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The Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

25 March 2011

Re: **Inquiry into the Customs Amendment (Anti-Dumping) Bill 2011**

I am writing to make a submission to the above-named inquiry. As I understand it, the bill, "seeks to amend Part XVB of the *Customs Act 1901* to provide that the importer of goods which are subject to anti-dumping applications bears the onus of proof to prove that the goods have not been dumped or subsidised for export into Australia. The bill provides a presumption that where dumping and material injury have been proven, the material injury is the result of the dumping. [Is this WTO-legal?] It also enables preliminary affirmative decisions to be initiated once an investigation is started and allows consultation with industry experts as part of the investigation and review processes."

I would urge the Inquiry to reject these proposed amendments *in toto* for a number of extremely compelling reasons, not all strictly economic.

First, this proposal seeks to reverse basic principles of equity that have been enshrined in the Australian legal system since its inception. That a firm is deemed to be guilty of dumping - and bear the onus of proof to dismiss that presumption - when the only case against it is the complaint of a rival is something we would not tolerate in any other sphere of activity. We should not let the pleadings of inefficient local firms allow such a sacrifice of principle. Where is the onus on the plaintiff to make a case? While we may currently observe that domestic firms substantiate their complaints, once the burden of proof is shifted we will rapidly find ourselves in a world of allegations based on nothing but hearsay and innuendo and we will increase the already substantial costs to innocent firms of fighting these sorts of actions. Already there is substantial economic evidence suggesting that AD complaints are levied as a form of economic harassment against foreign producers and increasing foreign costs of fighting false allegations will just exacerbate this problem. In a remarkable coincidence, on March 11th I was attending the 6th Australasian Trade Workshop being held at the University of Adelaide, and a paper was presented that addressed the question of what triggers AD complaints. In the ensuing discussion I suggested, in jest, that the motto of the US ITC, with respect to its dumping injury determinations, was "post hoc ergo propter hoc". To discover the next week that this is seriously proposed to be enshrined in law in Australia is very depressing.

Second, this proposal further undermines the already shaky basis we have in the world to argue credibly for freer trade. We are a founding member of the Cairns Group of agricultural exporters and, given the prevalence of agricultural protection around the globe, our overwhelming national interest lies in global free trade. To argue for free trade - a doctrine that favours production of goods by the world's most efficient producers of those goods - and have any credibility whatsoever we must be perceived to pursue free trade ourselves. Our stock in this matter is already very low, given our own agricultural protection (such as our extensive WTO-illegal treatment of apple imports and our treatment of bananas and so on) but we cannot afford to backslide even further by increased facilitation of the naked protectionism that is anti-dumping.

Third, the economics of anti-dumping (AD) are very simple and, I think, are very compelling. The key reminder economists have to offer to the makers of international trade policy, in my experience, is to remember the consumer. Time and time again - and for reasons that are obvious and well-known - the consumer is ignored in the setting of trade policy. This means, for example, that if a lower price of an import yields gains to consumers of, say, $10m, but losses to domestic producers of $1m, then policy-makers too often perceive the overall national effect of this to be a loss of $1m. Some years ago I attended a DFAT-organised conference in Shenzhen concerning the China-Australia Free Trade Area and I was astounded that, myself and two other economists excepted, not a single speaker over the course of two days mentioned the gains to domestic consumers from lower prices of imports. The reasons are simple, if cynical. In my example above the gain to consumers of $10m, when spread across, say, 20m consumers, is only 50c each. On the other hand, if there are, say, only two domestic firms producing these goods then each stands to lose $100,000. The incentives for political action and making demands of one's representatives are obvious. I doubt, for example, that you will receive many submissions to this inquiry from individual consumers and I expect that the majority will come from domestic industry representatives. I sincerely hope I am wrong in this.

Dumping is the practice of a foreign firm selling a good in our market at "too low" a price, the reference price typically being that charged by the seller in their own home market. It is perhaps the only area of economic activity where buyers complain about being undercharged (but, of course, in reality it is not the actual buyers complaining but higher-priced local rivals through the medium of national AD policy.) If one agrees with the general desirability of free trade in principle, then there is only one intellectually respectable argument for prohibiting foreign producers from charging low prices[1] and that is if the dumping is deemed to be *predatory*. This occurs when the low prices are expected to only be temporary and last long enough to drive domestic rivals out of business, at which point the foreign firm will be a monopolist and can

[1] To consider other arguments briefly, the most obvious cause of a foreign firm charging less for its good in Australia than at home is that it faces more competition here. To prevent this practice is to insist that foreign firms gouge our consumers as much as they gouge their own, an indefensible position. If the low prices are only temporary or cyclical, perhaps because of demand cycling or from fluctuating conditions in the exporter's home market, then the 'dumping' is harmless: our consumers get the benefit of sale prices for a short time and we then return to normal. If the low pricing is long term then either it is because of different competitive conditions in the two markets, it is because the foreign supplier is more efficient (lower cost) then our domestic competitors (in which case we should let our productive resources flow to industries other than this one) or it is due to permanent foreign government support. In the latter case the appropriate response is a thank-you note: foreign taxpayers are permanently subsidising Australian consumers. Lest it be thought that this kind of analysis ignores the well-being of domestic firms, the argument that it is better to buy cheaply from abroad than at higher cost at home is because the cost of production that domestic businesses face is determined by their competing for resources on domestic input markets. The price firm x pays for labour is determined by the price that other firms are willing to pay for that labour so, if firm x employs a worker, it does so at the expense of another firm and output produced elsewhere in the economy. Thus high-cost local firms are high-cost because they draw resources away from other uses and this is a real production-side loss to the Australian economy of protecting inefficient firms.

drive prices back up again. In this instance the foreign firm predates upon domestic firms and the consumer benefits of low prices are short-lived and more than offset by the subsequent losses from monopoly pricing. To most economists, this is the only scenario in which domestic firms' cries for protection from lower-priced foreign rivals might be reasonable: in all other cases it is naked protectionism and AD remedies simply harm domestic consumers to the partial benefit of domestic firms.

But this scenario, while it might in principle provide a rationale for AD action, is so unlikely in practice as to be effectively a zero probability event. (Indeed, the U.S. Supreme Court has opined that, "predatory pricing schemes are rarely tried and even more rarely successful."[2]) The scenario requires that domestic firms are relatively easily driven out (else the costs of predation will be too high) so they must have low exit costs, but then it also requires that they do not simply re-enter when prices rise again, so their entry costs must be high. These two conditions are seldom compatible. The scenario also requires that the dumping firm be a global monopolist once domestic firms have been extinguished: Australia would have no incentive at all for any border protection of the good in question once a domestic presence had disappeared, so this dumper must have no other rivals worldwide for predation to be attractive to it. Beyond this, US jurisprudence on predatory pricing generally requires two elements: that the predator's initial pricing be below some measure of its costs and that there is a reasonable prospect of subsequent recoupment of its losses incurred during the predation stage. These are very rare elements indeed.

Despite this, AD actions are common worldwide and the reason is that the practice of AD codes has nothing to do with the underlying issue of predation. The US steel industry, for example, can bring AD cases against 30 competitors at once: clearly these are not firms with any significant market power. Generally, the market shares of firms against which AD complaints are launched are tiny and it is clear that AD is just another option in the protectionist's toolkit and has nothing to do with underlying economic welfare.

The other critical point here is that actual predation, as described above, is economically undesirable regardless of who is doing it, be they foreign or domestic. In this regard, it is extremely instructive to look at a couple of historical aspects of AD as a trade remedy. First introduced by Canada over a hundred years ago, other countries quickly followed, including the US and Australia. In the US, the first AD Act was passed in 1916 and it was driven by the fear of predation. Accordingly, it applied to foreign firms, quite appropriately, the same standards that were then applied in antitrust provisions to domestic firms and required that an AD complainant prove the predatory intent of the alleged dumper (a burden of proof in stark contrast to the proposal before this Committee, which entails the complainant actually *proving* (rather than *alleging*) nothing at all – not even that dumping has occurred!) This did not satisfy US businesses and, amidst a campaign of alarm about cheap foreign imports, they succeeded in getting the law changed in 1921 to remove the role of predatory behaviour completely. This really marked the dawn of AD as a significant protectionist tool.

The second very significant historical episode is a recent one in our own history and a shining and exemplary one at that. In 1988, under the aegis of the CER agreement, Australia and New Zealand had the foresight and courage – over the predictable opposition of business interest

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[2] *Matsushita v. Zenith,* 475 U.S. 574 (1986).

groups – to remove trans-Tasman AD remedies completely from June 1990 onwards.[3] A part of the rationale for doing this was the recognition that predatory behaviour – the only respectable economic argument for AD remedies – was captured already in each country's domestic competition law and needed no special added treatment. My understanding is that, since that time, not a single trans-Tasman predation case has been brought in either of the CER partners, a very robust testimony to the wisdom of the change. The bottom line of all this is that the economic 'evil' that AD remedies are supposed to address is far more appropriately and efficiently left to domestic competition law. The fact that – modulo CER – we do not do this is a very clear signal that AD is, in fact, simply a protectionist tool and nothing more.

Finally, I am attaching as an Appendix to this submission a chapter from Bovard, J., 1991, The Fair Trade Fraud. St Martin's Press: New York. Entitled, "A bureaucratic war on low prices", the chapter discusses the nightmare that is US AD implementation and I attach it for two reasons. First, it provides a useful historical context to the arguments doubtless being put forward by proponents of the legislation before you, in which small Aussie battler firms face an unstoppable tide of dumped foreign goods, by showing that this kind of line is a standard and baseless exhibit in these sorts of hearings. Second, Bovard provides a litany of, frankly, amazing practices that have been pursued in AD determinations in the US by the government departments – Commerce and the ITC – charged with these investigations. Even under circumstances already highly skewed to favour domestic complainants, the bureaucrats responsible for AD investigations have bent even further over backwards to hammer foreign firms. The reason for this lies in my earlier comments on AD: it is an instrument of naked protection for domestic producing interests and there is no domestic interest group to speak out in favour of the consumers harmed by the consequent high prices. Australia should resist very strongly any inclination to travel further down this road ourselves.

In sum, I would urge you to reject completely these proposals before you and recognise them as bad economics, bad legal principle and bad policy.

Yours faithfully,

(...)

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[3] See Vautier, K.M. and P.J. Lloyd, 1997, International trade and competition policy: CER, APEC and the WTO. Institute of Policy Studies: Wellington, NZ. This is an excellent book generally, co-authored by one of Australia's leading and most prominent trade economists, and the section on AD and CVD remedies is worthy of close study.

Also by James Bovard

The Farm Fiasco

THE FAIR TRADE FRAUD

James Bovard

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5

A Bureaucratic War on Low Prices

If the other fellow sells cheaper than you, it is called "dumping"! Course, if you sell cheaper than him, that's "mass production."

Will Rogers[1]

Anti-dumping suits are emerging as the chemical weapons of the world's trade wars.

The Economist, 1988[2]

Economic xenophobia is the foundation of U.S. antidumping law. The U.S. Commerce Department sees low-priced imported goods as Trojan Horses insidiously trying to undermine the American economy. The antidumping law is a sword of Damocles hanging over every foreign company exporting to the U.S. The U.S. government has imposed more dumping penalties against low-priced imports than has any other government in the world.[3]

Dumping has long been portrayed as a serious threat to the American economy. A 1921 House of Representatives report warned against "a now common species of commercial warfare of dumping goods on our markets at less than cost or home value if necessary until our industries are destroyed."[4] The Senate Judiciary Committee warned in 1986 that "the unlawful dumping of foreign goods...has become a serious threat to American industries."[5] A federal judge characterized dumping in 1989 as inherently "predatory" and declared that dumping involves an element of "wrong-doing."[6]

Dumping is often denounced but rarely understood. President Reagan declared in 1983 that "'dumping' means [foreigners] were invading our market and selling at lower than production cost by government subsidies being provided to the producers... in those countries."[7] In reality, dumping has nothing to do with government subsidies. Rep. Dan Rostenkowski, chairman of the House Ways and Means Committee, the committee with primary responsibility for U.S. trade law, denounced foreign competition: "It's dumping to us because the prices are such that we can't compete with our social standards." But dumping law has nothing to do with comparative social standards, only with a comparison of foreign prices or cost of production and the U.S. selling price.

U.S. dumping law routinely expels foreign corporations from the U.S. market as punishment for normal business practices. The dumping law forces foreign companies to run a nearly endless gauntlet of American bureaucrats. A federal judge concluded that the dumping law allowed American companies to conduct "economic war" against their foreign competitors.[8] U.S. dumping law is so biased that, between 1980 and 1989, almost all foreign companies investigated for alleged dumping were found guilty.[9]

While many people consider dumping an arcane subject, dumping penalties have forced Americans to pay more for photo albums, pears, mirrors, ethanol, cement, shock absorbers, roof shingles, codfish, televisions, paint brushes, cookware, motorcycle batteries, bicycles, martial art uniforms, computers and computer disks, telephone systems, forklifts, radios, flowers, aspirin, staplers and staples, paving equipment, and fireplace mesh panels. Dumping laws increasingly prevent American businesses from getting vital foreign supplies and machinery. Commerce Department officials now effectively have direct veto power over the pricing policies of over 3,000 foreign companies. Dumping law constitutes potential political price controls over almost $500 billion in imports a year

Dumping law exists to prevent foreign companies from selling goods in the United States at "less than fair value." What is less than fair value?

The Commerce Department's creative definitions have probably made many medieval scholastics smile in heaven. Technically, less than fair value means selling a good in the U.S. for less than the price in the foreign home market, or for less than its cost of production plus a large profit. Commerce Department regulations state, "Fair value...is an estimate of foreign market value."[10]

The "crime" of dumping results solely from applying different tests of fairness to U.S. prices and to foreign prices. The Treasury Department, in a 1957 report on dumping, defined "fair value" for *foreign prices*: "The word 'fair' as used here simply means what one ordinarily conceives of as the 'fair market' value — what a willing buyer will pay a willing seller."[11] But, U.S. dumping law rejects voluntary agreement as the measure of fairness of the *U.S. prices* for imported products. The U.S. price of an imported product is "fair" not according to whether a foreign seller and American buyer voluntarily agree, but according to whether the foreign company can pass dozens of arbitrary tests imposed by the U.S. government.

U.S. trade laws require that the Commerce Department judge whether a foreign product is being dumped. After Commerce finds dumping, the U.S. International Trade Commission then judges whether dumped imports have injured U.S. corporations. We will examine the ITC's administration of the injury-finding process in chapter 7.

A SHORT HISTORY OF THE CRIME OF DUMPING

Senator Henry Clay was the nation's premier protectionist in the early 1800s. Clay made his most spirited attack on dumping in an 1824 speech, when he called for uniformly high tariffs because "the unprotected manufacturers of a country are exposed to the danger of being crushed in their infancy either by the design or from the necessities of foreign manufacturers.... Gentlemen are incredulous as to the attempts of foreign merchants and manufacturers to accomplish the destruction of ours. Why should they not make such attempts?"[12] But, as economist

Jacob Viner noted, "The only evidence Clay presented to demonstrate the credibility of charges of predatory price-cutting was a reputed offer of an American to carry the mails between Baltimore and Washington for a whole year for one dollar in order to drive a competitor off the road."[13] Clay thereby set the standards of evidence that would dominate American trade policy debates in coming centuries.

There was often a trace of hypocrisy in American politicians' condemnations of foreign dumping. The U.S. in the late 1800s had some of the highest tariffs in the world, and prices in the U.S. were usually higher than prices in foreign markets. Thus, in order to export, American manufacturers often had to sell at lower prices abroad. In 1880, Secretary of State W. M. Evarts urged American cotton manufacturers to dump abroad in order to establish foreign markets.[14] In 1890, Secretary of Agriculture J. M. Rusk protested export dumping by the American Harvester Company as unfair to the American farmer and "injurious to the popularity of the protectionist policy."[15] The 1906 Republican campaign book asserted that if American manufacturers captured foreign markets by dumping, "it is to the glory and honor of every American manufacturer who has done it that he has increased the sales of his wares abroad, thereby increasing the volume of his output, the employ of labor, and the wages of his men."[16]

Dumping did not become a dominant trade issue until the twentieth century, perhaps because our ancestors had not studied enough economics to become paranoid about minor price variations. In 1916, Congress passed the first Anti-Dumping Act, largely based on a fear of predatory German dumping.[17] The 1916 act applied the same antitrust guidelines to foreign companies as to U.S. companies. To prove dumping, the 1916 act required proof that foreign companies intended to harm or destroy an American industry. The act authorized penalties only for predatory foreign behavior.[18]

Protectionists were not satisfied with the 1916 act and pushed for a more restrictive dumping law. The U.S. Tariff Commission [subsequently renamed the International Trade Commission] came to the

rescue. As a Federal Court noted in 1980, "The genesis of the Antidumping Act of 1921 is a report of the United States Tariff Commission which concluded that the Antidumping Act of 1916 had not been effective in deterring dumping."[19] The 1916 act ordered the Tariff Commission to investigate all known or reported instances of dumping. Two years later, the Tariff Commission sent out a questionnaire to leading manufacturing associations and such bastions of objectivity as the American Tariff League.[20] The Tariff Commission eventually delivered questionnaires to 562 manufacturers, exporters, importers, and other business firms "inviting the statement of personally known instances within ten years, of unfair competition in articles of foreign origin."

In its 1919 report, the Commission began by using a far wider definition of dumping than did Congress:

> Dumping may be comprehensively described as the sale of imported merchandise at less than its prevailing market or wholesale price in the country of production.... The antidumping act of Congress of September 8, 1916, somewhat modifies the above definition.... It declares unlawful — if done with the intent of destroying, injuring or preventing the establishment of an industry or restraining or monopolizing trade or commerce in the U.S. — the common and systematic importation or sale of articles within the U.S. "at a price substantially less than the actual market value or wholesale price of such articles at the time of exportation."[21]

The Tariff Commission adopted a definition that would allow the U.S. government to convict any foreigner who sold at so-called less than fair value on any item at any time, whereas Congress had been concerned only with endemic, predatory offenders.

Despite casting a wide net, the Tariff Commission received only twenty-three unsubstantiated allegations, accusations, and claims of dumping. The Commission made no effort to investigate the validity of the complaints but simply reprinted them in its official report. Nine of the twenty-three complaints cited leather imports, including four different complaints about harness leather from Canada, one of which admitted, "It is very hard to prove 'dumping.'"[22] The sole evidence for a dumping complaint about German steel products was a report that

one salesman assured a customer that Germans wanted foreign customers so much that they were willing to sell at a loss. This is one of the oldest sales tricks in the books, yet the Tariff Commission swallowed it hook, line, and sinker. Another of the twenty-three cases consisted of one businessman's report: "We know of very few instances of dumping in this market. One happened seven or eight years ago in connection with India kidskins, and while this created a furor at first, it really amounted to very little."

The Tariff Commission's report was a collection of innuendos and shots in the dark. The Commission conceded, "The net results of the commission's request for detailed information, though the instances cited are frequently lacking in certainty, and, in some respects, are unexpectedly few in number, exemplify the definitions given at the outset of this report." The Commission concluded, "In the light of the evidence, the reality of the attempts, at least from time to time, to dump goods in this country will hardly be doubted."[23] Yet, the Tariff Commission received only one accusation of predatory dumping by a foreign company. If the Commission had not completely disregarded the legal definition of dumping, its report to Congress would have been almost empty.

The Commission observed that "the language of the Act makes difficult, if not impossible, the conviction of offenders and, for that reason, the enforcement of its purpose."[24] But this was incorrect: the Tariff Commission assumed that Congress wanted a far more protectionist law than Congress had actually enacted. The Tariff Commission's report was one of the great scams in trade policy history.

Dumping bills faltered in Congress in 1919 and 1920 before hitting paydirt in 1921. In 1921, as in 1916, the dumping bill was propelled by hysterical business propaganda about a nonexistent foreign threat. Once the shooting war ended, business leaders and Republican politicians warned that Germany would launch an economic war to win in the marketplace what she had lost on the battlefield. Congressmen declaimed that there was a flotilla of merchant ships loaded with German

goods lurking a few miles outside of U.S. coastal waters, waiting to deluge the American market with cheap goods. In reality, no such flotilla existed.

Although many members of the House of Representative believed that American businesses were perishing under a flood of dumping, the Senate was skeptical. When the Antidumping Act made it to the floor of the Senate, Sen. Porter McCumber, the floor manager of the bill, assured his colleagues that there was no danger of a company being convicted of dumping "unless it is sought by a foreign competitor to sell goods... for the purpose of destroying an industry in this country and, when the industry is destroyed, of then raising the price to an excessive amount; and that is all the old antidumping law was. That is all we can say of the new one."[25] McCumber either did not understand the bill or he consciously deceived other senators about the vast expansion of the definition of dumping. McCumber noted,

> In all the hearings that we had before the Committee on Finance there was not in any instance any showing of any dumping of foreign goods into this country.... The price of almost every manufactured commodity is so much higher in the United States than anywhere else in the world that it is not necessary for the exporter from a foreign country to export it into this country at a less price than the same article is sold for in the markets of the producing country.[26]

Some senators realized that the dumping law could be a Pandora's box for U.S. exporters. Sen. Augustus Stanley asked, "How are we going to enter any foreign market, with our cost of production higher than the cost in foreign countries, without selling our surplus for less than the cost of production?... If the countries of the Old World follow our example and enact similar legislation the doors of Europe will be closed to American industry."[27] Senator Reed Smoot, a leading protectionist, answered this concern: "The only answer to that argument is that foreign countries do not buy from us any more than they are really compelled to and do not pay anything more than they have to, and therefore that would not cut any figure as far as foreign countries are concerned."[28] (The same belief — that America is somehow magically invulnerable to

foreign retaliation against American protectionism — paved the way to the Great Depression.)

Many antidumping investigations occurred in the 1920s, but the dumping law became relatively inactive after the passage of the Reciprocal Trade Agreements Act of 1934. Between January 1, 1934, and October 1, 1954, American companies brought 146 dumping cases against foreign companies, but only seven cases resulted in dumping duties. Between October 1, 1954 and December 31, 1956, the Treasury Department found dumping and injury in only one of fifty-two cases.[29]

In the 1960s, the Kennedy Round of GATT negotiations established an international Antidumping Code. The U.S. Government lobbied to sharply curtail the scope of dumping laws. As author Richard Dale observed,

> The American delegation...wanted to see much more open hearings in place of the "Star Chamber" procedures, allegedly favored by most other countries.... The American delegation also questioned why dumping should be treated differently from other sources of competition which result in injury to producers in the importing country. In one discussion paper the U.S. noted the "extreme unlikelihood" that predatory dumping can often achieve monopolization, that economic theory "would be likely to conclude that most dumping will be beneficial to the importing country."[30]

U.S. trade negotiators advocated that the international dumping code require a finding of predatory intent before dumping duties could be imposed. Foreign governments rejected the U.S. proposal.

In 1974 and 1979, Congress revised the dumping law and made it more protectionist. In 1979, Congress transferred administration of the dumping law from Treasury to the Commerce Department, largely because it wanted to see more dumping penalties imposed on foreign companies.

HOW COMMERCE LEVELS THE PLAYING FIELD

President Reagan observed in 1986, "We strive to ensure that trade is fair by vigilantly enforcing current trade laws."[31] The dumping law is a fair trade law — fairness is its *raison d'etre* — and dumping duties are

justified primarily to rectify an alleged foreign unfair trade practice. Any government agency claiming to uphold and enforce a standard of fairness should itself be held to a high standard of conduct.

Many people might presume that federal dumping investigations consist of searching for examples of conspiracies, predatory intent, fraud, and general malfeasance. But instead, dumping cases are a bureaucrat's Nirvana. "Dumping" often occurs as the result of American bureaucrats' manipulation of numbers, rather than actual foreign business practices.

When Commerce convicts a foreign company for dumping, it does not simply compare the U.S. and foreign price but subtracts many items from the U.S. price, including foreign inland freight, foreign brokerage, handling and port charges, ocean freight, insurance, and U.S. tariffs. In many dumping cases, the price of the foreign product is higher in the U.S. than in the foreign market, but appears to be lower after Commerce makes numerous subtractions to the U.S. price before comparing it to the foreign price. In these cases, "unfair trade" exists because Commerce feels that a foreign company's U.S. price should be even higher than it already is above its home market price. The dumping margin is the percentage by which the price charged in the home market of a foreign company exceeds a product's price in the U.S. market.

Commerce convicted a Brazilian company for selling its frozen concentrated orange juice for 1.96% less than fair price.[32] The U.S. has a 40% tariff on orange juice, so Commerce subtracted 40% from the Brazilian company's U.S. sale price before comparing it to the Brazilian price. The Brazilian government imposes a 3.5% export tax on orange juice, and shipping and freight and insurance costs probably added at least another 2 or 3%. Thus, Brazil was selling orange juice for at least 45% more in the U.S. than in Brazil. But the Commerce Department still considered Brazil's prices unfairly low.

Even after subtracting tariffs and other items from foreign companies' U.S. prices, Commerce finds other creative ways to slant the comparison between U.S. and foreign prices.

EXCHANGE RATE SHUFFLES

Dumping margins are calculated by contrasting a foreign company's U.S. price with its foreign price — after recalculating the foreign price in U.S. dollars. The method of currency exchange adjustment by itself often produces dumping margins. As Deputy Assistant Commerce Secretary Gilbert Kaplan assured the Senate Finance Committee in 1986,

> A foreign producer may not even know whether he is dumping. He doesn't know what effect currency fluctuations might have between the time he signs a contract and actually sells and the time the investigation starts. If the home market price is 200 yen and the U.S. price is $1.00 and the exchange rate is 200 yen equal $1.00, there is no dumping. If the yen appreciated against the dollar, however, so that only 150 yen equaled $1.00, unless there was a corresponding change in prices, suddenly the company is dumping by 33%, because 200 yen is now worth $1.33.[33]

In 1986, Commerce "proved" that Iranian companies had a 317% dumping margin on their pistachio nut exports — meaning that the Iranians sold nuts worth $4.17 for only $1.00 in America. Commerce created the 317% margin by comparing the U.S. sale price as measured by the official Iranian exchange rate (90 rials to the dollar) with the home market price of pistachios in Iran. The Iranian official exchange rate was not used by any business in the world; it was only a figment of the imagination of the Iranian theocracy. The Iranian pistachio growers actually exchanged their dollars at a rate of 600 rials to the dollar. Because Iran, like many dictatorships, has a totally unrealistic official exchange rate, Commerce effectively banned Iranian pistachios from the U.S. market.[34] The U.S. Court of International Trade struck down Commerce's decision, concluding that the official Iranian exchange rate was largely irrelevant.[35]

In 1989, Commerce found a 259.17% dumping margin on Venezualan exports of aluminum sulfate to the U.S. Commerce created the dumping margin by measuring the company's prices at Venezuela's official exchange rate of 14.5 bolivares per dollar, rather than the rate

the company actually used — the free market exchange rate of 39.5 bolivares per dollar.[36] Venezuela's foolish exchange rate policies allowed Commerce to expel the Venezuelan company from the U.S. market.

Washington lawyer David Palmeter observes, "In the U.S., exchange rates in antidumping proceedings are determined by applying an outdated regulation, a relic of an era that ended in the early 1970s when the fixed exchange rate system established at Bretton Woods was abandoned.... The rate established by the Federal Reserve is a quarterly one, set in advance, and based on transactions at the end of the previous quarter.... This average rate is used throughout the quarter unless, on any particular day, it varies from the average by more than five percent, in which case the daily rate is used."[37] Yet, although Commerce will only take notice of a 5 percent fluctuation, if the U.S. and foreign price for a product vary by more than one half of one percent, Commerce will convict a foreign company of dumping.

Exchange rate convictions sometimes occur as a result of a Third World nation's hyperinflation. In the case of Brazilian steel wheels, Commerce estimated the U.S. sale price by taking the dollar/cruzeiro exchange rate on the date of sale, but based its Brazilian cost of production estimate on the dollar/cruzeiro exchange rate on the date of export — up to three months later. In the meantime, Brazil suffered severe inflation and a consequent sharp decline in its exchange rate. As Brazilian counsel Bill Barringer notes, "Commerce's method is roughly comparable to taking the cost of production of a product in the U.S. today and comparing it with the price of the same product in 1970."[38] Commerce later admitted that it "did not adjust... to account for inflation occurring between the date of sale and the date of shipment."[39]

Commerce exchange rates rules presume that foreign companies have unlimited flexibility to change their prices. But, many, if not most, foreign companies export their products with fixed-price contracts. Most foreign suppliers cannot raise or cut their prices on a daily basis

without losing their U.S. customers. Commerce's rules effectively require foreign companies to act in a profoundly unbusinesslike manner.

As lawyer Noel Hemmendinger observes, "The theoretical foundation of charges of unfairness are built on sands because of exchange rate fluctuations — which are dominated by market conditions unrelated to trade."[40] Scores of factors can cause changes in exchange rates, such as the U.S. president fainting in public, the Federal Reserve raising or lowering interest rates, or a stock market crash. In September 1985, the U.S. government decided to solve the U.S.'s economic problems by driving down the value of the dollar. As the U.S. dollar sank, the number of de facto unfair imports and dumping cases multiplied. But was it foreign companies' fault that Washington decided to torpedo the dollar?

Commerce uses official quarterly exchange rates even when companies can prove that the actual exchange rate they used was different. Many foreign companies purchase currency futures contracts to protect themselves against exchange rate fluctuations. In these cases, Commerce has sometimes created an "imputed foreign exchange loss" to distort its price comparisons — even though no foreign exchange loss actually occurred. This occurred in the 1989 case of spun acrylic yarn from Italy,[41] the 1987 case of brass sheet and strip from Italy,[42] and the 1987 Columbian flower case.[43]

Commerce officials have used the capricious rules on exchange rates to encourage American companies to file dumping cases against foreign competitors. *Inside U.S. Trade* newsletter reported in early 1988, "The Commerce Department is trying to cajole industries into filing dumping cases against Japanese imports for products that it feels are being sold at prices that do not sufficiently reflect the recent appreciation of the Japanese yen, according to many sources including Commerce officials. Commerce has been unofficially compiling a list of products suspected of being dumped by Japanese companies."[44] One Commerce official declared that the agency was "trying to force Japanese concessions on contentious trade issues — such as restrictive bidding on construction

projects and agricultural quotas — by 'creating an anti-Japanese climate.'"[45]

COMPARING DISSIMILAR PRODUCTS

Commerce sometimes penalizes foreign companies for selling different products for different prices. In 1984, an Italian company was convicted of a less than fair value margin of 1.16% on its sales of pads for woodwind instruments. Commerce compared the prices of a smaller woodwind pad sold in the U.S. with a larger woodwind pad sold in Italy. Since the smaller pad sold for less than the larger pad, the Italian company was dumping.[46] In a brief defending its action to the Court of International Trade, the U.S. government admitted that it did not compare the sales price of identical size pads — and then claimed that Commerce has unlimited discretion to grant or deny merchandise adjustments because any "person who alleges entitlement to any adjustment...must establish entitlement thereto to the satisfaction of the Secretary [of Commerce]."[47] Commerce took the high road and refused to believe that there was any difference in the cost of production between small pads and large pads.

In the case of Japanese electric motors, Commerce initially ruled that motors sold in Japan and in the U.S. were sufficiently alike to compare prices as long as the difference between them was less than ten horsepower. Once Commerce announced this, Japanese companies revised their motor prices to comply with U.S. law. Then, two years later in the first review of Japanese prices, Commerce retroactively changed its policy and announced that any motors with a difference of less than 10 *percent* in horsepower were sufficiently alike for price comparisons.[48] (A price difference of 0.5 percent still proved dumping.) Not surprisingly, the Japanese were again found guilty.

Commerce sometimes creates dumping margins by comparing prices of low-quality products sold in the U.S. and high-quality products abroad. In the case of Canadian raspberries, Commerce compared the price of grade B raspberries sold for juice in the U.S. with the price of

grade A raspberries sold for jam in Canada. Juice stock raspberries are harvested by machines, while jam stock raspberries are harvested by hand. Since hand harvesting costs twice as much as machine harvesting, significant cost differences exist. Yet, Commerce denied any adjustment.[49]

In the 1986-1987 investigations of flowers from Colombia, the Netherlands, Kenya, Chile, and Ecuador, a major issue was whether imported flowers that had wilted were sold or were burned or trashed at the end of the sales day. Commerce admitted in a *Federal Register* notice, "Because of [flowers'] perishability, sellers may be faced with the choice of accepting whatever return they can obtain on certain sales or destroying the merchandise."[50] Although Commerce conceded that flower sellers were sometimes forced to sell at any price they could get, it penalized them anyhow. Commerce effectively compared the price of a fresh flower sold in Amsterdam with the price of a wilted flower sold in New York.

In the Japanese TV case, one company had its dumping margins increased because it donated unsold television sets to charity. Commerce assessed the firm as if the television sets had been "sold" for $0.00 in the U.S. market — the ultimate act of unfair trade.[51] Companies have also received higher dumping margins for selling TVs to company employees at a large discount, and for selling damaged or defective televisions with a markdown.[52] In an investigation of Japanese forklift trucks, Commerce compared the sale price of new forklifts in Japan with the price of three-year old forklifts sold in the U.S.[53]

JUDICIOUSLY JUGGLING PRICES

Even if a company sells its products in the U.S. for exactly the same prices as it sells the product in its home market, Commerce can still find dumping. How? Commerce routinely compares the *average* foreign price over a six-month period with *individual* U.S. sale prices. Most companies sell their goods at a variety of prices. If *any* U.S. sales occur at prices below the *average* foreign price during the six- or twelve-month period of Commerce's investigation, Commerce can create a dumping margin.[54] With Commerce's method, if only one foreign sale out of a hundred occurs at "less than fair value," Commerce can impose dumping penalties. In a 1989 review, Commerce announced that Tokyo Juki was guilty of a 0.0004% dumping margin on its electric typewriter exports.[55] (The requirement of a price difference of at least 0.5% applies only in the initial dumping investigation, not for later reviews.) This 0.0004% margin amounts to less than one-tenth of a cent difference between typewriter prices in the U.S. and Japan. Almost all of Tokyo Juki's sales in the U.S. were at above so-called fair value. But because Commerce effectively disregarded the higher-priced sales, it needed to find only a few typewriters sold at less than fair value in order to announce a dumping duty. Similarly, Commerce penalized a Canadian raspberry grower for a price difference between his U.S. and Canadian sales of 0.002% — less than a one cent difference for a sale of 500 pounds of raspberries.[56]

According to the Commerce Department, foreign companies are acting unfairly unless they charge Americans the highest prices in the world. Foreign producers sometimes have limited sales in their home market. In these cases, Commerce may compare a company's export prices to the U.S. with its export prices to a third market. In 1990 Commerce penalized Korean sweater companies primarily because their export prices to the U.S. were allegedly slightly lower than the prices they charged other nations. The Korean company Chungi was guilty because it sold sweaters to Americans for 1.20% less than it sold sweaters to Mexico; Shinwon was convicted because its prices were 1.11% less than its prices to Canada; and Young Woo was convicted because its U.S. prices were 0.73% less than its prices to the United Kingdom.[57]

But actually, the Korean companies' U.S. prices may not have been lower than their foreign prices. Each Korean export shipment was custom made, and there were significant differences in the sweaters shipped to different nations; yet Commerce assumed the sweaters were identical. And there may have been no difference between the export

prices to the U.S. and other nations. Commerce disregarded U.S. sale prices higher than the foreign sale prices, so it understated the actual average U.S. price. The combination of comparing a misleading set of prices for different sweaters sold on different continents created a dumping margin.

Commerce's biased averaging has long been controversial.[58] The General Accounting Office observed in 1979 that the weighted-average "method of determining margins between home and export market sales tends to enlarge existing margins or to create margins where none existed."[59] The Court of International Trade concluded that Commerce's method of price comparisons results in the "loss of reasonable fairness in the results."[60] In 1984, Congress specifically granted Commerce authority to use sampling and averaging techniques in comparing both U.S. and foreign prices. Yet, Commerce continues its slanted method.

THE WHOLESALE/RETAIL SCAM

Commerce penalizes imports for differences between U.S. wholesale and foreign retail prices. Most companies naturally charge lower prices to purchasers of large quantities of goods than to purchasers of single items or small quantities of goods. But in recent years, Commerce has acted as if wholesale/retail price differences are simply a clever ruse by foreigners.

Toshiba sold its cellular mobile telephones in Japan directly to small local dealers while all U.S. sales went to a single large purchaser who resold the merchandise to distributors. Commerce made no adjustment in comparing Toshiba's U.S. and Japanese prices.[61]

In the case of stainless steel products from the Swedish company Avesta, Commerce compared sale prices of small quantities of steel sold in Sweden with the prices of large quantities of steel in the U.S. As Avesta's brief noted, "Over two-thirds of the sales in Sweden were for quantities less than 500 kilograms, and the average price of these sales is over 22% greater than the average price for sales with total order quantities between 501 and 5,000 kilograms, and over 60% greater than the average price of sales with total order quantities over 5,000 kilograms."[62] Because Avesta sold 5,000 kilogram quantities for lower prices than 500 kilogram quantities, it was acting unfairly.[63]

The Commerce Department apparently believes that the rules for judging fair trade should be constructed almost solely for the convenience of government employees. In a 1985 study of the antidumping law, Commerce observed, "We have found it difficult, if not impossible, however, to determine if and how differences in levels of trade affect price comparability.... There is no statutory requirement that we make a level-of-trade adjustment when comparing sales at different levels of trade.... Thus, the Department is considering eliminating the level of trade provision from its regulations."[64] Because it is not easy to measure the impact on prices of different quantities of sales, Commerce considered formally abolishing all adjustments. In practice, Commerce has already practically eliminated such adjustments.

DIRECT/INDIRECT: FAIR/UNFAIR TRADE

The question of whether a price is fair often depends on whether a low-level Commerce bureaucrat ordains that certain sales expenses are direct or indirect. Foreign companies are often judged to be competing unfairly if they have greater sales expenses in their home market than in the U.S. Commerce has convicted many foreign companies of dumping by subtracting certain sales costs from the company's U.S. sales price, yet refusing to subtract the same sales costs from the foreign market value. Commerce effectively compares a company's sales cost of one person on the phone in Japan lining up huge U.S. sales to Sears or Montgomery Ward and the company's sales cost of delivering the same product to a mom-and-pop store in Nagasaki, including the cost of salesmen, trucks, warehouses, service, etc.

Commerce imputed an inventory carrying cost in the U.S. market for Brother typewriters, but did not impute the same cost to Brother typewriters sold in Japan. The reason: Commerce claimed there was no

"information in the record to quantify such an adjustment." Likewise, there was no information to quantify such an adjustment for the U.S. market, but Commerce did it anyhow.[65] Commerce subtracted from Canon's U.S. price the cost of freight shipping to regional warehouses in the U.S., but refused to make a similar adjustment in Japan because Commerce claimed "the cost was not attributable to specific sales under consideration."[66] In the case of Korean small business telephone systems, Commerce deducted the cost of inland U.S. freight from Samsung's U.S. sale price, but refused to adjust the Korean price for inland freight costs incurred in Korea.[67]

In the case of Japanese television receivers, Commerce rejected all of Fujitsu's home marketing advertising expense claims except the cost of printing sales catalogs.[68] In a 1987 review of Japanese typewriter exports, a significant issue was how to account for the depreciation of one neon sign above Silver Reed America's headquarters.[69] In the Canadian raspberry case, a major dispute occurred over whether cold storage of raspberries is a direct or indirect sales expense: Commerce concluded, "Since the berries are frozen first and sold afterward, we treated cold storage as an indirect expense."[70] (Indirect expenses in the home market are routinely disregarded in the calculation of foreign market value, thereby increasing the apparent foreign market value and creating or increasing the dumping margin.) Commerce disallowed as direct selling expenses the "cost of seminars conducted by Samsung for its home market customers, because the expenses included were of general promotional nature rather than actual technical services provided for specific customers in connection with specific sales."[71] In the case of Japanese television sets, Commerce disallowed NEC's "depreciation of signboards and cars provided to retailers, room rental and catering costs for promotion of new merchandise and new sales techniques, instructors' salaries and room rental for training new employees."[72] Zenith sought to persuade the Commerce Department that it should deduct from Japanese companies' U.S. sale prices all expenses that the Japanese incurred in defending themselves against the government's

antidumping suit.[73] Thus, the more that Japanese companies had to spend to defend themselves against dumping charges, the more unfair their U.S. prices would appear to be. (Commerce rejected Zenith's suggestion.)

If a foreign company contracts out its warranty service, the entire cost is a direct sales expense. But, if the company provides its own warranty service, Commerce has a web of arcane rules on direct and indirect warranty costs to determine the foreign sales price. In a 1985 study, the Commerce Department defined its concept of direct (allowable) and indirect (nonallowable) warranty expenses:

> Direct expenses incurred include travel expenses of servicemen going to and from the location of the servicing, hotel expenses incurred in travel to perform servicing, and payments to unrelated firms for performing servicing. Indirect warranty expenses include a serviceman's wages, depreciation on a service truck, and welfare, bonuses, retirement, depreciation, utilities, rent, and [general and administrative expenses] incurred by the service department.[74]

In the case of Japanese television receivers, Commerce ruled on Victor Corporation's warranty expenses: "Because all home market warranty repairs are performed by service contractors related to Victor, and in the absence of information that would demonstrate the arms' length nature of these expenses, we considered the labor portion of this warranty claim to be a fixed cost, not directly related to the sales under consideration. Therefore, we treated home market warranty labor costs as indirect selling expenses..."[75] The Court of International Trade recently concluded, "The absurd results of [Commerce's] differentiation between the labor costs incurred through an outside [warranty] servicing company in the U.S. and the in-house labor costs of the same nature is obvious."[76] The unfairness of the direct-indirect test comparison method has been obvious for over a decade. As the General Accounting Office observed in 1979, "The provision that cost be directly related to sale under consideration does not make allowances for such things as salaries and expenses of sales staff, maintenance of distribution centers, most advertising costs, etc.; thus the foreign market value is overstated."[77]

HOW BUREAUCRATS CALCULATE COST OF PRODUCTION

Eight hundred years ago, medieval scholastics debated how large a profit a business could make without being unjust to its customers. Nowadays, federal bureaucrats dictate how small a profit a foreign business can earn and not be unfair to American businesses. The obsession with pedantic measures of justice remains — but at least the goal has "progressed" from protecting consumers against high prices to protecting competitors against low prices.

Until 1974, the dumping law consisted largely of comparisons of U.S. and foreign prices. But in 1974, Congress added a cost of production test. Congress clearly intended that the test be used only in special circumstances.[78] Peter Suchman, who was Deputy Assistant Secretary at Treasury at that time, observes, "In 1974, there was almost no discussion in Congress as to what it meant by cost of production. Those of us in government at that time assumed it was to mean the same standard as in antitrust law — which is variable cost of production."[79]

The cost-of-production test was rarely used until the Commerce Department took over dumping investigations in 1980. By 1987, two-thirds of all dumping cases were based, at least in part, on cost of production allegations.[80] Now, as Sen. Arlen Specter asserts, "Free trade means cost of production plus a reasonable profit."[81] And, by coincidence, Commerce insists that it is "reasonable" that foreign companies must earn significantly higher profits than their American competitors.

Commerce, after making an estimate of the material cost of production for a foreign product, adds 10% to the cost as administrative overhead. If a company's actual administrative expenses exceed 10%, Commerce's arbitrary formula will not affect it; but if its administrative costs are less, it will be penalized. The more efficient and lean a foreign company is, the more unfairly it is assumed to be competing against bureaucratically swollen American companies.

After Commerce estimates the cost of production and adds 10% overhead, Commerce adds 8% profit to achieve the total "constructed value" of the foreign product. If a foreign company earns a profit of 7%, Commerce will punish the company for selling at a loss of 1%. As Commerce Deputy Assistant Secretary Kaplan told the Senate Finance Committee, "What company, unfamiliar with the antidumping law, could imagine that the United States requires that at least eight percent profit must be included when calculating a constructed value?"[82] Every dumping case that "proves" that foreign companies are selling below cost of production also assumes that foreign companies made an 8% profit. The 8% assumption is totally arbitrary. GAO recognized the assumption as unfair and recommended its abolition in 1979. The International Trade Commission reported that average "profits before income taxes for all U.S. corporations in 1986 were 6% of sales."[83] Thirteen of the fifteen largest companies in the Fortune 500 failed the 8% profit test in 1989.[84]

Even if a company is obviously making a profit on a sale that Commerce alleges is being made at a loss, Commerce will disregard the evidence. As Kaplan observed, Commerce at one time made references to profits on U.S. sales but "has since abandoned that approach. The Department reasons that, because the sales to the U.S. market are being challenged as dumped transactions, reliance upon profits derived from these sales could result in distorted calculations."[85] Apparently, looking at actual profits leads to "distorted calculations," while using a number pulled out of a hat leads to undistorted calculations.

Commerce uses other methods to inflate its estimates of foreign cost of production. Kaplan explained, "When part-time labor has been disproportionately assigned to the manufacture of the product under investigation, thereby lowering the labor costs, the Department will not accept such costs. When such a situation occurs, in accordance with the Department's overall approach of using weighted-average costs of the company, the Department may apply the weighted-average costs of the labor for the whole facility."[86] Thus, it is unfair for foreign companies to use part-time workers to produce for export — a new breakthrough in the demonology of foreign competition.

Cost-of-production estimates for agricultural products are especially creative. Although a farm's yield naturally varies from year to year, Commerce bases its cost-of-production estimate on a single year's crop.[87] Commerce declared in a 1988 notice, "Since agricultural costs depend on yields and since future yields are unpredictable because they depend on unforeseeable variables such as weather and disease, recovery of costs over time is unpredictable. Moreover, since these costs are associated only with production during the crop year...they should be recovered during the current crop year."[88] Commerce acts as if every foreign farmer must make a profit every year — or else he is cheating his American competition. Yet a farmer's revenue will always be less consistent and less reliable than a government employee's salary.

Commerce based its analysis of Canadian raspberry production costs on a random survey of ten Canadian farmers. Raspberry production costs vary sharply; an ITC study found U.S. farmers' raspberry production costs varied almost 100 percent.[89] Commerce noted, "If the farm was mortgaged, the interest expense was included in the cost."[90] The fairness or unfairness of Canadian raspberry prices depended largely on the size of the rent or mortgage payment, if any, that Canadian farmers paid. Commerce's method totally divorced the value of the raspberry from the supply and demand of raspberries and instead myopically focused on the production process. If farmers followed Commerce's pricing rules, the result would be two farmers selling raspberries at roadside stands next to each other — with the farmer who owned his land selling at a low price, and the farmer with a heavy mortgage selling at a high price. Such a pricing policy would guarantee more farm bankruptcies.

Most farmers do not pay themselves a wage; instead, they take the leftover profit at the end of the year as their earnings. But Commerce imputes a wage to the farmer anyhow. This significantly increases the total cost of production, onto which Commerce adds 10% overhead and 8% profit. Commerce routinely penalizes foreign farmers for not being able to show an 8% profit on the wage he did not pay himself.

Commerce also adds a cost for family labor used on the farm — even when the family member is not on the payroll. Commerce explained: "The Department of Commerce imputed a cost for family labor since the owner of a business expects a minimum return for his labor as well as a return on his investment."[91] Does Commerce believe that the head of the household owns the other family members, and thereby should show a profit off them? In Commerce's view, if a foreign farmer can only earn an 8% profit by putting his wife and son on the tractor, he is cheating — even though American farmers also use unpaid family labor.

Cost-of-production analyses tend to be sinkholes of quibbles and capricious judgments. Commerce usually considers only the cost of production during the six month period in which it is examining the foreign company's U.S. sales. A major issue in the raspberry case was how to amortize the cost of a raspberry plant — whether ten, fifteen, or twenty-five years was the proper time frame.[92] In the case of British antifriction bearings, Commerce included in its cost of production estimate the debt paid on a recent corporate takeover.[93] Commerce included in one analysis the expenses Suzuki incurred in defending itself before the U.S. Consumer Product Safety Commission on charges that its all-terrain vehicles were unsafe.[94] In the 1990 sweater investigation, Commerce penalized two Korean firms for making donations to local charities, claiming that the unrelated donations were part of the cost of making sweaters, and should have been reflected in higher sweater prices.[95]

Estimating cost of production is not as simple as it sounds. As GAO observed, "Although cost accounting is a specialty field, outside experts have not been used for verifying and evaluating cost of production data."[96] The Commerce Department constantly changes its own rules for measuring costs. Commerce has used over ten different approaches to measure cost of production of Brazilian companies. A company usually does not know which method Commerce will use until it is too late to defend itself and explain its accounting system to U.S. government auditors.[97]

Commerce's costs estimates are especially misleading for high-technology products. In its 1985-1986 investigations of semiconductors, Commerce stated, "The Department matched the sales prices with the cost of manufacturing occurring three months prior to the date of sale for the final determination."[98] It would be difficult to create a more biased "fair price" test. As a Federal Trade Commission report noted, "Between 1984 and 1985, average variable cost [of producing semiconductors] is estimated to have declined by 66% (from $8.0313 to $2.7376). Between 1985 and 1986, these costs are expected to fall by 52% (from $2.7376 to $1.2989)."[99] Although production costs were falling on a week-to-week basis, Commerce measured the fairness of Japanese chip prices by the cost of production several months before the chips were sold.

The real question in cost of production cases should be not what total costs are, but what the variable costs are — the costs of producing one additional unit after all initial outlays are made. If a company is selling above its variable costs, it can make a profit. The FTC noted, "Economists expect that in a competitive industry it is normal for firms to sometimes sell at prices that are below average total cost. Only over the entire trade cycle is it expected that firms cover all their economic costs."[100] The FTC concluded that Commerce "should not include fixed costs (which will be incurred regardless of the level of production in any particular period of time) in the accounting measure used for comparison purposes."[101] Mike Becker, an analyst for Citizens for a Sound Economy, noted, "Original capital 'start up costs' and 'research and development' are irrelevant in determining whether the price is adequate to justify additional production."[102] According to Motorola, variable costs amounted to only about 25 percent of the total costs of producing semiconductors.[103] In other words, once a company had already completed the research and built a factory, each additional chip cost only 25 percent of the original start-up costs. UCLA economist Andrew Dick concluded, "Japanese firms were simply responding optimally to their industry's particular cost and demand conditions when making the output decisions, rather than engaging in predation against American competitors."[104]

Especially for high-tech products, variable costs are usually far lower than fully allocated costs. Assume a company's fully allocated cost for producing chips is $1.40, and its variable cost is 70 cents. Is the company better off selling 5 million chips at $1.50, or 100 million chips at $1 each? Selling 5 million chips at $1.50 provides a total revenue of $7.5 million; selling 100 million chips at $1 each provides $100 million. The greater the volume of sales that occur above variable cost of production, the more irrelevant the fully allocated cost standard becomes. Commerce's method pressures foreign companies to sell a small number of items above fully allocated costs rather than a great number of items above variable costs.

SPECIAL PROTECTION FROM THE WORLD'S LEAST EFFICIENT PRODUCERS

Commerce saves its greatest creativity for dealing with exports from nonmarket economies. The U.S. now has $24 billion in trade each year with nonmarket economies. Even though some communist countries have large debts to American banks, the Commerce Department has frequently made it practically impossible for them to export their products to the United States.

Since communist economies lack a viable, realistic price system, Commerce judges the fairness of their export prices by randomly choosing other countries and concocting what the cost of production or product prices are or might be for the same product in the second country. Commerce then compares the contrived cost or price to the actual export price of the communist country. Communist nation exports are fair or unfair based solely on how their price compares to the contrived price that Commerce creates for a surrogate country.

A communist nation can never know what country Commerce will choose to compare its prices and cost of production to, thereby making it impossible for it to set its own prices to avoid violating U.S. trade law.

Gary Horlick, who was Deputy Assistant Secretary of Commerce for Import Administration from 1981 to 1983, described the process to the Senate Finance Committee: "I can tell horror stories about how one goes about choosing a surrogate; it is usually done about 10 at night when one has run out of any reasonable alternative. Just to take an example, for Chinese shop towels we went through, in order: Pakistan, Thailand, Malaysia, Hong Kong, the Dominican Republic, Colombia, and wound up with a hypothetical Chinese factory in India. It just doesn't make any sense."[105] Former ITC commissioner Ron Cass and lawyer Stephen Narkin observed in November 1990, "Selection of the surrogate country provides boundless opportunity for biasing the outcome, and there is more than a little evidence that Commerce has availed itself of this opportunity on several occasions."[106]

In 1986, Commerce cited China for a dumping margin of 66.65% on its porcelain-on-steel cookware, meaning that China was selling goods worth $1.67 for only $1.00 in the U.S.[107] How did Commerce divine 66.65%? Since China does not have a market price system, Commerce looked elsewhere to deduce the cost of Chinese cookware production. Commerce decided that Thailand was "at a level of economic development comparable" to China. (This is a surprise to Bangkok, since Thailand's per capita income is almost triple that of China's.) But Thai cookware makers refused to open their files to allow Commerce officials to determine Thailand's production costs. (A Finnish steel producer that generously helped Commerce in 1984 was subsequently hit with dumping charges itself as a result of the information it voluntarily provided to Commerce.)[108]

Commerce then resolved to judge China by comparing its cookware prices to Dutch, French, and West German cookware prices. Not surprisingly, Chinese prices were much lower. (Chinese quality was also lower, but Commerce did not adjust for that.) Commerce thereby proved that China was unfairly dumping its pots and pans on America.[109]

Commerce sometimes makes no effort to compare similar products. In the case of Chinese pipe imports, Commerce compared Chinese

prices to Argentine prices. Commerce's verification report noted that the Chinese pipe "as received in the USA was severely rusted."[110] The Chinese pipe was of such poor quality that it had to be regalvanized after it arrived in the U.S. before it could be sold. Commerce insisted on comparing the price of rusted pipe from China with the price of unrusted pipe from Argentina. Not surprisingly, a 30% dumping margin was found.[111]

While Commerce can insist on hundreds of thousands of pages of documentation to justify a foreign company's prices and production costs, in nonmarket cases it will sometimes use any slim thread of evidence to convict foreign companies. In 1987, Commerce compared the price of Hungarian tapered roller bearings with the supposed cost of production of bearings in Portugal. The result: a dumping margin of 7.42%.[112] The only piece of information Commerce had on Portuguese production costs came from an American consulate who phoned an engineer at a Portuguese factory and got an estimate of the Portuguese costs of production for steel pipes, small motors, and steel hand tools. The U.S. Embassy official in Portugal also reported that he had heard that Portuguese factory overhead was 40-45 percent of materials and 30-33 percent of labor. As Peter Ehrenhaft, former Deputy Assistant Secretary of Treasury and counsel to the Hungarians, observed, the evidence Commerce possessed was "only one miserable cable from the embassy in Lisbon in 1987."[113] When counsel for an American importer requested assistance from the U.S. embassy in Lisbon to more accurately determine Portuguese production costs, the American embassy refused to respond.[114]

Once a company is convicted of dumping, it will usually raise its prices to insure that it is no longer violating U.S. law. But, Commerce in its reviews sometimes changes the country to which it compares the communist country's prices. In the case of manhole covers from China, Commerce in 1986 found the Chinese guilty of an 11% dumping margin based on comparing the price of Chinese manhole covers with the price of Belgian, Canadian, French, and Japanese manhole covers.

After Commerce announced the penalties, the Chinese raised their export prices. Then, in 1990, Commerce reviewed the case and revised its methodology. On June 5, 1990, Commerce announced it was preliminarily retroactively raised the dumping tax for 1988-1989 to 97%.[115] Commerce decided to compare Chinese prices not to other nations' prices, but to the imaginary cost of producing manhole covers in the Philippines. The average wage in the Philippines is far higher than in China, thus creating huge differences in labor costs. Commerce creatively assumed that the sand used in Philippine manhole production cost more than pig iron. (If this is true, then the Sahara Desert is the world's greatest untapped source of wealth.)[116] As soon as the high dumping margin was announced, Chinese companies were effectively banned from further exporting. American companies that had imported the Chinese products were suddenly struck with the prospect of paying tens of millions of dollars in dumping duties as a result of Commerce's change in methodology.

TELL US EVERYTHING — AND BE DAMNED

Often, when large dumping margins are announced, it is because the foreign company refused to divulge all its financial secrets to Commerce investigators. In the same way that Coca-Cola refuses to reveal its secret formula to prying foreign governments, many foreign companies prefer not to bare their financial soul to U.S. bureaucrats.

Many foreign companies are loath to answer Commerce's demands because information they previously provided landed in the lap of their American competitors. Trade lawyer Patrick O'Leary notes: "There are numerous instances where parties have publicly or privately disclosed an opposing party's confidential information."[117] A Washington trade lawyer observed, "We have had cases where the confidentiality of four or five consecutive submissions by a foreign company was violated."[118] There is no evidence that Commerce has punished lawyers who divulged confidential information.

Commerce, in its judgment on the Japanese semiconductor case, observed, "When a company is requested to respond and refuses, the most conservative approach is for the U.S. to assume that the potential respondent has seen the petition and determined that its actual margins of dumping are even higher than those alleged."[119] The U.S. can demand an almost unlimited amount of information, and any refusal to comply is taken as a confession of guilt.

A dumping investigation can impose crushing burdens on foreign companies. The average dumping questionnaire is over seventy pages long, single-spaced. Foreign companies have only forty-five to sixty days to put together a complete response. During this time period, as lawyer Robert Lipstein observes, foreign companies must:

- Translate the questionnaire into its native language for distribution to all company employees who will be involved in the process.
- Identify the sales in the U.S. and the home country that need to be reported.
- Identify all antidumping related expenses, such as freight, insurance, credit, direct selling expenses and rebates, discounts, commissions, indirect selling expenses, and general and administrative expenses.
- Develop factors for allocating expenses to specific transactions.
- Prepare computer tapes (often providing as many as 70 or more variables for each sale for all sales in the home and US markets for the six month period of investigation.[120]

Commerce brushed off criticisms of the difficulty of its questionnaires and information demands in March 1989: "By spelling out in detail each filing requirement, the Department has made it easy for interested parties to understand how to file documents timely and in the proper form."[121] But many trade law experts believe that Commerce is redoubling the burden on foreign companies to persuade them to abandon the case — and thereby surrender any hope of exporting to the U.S. market. In a 1989 investigation of small business telephone sys-

tems, Matsushita withdrew from the case, thereby abandoning over $50 million in telephone system exports. The straw that reportedly broke Matsushita's back occurred when Commerce officials commanded the company on a Friday afternoon to translate 3,000 pages of Japanese financial documents and present investigators with English versions on the following Monday morning.[122] Paul Victor, Matsushita's counsel, complained the "highly unreasonable, burdensome, and arbitrary manner in which the [Commerce] Department has, from the outset, conducted this proceeding." Matsushita was

> particularly troubled by the unnecessarily onerous nature of the Department's requests for information.... Indeed, the Department's information requests have been so unreasonable, and have imposed such costly and unrealistic obligations on the Matsushita respondents, that they have made it impossible for the respondents to have a reasonable opportunity to defend themselves under the time constraints of this proceeding.... The Department forced the Matsushita respondents to undertake the massive job of redoing the books and records of 45 sales companies.[123]

Matsushita's task was made extremely difficult because it was not in a legal position to order independent distributors to surrender their price data to U.S. government inspectors.

If a foreign company does not speedily answer all the Commerce Department's requests, Commerce will use the "best information available" (BIA). But the BIA is usually allegations that a U.S. company gave the Commerce to launch the initial investigation, which is usually the most adverse "information" about the foreign company. If a respondent makes an error in the cartons — and sometimes carloads — of information that it is ordered to provide, Commerce can disregard the entire response and invoke BIA, even though it is totally unverified. This is an engraved invitation for U.S. firms to exaggerate their accusations against foreign competitors in their initial petitions.

Commerce will even sometimes use the allegations by a U.S. company against its foreign competition when it recognizes the information is incorrect or false. (The Court of International Trade rebuked Commerce in 1990 for this practice in the case of Japanese typewriter

imports.)[124] Commerce noted on a British bearings case: "Given the number of companies to which best information available has been applied, we do not believe we should correct perceived deficiencies in the best information available rate we have applied. If we were to do this for INA-UK, we would then be required to correct perceived deficiencies in all other responses other foreign manufacturers subject to best information available."[125] In other words, if Commerce acted fairly toward one company, it might be required to act fairly toward all companies.

In the 1989 bearings case, SKF, a Swedish manufacturer, provided Commerce with information on over 100 million separate sales. SKF's first submission of information to Commerce was over 150,000 pages long and weighed three tons. SKF was required to provide over 4 billion separate pieces of information. Commerce demanded several revisions and reformattings, and SKF eventually provided over twelve tons of documents to the Commerce Department. Not surprisingly, the Swedish company made a few mistakes in its data. (SKF's counsel pointed out, "The explanation for the discrepancy...is that the Department only allowed SKF about a week to put together this response.")[126] A Commerce investigator was very critical because an SKF subsidiary in West Germany miscoded data on the sales of 290 Y-bearings — out of a total of 175 million Y-bearings sold.[127] Commerce investigators became indignant because an independent sales company that accounted for roughly 1 percent of SKF sales in Germany and that had minimal computer resources did not present its sales data in a form acceptable to Commerce. Commerce reacted by disregarding almost all SKF information provided on sales in Germany; it treated SKF as if it had provided no information and penalized it with a BIA dumping margin of 180%.[128]

In 1977, a Swedish company, Extraco Geltec AB, was convicted of dumping animal glue. In the first review of shipments from 1977 through 1978, zero dumping margins were found. For the second review, Commerce officials visited Sweden, successfully verified the company's sales data for late 1978 through 1980, and announced a preliminary dumping margin of 1.93%. But, before issuing a final

determination, Commerce issued two additional lengthy questionnaires to the Swedish company, demanding to know whether it was selling certain grades of glue to other countries. The Swedish company replied that it had made no other foreign sales of the glue. Commerce officials became indignant because the Swedish company did not provide a list of its other foreign customers, even though the company had no other foreign sales. (Commerce had no reason to believe that the company was lying about having no sales.) To chastise the Swedes, Commerce raised the dumping duty on the company from less than 2% to 92.72%. The Court of Appeals for the Federal Circuit noted in a ruling overturning Commerce's action, "Commerce characterizes Extraco's conduct as a 'refusal to provide the requested data.' Contrary to the Commerce view, a 'No' answer is not a refusal to provide data. If there is no data, 'No' is a complete answer." Commerce's decision effectively "means that it may resort to the 'best information' rule where a submitter cannot produce data because such data never existed," the court declared.[129]

Commerce usually examines the sales data only for larger foreign companies in a dumping investigation, and then imposes a dumping penalty on smaller companies from the same nation derived from the dumping margin for large companies. Commerce routinely refuses to allow smaller foreign companies even to defend themselves. Commerce declared in March 1989, "The short statutory time limits and the complexity of antidumping duty proceedings, including verification requirements, usually make it impossible for the Department to consider unsolicited questionnaire responses."[130] Technically, smaller companies can submit a voluntary response, but Commerce reserves the right to reject such responses for any reason. As Commerce declared in the Ecuadoran flowers case, "The Department's policy is that we will accept and consider voluntary responses only if they are submitted in a timely fashion and are free of deficiencies."[131] If Commerce finds any error in a 5,000-page voluntary response, it can throw out all the information.[132]

Commerce is now imposing a 5.86% duty on sweaters exported by hundreds of Hong Kong companies because one Hong Kong company

did not earn an 8% profit in 1989.[133] Commerce effectively wrecked the exports of hundreds of Taiwanese sweater companies because a few small Taiwanese companies could not quickly respond to Commerce's massive information requests. Commerce sent the Taiwanese firms a 100-page single-spaced questionnaire in English; the average Taiwanese firm was commanded to quickly provide over 200,000 bits of information. Commerce conceded in its *Federal Register* notice that "none of the investigated [Taiwanese] companies refused to provide the information requested, refused verification, or otherwise significantly impeded the Department's investigation." The management of one Taiwanese sweater company consisted of the owner and his wife. Commerce imposed punitive duties on the company, declaring that "lack of manpower" to answer the questionnaire was no excuse. Commerce imposed punitive duties on another Taiwanese company largely because the company's factory had burned down and it had lost many of its records. As a result of such judgments, the "all other" rate for Taiwanese sweaters is 21.94%.[134] Since the U.S. also imposes a 34% tariff on the sweaters, this effectively locks hundreds of Taiwanese sweater companies out of the U.S. market.

HOW TO PARALYZE YOUR FOREIGN COMPETITION

A domestic company can point the Commerce Department like a guided missile against its foreign competition and let the U.S. government do the rest. Commerce effectively allows U.S. companies, based on a submission of a few unsubstantiated allegations, to command the U.S. government to impose a de facto $500,000-plus penalty on their foreign competitors.

A U.S. company needs almost no information to persuade Commerce to initiate an inquisition of its foreign competition. American companies have not been penalized for submitting knowingly false information in order to persuade Commerce to investigate their competitors. As Gary Horlick observes, "Virtually all petitions are accepted. The filing of a petition in this country in essence automatically triggers an elaborate

quasi-judicial proceeding."[135] Between 1986 and 1989, Commerce ruled that 96 percent of all petitions submitted by U.S. companies provided sufficient grounds to launch investigation of foreign companies.[136]

Under U.S. law, Commerce is not supposed to proceed with a dumping investigation unless it is clear that a majority of the U.S. industry supports the investigation. But Commerce allows practically any company to claim it represents a domestic industry and file a dumping petition against all importers of similar products. In practice, it takes only a single U.S. company to launch an investigation — but Commerce requires over 50 percent of an industry to explicitly oppose an investigation to dissuade Commerce from prosecuting the foreign companies.[137]

THE NEVER-ENDING PUNISHMENT

Once Commerce convicts a company of dumping, the Department can effectively keep the company under "economic house arrest" for the next fifteen years. Once a company gets caught in the dumping snare, it is often practically impossible to get out. Over 90 percent of all companies convicted of dumping since 1980 are still restricted by dumping orders — still penalized as if they were acting unfairly on a day-to-day basis. As World Bank economist Michael Finger observes, "Once you get an antidumping order in place, what happens to an exporter essentially comes out of a black box."[138]

The dumping margin that is calculated at the end of initial investigation is an estimated dumping duty — the amount that the American importers must deposit with the Customs Service on each import shipment. The actual amount that the company must pay is determined when the Commerce Department does administrative reviews of the imports that have occurred since the original investigation. Commerce then looks at the price of imports on a piece by piece basis and determines the penalty on each import shipment.

When Congress transferred authority for dumping laws to Commerce in 1980, it mandated that Commerce do an annual review for each existing dumping order. But Commerce disregarded its duty and Congress dropped the requirement in 1984. Although Commerce is slow in performing reviews, if it subsequently completes a review and rules that the dumping margin is higher than it previously estimated, it will impose a compound interest penalty on the importer. The U.S. Customs Service gets to hold the dumping margin deposit for as many years as Commerce delays a review. As Finger observes, "The Commerce Department enforces aggressively the part of the trade law that forces exporters to deposit money with the U.S. government and enforces passively the parts of it that might give the money back."[139] The longer the Commerce delays a review, the longer a foreign company will be punished for a crime it may not be committing.

Commerce has made it increasingly difficult for a foreign company to escape an antidumping order. Up until 1986, Commerce would sometimes consider evidence of three years of no sales at less than fair value as sufficient to revoke a dumping order. If a foreign company did not export to the U.S. for several years, Commerce could conclude that it was no longer violating U.S. dumping law.

In 1987, Commerce began requiring that foreign companies prove there is no likelihood of their dumping in the future. Commerce defended its new policy: "It has been the Department's experience that the absence of shipments is no indication of the absence of price discrimination, which is the basis for revocation..."[140] Commerce assumes a foreign company is still discriminating against the United States, even though the company may not be selling anything within 3,000 miles of New York or Los Angeles. A company can discriminate against the U.S. even after Commerce effectively expels the company from the American market with prohibitive dumping duties.

The Japanese television case illustrates both the everlasting nature of dumping orders and the U.S. government's lack of fair play.[141] The Treasury Department began investigating Japanese TVs in 1968 and

issued an antidumping order in 1971.[142] Due to the large number of sales, Treasury fell far behind in calculating dumping margins. Treasury simplified its work in 1978 by assuming that Japanese televisions were dumped by the precise amount of the commodity tax levied on Japanese manufacturers by the Japanese government. This commodity tax had nothing to do with dumping, but using it saved Treasury officials a lot of difficult paperwork. A federal court decision found that Treasury grossly neglected both federal dumping law and its own regulations.[143] The Commerce Department's general counsel conceded in early 1980 that the government's novel methodology would likely be shot down in court.[144]

In 1980, the U.S. government reached an agreement with twenty-two Japanese TV producers on phasing out the antidumping order. As part of the settlement, Japanese companies paid $23 million in dumping penalties and the Commerce Department promised to use the "traditional methodology" in conducting administrative reviews. Japanese companies were concerned that inscrutable U.S. officials might again flimflam them by changing its measurement of dumping.

On August 18, 1983, Commerce announced it had tentatively decided to revoke the dumping penalties on several Japanese television exporters.[145] But before making the revocation final, Commerce changed its methodology and began comparing Japanese retail prices with U.S. wholesale prices. Since the Japanese retail prices were higher than the U.S. wholesale prices, this created new dumping margins. Sanyo and NEC complained that Commerce was violating the 1980 agreement by not using the "traditional methodology." Commerce replied: "For these respondents, as for respondents in all other proceedings before the Department, the Department will use the 'traditional methodology' as altered by any changes in applicable regulations and practices, when they occur."[146] In other words, Commerce will use the traditional methodology — until it decides to change its traditions.

Commerce dawdled for six years after its 1983 tentative revocation before reaching a final decision. On August 28, 1989, Commerce announced,

> Since publication of the tentative determination to revoke [1983], the evidence shows that imports as a percentage of U.S. consumption have increased, competitive pricing pressures in the U.S. have become stronger, EC import controls have become more restrictive, and, at least through 1988, the yen has appreciated against the dollar, thereby making it more difficult for Japanese exporters to be competitive in the U.S. market without selling at LTFV.... Given the high production costs in Japan and the high value of the yen, it is difficult to see how Hitachi or Sanyo, if they were to resume shipments to the United States on a competitive basis, could compete in such a tight market without selling at LTFV. We have no reason to believe that present market conditions in the U.S. and Japan will change.[147]

Because the yen appreciated in the years between the tentative revocation and the final decision, Commerce decided that the Japanese companies could not be trusted.

Commerce officials have worked overtime to avoid releasing Koyo Seiko, a Japanese tapered roller bearing (TRB) manufacturer, from their control. The Treasury Department began investigating Koyo Seiko in 1969 and concluded in 1971 that the firm was not dumping. Koyo's primary U.S. competitor, Timken Co. of Canton, Ohio, persuaded Treasury to reinvestigate Koyo and other Japanese bearing exporters in 1973. Treasury finally published its results on August 18, 1976, and tagged Koyo with a 3.2% dumping margin.[148] Only one Koyo TRB model was found to be sold at less than fair value — and that for only a single month. Based on the results of Treasury's investigation, Koyo adjusted its prices to prevent any subsequent dumping.[149]

Between 1976 and 1989, six different case analysts at Treasury and Commerce worked on the case, and Koyo made over fifty different formal submissions of data. U.S. government officials visited Koyo's headquarters in Japan nine times to verify the data.[150] Treasury, after repeatedly examining Koyo's books, required no dumping duty deposits on Koyo imports, indicating that it had found no dumping.

In 1982, Koyo was informed that the investigation of its 1974-1979 imports was finished and that all dumping margins were between 0 and 2%. But Commerce never published its findings.[151] The Acting Assistant

Secretary for Trade Administration, William Archy, declared that because of "Timken's intense interest in our results regarding Koyo," it would be "advisable" to postpone publication of any preliminary results until Commerce is able to "resolve all points of contention."[152]

In 1983, Timken alleged for the first time to Commerce that Koyo's home market sales were made at below Koyo's cost of production. Commerce responded by demanding cost of production information for Koyo TRBs from 1978 onward. This vastly increased the scope of the investigation. But, even with the expanded investigation, no incriminating evidence was found. On August 30, 1985, Commerce indicated that it would close the case within forty-five days and assess zero dumping duties on Koyo unless it heard a protest. Naturally, Timken again protested and urged Commerce to re-review all of Koyo's bearing exports since 1974.

In July 1986, Commerce announced a new review for Koyo and promised that it would issue results "no later than July 31, 1987."[153] Koyo thought it could see the light at the end of the tunnel. Then in August 1986, Commerce announced it was totally changing its methodology and greatly expanded the number of bearing models that it was investigating, thereby requiring vast amounts of new information. As Koyo's brief to the Commerce Department noted, as a result of the 1986 change, "All of Koyo's work to adjust prices based on Government methodology for antidumping price comparisons — based on 17 years of experience — was rendered useless. There is no way Koyo could have retroactively adjusted its U.S. prices in 1986 for transactions which occurred in 1974 or 1978."[154] On June ll, 1987, less than sixty days before its self-imposed deadline, Commerce again changed its methodology and vastly expanded the number of bearings models investigated.[155]

From 1974 through March 28, 1989, Koyo had the impression that its dumping duties for the fifteen year period would be either zero or very low. Then, on March 29, 1989, Commerce delivered a bombshell, finding Koyo guilty of dumping margins of up to 22.9% for its exports

from 1974 to 1979.[156] Two months later, on June 1, 1990, Commerce issued a final ruling that raised the margin up to 35.9%.[157] Koyo faced a multi-million dollar dumping duty bill. Koyo's total penalties could even exceed the value of the bearings it sold in the U.S. during the mid to late 1970s.

Commerce found minor variances among the masses of information Koyo had submitted and seized upon the discrepancies as an excuse to reject almost all of Koyo's responses — even information that had been verified again and again by Treasury and Commerce officials. As Koyo counsel Peter Suchman noted, "After Commerce manipulated Koyo's data through extensive improper adjustments, it concluded that the data was 'no longer representative of the original data' and therefore could not be used at all."[158] Commerce Department official Sean Kelley declared that the dumping duty on Koyo "is supposed to be punitive because we didn't have the data. That is our policy."[159] Yet, as Suchman observed, "Commerce repeatedly used Best Information Available in circumstances where Koyo had in fact submitted information. In some cases, Commerce seems not to have been aware that there was information on the record."[160] The penalties were especially arbitrary since Koyo no longer retained the corporate records to defend itself.[161] (American tax laws require a corporation to retain full records for only three years.) After Commerce announced its punitive dumping margin, Timken informed Koyo's American customers that Koyo would soon be going bankrupt and urged them to switch their business to Timken.[162]

When Commerce considers whether to revoke an antidumping order, practically any objection by a U.S. company or union becomes sufficient to deny revocation. As Gary Horlick observes, "All it takes is a 25 cent stamp and a letter to continue a dumping order after an Administrative Review."[163] Commerce provides written notice of pending revocation to the parties to the original dumping case and "to any other person which the Secretary has reason to believe produces or sells the like product in the United States."[164] This is almost begging American companies to speak up and urge Commerce to perpetuate its

controls over their foreign competition. In 1988 and 1989, Commerce cancelled a number of tentative revocations after U.S. companies objected.

Political considerations sometimes prevent termination of dumping orders. In one case, a review was postponed so that the lawyer for the domestic petitioner could spend more time analyzing a Japanese company's confidential response to find some basis for the Commerce Department to deny terminating a dumping order.[165] Political pressures from American television producers helped perpetuate the dumping penalties on Japanese companies.

With its refusal to grant revocations, Commerce is choking on its own greed to control imports. Leonard Shambon, the director of Commerce's Office of Compliance with jurisdiction over dumping order reviews, noted in 1987, "The result of the ever-increasing workload is predictable. The quality of the Department's analysis declines. The speed of review and revocation declines. The number of court challenges and remands increases."[166] Commerce is now administering price controls on the sale of over 200 million items a year.

LEVELING THE FIELD BY STACKING THE DECK

The dumping law turns foreign companies into economic lepers. Perpetual jeopardy is the natural condition of companies under dumping orders. Although a company may be complacent with a 1.93% margin, Commerce can raise the dumping margin to 92% with only a few paragraphs of notice in the *Federal Register.*[167] To be hit by a dumping order can easily torpedo a foreign company's exports to the U.S.

Federal officials have bragged about the chilling effect of dumping laws. The Treasury Department observed in 1971 that even when an exporter claims that to have corrected for dumping margins, "so long as the dumping finding remains outstanding, the importer can never be sure that this is true. Even if the exporter is not stating a falsehood, he may have erred in his calculations. Moreover in a fast changing market, it is conceivable that an exporter may not be entirely certain that he has

in fact eliminated his dumping margins in the case of all his sales. Given these circumstances, an American importer, if he has a choice, would prefer to deal with a supplier against whom no dumping finding is outstanding. Only then can he be absolutely sure that he will not have to pay dumping duties."[168] Commerce Deputy Assistant Secretary Gilbert Kaplan told the Senate Finance Committee in 1986, "The minute a case is filed, an importer or a customer faces an undetermined liability, an undetermined price basically, for items, for an indeterminate period of time, into the future.... If you are a purchaser, you have to think very long and hard before buying from an exporter given that undetermined liability that you are going to face for quite a number of years."[169] Commerce Secretary Malcolm Baldridge declared in 1986: "The [dumping] penalty is actually applied to the U.S. importer, but it means that if he's got to pay that penalty, he just ain't going to import any more. That's the stick that you're looking for."[170] The dumping law provides a mechanism for Commerce to beat with a stick American companies that import foreign products.

Commerce employees views finding a dumping margin as "winning a case." And since Commerce is judge, jury, and executioner, the agency almost never loses.[171] While imposing vast burdens and daunting deadlines on respondents, Commerce disregards its own obligation to be consistent in its own rulings. Commerce claims a prerogative to change the methodology by which it judges the fairness of foreign prices at any time — even retroactively. In a *Federal Register* notice on a review of a dumping order on barium chloride from China, Commerce observed, "Neither the law nor the Commerce Regulations compel us to use precisely the same method of determining foreign market value as that used in the original investigation or a previous administrative review."[172] In a case on forklift trucks from Japan, Commerce declared that it is important for the Department not to get bogged down by making too many explicit rules to govern its own conduct of an investigation: "If the rulemaking process were followed, the Department would be obligated to apply a 'rule' once made.... Such a requirement would

unduly restrict the ability of the Department to carry out the intent of Congress."[173] In other words, Commerce needs to be able to change the rules of the game at any time in order to assure that the right side wins. In a notice on Japanese televisions, Commerce noted, "We note further that our reviews are not subject to the Administrative Procedures Act. Consequently, as we have stated elsewhere, we need not apply changes in methodology only on a prospective basis."[174] The Administrative Procedures Act is the federal law that provides for due process for people involved in administrative law proceedings. By stressing the fact that antidumping investigations are exempt from this safeguard, Commerce flaunts the fact that there are few restraints on its power over foreign companies.

Congressmen routinely lobby Commerce Department officials, urging them to find dumping margins and impose penalties on foreign companies. Since Congress controls the Commerce Department's annual budget, congressional intervention is a serious matter.

Commerce officials sometimes make their biases blatant. In a 1991 speech, Marjorie Chorlins, Deputy Assistant Secretary of Commerce for Import Administration, thanked the American Wire Producers Association (AWPA) in early 1991 for their frequent use of the antidumping law against wire imports and declared, "The partnership which the AWPA and Import Administration have enjoyed over the past ten years has been active and rewarding."[175] Commerce Secretary Robert Mosbacher in 1989 described himself as "the advocate for U.S. business in the [Bush] Administration."[176] Mosbacher is the highest "judge" in the Commerce Department in dumping cases. Since the judge has proudly declared his bias in favor of U.S. businesses, it is not surprising that dumping investigations are often a kangaroo court.

At times it appears that one goal of dumping law is to end the U.S. trade deficit by engineering large transfers of money from foreign companies to American lawyers. Roy Denman, chairman of the European Community delegation in Washington, complained to Secretary Mosbacher in a February 2, 1989 letter on the antifriction

bearings case, "Most attorneys to whom we have spoken believe that the frequent changes in approach by [Commerce] has led to legal and accounting fees double those that would have been incurred if the case had been managed more efficiently."[177] *South* magazine recently noted, "In a recent case against Ecuadoran flower growers, the cost of hiring lawyers to fight anti-dumping and anti-subsidy charges was not only far greater than one grower's US $5,000 in annual net profits, it exceeded the total value ($60,000) of Ecuador's contested flower exports to the U.S., says Jorge Landivar, commercial counsellor at the Ecuadoran embassy in Washington."[178] Colombian flower growers have paid more than $1 million in legal expenses since 1987 to finance their defense against Commerce's dumping investigation.[179]

THE ECONOMICS OF DUMPING

The dumping law provides potential price controls over every imported product. What is the economic rationale for this government intervention?

Commerce declared in a 1985 *Federal Register* notice, "We believe that the antidumping duty law is intended to remedy situations in which a foreign producer accepts a lesser return on his US sales than on his home market sales."[180] In a report on the dumping law, Commerce stated, "Ultimately, one is attempting to answer the question: what is the per-unit profit differential between the merchandise actually sold in the U.S. market and the merchandise actually sold in the foreign market?"[181] According to a Commerce Department magazine, dumping "may result in lower prices to the United States — at least temporarily — but [it] represents artificial and *uneconomic competition* that disrupts the fair operation of a free market economy."[182] [italics added]

But rather than "uneconomic competition," dumping is simply price differentiation between national markets — charging different prices in different places on Earth. As the GAO noted in 1979, "Dumping can be inadvertent or the result of rational business decisions to introduce a new product, test a new market, or reduce surplus or outdated inven-

tory."[183] According to Commerce's rules, it is "uneconomic competition" if a foreign company makes a profit of 7.97% on its American sales, but "economic competition" if the company makes a profit of 8.01%. It is "uneconomic competition" if a foreign company uses part-time workers and "economic competition" if the company uses full-time employees.

The basic premise of dumping law — that it is a crime for a company to sell the same product for two different prices in two different markets 15,000 miles apart — is an economic absurdity. Price differentials usually prove nothing except that prices are different. If a businessman sold ice cream to Eskimos and to people on a tropical island — and the people on the tropical island willingly paid more — does that mean the businessman is unfairly dumping the ice cream on the Eskimos because he is selling to them at a lower price? Are the Eskimos harmed by the price differential between the arctic and the tropics? If a businessman charges higher prices in New York than in Kansas, does that prove he is trying to bankrupt every competing business in Kansas and achieve a monopoly?

Commerce feels compelled to prevent "situations in which a foreign producer accepts a lesser return on his U.S. sales than on his home market sales." Dumping law implicitly assumes that businesses are selling for less than they could — that companies are losing profits because they are selling in the U.S. for less than they may be selling in the home market. But foreign companies often must either sell at prices prevailing in the U.S. market or abandon exporting. The real question is, at what price can a foreign company maximize its profits in the U.S. market? Commerce officials, with a static world view derived perhaps from reading too many *Federal Register* notices, focus on whether a foreign company makes an 8 percent profit on each sale. Companies set prices to maximize their profits on the total volume sold, not to squeeze the maximum profit out of each sale. (Admittedly, the American automobile industry may be an exception to this rule.)

Dumping law presumes that the American economy is so sensitive that minuscule price differences between American and foreign prices

can cause an economic earthquake that will level competing American industries. Dumping law presumes that if prices are different, the locale where prices are lower is somehow automatically harmed. But as economist Gottfried Haberler noted in 1936, "The effects upon the importing country of imports which are cheap because they are dumped are in no way different from those of imports which are cheap for some other reason."[184] The fact that prices on different continents are different usually has no impact on anything except the imagination of politicians and bureaucrats. Economist Michael Knoll notes, "The ability of foreign firms to charge low prices in the United States is not likely to be affected by their opportunities to charge high prices in other markets.... The price the foreign producer charges in the export market depends only on marginal delivered cost and demand conditions in the U.S. market."[185]

And what about dumping cases where foreign producers are allegedly selling below cost of production? Although most convictions on cost-of-production issues are the result of Commerce's slanted methodology rather than foreign business practices, it is likely that some foreign companies do occasionally sell below price.

Selling at below cost of production can be rational behavior, especially for Third World countries. John Stuart Mill observed in 1842, "We may often, by trading with foreigners, obtain their commodities at a smaller expense of labor and capital than they cost to the foreigners themselves. The bargain is still advantageous to the foreigner, because the commodity which he receives in exchange, though it has cost us less, would have cost him more."[186] A nation may have a great comparative advantage in the production of some item, with little ability to produce a second item that it desperately needs. Economists Leland Yeager and David Tuerck observed, "The production of one good to exchange for another is an alternative method of producing the second commodity."[187] Especially for small, relatively backward nations, the advantages of trade with advanced countries often far surpasses the difference in prices between their home and foreign markets. It is rational to sell a product for 5 percent below cost of production if, by

doing so, you can purchase another product for 50 percent less than it would cost you to produce it. If a country is selling flowers at a loss in order to buy spare parts for its oil rigs, vital to preserving its energy supply, then it is acting rationally.

There are two sides to every trade equation — what is sold, and what is bought. Dumping law presumes that what is sold is all that matters. Assume a Mexican farmer sells five cows to a Texan for $8,000. Commerce applies a formula which shows that, counting the imaginary wage the farmer did not pay himself, the wage the farmer did not pay his wife, and the overhead costs that did not exist, the metaphysical, bureaucratic cost of production of five cows in Mexico is $8,500, not $8,000. Is the Mexican dumping his cows on Texas? Before judging the Mexican's sale price, we should ask, why does the Mexican sell his cows? Perhaps to buy a small Ford pickup truck to haul hay to his cattle. Essentially, Commerce is declaring that the five cows the Mexican raised are worth more than the pickup truck the Mexican wants to buy. Everyone would laugh if Commerce bureaucrats put on wizard caps and started pronouncing on the intrinsic value of computer chips versus cotton bales, hub caps versus soybeans, and cement versus lingerie. All international trade is simply modified barter. Most foreign companies do not sell in the U.S. to get dollars to have framed on the wall, but to get currency to buy products they need. Money is only a facilitator for the exchange of commodities.

Selling below cost can be almost a duty in many cases as the result of a Third World debt crisis. Many Third World nations find themselves in the same position as someone who has taken out a loan from a Mafia loan shark and must either come up with the money by Friday or have his legs broken. If a country has an option of selling a product for 10 percent less than cost of production — and thereby earning foreign currency and averting a major debt default that could cripple the nation's future — then selling below cost is self-preservation.

Selling below cost is often an illusion based on the difference in real value between the Third World country's currency and the U.S. dollar.

The Honduran government has allowed no change in the exchange rate between the Honduran lempira and the U.S. dollar in 40 years, even though Honduras has experienced perennial high inflation. Thanks largely to imbecilic government policies and currency controls, the weighted index of the real exchange rates for all sub-Saharan African nations appreciated by 75 percent between 1975 and 1984 — at the same time that African economies were collapsing and African governments were defaulting on their debts.[188] Would the Commerce bureaucrats who condemn foreign companies for price differences based on unreal exchange rates be willing to take their next four paychecks at the official exchange rate in Mexican pesos, Argentinean australs, or Brazilian cruzeiros?

Commerce Undersecretary Bruce Smart asserted in 1987 that "selling below cost by American producers in the American market is a common — and legal — practice. But selling to Americans, by American firms competing with one another does not threaten to transfer wealth and unemployment across international boundaries."[189] Smart's argument — if it covers anything — could be applied to any low-priced import. If foreigners are selling below cost, that means that they are transferring wealth to Americans — they are giving Americans a handout. Should the U.S. be so paranoid of foreigners bearing gifts? How can a foreign company give Americans money and at the same time weaken the American economy? If the net amount of capital and goods in the U.S. increases, this means more economic opportunity. The economic argument against dumping is justified solely on the grounds that dumping is a predatory behavior that means cheap prices in the short run and extortionary prices in the long run.

Dumping margins often have little or no relation to the actual prices charged by foreign companies. Most dumping margins are statistical delusions created by putting thousands or millions of largely irrelevant bits of data through the Commerce Department's blenders. This is especially clear in looking at the margins for competing companies from the same foreign country. For instance, on March 5, 1987, Commerce

ruled that, of fifteen Colombian flower growers, three had zero margins, three had dumping margins of 0.52%, one had 3.26%, one had 9.09%, one had 9.12%, one had 33.89%, and five had margins of 83.97%.[190] According to the International Trade Commission, fresh flowers prices are extremely volatile: during 1985, prices for U.S.-grown miniature carnations fluctuated by 300%, while prices for imported miniature carnations fluctuated by 267%.[191] The sharp variances in dumping margins for the Colombian companies were largely the result of the Commerce Department officials' choices of which sales transactions to use to calculate dumping margins.

If there is a vast difference in price for similar products being exported by two foreign companies, then one company is either effectively giving the product away and will soon be bankrupt, or the other company's prices are presumably so high that it is difficult to understand how it could sell anything in the U.S. With a product like flowers, where foreign companies are competing against each other as well as against U.S. producers, foreign companies have no incentive to sell at a price far below their cost of production or far below prevailing prices. And Americans have no incentive for paying a high price for Colombian flowers when competing companies offer Colombian flowers at a much lower price.

Every dumping duty is an attempt to create an artificial scarcity, to deter foreign companies from exporting,and to decrease the supply of goods on the American market in order to allow American companies to charge higher prices. Politicians measure the success of the dumping law by the number of foreign companies that are banned from the U.S. market, or are forced to sharply raise their prices here. Senator Arlen Specter declared at a 1986 Senate Finance Committee hearing on the administration of dumping laws: "I am not looking for more people to collect damages from, frankly. I am trying to stop the [foreign] goods from coming in."[192]

Dumping law encourages American companies to gamble on high legal fees to get a federal license to levy surcharges on their American

customers. Clyde Farnsworth of the *New York Times* reported on the antifriction bearings case, "The benefits for the industry getting the protection are substantial. On the basis of $2 billion a year of domestic shipments of antifriction bearings... every percentage point increase in domestic price levels would mean a $20 million rise in profits for this industry.... Since [Torrington Corp.] alleges dumping margins of as much as 50 percent, potential benefits for it alone total $250 million."[193] Shooting a few million dollars on Washington legal fees bought Torrington a lottery chance to collect hundreds of millions of dollars extra from its customers.

Arbitrary dumping penalties can devastate foreign industries. One Commerce ruling effectively wrecked the Taiwanese sweater industry. In the year after Commerce began its sweater dumping investigation, over two-thirds of all Taiwanese acrylic sweater companies closed down and thousands of workers lost their jobs.[194] Due almost entirely to Commerce's capricious methodology, dumping duties on most Taiwanese firms were set at levels almost twenty times higher than duties on most Korean firms. Dr. Philip Chen of the Taiwan Textile Federation said, "It is expected that U.S. buyers will place no more orders for [acrylic] sweaters with any Taiwan producers."[195] As a result of the dumping case, 40 million fewer acrylic sweaters were exported to the U.S. from Hong Kong, Taiwan, and Korea in 1990 than had been exported in 1989.[196]

THE PHANTOM OF PREDATORY PRICING

William Graham Sumner characterized American trade laws in the 1880s, "The protective system puts us certainly in the hands of a home monopoly for fear of the impossible chance that we may fall into the hands of a foreign monopoly."[197] Little has changed in recent years. Dumping laws are the equivalent of committing economic suicide today for fear of catching a slight cold in the distant future. The Commerce Department's "trade medicine" is more harmful than any illness it claims to prevent. Dumping laws perpetually inflate domestic prices in order

to protect consumers against the one-in-a-million possibility that a foreign company could corner the market — and raise prices.

The ultimate justification of U.S. dumping laws is to prevent foreigners from domineering the U.S. market and skewering American consumers. The specter of predatory foreign companies is repeatedly raised in order to justify preemptive first strikes against foreign competition. U.S. Trade Representative Clayton Yeutter defined "dumping" in 1987 as "a predatory pricing practice condemned under U.S. law."[198] Yeutter often asserted that the Semiconductor Arrangement was a necessary response to Japanese "predatory pricing of semiconductors" — even though the U.S. government never found any evidence of predatory behavior by Japanese semiconductor companies.[199] Congressmen perennially equate dumping with predatory behavior; Rep. Jack Brooks warned in 1987, "The life blood of free enterprise in this country is being drained by the predatory pricing of foreign companies."[200]

Predatory pricing is the great hoax of the dumping racket. Not since 1921 has U.S. law required evidence of predatory behavior to convict foreign companies of dumping; yet judges, congressmen, and U.S. trade representatives still talk as if every dumped foreign product is smoking-gun evidence of an intent to exterminate an American industry. Politicians and bureaucrats talked of the danger of predatory foreign companies, and then constructed a labyrinth of rules to penalize foreign companies for using part-time workers, for differences in corporate warranty programs in Omaha and Osaka, and for donations of TV sets to American charities.

The more widespread international competition has become, the less chance any one company or country has of cornering the world market. As Finger observes, "The customer's best defense against predatory pricing is the availability of an alternative supplier." If Japan tries to ratchet up car prices, the South Koreans and Europeans will boost their exports. If German brewers try to put the squeeze on American beer drinkers, Belgian, Canadian, and even Mexican beer companies will come to the rescue. As more nations become industrialized, it is ever less

likely that any nation can monopolize a vital industry. Judge Robert Bork observed, "Predation by such [pricing] techniques is very improbable."[201] The Supreme Court recently concluded that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."[202]

Although the fear of predation permeates dumping laws and regulations, there is no known case in the last century of any company dumping its products in a U.S. market, bankrupting American producers, and then driving up its prices and shafting American consumers for a long period. If such examples existed, they would be trumpeted far and wide.

The classic predatory dumping case — often cited by advocates of a more draconian dumping law — is the Japanese TV case. For decades, Zenith devoted its energies to persuading Congress and five U.S. presidents that Japanese TV imports were destroying the American television industry, after which American consumers would be impaled with extortionary prices. Yet, after twenty years of alleged dumping, the *coup de grace* has yet to occur. The real, inflation-adjusted price of color TVs has fallen 25.6 percent since 1971.[203] While the Japanese were responding to American consumer demand by making smaller TVs, American companies continued building large TVs that would serve as room centerpieces. While the Japanese adopted new technology and better quality control, the American companies spent their time playing politics. The dumping laws forced Japanese companies to raise their U.S. prices, thereby providing extra profits to the Japanese companies. According to a study by the Organization for Economic Cooperation and Development, the extra profits generated by Japanese TV sales in the U.S. played a major role in financing Japanese investments in videocassette recorder production.[204]

Most violations of dumping laws are crimes without a motive. If foreign companies don't intend to take over the U.S. market, what incentive would they have to perennially sell at a loss? How likely is it that Kenya, Turkey, or Colombia will successfully bankrupt all their

American competition? How can nations with little or no foreign currency reserves carry out a costly war of attrition against their American competition?

Although fear of predatory pricing was the fount of the U.S. dumping law, the list of products that have been hit with dumping duties makes a mockery of the predatory argument. Did Washington bureaucrats really believe in 1972 that Canadian companies were conspiring to dump ice cream sandwich wafers in the U.S. to destroy their American competition?[205] And what good would it do to corner the ice cream sandwich wafer market anyhow? If the Canadians had obliterated their U.S. competition and tripled the price of ice cream sandwich wafers, Americans would simply buy more ice cream cones and fewer ice cream sandwiches.

THE FAIRNESS ISSUE

The heart of the dumping issue is: What is fair competition? Dumping law has created a new scholasticism of fair competition. The fairness of U.S. dumping law rests almost entirely on the definition of "fair value" that is the driving engine in trade law administration and enforcement.

We have radically different definitions of "fair trade" for Americans and foreigners. Fred Smith of the Competitive Enterprise Institute says, "If our antidumping laws applied to U.S. companies, every after-Christmas sale in the country would be banned."[206] In order to achieve "fair competition," Commerce attaches handcuffs and leg irons on one of the competitors. As Horlick notes, the antidumping law "directly controls the prices at which imported goods are sold to the U.S."[207] But, there are no controls on the prices charged by U.S. companies.

Dumping law deifies prices in themselves — taking each price as a moral act. U.S. International Trade Commissioner Alfred Eckes declared that a dumping "margin reflects the unfairness of that particular company's selling practice."[208] According to Eckes's view, a difference of a hundredth of a percent in U.S. and foreign price indicates a moral deficiency on the part of a foreign company. But, the actual tests of whether a foreign company is acting fairly are a laughingstock. As one frustrated trade lawyer observed, "Where is it written that direct expenses are fair and indirect selling expenses are unfair?"

Dumping penalties can sometimes be reduced simply by a company lowering its price in its home market. If dumping is inherently evil, how can a 2 percent price decrease in the price of flowers being sold in Nairobi change an unfair Kenyan company into a fair Kenyan company? In cases where foreign companies are supposedly cheating by selling below cost of production, some foreign companies could theoretically become fair traders simply by slashing their workers' wages.

Dumping laws are designed to force foreign companies to charge Americans higher prices than American companies are allowed to charge Americans. The goal of American dumping law is to protect American companies against vigorous foreign competition. This is most evident in the 8 percent profit rule.

Commerce officials justify dumping law as a means to prevent foreign companies from charging lower prices than in their home market. But in reality, U.S. dumping law forces foreign companies to charge significantly higher prices in the U.S. than in their home market. Commerce policy declares that, to be fair, a foreign company's U.S. price must be higher than its foreign price *plus* foreign inland freight, *plus* shipping insurance, *plus* shipping costs, *plus* U.S. tariffs, *plus* any change in the exchange rate, *plus* the difference between foreign retail and U.S. wholesale prices, etc.

Dumping laws protect competitors, not competition. When Commerce talks about unfair prices, the question is, unfair to whom? And always the answer is not to the foreign company's customers, but to the foreign company's American competition. According to Commerce, a high price can never be unfair, but a low price can be unfair for any of fifty different reasons. Dumping law creates a price floor but no price ceiling.

As the U.S. government admitted in a 1988 court brief, the dumping laws exist to aid American companies.[209] Dumping law seeks to deter-

mine whether a foreign company's prices are fair to its American competitors. The dumping law exists to protect American companies against foreign companies charging low prices to American consumers. The case against dumping is based on the idea that allowing consumers to buy at the lowest prices is unfair to producers.

If U.S. policymakers are sincerely concerned about foreign dumping, one solution would be to negotiate "boomerang" clauses with foreign nations. The European Community and the European Free Trade Association have special regulations to facilitate re-export of products back to their country of origin.[210] This provision allows businessmen in export markets to capitalize on opportunities when foreign companies export products at lower prices than the products are sold for in their home market. The negotiation of a zero-tariff, automatic re-entry boomerang clause could be especially helpful in resolving tension between the U.S. and Japan over alleged Japanese dumping.

The U.S. should take the lead in the dismantling of antidumping laws. While U.S. companies have profiteered from the protection offered by antidumping laws in recent years, U.S. exports are increasingly being buffeted by foreign antidumping regimes. Twenty-four nations now have antidumping laws, and U.S. exports were hit by 144 antidumping investigations in the 1980s.[211] Mexico recently launched four antidumping investigations against U.S. steel exports.[212] Each year, more nations are erecting their own antidumping laws and fair trade bureaucracies.

CONCLUSION

In the halls of the federal bureaucracy, low prices have become conclusive proof of malevolent intent. The more precise dumping law tries to be, the more absurd it has become. The more complex the rules have become, the less fairness remains in dumping investigations. The dumping law was created to prevent foreigners from treating Americans unfairly; it has instead become a license for American officials to act unfairly toward foreigners. The dumping law has become a multibillion

dollar game of Trivial Pursuit — gone from a concern over foreigners taking over the U.S. market, to an obsession with depreciation of neon signs, raspberry freezing costs, and measuring costs that don't exist.

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6

THE SPECTER OF FOREIGN SUBSIDIES

U.S. trade policy acts as if every handout given to a foreign business is automatically a stab in the back to a competing American corporation. Foreign subsidies have long been a prime hobgoblin of American protectionists. Rep. Thomas Hartnett warned in 1986, "Foreign governments, through the introduction of subsidies, rebates, and other economic incentives have made fair competition an impossibility."[1] According to Gary Hufbauer and Joanna Erb of the Institute for International Economics, "Unbridled and competing national subsidies can undermine world prosperity."[2]

The case for retaliating against foreign subsidies is, at first glance, stronger than the case for penalizing foreign companies for differential pricing or low profits. Yet the United States is the only nation in the world that is obsessed with foreign governments' aid to business. As Michael Finger and Julio Nogues of the World Bank observe, "The subsidies-countervailing duties issue is not a multilateral issue but a bilateral issue with the United States on one side and its trading partners on the other."[3] The U.S. government has imposed more penalties on subsidized imports than have all other governments in the world combined.

The U.S. imposes countervailing duties (CVDs) on imported products that allegedly benefitted from government subsidies. The CVD is supposed to isolate the U.S. from the effect of a foreign subsidy, thereby preventing foreigners from cornering the American market.