushrooms discussed above, provides an example of the effect of this distortion in actual practice. For purposes of this study, the company's dumping margin was recalculated by subtracting "negative" dumping margins from the positive margins.[40] The revised dumping calculation makes a proper apples-to-apples comparison of product-wide profitability to a product-wide profit benchmark, as opposed to the normal method of comparing model-specific profitability to a product-wide benchmark. In the revised calculation, Dieng/Surya Jaya's dumping margin completely disappears: it drops from 7.94 percent to zero (Table 3).

Market Distortions Assumed, Not Proven

The evidence reviewed thus far shows that the antidumping law is highly prone to finding dumping even when there is no price discrimination or selling below cost. But there is another, deeper problem with the law. Namely, it simply assumes that those pricing practices, when found, indicate the existence of government-caused market distortions. As shown below, this assumption is entirely unwarranted.

It is true that international price differences can reveal a sanctuary home market. Likewise, sales below cost, under certain circumstances, can signal the presence of government-caused market distortions. But just because they *can* does not mean that they usually *do*. There are many other possible explanations—explanations that rest entirely on normal business practices and have nothing to do with any "unfair" competitive advantage. By ignoring alternative causes of the pricing behavior it targets, the antidumping law routinely punishes foreign firms for normal commercial conduct.

Price Differences and Sanctuary Markets

As to the connection between affirmative dumping findings and the existence of sanctuary markets, consider Table 5. It identifies, for each of the 18 investigations in the sample in which Commerce relied at least partially on price-to-price comparisons, the primary U.S. Harmonized Tariff System 10-digit number under investigation.[41] It then compares the tariff rates for that product in the United States

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Table 5
Comparison of Tariff Rates

Case Name	HTS No.	U.S. Rate (%)	Home Rate (%)	Dumping Margins (%)
Polyvinyl alcohol from Taiwan	3905.20.00.00	3.2	5.0	19.21
Certain pasta from Italy	1902.19.20.00	0.0	11.3 + 31 ecu/100 kg	0.00 - 19.09
Framing stock from United Kingdom	3924.90.20.00	3.4	6.5	0.00 - 20.01
Dinnerware products from Indonesia	3924.10.20.00	3.4	30	8.95
Dinnerware products from Taiwan	3924.10.20.00	3.4	5.0	0.00 - 3.25
Reinforcing bars from Turkey	7214.20.00.00	3.9	15.0	9.84 - 18.68
Rayon singles yarn from Austria	5510.11.00.00	10.6	7.5	2.36 - 12.36
Steel plate from South Africa	7208.52.00.00	4.8	5.0	26.01 - 50.87
Steel wire rod from Canada	7213.91.30.00	1.3	0.6	0.91 - 11.94
SRAM semiconductors from Korea	8542.13.80.49	0.0	8.0	1.00 - 5.08
SRAM semiconductors from Taiwan	8542.13.80.49	0.0	1.0	7.56 - 93.71
Steel wire rod from Trinidad and Tobago	7213.91.30.00	1.3	10.0	11.85
Stainless steel wire rod from Italy	7221.00.00.15	3.3	4.2	1.27 - 12.73
Stainless steel wire rod from Japan	7221.00.00.15	3.3	3.2	21.18 - 34.21
Stainless steel wire rod from Korea	7221.00.00.15	3.3	7.0	5.19
Stainless steel wire rod from Spain	7221.00.00.15	3.3	4.2	4.73
Stainless steel wire rod from Sweden	7221.00.00.15	3.3	4.2	5.71
Stainless steel wire rod from Taiwan	7221.00.00.15	3.3	7.5	0.02 - 8.29

Notes: HTS = U.S. Harmonized Tariff System; SRAM = static random access memory

and the corresponding product in the relevant home market at the time of the investigation.[42]

The upshot of this comparison is that in only 3 of the 18 investigations was the home-market tariff rate greater than 10 percentage points higher than the U.S. rate. In only 2 additional cases was the home-market rate more than 5 percentage points higher than the U.S. rate. In short, as least as far as the most obvious form of protectionism is concerned, there is no evidence that the home market is significantly more protected than the U.S. market in the vast majority of relevant cases. Furthermore, there is no correlation between the degree of relative protection in the home market and the range of dumping margins found.[43]

There is no correlation between the degree of relative protection in the home market and the range of dumping margins found.

Especially interesting is the case of open-end spun rayon singles yarn from Austria. This was the only investigation in the entire sample of 49 in which Commerce made affirmative dumping determinations strictly on the basis of comparing U.S. and home-market prices. And yet in this case, the U.S. tariff rate at the time of the investigation was actually *higher* than the Austrian rate.

It is possible, of course, that some of these foreign product markets may be shielded from foreign competition by nontariff barriers. If such barriers were significant, however, one would expect that they would merit inclusion in the U.S. Trade Representative's annual compendium of foreign trade barriers, the National Trade Estimates report. A review of the NTE reports for 1995–98 found allegations that might pertain to 2 of the 18 relevant antidumping investigations.[44] With respect to the other 16 cases, though, the NTE reports do not even allege (much less prove) the existence of protectionist policies that would create sanctuary markets.

Even if a foreign producer does enjoy significantly more protection in its home market than U.S. companies do here at home, the case for an "artificial" and "unfair" competitive advantage still has not been established. Although the foreign producer may be able to charge higher prices at home, it may also be burdened by higher costs; accordingly, its profitability may not be superior to that of its U.S. competitors. And even if a company is earning

supranormal profits, it does not gain any significant advantage if its domestic market is much smaller than its U.S. market. A high profit rate earned on relatively few sales will not provide a sufficient "war chest" to offer signficant opportunities for subsidizing its U.S. sales.

For a concrete illustration of these issues, consider again the case of ISSI, one of the respondents in the investigation of SRAMs from Taiwan. As already discussed, most of its dumping margin was due to deviations from a pure price-to-price comparison. But does its remaining dumping margin of 2.74 percent provide any evidence of government-caused market distortions? As shown in Table 5, the Taiwan SRAM market was not overtly protected: the tariff rate at the time of the investigation was only 1 percent. Assuming for the sake of argument that other "hidden" barriers did in fact shield the Taiwan market, the antidumping investigation nonetheless revealed that ISSI was not enjoying supranormal profits in Taiwan. The profit rate on ISSI's *above-cost-only* sales in Taiwan was only 7.61 percent of sales; by comparison, the average profit rate for the U.S. electrical and electronics products industry in 1997 was 10.85 percent.[45] Meanwhile, even if ISSI had been earning inflated profits in Taiwan, the fact is that ISSI's Taiwan sales during the period of investigation were only about 40 percent of its U.S. sales in value terms.[46] Consequently, its Taiwan market was not sufficiently large to serve as a base for subsidizing export sales.

The lack of connection between affirmative dumping determinations and evidence of sanctuary markets is not surprising. As discussed above, the methodological flaws in pure price-to-price comparisons, compounded by the practice of using both price-to-price and cost-based comparisons in a single case, can result in findings of dumping even when there is no real pattern of international price differences.

Furthermore, even when antidumping investigations do stumble onto cases of actual price discrimination, they are incapable of distinguishing between those that reflect the existence of a sanctuary market and those that are attributable to normal commercial factors. There are in fact many unexceptionable business reasons for charging more in one market than in another, and the persistence of those price differences over time by no means proves that the high-price market is closed.

International price differences can arise when a firm's status differs between national markets. A consumer goods firm may enjoy brand recognition in its home market that allows it to command a premium price, while abroad its brand name may be less valuable. Similarly, a producer goods firm may have built a reputation at home as a reliable supplier of high-quality products, while remaining a relative unknown in foreign markets. Or it may have carefully cultivated long-term business relationships with its domestic customers, while serving export markets on more of a spot-market basis. In all of those situations, the firm is exposed to greater pricing pressure abroad than at home and consequently will be forced to accept a lower price on its export sales.

Business strategists recognize that, whether in domestic or international markets, established "incumbents" enjoy a built-in competitive advantage over new market entrants. As Michael Porter, a leading expert on business strategy, puts it:

> Product differentiation means that established firms have brand identification, and customer loyalties, which stem from past advertising, customer service, product differences, or simply being first into the industry. Differentiation creates a barrier to entry by forcing entrants to spend heavily to overcome existing customer loyalties.[47]

New entrants can offset the incumbent's advantage and wrest away market share by introducing a superior new product, or by advertising frequently or especially effectively, *or by offering a lower price.* In the international setting, if a new entrant in an export market enjoys an incumbent position at home, it may well find that the most effective way for it to

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Price differences across national markets can easily persist in the absence of government-imposed trade barriers.

gain ground abroad is by pricing more aggressively than it does in the domestic market.

Price differences can also result when the market structures or conditions in which a firm must operate vary from country to country. For example, market concentration may be higher in the firm's home market than abroad, and pricing pressures may consequently be less severe. Or numerical market concentration may have nothing to do with it; the vagaries of business culture and market history may combine to render a firm's home market less prone to aggressive price cutting than a particular export market. The distinction here is not between competitive behavior in one market and anticompetitive behavior in another; rather, it is a matter of competitive rivalry of greater or less intensity.

Variations in competitive intensity among a firm's customers are also capable of producing international price differences. Consider the example of a foreign manufacturer that sells to small, traditional, family-owned distributors in the home market and highly sophisticated, nationwide retail chains in the United States. The manufacturer's bargaining position will be much weaker when facing a Wal-Mart or a Home Depot than when dealing with a mom-and-pop wholesaler back home; as a result, the prices it charges in the United States are likely to be lower than those in the domestic market.[48]

All of the sources of international price differences discussed above boil down to differences in market power. When a company has greater market power in one country than another—whether due to brand recognition, reputation, the business decisions of its rivals, or the bargaining positions of its customers—it will be able to command a higher price. The resulting price differences across national markets reflect purely commercial factors and have nothing to do with government intervention or sanctuary markets.

Not only differences in market power, but differences in marketing strategy as well, can create price gaps between countries. In Country A a manufacturer may choose to market its products (say, cosmetics) as premium goods: its strategy is to sell limited volumes at high prices through a carefully selected upscale distribution network. Meanwhile, in Country B the same manufacturer may opt to sell the very same products as mass-market items: this time, the strategy is to sell high volumes at low prices through mass-merchandise outlets. Price points in Countries A and B will be very different, but again sanctuary markets will not be to blame.

Antidumping supporters argue that these kinds of commercially caused price differences are unsustainable: without government-imposed market barriers, they say, all such price differences will simply be arbitraged away. Savvy entrepreneurs in the low-price markets will buy up goods and sell them in the high-price markets; increased demand in the former and increased supply in the latter will cause prices to converge somewhere in the middle.

Such a scenario makes sense in theory, but in practice things don't work quite so smoothly. It is true that price differences will create incentives for arbitrage, but taking advantage of arbitrage opportunities entails costs. Most obviously, there are the costs of shipping goods to the high-price market. In addition, there are all kinds of hidden transaction costs: the cost of identifying the price differences in the first place, the cost of obtaining supplies in the low-price market, and the cost of finding willing buyers in the high-price market. Those costs may not be significant for fungible commodities with well-established spot markets and public prices, but for other commodities they are capable of overwhelming the price gaps in question. When transportation costs are significant, when prices are negotiated and treated as trade secrets, or when distribution is dominated by established relationships and long-term contracts, price differences across national markets can easily persist in the absence of government-imposed trade barriers. The normal marketplace frictions of relatively illiquid product markets can suffice to prevent the forces that push toward price equalization from reaching their logical, textbook conclusion.

For empirical evidence in support of this

proposition, consider the billions of dollars of "gray-market" imports that flow into the United States every year.[49] Gray-market goods, also known as parallel imports, are copyrighted, trademarked, or patented products that enter the country without the intellectual property owner's permission. Often those goods are "reverse imports"—products originally exported to other markets and then imported back through unauthorized channels. Why do the goods boomerang? They come back because prices are higher in the United States. As a legal commentator explains:

> Parallel importations occur because of price differentials in the global marketplace. A publisher of computer software may, for example, have only a small market share in Mexico. As a business strategy, that publisher may legitimately decide to introduce a new product into the Mexican market at a substantial discount compared to the sales price for the same product in the United States. If the discount is large enough, U.S. parties are able to purchase the software in Mexico and import it into the United States for resale at a discount over the same product in authorized channels.
>
> In other cases, a manufacturer may limit its retail distribution to upscale markets. This strategy is common in the cosmetics trade, in which some products are sold only through salons or selected stores. Discount retailers who would like to sell the same product often find it on sale abroad at deeply discounted prices.[50]

The existence of gray-market imports refutes the assumption that international price differences require government intervention in the home market. Reverse imports show that, for some products, prices are higher in the relatively open U.S. market than elsewhere, and thus that price differentials can arise without government-imposed barriers to competition. Furthermore, the fact that gray-market imports of certain products persist year after year proves that price gaps can continue even in the face of arbitrage activity. In other words, arbitrage cannot always be counted on to achieve full price convergence.

Sales below Cost and Market Distortions

Just as price discrimination can reflect the existence of market distortions, so can below-cost pricing be associated with "abnormal" market behavior. First, sales below *marginal* cost generally do not make commercial sense; while sales above marginal cost (but below full unit cost) at least make some contribution to recovering sunk costs, sales below marginal cost only compound total losses and therefore are almost always to be avoided. Likewise, firms cannot normally sell below full unit costs for a protracted period of time. Over the long term, chronic loss-making firms cannot attract the capital needed to stay in business. In these scenarios, firms exhibiting a pattern of making losses—whether of the acute, marginal cost variety or the chronic, below-unit-cost variety—may be benefiting from some form of government intervention that allows them to ignore normal market signals.

The usual reason for sales at a loss is nothing other than a normal, healthy, competitive marketplace. Here in this country, for example, of the 4.47 million U.S. corporations that filed tax returns in 1995, only 2.46 million—or 55 percent—reported any net income.[51] Even the mightiest corporations are not immune from red ink. General Motors lost money three years in a row in 1990-92, with accumulated pre-tax losses during that period of $11.4 billion. IBM posted two straight years of negative earnings in 1992 and 1993, racking up a staggering $17.8 billion of pre-tax losses—14 cents in the red for every dollar of sales.[52]

Sales at a loss can indicate all kinds of normal market phenomena. Companies that are going out of business generally leave a trail of red ink on the way out. Other times, losses are only temporary, as companies make mistakes or business conditions deteriorate; companies can get back in the black by correcting errors and riding out the storm. During down periods, it may make good business sense to go on producing at a loss instead of cutting back produc-

The usual reason for sales at a loss is nothing other than a normal, healthy, competitive marketplace.

tion. For example, there may be long-term strategic benefits that accompany a certain market position (and market share); staying the market leader through a temporary downturn may maximize long-term profitability.

Also, if a downturn is seen as too temporary to justify permanent capacity cutbacks, it may pay to continue producing instead of allowing capacity to go idle. Here the distinction between marginal and sunk costs, or their real-world equivalents of variable and fixed costs, is crucial. If a company can continue to produce and sell goods above variable costs, it can at least make some contribution to fixed costs—costs that would be incurred even if those goods had not been produced. Under these conditions—which are typical for industries that face cyclical peaks and troughs of demand—continuing to produce and sell minimizes total losses during the downturn.

For young companies, losses are not just common; they are the norm. Investment must come first, followed (eventually, if all goes well) by returns on that investment. In these circumstances, even fast-growing companies can generate significant red ink. Consider the case of Amazon.com, the online retailer. In less than four years it has grown into the nation's third-largest bookseller, yet it has never made a profit. In 1998, while sales more than quadrupled from $147.8 million to $610 million, Amazon's net loss was a colossal $124.5 million.[53] Those losses are part of Amazon's business strategy: to grow as fast as possible and establish the market leadership that will bring long-term profitability.[54] The strategy may succeed or fail, but that is purely a commercial matter; government interventionism is irrelevant.

Even for established companies, losses are common on new products. By virtue of the well-known phenomenon of the "learning curve," production costs tend to decline in line with cumulative production volume. Knowing this, businesses often price new goods below full current cost in order to increase sales volumes and accelerate passage down the learning curve. Such a strategy is intended to maximize profitability over the full life cycle of the product. This practice of "forward pricing" is particularly well known in high-tech products like semiconductors, but learning curves have been found in a wide variety of industries.[55]

Eventually, of course, companies must turn a profit on their overall operations if they are to stay in business. Likewise, specific products must generally earn a profit sooner or later or else be dropped from a company's business line. There are, however, important exceptions. On some products, companies can lose money indefinitely; indeed, under certain conditions they may be well advised to do so.

For example, a multiproduct firm may intentionally charge a money-losing price for one good to encourage higher sales of another good. Such a "cross-subsidization" strategy, if successful, can actually maximize overall firm profits. Michael Porter explains:

> When a firm offers products that either are complementary in the strict sense of being used together or are purchased at the same time, pricing can potentially exploit the relatedness among them. The idea is to *deliberately* sell one product (which I term the base good) at a low profit or even a loss in order to sell more profitable items (which I term profitable goods).
>
> The term "loss leadership" is commonly used to describe the application of this concept in retailing. Some products are priced at or below cost in order to attract bargain-conscious buyers to the store. The hope is that these buyers will purchase other more profitable merchandise during their visit. Loss leader pricing is also a way of establishing a low price image for the store.
>
> The same pricing principle is at work in the so-called "razor and blade" strategy, which involves complementary products. The razor is sold at or near cost in order to promote future sales of profitable replacement blades. The same strategy is also common in amateur cameras, aircraft engines, and elevators. . . .
>
> Another variation of cross-subsidization is a trade-up strategy. Here product

On some products, companies can lose money indefinitely; indeed, under certain conditions they may be well advised to do so.

varieties that are typically first purchases are sold at low prices, in the hopes that the buyer will later purchase other more profitable items in the line as trade-up occurs. This strategy is sometimes employed, for example, in light aircraft, motorcycles, copiers, and computers.[56]

Selling below full unit costs may also make sense in the case of so-called coproducts or joint products—two or more different goods that are produced simultaneously in the same manufacturing process. Examples include different cuts of meat from the same animal, different ores extracted in the same mining operation, different chemicals produced by the same reaction, and products of varying quality produced in the same manufacturing batch. For those types of products, some allocation of shared manufacturing costs among the various joint products is necessary for cost-accounting purposes. Depending on how costs are allocated, a given coproduct may show a profit or a loss.

Accounting results, however, are ultimately irrelevant to proper business decisions. Managers must decide what product mix to target and what further processing to do after "splitoff" of the joint products; in doing so, they should focus not on total unit costs but on marginal costs. As a leading cost-accounting textbook explains:

> No technique for allocating joint-product costs should guide management decisions regarding whether a product should be sold at the splitoff point or processed beyond splitoff. When a product is an inevitable result of a joint process, the decision to further process should not be influenced either by the size of the total joint costs or by the portion of joint costs allocated to particular products. . . .
>
> The decision to incur additional costs beyond splitoff should be based on the incremental operating income attainable beyond the splitoff point.[57]

Joint products are manufactured from the same raw materials, but there are many other ways for products to share costs. Sharing of factory overhead costs (e.g., electricity, fuel, maintenance, plant and equipment depreciation, engineering support, research and development) and selling, general, and administrative expenses is the norm in multiproduct firms. Indeed, economists explain the very existence of multiproduct firms in terms of the benefits of cost sharing, also known as economies of scope.[58] As a leading textbook on the economics of business strategy explains, "Economies of scope are usually defined in terms of the relative cost of producing a variety of goods together in one firm versus separately in two or more firms."[59] The same textbook goes on to clarify that "these economies arise because of inputs that can be shared to produce several products."[60]

The ubiquitousness of cost sharing suggests that a focus on product-specific total unit costs (which include overhead and selling, general, and administrative expenses) can be deceptive. A particular product that is never profitable when viewed in isolation may nonetheless contribute to fixed costs that would be incurred anyway on other, profitable products. Paradoxically, then, a perennially money-losing product can help to maximize firmwide profits.

In sum, sales below cost can mean many things other than the presence of government-caused market distortions. The antidumping law, however, completely ignores this possibility. When below-cost sales do end up getting caught in the wide net thrown in constructed-value and NME cases, the Commerce Department's calculation methodologies fail to distinguish between normal commercial losses and those that point to the existence of government interventionism. As a result, antidumping law too often penalizes normal commercial practices having nothing to do with anyone's definition of "unfair trade."

For the existence of below-cost sales to raise any serious question of government interventionism, the losses must either be acute (i.e., sales must be below variable costs) or chronic (i.e., losses must persist for a period of

The ubiquitousness of cost sharing suggests that a focus on product-specific total unit costs can be deceptive.

years). The current antidumping law makes no attempt to identify either acute or chronic losses.

An examination of specific cases reveals the impact of this omission. With respect to acute losses, the dumping margins of Liaoning (respondent in the NME investigation of cut-to-length steel plate from China) and Dieng/Surya Jaya (respondent in the constructed-value investigation of preserved mushrooms from Indonesia) were recalculated for purposes of this study by comparing U.S. prices to an estimate of variable costs (as opposed to full unit costs plus profit).[61] As Table 3 shows, dumping margins for both companies disappeared completely: Liaoning's margin fell from 17.33 percent to zero, and Dieng/Surya Jaya's fell from 7.94 percent to 0.04 percent (*de minimis*). These results show that the Commerce Department's affirmative dumping determinations cannot be taken as reliable indicators of acute below-cost sales.

For chronic losses, the period investigated by the Commerce Department in antidumping cases is only 12 months.[62] Consequently, Commerce lacks the evidentiary record to determine whether a company's losses are abnormally persistent. Because Commerce does not take a longer view, it cannot determine whether losses reflect a temporary market downturn or business reversal, or whether they flow from a conscious growth-oriented strategy for a new company or a new product. The Commerce Department does make some adjustment for losses incurred on new products, but the adjustment is restricted to situations in which technical factors during the start-up phase limit production levels.[63] There is no adjustment for losses incurred to take advantage of learning-curve effects, or for investments in growth at the expense of current earnings.

Likewise, antidumping investigations develop no evidentiary record for determining whether acute or chronic losses, to the extent they exist, have a reasonable commercial explanation. Commerce does not examine combined profitability in joint product situations, or possible reasons for cross-subsidization when goods are complementary or share costs.[64]

Most fundamental, Commerce does not examine whether the supposedly below-cost U.S. sales it identifies are in any way connected with government interventionism in the home market. There is no investigation of whether trade barriers or other restrictions on competition create a domestic sanctuary market that bankrolls losses abroad; nor of whether the foreign producer receives government grants, soft loans, special tax breaks, preferential access to credit on noncommercial terms, or any other form of assistance that supports its loss-making operations; nor of whether there are basic structural flaws in a country's economic policy that impede normal market responses to losses.

Commerce does not examine whether the supposedly below-cost U.S. sales it identifies are in any way connected with government interventionism in the home market.

On this point, the case record reviewed in this study argues against any reliable connection between constructed-value cases and underlying market distortions. In as many as 33 of the 53 possible determinations in which Commerce relied fully or partially on constructed value, Commerce resorted to constructed value only because of an absence of above-cost home-market sales. Such an absence is flatly inconsistent with the supranormal profits supposedly associated with sanctuary markets. Meanwhile, in another 13 constructed-value-based determinations, Commerce found that there was no viable home market at all.

In addition, there is reason to doubt that constructed-value cases point with any regularity to the existence of foreign government subsidies. Here it is instructive to examine the interplay between constructed-value-based antidumping actions and investigations under the countervailing duty (CVD) law. The CVD law directly targets foreign government subsidies, while the antidumping law allegedly does so indirectly by targeting pricing practices (e.g., U.S. sales at prices below constructed value) that supposedly reflect underlying subsidies.[65] Consequently, if indeed constructed-value cases are addressing the effects of foreign government subsidies, one would expect to find affirmative CVD determinations with respect to the same imported products. After all,

simultaneous pursuit of antidumping and CVD remedies offers the prospect of double relief for the same underlying market distortions—surely an attractive outcome from the petitioning U.S. industry's perspective.[66]

Yet only 4 of the 26 antidumping investigations in which constructed value was used covered products with respect to which Commerce also made affirmative CVD findings.[67] The absence of any associated affirmative CVD findings with respect to any of the other 22 investigations calls into serious question whether in fact there were any market-distorting government policies in those cases that would have accounted for any below-cost sales.[68]

Conclusion

The antidumping law is defended as a remedy for market distortions caused by foreign government interventionism. Yet in actual practice, the methods of determining dumping under the law fail, repeatedly and at multiple levels, to distinguish between normal commercial pricing practices and those that reflect government-caused market distortions.

As a result, the antidumping law as it currently exists routinely punishes normal competitive business practices—practices commonly engaged in by American companies at home and abroad. It is therefore not the case that the law guarantees a "level playing field" for American companies and their foreign competitors. On the contrary, it actively discriminates against foreign goods by subjecting them to requirements not applicable to American products.

An antidumping law that actually did target government-caused market distortions would look very different from the law in its present form. Bringing the reality of antidumping practice into line with the rhetoric of antidumping supporters would require dramatic reforms.

Price-Discrimination Dumping

An affirmative determination of price-discrimination dumping would have to include all of the following findings:

1. *Properly measured international price discrimination*. A methodologically defensible comparison of prices would have to reveal a significant and stable differential between a foreign producer's U.S. prices and its home-market prices. Comparisons of U.S. prices to above-cost home-market prices only, or to third-country prices, or to constructed value, would have no place whatsoever in a proper analysis. Furthermore, in comparing U.S. and home-market prices, Commerce should abandon its current practice of comparing all U.S. sales to some benchmark of normal value; instead, it should select representative U.S. sales for which there are home-market sales made under nearly identical circumstances.

2. *Government policies that insulate the foreign producer's domestic market from outside competition*. These policies could include high tariffs, nontariff import barriers, and government support of a domestic cartel. The U.S. industry seeking relief would have to show that the level of protectionism was higher in the foreign market than in the U.S. market—in other words, that there was an "unlevel playing field."

3. *High profits enjoyed by the foreign producer on its domestic sales*. The existence of a protected home market alone does not guarantee a foreign producer any kind of competitive advantage; after all, its costs may be inflated because of similar competitive restrictions in upstream input markets. Accordingly, it must be established—with respect to an appropriately defined product line over an appropriately defined time period—that the foreign producer's rate of profit is higher than the U.S. industry average.

4. *A relatively large domestic market*. Even if a foreign producer is earning high profits in a protected home market, it derives no significant "unfair" advantage if the sanctuary market is small with respect to its export markets. A small domestic market offers no potential for significant cross-subsidization of export sales. Accordingly, the size of the foreign producer's domestic market in value terms should at least equal the size of its

An antidumping law that actually did target government-caused market distortions would look very different from the law in its present form.

If the antidumping law were overhauled along the lines suggested here, claims that it serves as a remedy against international market distortions would be on much firmer ground.

U.S. market before an affirmative dumping finding can be made.

For legitimate NME cases (assuming there are any such things), the absence of market-based home-market prices can be overcome without resort to the crude approximations of surrogate-country values. In lieu of price-to-price comparisons, Commerce could compare the profit rate on U.S. sales to the profit rate in the home market. In this context, whether or not home-market prices and costs reflect market transactions is irrelevant. All that matters is the company's relative profitability in the domestic and U.S. markets; profitability is an objective fact regardless of how the constituent prices and costs are derived.

Below-Cost Dumping

To support an affirmative determination of below-cost dumping, all of the following findings would be needed:

1. *Acute or chronic below-cost sales*. Commerce would have to determine that a foreign producer was engaging in an unusual pattern of below-cost selling. Specifically, it could find that the company was selling below average variable costs over some significant period of time (e.g., one year). Alternatively, it could find that the company was selling below full unit costs for a protracted period of time (e.g., at least three years).

2. *Absence of commercial explanation for losses*. Foreign producers should be allowed to demonstrate that any acute or chronic losses have a commercial justification. Possible explanations would include the existence of joint products, products that share overhead costs, and complementary products; learning-curve effects; and investment in rapid growth to establish a strong market position. An affirmative determination could not be made if the foreign producer proved that losses on the product under investigation were part of a conscious strategy to maximize long-term firmwide profits.

3. *Government policies that inhibit the normal market consequences of acute or chronic losses.* Such policies would include protectionist import barriers, explicit or implicit subsidies, and basic structural measures that block normal market responses to losses (e.g., poorly developed bankruptcy law, severe monetary disorder). To prevent double counting, antidumping liability should be reduced by the full amount of any CVD duties paid with respect to the same product.

There is no need for a special NME methodology in below-cost dumping cases. The issue in such cases is whether the company is losing money on its U.S. sales as a result of market distortions back home. In deciding that issue, it should not matter that the company's costs do not result from market transactions. Regardless of how its costs are determined, if a company is selling above them, it cannot be engaging in below-cost dumping.

If the antidumping law were overhauled along the lines suggested here, claims that it serves as a remedy against international market distortions would be on much firmer ground. Nevertheless, fundamental questions about the law's propriety would remain. Is closing our markets the correct response to policy flaws abroad? Aren't negotiations to eliminate foreign market distortions a better approach? And even if international policy differences are intractable, is it wise to sacrifice the economic benefits of open markets in the name of "fairness"? And on the subject of fairness, is it really fair to defend a level playing field for particular U.S. industries if doing so harms downstream U.S. industries and consumers?

The point of this paper, though, is that such fundamental questions about free trade versus "fair trade" are irrelevant to an evaluation of the antidumping law as it currently stands. When the law is analyzed on the basis of what it does, as opposed to what its supporters say it does, it is clear that the law cannot be justified as a "fair trade" measure. Free traders who attack it as such are giving their opponents too much credit.

Appendix:
U.S. Antidumping Investigations, 1995-98

Country	Product	Inv. No.	Initiation Date	Final Date	Respondent	Rate	Methodology
China	Polyvinyl alcohol	A-570-842	4/4/95	3/29/96	Guangxi	116.75%	NME
China	Polyvinyl alcohol	A-570-842	4/4/95	3/29/96	Sichuan	0.00%	NME
Taiwan	Polyvinyl alcohol	A-583-824	4/4/95	3/29/96	Chang Chun	19.21%	HM mixed
Japan	Polyvinyl alcohol	A-588-836	4/4/95	3/29/96	Kuraray	77.49%	FA
Japan	Polyvinyl alcohol	A-588-836	4/4/95	3/29/96	Nippon Goshei	77.49%	FA
Japan	Polyvinyl alcohol	A-588-836	4/4/95	3/29/96	Unitika	77.49%	FA
Japan	Polyvinyl alcohol	A-588-836	4/4/95	3/29/96	Shin-Etsu	77.49%	FA
China	Bicycles	A-570-843	5/1/95	4/30/96	Bo An	0.00%	NME
China	Bicycles	A-570-843	5/1/95	4/30/96	CBC	2.95%	NME
China	Bicycles	A-570-843	5/1/95	4/30/96	CATIC	2.02%	NME
China	Bicycles	A-570-843	5/1/95	4/30/96	Giant	0.67%	NME
China	Bicycles	A-570-843	5/1/95	4/30/96	Hua Chin	0.00%	NME
China	Bicycles	A-570-843	5/1/95	4/30/96	Merida	0.37%	NME
China	Bicycles	A-570-843	5/1/95	4/30/96	Overlord	0.00%	NME
China	Bicycles	A-570-843	5/1/95	4/30/96	Chitech	1.83%	NME
China	Bicycles	A-570-843	5/1/95	4/30/96	Universal	2.27%	NME
Japan	Clad steel plate	A-588-838	10/25/95	5/9/96	Japan Steel Works	118.53%	FA
Romania	Circular welded nonalloy steel pipe	A-485-804	5/22/95	5/14/96	Metagrimex	85.12%	NME
Romania	Circular welded nonalloy steel pipe	A-485-804	5/22/95	5/14/96	Metalexportimport	77.61%	NME
South Africa	Circular welded nonalloy steel pipe	A-791-803	5/22/95	5/14/96	RIH Group	117.66%	FA
Italy	Certain pasta	A-475-818	6/8/95	6/14/96	Arrighi	19.09%	HM mixed
Italy	Certain pasta	A-475-818	6/8/95	6/14/96	De Cecco	46.67%	FA
Italy	Certain pasta	A-475-818	6/8/95	6/14/96	Delverde	1.68%	HM mixed
Italy	Certain pasta	A-475-818	6/8/95	6/14/96	De Matteis	0.00%	HM mixed
Italy	Certain pasta	A-475-818	6/8/95	6/14/96	La Molisana	14.73%	HM mixed
Italy	Certain pasta	A-475-818	6/8/95	6/14/96	Liguori	11.58%	HM mixed
Italy	Certain pasta	A-475-818	6/8/95	6/14/96	Pagani	17.47%	HM mixed
Turkey	Certain pasta	A-489-805	6/8/95	6/14/96	Filiz	63.29%	FA
Turkey	Certain pasta	A-489-805	6/8/95	6/14/96	Maktas	60.87%	FA
Germany	Large newspaper printing presses	A-428-821	7/27/95	7/23/96	MRD	30.72%	CV
Germany	Large newspaper printing presses	A-428-821	7/27/95	7/23/96	KBA	46.40%	FA
Japan	Large newspaper printing presses	A-588-837	7/27/95	7/23/96	Mitsubishi	62.26%	CV
Japan	Large newspaper printing presses	A-588-837	7/27/95	7/23/96	Tokyo Kikai Seisakusho	56.28%	CV
United Kingdom	Foam extruded PVC & polystyrene framing stock	A-412-817	10/6/95	10/2/96	Ecoframe	20.01%	HM mixed
United Kingdom	Foam extruded PVC & polystyrene framing stock	A-412-817	10/6/95	10/2/96	Robobond	0.00%	HM mixed
United Kingdom	Foam extruded PVC & polystyrene framing stock	A-412-817	10/6/95	10/2/96	Magnolia	84.82%	FA
Indonesia	Melamine institutional dinnerware products	A-560-801	3/1/96	1/13/97	Mayer Crocodile	12.90%	FA
Indonesia	Melamine institutional dinnerware products	A-560-801	3/1/96	1/13/97	Multiraya	8.95%	HM mixed
China	Melamine institutional dinnerware products	A-570-844	3/1/96	1/13/97	Chen Hao Xiamen	0.46%	NME
China	Melamine institutional dinnerware products	A-570-844	3/1/96	1/13/97	Gin Harvest	0.47%	NME
China	Melamine institutional dinnerware products	A-570-844	3/1/96	1/13/97	Sam Choan	0.04%	NME
China	Melamine institutional dinnerware products	A-570-844	3/1/96	1/13/97	Tar Hong Xiamen	2.74%	NME

continued

Appendix—*continued*

Country	Product	Inv. No.	Initiation Date	Final Date	Respondent	Rate	Methodology
Taiwan	Melamine institutional dinnerware products	A-583-825	3/1/96	1/13/97	Chen Hao Taiwan	3.25%	HM mixed
Taiwan	Melamine institutional dinnerware products	A-583-825	3/1/96	1/13/97	Yu Cheer	0.00%	HM
Taiwan	Melamine institutional dinnerware products	A-583-825	3/1/96	1/13/97	IKEA	53.13%	FA
Taiwan	Melamine institutional dinnerware products	A-583-825	3/1/96	1/13/97	Gallant	53.13%	FA
Kazakstan	Beryllium metal & high beryllium alloys	A-834-805	4/9/96	1/17/97	Ulba	16.56%	NME
China	Brake drums	A-570-845	4/3/96	2/28/97	CMC	0.00%	NME
China	Brake drums	A-570-845	4/3/96	2/28/97	Qingdao	0.00%	NME
China	Brake drums	A-570-845	4/3/96	2/28/97	Xinchangyuan	0.00%	NME
China	Brake drums	A-570-845	4/3/96	2/28/97	Yantai	0.00%	NME
China	Brake rotors	A-570-846	4/3/96	2/28/97	CAIEC & Laizhou CAPCO	0.00%	NME
China	Brake rotors	A-570-846	4/3/96	2/28/97	Shenyang and Laizhou	0.00%	NME
China	Brake rotors	A-570-846	4/3/96	2/28/97	Xinjiang	0.00%	NME
China	Brake rotors	A-570-846	4/3/96	2/28/97	Yantai	3.56%	NME
China	Brake rotors	A-570-846	4/3/96	2/28/97	Southwest	16.07%	NME
Turkey	Certain steel concrete reinforcing bars	A-489-807	4/4/96	3/4/97	Colakoglu	9.84%	HM mixed
Turkey	Certain steel concrete reinforcing bars	A-489-807	4/4/96	3/4/97	Ekinciler	18.68%	HM mixed
Turkey	Certain steel concrete reinforcing bars	A-489-807	4/4/96	3/4/97	Habas	18.54%	CV
Turkey	Certain steel concrete reinforcing bars	A-489-807	4/4/96	3/4/97	IDC	41.80%	FA
Turkey	Certain steel concrete reinforcing bars	A-489-807	4/4/96	3/4/97	Metas	30.16%	HM/CV
Austria	Open-end spun rayon singles yarn	A-433-807	9/13/96	3/26/97	Linz	12.36%	HM
Austria	Open-end spun rayon singles yarn	A-433-807	9/13/96	3/26/97	Borckenstein	2.36%	HM
Japan	Engineered process gas turbo-compressor systems	A-588-840	6/4/96	5/5/97	Mitsubishi Heavy Industries	38.32%	CV
China	Persulfates	A-570-847	8/6/96	5/19/97	Wuxi	34.41%	NME
China	Persulfates	A-570-847	8/6/96	5/19/97	AJ	32.22%	NME
China	Persulfates	A-570-847	8/6/96	5/19/97	Guangdong	34.97%	NME
China	Freshwater crawfish tail meat	A-570-848	10/17/96	8/1/97	China Everbright	156.77%	NME
China	Freshwater crawfish tail meat	A-570-848	10/17/96	8/1/97	Binzhou	119.39%	NME
China	Freshwater crawfish tail meat	A-570-848	10/17/96	8/1/97	Huaiyin FTC	91.50%	NME
China	Freshwater crawfish tail meat	A-570-848	10/17/96	8/1/97	Yangchen FTC	108.05%	NME
Japan	Vector supercomputers	A-588-841	8/23/96	8/28/97	Fujitsu	173.08%	FA
Japan	Vector supercomputers	A-588-841	8/23/96	8/28/97	NEC	454.00%	FA
China	Collated roofing nails	A-570-850	12/20/96	10/1/97	Top United	0.00%	NME
China	Collated roofing nails	A-570-850	12/20/96	10/1/97	Qingdao Zongxun	0.00%	NME
Korea	Collated roofing nails	A-580-827	12/20/96	10/1/97	Senco	0.00%	3C
Korea	Collated roofing nails	A-580-827	12/20/96	10/1/97	Kabool	0.00%	CV
Taiwan	Collated roofing nails	A-583-826	12/20/96	10/1/97	Unicatch	0.07%	CV
Taiwan	Collated roofing nails	A-583-826	12/20/96	10/1/97	Lei Chu	0.00%	CV
Taiwan	Collated roofing nails	A-583-826	12/20/96	10/1/97	S&J	2.98%	CV
Taiwan	Collated roofing nails	A-583-826	12/20/96	10/1/97	Romp	40.28%	FA
Taiwan	Collated roofing nails	A-583-826	12/20/96	10/1/97	K.Ticho	40.28%	FA

Country	Product	Inv. No.	Initiation Date	Final Date	Respondent	Rate	Methodology
China	Cut-to-length carbon steel plate	A-570-849	12/3/96	11/20/97	Anshan	30.68%	NME
China	Cut-to-length carbon steel plate	A-570-849	12/3/96	11/20/97	Baoshan	34.44%	NME
China	Cut-to-length carbon steel plate	A-570-849	12/3/96	11/20/97	Liaoning	17.33%	NME
China	Cut-to-length carbon steel plate	A-570-849	12/3/96	11/20/97	Shanghai Pudong	38.16%	NME
China	Cut-to-length carbon steel plate	A-570-849	12/3/96	11/20/97	WISCO	128.59%	NME
South Africa	Cut-to-length carbon steel plate	A-791-804	12/3/96	11/20/97	Highveld	26.01%	HM mixed
South Africa	Cut-to-length carbon steel plate	A-791-804	12/3/96	11/20/97	Iscor	50.87%	HM mixed
Russian Fed.	Cut-to-length carbon steel plate	A-821-808	12/3/96	11/20/97	Severstal	53.81%	NME
Ukraine	Cut-to-length carbon steel plate	A-823-808	12/3/96	11/20/97	Azovstal	81.43%	NME
Ukraine	Cut-to-length carbon steel plate	A-823-808	12/3/96	11/20/97	Ilyich	155.00%	NME
Korea	Static random access memory semiconductors	A-580-828	3/21/97	2/23/98	Samsung	1.00%	HM mixed
Korea	Static random access memory semiconductors	A-580-828	3/21/97	2/23/98	Hyundai	5.08%	HM mixed
Korea	Static random access memory semiconductors	A-580-828	3/21/97	2/23/98	LG Semicon	55.36%	FA
Taiwan	Static random access memory semiconductors	A-583-827	3/21/97	2/23/98	Advanced Microelectronics	113.85%	FA
Taiwan	Static random access memory semiconductors	A-583-827	3/21/97	2/23/98	Alliance	50.15%	HM/CV
Taiwan	Static random access memory semiconductors	A-583-827	3/21/97	2/23/98	BIT	113.85%	FA
Taiwan	Static random access memory semiconductors	A-583-827	3/21/97	2/23/98	ISSI	7.56%	HM mixed
Taiwan	Static random access memory semiconductors	A-583-827	3/21/97	2/23/98	TI-Acer	113.85%	FA
Taiwan	Static random access memory semiconductors	A-583-827	3/21/97	2/23/98	UMC	93.71%	HM mixed
Taiwan	Static random access memory	A-583-827	3/21/97	2/23/98	Winbond	101.53%	FA
Canada	Steel wire rod	A-122-826	3/24/97	2/24/98	Ispat-Sidbec	11.94%	HM mixed
Canada	Steel wire rod	A-122-826	3/24/97	2/24/98	Ivaco	6.95%	HM mixed
Canada	Steel wire rod	A-122-826	3/24/97	2/24/98	Stelco	0.91%	HM mixed
Germany	Steel wire rod	A-428-822	3/24/97	2/24/98	Brandenburg	153.10%	FA
Germany	Steel wire rod	A-428-822	3/24/97	2/24/98	IHSW	72.51%	FA
Germany	Steel wire rod	A-428-822	3/24/97	2/24/98	Saarstahl	153.10%	FA
Germany	Steel wire rod	A-428-822	3/24/97	2/24/98	Thyssen	153.10%	FA
Trinidad &Tobago	Steel wire rod	A-274-802	3/24/97	2/24/98	CIL	11.85%	HM mixed
Venezuela	Steel wire rod	A-307-813	3/24/97	2/24/98	Sidor	66.75%	FA
Chile	Fresh Atlantic salmon	A-337-803	7/10/97	6/9/98	Aguas Claras	5.44%	CV
Chile	Fresh Atlantic salmon	A-337-803	7/10/97	6/9/98	Camanchaca	0.16%	CV
Chile	Fresh Atlantic salmon	A-337-803	7/10/97	6/9/98	Eicosal	10.69%	CV
Chile	Fresh Atlantic salmon	A-337-803	7/10/97	6/9/98	Mares Australes	2.23%	3C mixed
Chile	Fresh Atlantic salmon	A-337-803	7/10/97	6/9/98	Marine Harvest	1.36%	CV
Germany	Stainless steel wire rod	A-428-824	8/26/97	7/29/98	Krupp	21.28%	FA
Germany	Stainless steel wire rod	A-428-824	8/26/97	7/29/98	BGH Edelstahl	21.28%	FA
Italy	Stainless steel wire rod	A-475-820	8/26/97	7/29/98	Valbruna	1.27%	HM
Italy	Stainless steel wire rod	A-475-820	8/26/97	7/29/98	CAS	12.73%	HM mixed
Japan	Stainless steel wire rod	A-588-843	8/26/97	7/29/98	Daido	34.21%	HM mixed
Japan	Stainless steel wire rod	A-588-843	8/26/97	7/29/98	Nippon Steel	21.18%	HM mixed
Japan	Stainless steel wire rod	A-588-843	8/26/97	7/29/98	Hitachi Metals	0.00%	CV
Japan	Stainless steel wire rod	A-588-843	8/26/97	7/29/98	Sanyo Special Steel	34.21%	FA
Japan	Stainless steel wire rod	A-588-843	8/26/97	7/29/98	Sumitomo	34.21%	FA
Korea	Stainless steel wire rod	A-580-829	8/26/97	7/29/98	Dongbang/Changwon /POSCO	5.19%	HM mixed

continued

Appendix—*continued*

Country	Product	Inv. No.	Initiation Date	Final Date	Respondent	Rate	Methodology
Korea	Stainless steel wire rod	A-580-829	8/26/97	7/29/98	Sammi Steel	28.44%	FA
Spain	Stainless steel wire rod	A-469-807	8/26/97	7/29/98	Roldan	4.73%	HM mixed
Sweden	Stainless steel wire rod	A-401-806	8/26/97	7/29/98	Fagersta	5.71%	HM mixed
Taiwan	Stainless steel wire rod	A-583-828	8/26/97	7/29/98	Walsin Cartech	8.29%	HM mixed
Taiwan	Stainless steel wire rod	A-583-828	8/26/97	7/29/98	Yieh Hsing	0.02%	HM mixed
Chile	Certain preserved mushrooms	A-337-804	2/2/98	10/22/98	Nature's Farm Products	148.51%	3C/CV
China	Certain preserved mushrooms	A-570-851	2/2/98	12/31/98	China Processed	121.47%	NME
China	Certain preserved mushrooms	A-570-851	2/2/98	12/31/98	Tak Fat	162.47%	NME
China	Certain preserved mushrooms	A-570-851	2/2/98	12/31/98	Shenzen Cofry	151.15%	NME
India	Certain preserved mushrooms	A-533-813	2/2/98	12/31/98	Agro Dutch	6.28%	3C mixed
India	Certain preserved mushrooms	A-533-813	2/2/98	12/31/98	Ponds	14.91%	3C/CV
India	Certain preserved mushrooms	A-533-813	2/2/98	12/31/98	Alpine Biotech	243.87%	FA
India	Certain preserved mushrooms	A-533-813	2/2/98	12/31/98	Mandeep	243.87%	FA
Indonesia	Certain preserved mushrooms	A-560-802	2/2/98	12/31/98	Dieng /Surya Jaya	7.94%	CV
Indonesia	Certain preserved mushrooms	A-560-802	2/2/98	12/31/98	Zeta	22.84%	CV

Notes

1. Although the U.S. antidumping law dates back to 1921, dozens of other countries now have similar laws. The authority of national governments to impose antidumping duties is recognized under Article VI of the General Agreement on Tariffs and Trade and the World Trade Organization Agreement on Implementation of Article VI.

2. This paper focuses exclusively on what constitutes "dumping"; it does not address the effect of "dumped" imports on competing U.S. industries or the broader U.S. economy. Accordingly, this paper is concerned solely with the phase of antidumping investigations administered by the Commerce Department; it does not cover issues pertaining to the International Trade Commission's injury inquiry.

3. Greg Mastel, *Antidumping Laws and the U.S. Economy* (Armonk, N.Y.: M. E. Sharpe, 1998), p. 43.

4. Ibid., p. 41.

5. Ibid., p. 40.

6. "Observations on the Distinctions between Competition Laws and Antidumping Rules," Submission of the United States to the WTO Working Group on the Interaction of Trade and Competition Policy, Meeting of July 27-28, 1998, p. 2. Cited hereafter as U.S. Submission.

7. Ibid., p. 15.

8. Ronald A. Cass and Richard D. Boltuck, "Antidumping and Countervailing-Duty Law: The Mirage of Equitable International Competition," in *Fair Trade and Harmonization: Prerequisites for Free Trade?* ed. Jagdish N. Bhagwati and Robert E. Hudec (Cambridge, Mass.: MIT Press, 1996), vol. 2, p. 351.

9. Section 773(a)(1)(B)(i) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677b(a)(1)(B)(i).

10. Section 773(a)(1)(C) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677b(a)(1)(C).

11. Section 773(a)(1)(B)(ii) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677b(a)(1)(B)(ii).

12. 19 C.F.R. § 351.405(a) (1999).

13. Ibid. According to Commerce Department practice, a product sold in the comparison market will normally not be considered "comparable" (in other words, sufficiently similar) to a product sold in the United States if the difference in variable manufacturing costs between the two products is greater than 20 percent of the total manufacturing cost of the comparison-market product.

14. Section 773(b)(1) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677b(b)(1). Under a recent court decision, Commerce may not resort to constructed value in such situations unless there are no contemporaneous above-cost sales of any similar models of merchandise. Formerly, Commerce would use constructed value if there were no above-cost sales of the particular identical or similar model chosen by Commerce under its product-matching criteria. In other words, Commerce must now do its product matching after applying the sales-below-cost test, not before. This methodological change increases the likelihood that normal value will be based on above-cost sales rather than constructed value.

15. While the distinction between nonmarket and market economies was sensible during the Cold War, it is difficult to draw a clear line at present between the "transition" economies of post-communist countries and other developing countries. Nevertheless, to date the Commerce Department has revoked NME status only for the former East Germany, Poland, and the former Yugoslavia and has explicitly refused to do so for China, Russia, and Ukraine.

16. Section 773(c) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677b(c).

17. "Facts available" were formerly known as "best

information available."

18. "Facts available" determinations are routine in NME cases. In those cases Commerce will calculate producer-specific dumping margins for qualifying companies, as well as a countrywide rate for other producers and exporters. That countrywide rate is usually based on "facts available." By contrast, in market-economy cases, all uninvestigated companies receive an "all others" rate equal to a weighted average of the investigated companies' margins ("facts available" and de minimis margins, however, are excluded from the average).

19. 19 C.F.R. § 351.411(b) (1999).

20. Biases in antidumping methodologies are reviewed extensively in Richard Boltuck and Robert Litan, eds., *Down in the Dumps: Administration of the Unfair Trade Laws* (Washington: Brookings Institution, 1991).

21. To take just one obvious example, in "constructed export price" cases (normally, cases in which the importer of the investigated merchandise is related to the foreign producer), Commerce deducts the profit allocated to U.S. selling expenses from the U.S. price but makes no equivalent profit deduction from the comparison-market price. Section 772(d)(3) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677a(d)(3).

22. The antidumping statute authorizes the Commerce Department, in making a "facts available" determination because a foreign producer has failed to cooperate, to "use an inference that is adverse to the interests of that party." Section 776(b) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677e(b).

23. In constructed-value cases the costs used are the foreign producer's own, whereas in NME cases costs are calculated by valuing the foreign producer's "factors of production" according to price data from a surrogate market-economy country.

24. It can be argued that inclusion of an amount for profit is appropriate on the ground that a "normal" profit is part of a company's cost of capital. In other words, a company earning a subnormal return is selling below its full *economic* costs, if above its full *accounting* costs. First of all, it should be noted that antidumping supporters clearly convey the impression that the law targets sales at a loss, not insufficient profitability. More fundamentally, the claim that low profitability is evidence of market distortions is much weaker than is the case with respect to outright losses. Determining exactly what constitutes a normal profit for a given company in a given industry at a given time is significantly more difficult than determining whether or not that company is losing money. Moreover, low profits are generally sustainable over a much longer period than are outright losses. Persistent failure to earn competitive returns can undermine a company's ability to make necessary investments and thereby may lead eventually to outright losses; it may also threaten the employment security of the company's management. Unlike sustained losses, though, low profitability in and of itself does not imperil a company's solvency and future as a going concern. Accordingly, even chronically low profits are much less suggestive of "artificial" market conditions caused by government interventionism than are either acute or chronic losses.

25. Interestingly, among the critics of the NME methodology is the current U.S. Trade Representative, although she expressed her criticism before holding public office. Charlene Barshefsky, "Non-Market Economies in Transition and the U.S. Antidumping Law: Remarks on the Need for Reevaluation," *Boston University International Law Journal* 8, no. 2 (Fall 1990): 373-80.

26. The U.S. antidumping statute was revised in numerous respects by the Uruguay Round Agreements Act but has not been amended since. A number of proposals to revise the antidumping law are currently under consideration in Congress.

27. Commerce Department investigations are specific to a particular product from a particular country. In a single investigation, though, Commerce may calculate separate dumping margins for numerous different foreign producers.

28. In original antidumping investigations, any

dumping margin of less than 2 percent is considered *de minimis* and effectively equal to zero.

29. "Dumping typically involves international price discrimination." U.S. Submission, p. 8.

30. For 34 of the 36 determinations, Commerce relied entirely on "facts available"; in other words, it made no use whatsoever of information provided by the foreign producers. For 2 of the determinations (Maktas in the investigation of pasta from Turkey and Winbond in the investigation of SRAMs from Taiwan), Commmerce relied on a combination of foreign producers' information and facts available. These two determinations were included because in both cases the partial use of facts available was both extensive and punitive (that is, Commerce purposefully selected adverse facts).

31. This figure is a subset of the 37 determinations mentioned above in which Commerce partially or totally rejected home-market or third-country comparison product sales. This smaller figure excludes those determinations in which any third-country sales were used and those in which all comparison-market sales were rejected.

32. Interestingly, ISSI is a U.S.-based "fabless producer" that designs chips in the United States but relies on a semiconductor "foundry" in Taiwan for production. In this case, then, the antidumping law is being used by one American company (Micron Inc., the petitioner) against another.

33. Specifically, the program was run without the "cost test" element, so that below-cost home-market sales were not excluded from the calculation. The recalculation was performed by ISSI's counsel at the law firm of White & Case. The revised program was reviewed by the author of this study.

34. This total consists of 16 determinations in which Commerce used constructed value because of an absence of viable comparison markets or similar comparison products, and another 4 determinations in which publicly available information makes clear that Commerce rejected all comparison-market sales as below cost and therefore relied exclusively on constructed value.

35. The total consists of the 31 "mixed" cases discussed above, plus an additional 2 determinations in which Commerce rejected at least some third-country sales as below cost and instead relied either on above-cost third-country sales or constructed value. In those 33 determinations, it cannot be determined with certainty from the public record whether Commerce in fact used constructed value in every instance (such use would be unnecessary if there were any above-cost sales of the comparison products), nor can the extent to which constructed value was used be determined.

36. This respondent consists of two companies with common ownership whose operations are partially integrated. They were treated as a single company for purposes of the antidumping investigation.

37. These recalculations were performed by the companies' counsel at the law firm of White & Case. The revised dumping margin calculation programs were reviewed by the author of this study.

38. Profit rates were derived from the following sources: Chen Hao Taiwan, Commerce Department disclosure documents for correction of ministerial errors, January 31, 1997; brake drums and rotors from China, Commerce Department final factors memorandum, February 21, 1997; cut-to-length steel plate from China, Commerce Department final factors memorandum, October 24, 1997; PT Multi Raya, Commerce Department disclosure documents for correction of ministerial errors, January 31, 1997; collated roofing nails from China, Commerce Department final dumping margin calculation memorandum, September 23, 1997. These documents were made available by the companies' counsel at the law firm of White & Case. Commerce usually calculates the profit rate as a percentage of cost of production. To express the profit rate as a percentage of sales, the Commerce figures were divided by one plus the Commerce profit percentage.

39. The products under investigation and their equivalent U.S. industries are as follows: melamine institutional dinnerware, rubber and miscellaneous plastic products; brake drums and rotors, motor vehicles and equipment; cut-to-length steel plate,

iron and steel; collated roofing nails, fabricated metal products. Profit rates for U.S. industries were the average rate of pre-tax profits per dollar of sales during the year the investigation was initiated, as reported in Bureau of the Census, "Quarterly Financial Report for Manufacturing, Mining, and Trade Corporations," Table B, available at www.census.gov/prod/www/abs/qfr-mm.html.

40. This recalculation was performed by Dieng/Surya Jaya's counsel at the law firm of White & Case. The revised dumping margin calculation program was reviewed by the author of this study.

41. The scope of antidumping investigations and duty orders is defined by a verbal description of the "subject merchandise," not by U.S. Harmonized Tariff System numbers. The HTS numbers selected here were the ones that corresponded most closely with the product description; if multiple HTS numbers corresponded equally well with the product description, the one with the highest imports in the period immediately preceding the initiation of the investigation was selected.

42. Since the U.S. tariff system and foreign systems are not harmonized all the way to the 10-digit level, the foreign tariff items most closely corresponding to the relevant U.S. HTS numbers were selected. Foreign tariff rates are from the relevant country's tariff schedule for the year that the antidumping investigation was initiated, with the following exceptions: steel concrete-reinforcing bars from Turkey (1997), SRAMs from Korea (1996), SRAMs from Taiwan (1995), stainless steel wire rod from Trinidad and Tobago (1998), and stainless steel wire rod from Korea (1996). U.S. tariff rates are as of the year that the relevant antidumping investigation was initiated.

43. The dumping margins included in Table 5 exclude determinations calculated on the basis of "facts available," as well as those calculated purely on the basis of constructed value.

44. The two investigations in question are SRAMs from Korea and stainless steel wire rod from Japan. With respect to the former, the 1996 and 1998 NTE reports charge that import licensing and product pre-approvals impede foreign sales of electronics and high-tech products to Korea, but no specific mention of SRAMs is made. As to the latter, all NTE reports reviewed allege anticompetitive practices and restriction of distribution channels in the Japanese steel sector, but the clear focus of those allegations is on carbon steel. The distinctive stainless steel industry is not specifically mentioned.

45. ISSI's profit rate was derived from the Commerce Department's final computer printout, February 19, 1998. This document was made available by ISSI's counsel at the law firm of White & Case. Since Commerce calculates profit as a percentage of cost of production, it was necessary to divide the Commerce figure by one plus the Commerce profit rate to arrive at profit as a percentage of sales. The profit rate for the U.S. electrical and electronics products industry was taken from Bureau of the Census, "Quarterly Financial Report for Manufacturing, Mining, and Trade Corporations," Fourth Quarter 1997, Table B, available at www.census.gov/ prod/ www/abs / qfr-mm.html.

46. ISSI's Taiwan and U.S. sales figures were taken from its August 6, 1997, supplemental response to the Commerce Department's antidumping questionnaire. This document was made available by ISSI's counsel at the law firm of White & Case.

47. Michael Porter, *Competitive Strategy: Techniques for Analyzing Industries and Competitors* (New York: Free Press, 1980), p. 9.

48. The U.S. antidumping law does attempt to match U.S. and comparison-market sales made at the same "level of trade" and make price adjustments when such matching is impossible. The variations in competitive intensity referred to here, however, can occur within the same level of trade as defined by Commerce and thus elude any adjustment.

49. An estimate now over a decade old found that gray-market imports total $10 billion a year. S. Tamer Cavusgil and Ed Sikora, "How Multinationals Can Counter Gray Market Imports," *Columbia Journal of World Business* 23, no.

4 (Winter 1988): 76.

50. Lawrence M. Friedman, "Business and Legal Strategies for Combating Grey-Market Imports," *International Lawyer* 32, no. 1 (Spring 1998): 28.

51. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1998*, Table 863, p. 544.

52. Financial information taken from companies' 10-K reports, available at www.sec.gov.

53. Financial information taken from company's 1998 10-K report, available at www.sec.gov.

54. Kara Swisher, "At Amazon, the CFO Sells Investors on the Merits of Losses," *Wall Street Journal*, March 25, 1999.

55. See, for example, Pankaj Ghemawat, "Building Strategy on the Experience Curve," *Harvard Business Review* 85, no. 2 (March-April 1985): 143-49.

56. Michael Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (New York: Free Press, 1985), pp. 436-37. Emphasis in original.

57. Charles T. Horngren, George Foster, and Srikant M. Datar, *Cost Accounting: A Managerial Emphasis*, 9th ed. (Upper Saddle River, N.J.: Prentice Hall, 1997), p. 555.

58. See, for example, John C. Panzar and Robert D. Willig, "Economies of Scope," *American Economic Review* 71, no. 2 (May 1981): 268. Panzar and Willig coined the term "economies of scope."

59. David Besanko, David Dranove, and Mark Shanley, *The Economics of Strategy* (New York: John Wiley & Sons, 1996), p. 178.

60. Ibid., p. 184.

61. Specifically, profit, selling expenses, general and administrative expenses, and interest expenses were stripped out of the calculation of normal value. What remained was total manufacturing costs—raw materials, direct labor, and factory overhead. This remainder still overstates variable costs, since it includes fixed overhead costs (for these respondents it was not possible to separate out fixed and variable overhead). The recalculations were performed by the companies' counsel at the law firm of White & Case. The revised dumping margin calculation programs were reviewed by the author of this study.

62. Section 773(b)(2)(B) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677b(b)(2)(B).

63. Section 773(f)(1)(C) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677b(f)(1)(C).

64. Some antidumping supporters argue that cross-subsidization is itself an unfair trading practice. Thus, Terence Stewart, a prominent attorney who represents complaining U.S. industries in antidumping cases, has argued that the antidumping law is designed to "offset any artificial advantage that flows from closed foreign markets, *cross-subsidization by multiproduct firms*, government largesse, or other factors that have nothing to do with comparative advantage." Terence P. Stewart, "Administration of the Antidumping Law: A Different Perspective," in Boltuck and Litan, p. 288 (emphasis added). This position, however, is untenable. Cross-subsidization is endemic among multiproduct firms, both foreign and American; indeed, the potential for cross-subsidization is one of the main reasons that multiproduct firms exist. It makes no sense to condemn cross-subsidization by foreign companies as "unfair" when identical business practices are routinely pursued by their American rivals.

65. Admittedly, the scope of interventionist policies that the antidumping law claims to address is broader than that covered under the CVD law: first, the CVD law does not apply to NME countries; second, it does not purport to address sanctuary-market situations or broad structural distortions like insufficiently developed commercial law. Nevertheless, for constructed-value cases—which are limited to market economies and (as seen above) generally occur in situations in which sanctuary markets are highly unlikely—there is a significant overlap in the ostensible targets of CVD and antidumping investigations.

66. There are limits on obtaining double relief through simultaneous antidumping and CVD petitions. Specifically, the CVD law distinguishes between export subsidies (subsidies tied to exports) and domestic subsidies (subsidies targeted to specific industries). For export subsidies, the antidumping law provides an offset for any CVD duties paid; for domestic subsidies, though, there is no offset, and therefore it is possible that simultaneous antidumping and CVD actions could double count the market-distorting effects of such subsidies.

67. Those four investigations are pasta from Italy, carbon steel wire rod from Canada, carbon steel wire rod from Trinidad and Tobago, and stainless steel wire rod from Italy. In each of those cases Commerce conducted contemporaneous antidumping and CVD investigations. In addition, another constructed value-based antidumping investigation included in the sample—stainless steel wire rod from Spain—covers a product that is subject to an outstanding CVD order. That CVD case has been inactive, however, since an administrative review determination in 1990 found *de minimis* subsidies. Furthermore, three other CVD investigations overlapped with antidumping investigations included in the sample reviewed in this study: pasta from Turkey, carbon steel wire rod from Germany, and carbon steel wire rod from Venezuela. In those three cases, however, the Commerce Department's determinations were based on "facts available," not constructed value.

68. Indeed, in 1 of those 22 investigations, fresh Atlantic salmon from Chile, Commerce did conduct a CVD investigation but made a negative finding. Yet for three of the five respondents in the antidumping case, Commerce made affirmative determinations on the basis of comparing U.S. sales to constructed value (the other two respondents received negative determinations). It is hard to square an affirmative constructed-value-based dumping finding—which supposedly points to market-distorting government subsidies—and a negative subsidy determination in a corresponding CVD case.

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