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“Unfair” Trade Injury: A Competition-Based Approach

Diane P. Wood*

I. INTRODUCTION

Americans like to believe that they believe in competition, whether on the playing field, at the factory, in the boardroom, or in the classroom. The most ringing affirmation of that belief in the American legal system is the Sherman Antitrust Act of 1890,¹ which the Supreme Court once described as the “Magna Carta of free enterprise.”² The free enterprise competitive system is so important that the Court has repeatedly stressed that the antitrust laws protect “competition, not competitors.”³ If an individual firm loses market share, or even goes out of business, because others have bested it in a fair fight, this is a sign that the system is working as it should. In the end, everyone benefits from this system: Consumers benefit from the greatest selection of goods and services at the lowest prices, and producers benefit from the efficient production methods and the incentives to innovate inherent in a competitive marketplace.

The antitrust laws are not, however, the only U.S. statutes that regulate competition. My immediate topic is the other principal set of competition laws, known loosely as the trade statutes.⁴ When the

* Professor of Law, The University of Chicago Law School. I gratefully acknowledge the support for this research provided by the Kirkland & Ellis Faculty Research Fund and the Sonnenschein Fund. I also thank Frank Easterbrook and Alan Sykes for their thoughtful comments on an earlier draft.

1. 15 U.S.C. §§ 1-7 (1982).

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

3. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *see also* *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 115 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

4. The phrase “trade statutes” usually encompasses a number of related laws, all of which regulate the terms of international trade in one way or another. The Tariff Act of 1930, (the infamous Smoot-Hawley Act), as amended, contains provisions that authorize additional tariffs whenever a foreign producer engages in “dumping”—selling at a lower price in the United States than in the home market—or whenever the foreign product enjoys governmental subsidies that confer some kind of international trading advantage. *See* 19 U.S.C. §§ 1303, 1671a-1671h, 1673a-1673g, 1677 (1982 & Supp. IV 1986). Injury to the domestic industry is usually a prerequisite for antidumping or countervailing duties. For a general description, *see* JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* § 10.2 (dumping), § 10.3 (subsidies and countervailing duties) (2d ed. 1986). The Trade Act of 1974 also contains several important provisions. The so-called escape clause (section 201 of the 1974 Act) permits the imposition of duties when imports have increased dramatically over a relatively short period of time, thereby causing serious injury to the do-

competition at issue takes the form of imports from foreign producers, a curious amnesia about the virtues of the competitive process seems to afflict many observers. Among members of the bar whose practice includes both antitrust and trade cases, it has become the accepted wisdom that there is an irreconcilable conflict between the antitrust laws, with their consumer welfare orientation, and the trade statutes, with their producer or labor orientation.⁵ As Paula Stern, a former Commissioner on the United States International Trade Commission, put it:

Implicit in our trade law is the notion that U.S. workers and businesses should compete on the basis of comparative advantage, but they should not have to adjust to unfairly traded goods. Consumers are expected to forgo the savings resulting from dumping or subsidies in the interests of producers of the product.⁶

mestic industry. See 19 U.S.C. §§ 2251-2253 (1982 & Supp. IV 1986) (described more fully in J. JACKSON & W. DAVEY, *supra*, at §§ 9.2-9.3). Section 406 of the 1974 Act, 19 U.S.C. § 2436 (1982), operates as a similar mechanism to protect U.S. industries from greatly increased imports from Communist countries. Section 337 of the Tariff Act of 1930, as amended, prohibits unfair methods of competition and unfair acts in connection with importation, and is frequently used to protect intellectual property rights. See 19 U.S.C. §§ 1337-1337a (1982 & Supp. IV 1986); see also Tariff Act of 1930, § 526, 19 U.S.C. § 1526 (1982) (making it unlawful for a foreign party to import a good bearing a trademark registered by a U.S. party into the United States). Finally, unfair trade practices may be attacked under the general authority of section 301 of the 1974 Act. See 19 U.S.C. §§ 2411-2416 (1982 & Supp. IV 1986). See generally J. JACKSON & W. DAVEY, *supra*, at § 10.5 (describing retaliatory actions possible under section 301). The trade laws were recently amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1107 (signed on August 23, 1988).

The 1988 Omnibus Act made extensive changes to section 301 of the 1974 Act, in an attempt to strengthen the U.S. response to certain foreign trade practices. See *id.* § 1301, 102 Stat. 1164-76. It also spelled out in more detail the protection conferred by section 337 of the Tariff Act of 1930, and it eliminated a requirement that the injured U.S. industry had to be efficiently and economically operated. See *id.* § 1342, 102 Stat. 1212-16. Section 201 of the 1974 Act was rewritten to emphasize the process of adjustment to import competition. See *id.* § 1401, 102 Stat. 1225-41. Finally, the 1988 Omnibus Act contained a number of "improvements" for the enforcement of the antidumping and countervailing duty laws. See *id.* §§ 1311-1337, 102 Stat. 1184-1211. Although these amendments do not, for the most part, affect the argument of this article, they are referred to below where pertinent.

5. See, e.g., Harvey M. Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, 56 ANTITRUST L.J. 409 (1987); Thomas R. Howell, *Foreign Cartels and American Competitiveness*, in INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE § 16 (J. Jackson, R. Cunningham & C. Fontheim eds. 1985); Daniel Oliver, *Federal Trade Commission Antitrust Policy in International Trade*, in UNITED STATES AND COMMON MARKET ANTITRUST POLICIES 1 (B. Hawk ed. 1987); Jon Paugh, *Antitrust Principles and U.S. Trade Laws: A Review of Current Areas of Conflict*, 12 LAW & POL'Y INT'L BUS. 545, 562-610 (1980); *Task Force Report on the Interface between International Trade Law and Policy and Competition Law and Policy*, 56 ANTITRUST L.J. 463 (1987); A. Paul Victor, *Antidumping and Antitrust: Can the Inconsistencies Be Resolved?* 15 N.Y.U. J. INT'L L. & POL. 339 (1983). But see Barbara Epstein, *The Illusory Conflict Between Antidumping and Antitrust*, 18 ANTITRUST BULL. 1 (1973) (arguing that dumping occurs mainly when the exporting country has internal restraints on trade and antidumping laws thus serve as extensions of antitrust laws); Jeffrey L. Snyder, *International Competition: Toward a Normative Theory of United States Antitrust Law and Policy*, 3 B.U. INT'L L.J. 257, 309-16 (1985) (arguing that trade regulation should focus on competition rather than troubled industries, by emphasizing adjustment assistance as the remedy for fairly traded imports and aggressively "blocking" unfair imports, with bilateral agreements that cement an international competition regime).

6. Paula Stern, *New Directions for the Trade Laws*, 18 GEO. WASH. J. INT'L L. & ECON. 709,

Underlying this statement are two fundamental premises about the trade statutes: first, that there are such things as "unfairly" traded goods (primarily those that have been "dumped" or "subsidized"), and second, that producer welfare may take precedence over consumer welfare if producers have suffered from unfair trade. For the sake of argument, this article will accept Stern's first premise.⁷ The second premise, however, is far too simplistic. How readily should we, or must we, sacrifice consumer welfare in the name of producer welfare? When should we conclude that producers have been injured in the legal sense by unfair competition, and when should we conclude that they simply lost the competitive battle or were forced to abandon monopoly pricing (also undoubtedly an "injury")? Not only are the answers to these questions largely missing in conventional writing about the trade laws, but the questions themselves have been ignored.

In this article, I suggest a new way of viewing the injury requirement in our two principal unfair trade laws: the sections of the Tariff Act authorizing antidumping and countervailing duties. The proposed system respects the congressional decision that dumping and subsidization are unfair methods of trade and also interprets the injury requirement in both statutes in an economically reasonable way. I draw freely on antitrust thinking; many of these issues have been closely scrutinized in the antitrust and industrial organization literature. Without in any way denying that there is some tension between the trade statutes and the antitrust statutes, I argue that the conflicts need not be as great as some writers imply. The insights that originally appeared in antitrust theory would improve the administration of the existing unfair trade laws by striking a better balance between the protection of legitimate producer interests and the enhancement of consumer welfare.

713 (1985). See also the court's discussion of this point in *USX Corp. v. United States*, 682 F. Supp. 60, 67, 10 I.T.R.D. (BNA) 1016, 1021 (Ct. Int'l Trade 1988).

7. There is widespread political consensus that certain international trade practices are unfair, though there is little economic consensus supporting that proposition. The contents of the recently passed 1988 Omnibus Act demonstrate the strength of the political support for the unfair trade laws. See Paul Dymock & Donna Vogt, *Protectionist Pressures in the U.S. Congress*, 17 J. WORLD TRADE L. 496 (1983). I accept the premise of unfair trade for a practical reason: I think it unlikely to the vanishing point that the antidumping and countervailing duty laws will be repealed any time soon. This does not mean, however, that the laws must be administered in the most economically foolish way. As others have recognized, much can and should be done to rationalize enforcement. See, e.g., Oliver, *supra* note 5; Douglas E. Rosenthal, *Antitrust Implications of the Canada-U.S. Free Trade Agreement* 57 ANTITRUST L.J. 485 (1988). This article points out some significant steps that can be taken. I should note, however, that many people go further and argue that nothing short of repeal can cure the problems with the antidumping and the countervailing duty laws. See, e.g., John J. Barceló III, *Subsidies, Countervailing Duties and Antidumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257, 281, 286 (1980); John J. Barceló III, *The Antidumping Law: Repeal It or Revise It*, 1 MICH. Y.B. INT'L LEGAL STUD. 53 (1979); Wesley K. Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 LAW & POL'Y INT'L BUS. 681 (1981); George Kleinfeld, *A Critical Evaluation of U.S. Fair Trade Policy*, 18 VAND. J. TRANSNAT'L L. 515 (1985); J.A. Ordovery, A.O. Sykes & R.D. Willig, *Unfair International Trade Practices*, 15 N.Y.U. J. INT'L L. & POL. 323 (1983); Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199 (1989).

II. THE ANTIDUMPING AND COUNTERVAILING DUTY LAWS

The most important statutes addressing unfair trade are the antidumping and countervailing duty laws, which are concerned respectively with international price discrimination and foreign government subsidization.⁸ Other statutes exist that are more frankly protectionist; they limit import competition for domestic producers without even the justification that the foreign competitors are doing something wrong.⁹ The terms of debate concerning protection from fairly traded imports are understandably quite different from those concerning unfair trade. Not surprisingly, more disruption to U.S. interests must be shown before measures will be taken against fair trade, and a greater degree of executive discretion tempers those laws even further. Unfair trade, in contrast, is an easy target. The "playing field," one hears constantly, should be "level."¹⁰ The clear implication is that whenever something that has been dubbed an "unfair trade practice" is occurring, a country is justified—perhaps even compelled—to take measures against that practice. In this part of the article, I review briefly the history of the United States antidumping and countervailing duty laws, to set in context the conventional assumption that dumping and subsidization are unfair practices, and to highlight the role that injury to U.S. industry has played in the administration of the laws.

A. *The Statutes*

1. *The Antidumping Act of 1921.*

Between 1921 and 1979, the principal U.S. statute directed against international price discrimination was the Antidumping Act of 1921.¹¹

8. See note 4 *supra*. Private parties may also use the Revenue Act of 1916 to challenge dumping. See 15 U.S.C. § 72 (1982). The 1988 Omnibus Act amended sections 337 and 337a of the Tariff Act of 1930 (codified as amended at 19 U.S.C. § 1337 (1982 & Supp. IV 1986)) to eliminate the requirement that the complaining firm must prove that it was efficient. See Omnibus Trade and Competitiveness Act of 1988, § 1342, Pub. L. No. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1212. For discussion of these and other more specialized laws concerned with unfair trade, see generally J. JACKSON & W. DAVEY, *supra* note 4, at § 10.4.

9. E.g., Trade Act of 1974 § 201, 19 U.S.C. §§ 2251-2253 (1982 & Supp. IV 1986) (the escape clause); *id.* § 406, 19 U.S.C. § 2436 (1982) (the market disruption provisions).

10. See, e.g., JOHN H. BARTON & BART S. FISHER, *INTERNATIONAL TRADE AND INVESTMENT: REGULATING INTERNATIONAL BUSINESS* 168 (1986); HOUSE COMM. ON WAYS AND MEANS, REPORT ON TRADE AND INTERNATIONAL ECONOMY POLICY REFORM ACT OF 1987, H.R. REP. NO. 40, 100th Cong., 1st Sess., pt. 1, at 467 (1987) (dissenting views of Hon. Philip Crane).

11. Pub. L. No. 67-1, ch. 14, tit. II, 42 Stat. 11 (1921) (codified as amended at 19 U.S.C. §§ 160-171 (1976) (repealed 1979)). The Revenue Act of 1916 was of course on the books, but it was seldom used. It provides in part that

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale

It was directed against the practice of selling goods in the United States market at a price lower than in the home market, known as selling for less than fair value ("LTFV"). The statute did not require that the U.S. selling price fall below any commonly accepted measure of cost. The 1921 Act provided only for an administrative remedy against proven price discrimination, in the form of a tariff in the amount of the "margin of dumping" that the Department of the Treasury determined to exist. The margin was defined as the difference between the foreign manufacturer's price for home sales and its price for U.S. sales, measured on an *ex factory* basis in the home market and adjusted as required for differences in circumstances of sale and the like. It was not enough, however, to prove that dumping was taking place and to demonstrate by what margin. The Treasury also had to find that a U.S. industry was being or was likely to be injured, or was prevented from being established, by reason of the importation into the United States of the unfairly traded goods.

The 1921 Act reflected a general international consensus that dumping was an unfair trade practice. In 1947, this consensus was codified in Article VI of the General Agreement on Tariffs and Trade ("GATT"), which forthrightly states that:

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.¹²

Article VI goes on to elaborate on the meaning of "less than the normal value" and to state that countries are entitled to impose offsetting tariffs on dumped products. Later efforts in the GATT, including the 1967 Antidumping Code and the 1979 Agreement on the Implementation of Article VI, have carried forward the notion that dumping is an unfair practice while also trying to prevent the abuse of antidumping duties as unjustifiable impediments to international trade.¹³

thereof in the United States; *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

15 U.S.C. § 72 (1982). The need to prove what amounts to predatory pricing and the high standard of harm have made the law nearly a dead letter. For a discussion of the 1916 Act, see Kermit W. Almstedt, *International Price Discrimination and the 1916 Antidumping Act—Are Amendments in Order?*, 13 LAW & POL'Y INT'L BUS. 747 (1981).

12. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5-6, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 194 (effective Jan. 1, 1948), as amended, T.I.A.S. No. 1890 at 5 [hereinafter GATT]. For a general discussion of the practice of dumping, see JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* ch. 16 (1969); JACOB VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (1923).

13. The 1967 Antidumping Code, although adopted by the Contracting Parties to the GATT, was never fully embraced by U.S. trade authorities. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, July 1, 1968, 19 U.S.T.

2. *The Trade Agreements Act of 1979*

As part of its overall effort to implement in U.S. domestic law the results of the 1979 Tokyo Round of Multilateral Trade Negotiations, Congress enacted the Trade Agreements Act of 1979, which comprehensively revised the laws regulating dumping.¹⁴ The 1979 Act added a new Title VII to the Tariff Act of 1930, Subtitle B of which concerned the imposition of antidumping duties. Like the 1921 Act, Title VII(B) requires the administering authority to find that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value."¹⁵ An LTFV sale exists whenever the foreign market value exceeds the U.S. price for the merchandise. Since 1979, the administering authority has been the Department of Commerce, whose International Trade Administration is responsible for both the antidumping and the countervailing duty laws. Title VII(B) also requires a finding of injury to the affected U.S. industry, but unlike the 1921 Act, which did not further define the term "injury," Title VII(B) calls for a determination by the independent International Trade Commission (ITC) that:

- (A) an industry in the United States—
 - (i) is *materially* injured, or
 - (ii) is threatened with material injury, or
 - (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation
-¹⁶

4348, T.I.A.S. No. 6431, GATT BISD Supp. (No. 15), at 24 (1968). On the U.S. position, see Robert E. Hudec, *United States Compliance with the 1967 GATT Antidumping Code*, 1 MICH. Y.B. INT'L LEGAL STUD. 205 (1979).

The 1979 Antidumping Code is formally known as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650, GATT BISD Supp. (No. 26), at 171 (1980).

14. See Trade Agreements Act of 1979, § 2, Pub. L. No. 96-39, 93 Stat. 144, 147-48 (codified at 19 U.S.C. § 2503 (1982)). The 1979 Act specifically provides that "the Congress approves the trade agreements described in subsection (c) submitted to the Congress on June 19, 1979." 19 U.S.C. § 2503(a). The subsection (c) list includes, *inter alia*, the 1979 Antidumping Code and the 1979 Subsidies and Countervailing Duties Code.

The 1979 Act has been discussed widely. See, e.g., Peter D. Ehrenhaft & Charlotte G. Meriwether, *The Trade Agreements Act of 1979: Small Aid for Trade?*, 58 TULANE L. REV. 1107 (1984); Terrence Roche Murphy, *Antidumping and Countervailing Duties Under the Trade Agreements Act of 1979: A Preliminary Analysis*, 14 INT'L LAW. 203 (1980). See generally JOHN JACKSON, JEAN-VICTOR LOUIS & MITSUO MATSUSHITA, *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* (1984); ANDREAS F. LOWENFELD, *PUBLIC CONTROLS ON INTERNATIONAL TRADE* §§ 7.4-7.6 (2d ed. 1983).

The 1979 Act has itself been amended substantially on two occasions, first by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (codified in scattered sections of 19 U.S.C.), and then by the Omnibus Trade and Competitiveness Act of 1988 §§ 1311-1337, Pub. L. No. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1184-1211.

15. Trade Agreements Act of 1979 § 731(1), 19 U.S.C. § 1673(1) (1982).

16. *Id.* § 731(2), 19 U.S.C. § 1673(2) (1982 & Supp. IV 1986) (emphasis added). The language following the phrase "by reason of imports of that merchandise" was added by the Trade and Tariff Act of 1984 § 602(b), Pub. L. No. 98-573, 98 Stat. 3024.

Without an ITC finding of material injury, threat of material injury, or material retardation of establishment, no antidumping duty may be imposed.

Material injury is defined in the statute as "harm which is not inconsequential, immaterial, or unimportant."¹⁷ The definitional section then continues with exhaustive instructions on what the ITC must consider as it attempts to implement this rather circular standard,¹⁸ which was expanded in the 1988 Omnibus Trade and Competitiveness Act.¹⁹

The most important distinction in the statute is that between actual material injury and the threat of material injury. In cases of actual material injury, the Commission is directed to consider the volume of the subject imports, the effect of the imports on prices in the United States for like products, and the impact of the imports on domestic producers of like products, "but only in the context of production operations within the United States."²⁰ The Commission may also consider other factors, if it identifies them and explains their relevance. As the Commission evaluates volume effects, it must decide whether the volume of imports or any increase in that volume (either absolute or relative) is significant. With respect to price, it must consider whether the import prices have been set at levels significantly below the prices of the comparable U.S. products,²¹ and whether the imports have significantly depressed U.S. prices or prevented price increases. Finally, in examining

17. Trade Agreements Act of 1979 § 771(7), 19 U.S.C. § 1677(7) (1982).

18. For discussion of issues relating to determinations of material injury and threat of material injury, see, e.g., Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series # 8: Recent Developments Regarding Antidumping and Countervailing Duty Injury Determinations*, 20 INT'L LAW. 689 (1986); Paul W. Jameson, *Recent International Trade Commission Practice Regarding the Material Injury Standard: A Critique*, 18 LAW & POL'Y INT'L BUS. 517 (1986); N. David Palmeter, *Injury Determinations in Antidumping and Countervailing Duty Cases—A Commentary on U.S. Practice*, 21 J. WORLD TRADE L. 7 (1987); William E. Perry, *Administration of Import Trade Laws by the United States International Trade Commission*, 3 B.U. INT'L L.J. 345 (1985); Michael S. Knoll, *An Economic Approach to the Determination of Injury Under the United States Antidumping and Countervailing Duty Law* (Nov. 2, 1988) (unpublished manuscript) (on file with the *Stanford Law Review*).

19. See Omnibus Trade and Competitiveness Act of 1988 § 1328, Pub. L. No. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1205-06 (to be codified at 19 U.S.C. §§ 1677(7)(B), (C)). The amended statute makes it clear that the enumerated factors must be considered by the Commission, both by deleting language indicating that they were simply "among other factors" and by adding a requirement that the Commission explain its analysis of each factor listed under clause (i) of section 771(7)(B) (i.e. volume of imports, effect of imports on prices in the United States, and impact on domestic producers). The amended statute has new language permitting the Commission to consider other factors, in section 771(7)(B)(ii). The Commission is required to identify each additional factor considered and to explain in full its relevance to the determination.

The 1988 Omnibus Act also adds a new factor to section 771(7)(C) that the Commission must take into account in assessing the impact of imports on the domestic industry. New subpart (IV) lists the "actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product."

20. See *id.* § 1328(1), 102 Stat. 1205.

21. See *id.* § 1328(2), 102 Stat. 1205 (changing the terminology for price effects from "price undercutting" to "price underselling").

the impact of the imports on the affected industry, the Commission must "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States." The statute specifically mentions "actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity," "factors affecting domestic prices," "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment," and "actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product."²² For cases involving a threat of material injury, a special list of nine factors was added to the statute in 1984 and 1988.²³ The separate list supplements the ordinary indicia of injury because threat cases require a prediction about the industry's future precisely when the normal factors do not indicate injury.

Finally, since 1984 the Commission has been required by statute to "cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation."²⁴ The Commission looks at a variety of factors in performing this task, including the degree of fungibility of the products, common or similar channels of distribution, whether the prices of the imports and the domestic product are within a reasonable range, and whether the imports are simultaneously present in the market.²⁵ Notably, fairly traded imports

22. Trade Agreements Act of 1979 §§ 771(7)(A)-(C), 19 U.S.C. §§ 1677(7)(A)-(C) (1982) (as amended by the 1988 Omnibus Act § 1328, 102 Stat. 1205-06).

23. See Trade and Tariff Act of 1984 § 612(F), 19 U.S.C. § 1677(7)(F) (Supp. IV 1986); 1988 Omnibus Act § 1326, 102 Stat. 1204 (adding factor nine to the list that follows). The Commission was directed to consider these factors, "among other relevant economic factors," in any threat of material injury case. The factors are: (1) the nature of any subsidy involved, and whether it is inconsistent with the 1979 Subsidies Code; (2) increases in productive capacity, or unused capacity, in the exporting country, likely to result in significant increases of imports to the United States; (3) rapid increases in U.S. market penetration; (4) the probability that imports will have "a depressing or suppressing effect on domestic prices"; (5) substantial increases in inventories in the United States; (6) the presence of underutilized capacity in the exporting country; (7) "any other demonstrable adverse trends" indicating likelihood of actual injury; (8) the potential for product-shifting from products either subject to antidumping or countervailing duties, or under investigation, to the products under investigation, and (9) in investigations involving both raw agricultural products and processed products, the likelihood that there will be increased product shifting if there is an affirmative injury finding for one industry but not the other.

24. See 19 U.S.C. § 1677(7)(C)(iv) (Supp. IV 1986) (added by the Trade and Tariff Act of 1984 § 612(a)(2)(A), Pub. L. No. 98-573, 98 Stat. 3033). The 1988 Omnibus Act, § 1330, 102 Stat. 1206-07, added language making it clear that the investigations of the products could be under either the countervailing duty laws or the antidumping laws; there is no need to match dumped goods from Country A to dumped goods from Country B. Cumulation is required if an antidumping investigation of widgets from Country A is taking place at the same time as a countervailing duty or an antidumping investigation of widgets from Country B is taking place, subject only to the Commission's power to disregard imports that are "negligible and have no discernable adverse impact on the domestic industry."

25. See, e.g., *Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan, Turkey, and Yugoslavia*, USITC Pub. 1742, Inv. Nos. 701-TA-251-253 (Preliminary) (Aug. 1985) & USITC Pub. 1839, Inv. Nos. 731-TA-271-274 (Final) (Apr. 1986); *Certain Steel Wire Nails*

do not in theory enter the calculus.²⁶

In assessing actual fact situations under the statute, most members of the Commission follow a two-step procedure: Step one involves deciding whether or not the U.S. industry is experiencing material injury, and step two asks whether that injury is caused by the unfairly traded imports.²⁷ It is therefore possible to say that healthy U.S. industries rarely, if ever, succeed in persuading the Commission to make an affirmative finding of injury, even if they might have been even more robust without the import competition. On the other hand, factors such as declining production figures, plant closings, declining capacity utilization, and reduced demand for workers are typical indicia of an industry suffering "material injury."²⁸

In general, it is not too difficult to identify distressed industries using these criteria. The Commission's difficulties, and the disagreements among the Commissioners themselves, have arisen over the way in which causation must (or can) be demonstrated. One approach is simply to look at all the factors, such as the overall volume of imports, concrete evidence that the unfairly traded imports have "undersold" the competing U.S. products, the trend in import penetration, and the temporal relationship between the economic condition of the U.S. industry and import movements. Even these factors, however, can be misleading. For example, while a high volume of dumped imports may appear to be strong evidence of the necessary link, the converse is not true: In some industries, an apparently small volume of imports may have a significant impact.²⁹ Lost sales evidence is rarely collected with scientific rigor, and there are obvious difficulties in resting findings on anecdotal evidence.

from the People's Republic of China, Poland, and Yugoslavia, USITC Pub. 1730, Inv. Nos. 731-TA-266-268 (Preliminary) (July 1985).

26. This is clear from the Court of International Trade's decision in *USX Corp. v. United States*, 682 F. Supp. 60, 72, 10 I.T.R.D. (BNA) 1016, 1026 (Ct. Int'l Trade 1988), in which the court had to determine "when may imports be considered 'unfairly traded' so that they may be considered as candidates for cumulation analysis?" The court's discussion makes it clear that fairly traded imports may not be the basis of a finding of injury.

27. See, e.g., *Stainless Steel Pipes and Tubes from Sweden*, USITC Pub. 2033, Inv. No. 731-TA-354 (Final), 10 I.T.R.D. (BNA) 1374, 1378-80 (Nov. 1987); *Oil Country Tubular Goods from Canada and Taiwan*, USITC Pub. 1865, Inv. Nos. 701-TA-255 (Final) & 731-TA-276, -277 (Final), 9 I.T.R.D. (BNA) 1051 (June 1986). But see *id.* at 1054 n.18 (noting Chairwoman Stern's disagreement with the separation of injury and causation); *Additional Views of Chairwoman Stern in Cellular Mobile Telephones and Subassemblies Thereof from Japan*, USITC Pub. 1786, Inv. No. 731-TA-207 (Final), 8 I.T.R.D. (BNA) 1223, 1231 (Dec. 1985).

28. See, e.g., *Industrial Phosphoric Acid from Belgium and Israel*, USITC Pub. 2000, Inv. Nos. 701-TA-286 (Final) & 731-TA-365, -366 (Final), 10 I.T.R.D. (BNA) 1029 (Aug. 1987); *Malleable Cast-Iron Pipe Fittings from Thailand*, USITC Pub. 2004, Inv. No. 731-TA-348 (Final), 10 I.T.R.D. (BNA) 1037 (Aug. 1987); *Photo Albums and Filler Pages from Hong Kong and Korea*, USITC Pub. 1784, Inv. Nos. 731-TA-240, -241 (Final), 8 I.T.R.D. (BNA) 1217 (Dec. 1985); *Choline Chloride from Canada*, USITC Pub. 1595, Inv. No. 731-TA-155 (Final), 7 I.T.R.D. (BNA) 1273 (Oct. 1984).

29. See *Industrial Phosphoric Acid from Belgium and Israel*, 10 I.T.R.D. at 1035 (citing the legislative history of the 1979 Trade Agreements Act).

For these and related reasons, some Commissioners have experimented in recent years with a more structured approach to causation. In *Certain Red Raspberries from Canada*,³⁰ then Vice Chairman Liebeler proposed a five-factor test to be used in all cases. The factors were (1) large and increasing market share of imports, (2) high dumping margins, (3) homogenous products, (4) declining prices, and (5) barriers to entry to other foreign producers, or low elasticity of supply of other imports. The stronger the evidence of those five conditions, the more likely an affirmative determination would be made. The test was developed on the assumption that "[t]he focus of the causation analysis must be on whether the material injury suffered by a domestic industry is by reason of price discrimination."³¹ This, in turn, she assumed meant some form of predatory pricing—that is, pricing below the foreign producer's cost of production.

The *Red Raspberries* test has not fared well before the Court of International Trade, which hears appeals from the ITC's decisions. It sustained one negative determination of injury in which the test had been used on the express understanding that Commissioner Liebeler had not "substituted these five factors for those which are enumerated at § 1677(7)."³² In *USX Corp. v. United States*, however, the court found that the five-factor test was inconsistent with the statute.³³ It particularly rejected the idea that the antidumping law must be understood purely as a price discrimination statute, and therefore as a law prohibiting only below-cost foreign sales. Political forces might cause foreign firms consistently to price their products for the U.S. market at a low but remunerative level, serving goals like full employment. The court found that Congress intended to address injury caused by these dumped imports, as well as any imports sold below cost.³⁴

Other efforts to use more sophisticated economic analysis have met with mixed success. In principle, elasticity analysis should be particularly helpful in determining how sensitive U.S. prices are to various volumes of imports. Elasticity of demand refers to the amount by which demand for a product would change if there is a small (e.g., one percent) change in price.³⁵ In the case of some goods, a small difference in price would not cause people to change their buying patterns—

30. USITC Pub. 1707, Inv. No. 731-TA-196 (Final), 7 I.T.R.D. (BNA) 1969, 1974 (June 1985). See also *Tapered Roller Bearings from Japan*, USITC Pub. 2020, Inv. No. 731-TA-343 (Final), 10 I.T.R.D. (BNA) 1241, 1247 (Sept. 1987) (views of Chairman Liebeler).

31. *Certain Red Raspberries from Canada*, 7 I.T.R.D. at 1973.

32. *Copperweld Corp. v. United States*, 682 F. Supp. 552, 567-68, 9 I.T.R.D. (BNA) 2610, 2622 (Ct. Int'l Trade 1988).

33. See *USX Corp. v. United States*, 682 F. Supp. 60, 68, 10 I.T.R.D. (BNA) 1016, 1022 (Ct. Int'l Trade 1988).

34. See *id.*; see also *Maverick Tube Corp. v. United States*, 687 F. Supp. 1569, 1573-74 (Ct. Int'l Trade 1988).

35. For an explanation of the economic concept of elasticity, see, for example, RICHARD A. POSNER AND FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS*, app. at 1056 (2d ed. 1981) (appendix by W. Landes).

in other words, demand is relatively inelastic. It is unlikely that slightly lower priced imports of a good for which demand is inelastic would cause material injury to a U.S. industry. On the other hand, if demand is highly elastic, then even a small margin of dumping might have a great impact on the U.S. producers, as customers flock to the lower-priced imports.

In *Alberta Pork Producers' Marketing Board v. United States*, the Court of International Trade allowed the Commission to use elasticity estimates because it was satisfied that the economic data were sufficiently reliable.³⁶ In *USX*, however, it rejected the Commission's effort to rest a negative injury determination on outdated estimates of the elasticity of demand for all steel products.³⁷ Although the court did not say so explicitly, it may have been influenced by the ex parte nature of the Commission's estimate in *USX*, as compared with the adversarial testing of the data that occurred in *Alberta Pork*.

Although it is beyond the scope of this article to examine in minute detail the Commission's injury decisions, several points from these cases are important. First, any injury test that is adopted must consider injury from the standpoint of U.S. producers. Tests such as the *Red Raspberries* five-factor approach, which rely on the intent and cost structures of foreign producers and disregard the U.S. industry, go beyond the permissible scope of statutory interpretation. Second, experience with elasticity analysis gives reason to hope that an economically sound approach that respects the statutory limitations would be accepted by the courts. The approach to the injury determination set forth in this article was designed with these limitations and possibilities in mind.

Only a few additional points about the current U.S. antidumping law require attention at this point.³⁸ First, the statute does not penalize dumping in a strict liability sense. Some kind of injury to a U.S. industry is a prerequisite to the imposition of the duty, and that injury must occur "by reason of" the imports or the sales for importation. Second, the meaning of all these terms—*injury*, *materiality*, "by reason of"—is unclear. Neither the statute, the regulations, nor the decided cases give much guidance on how to weigh the myriad factors the Commission is

36. *Alberta Pork Producers' Mktg. Bd. v. United States*, 669 F. Supp. 445, 9 I.T.R.D. (BNA) 1129, 1142 (Ct. Int'l Trade 1987).

37. *USX Corp.*, 682 F. Supp. at 69-70, 10 I.T.R.D. at 1023.

38. There are many good general discussions of the ways that these laws operate. On the subject of the antidumping laws, see generally J. JACKSON & W. DAVEY, *supra* note 4; J. VINER, *supra* note 12; WILLIAM A. WARES, *THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY* (1977); Charlene Barshefsky & Richard O. Cunningham, *The Prosecution of Antidumping Actions under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COMM. REG. 307 (1981); Bruce A. Ortwine, *Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076 (1981) (student author). On the subject of subsidies and countervailing duties, see generally GARY CLYDE HUFBAUER & JOANNA SHELTON-ERB, *SUBSIDIES IN INTERNATIONAL TRADE* (1984); Donald E. deKieffer, *When, Why, and How To Bring a Countervailing Duty Proceeding: A Complainant's Perspective*, 6 N.C.J. INT'L L. & COMM. REG. 363 (1981); Sykes, *supra* note 7.

directed to consider. No acceptable framework, economic or otherwise, has yet been developed that tells courts or commissioners what overall policy will resolve doubtful cases.³⁹

3. *The countervailing duty laws.*

The importance of the injury requirement is illustrated more dramatically in the history of the countervailing duty laws. U.S. law prior to the GATT, and indeed prior to a 1975 GATT amendment, provided that if another country had paid a "bounty or grant upon the manufacture or production or export" of any dutiable product, then upon the importation of that article into the United States, the Secretary of the Treasury was to assess and collect a countervailing duty equal to the amount of the bounty or grant.⁴⁰ No finding of injury to the competing U.S. industry was necessary; the U.S. government's countervailing duty simply offset another government's distortion of international trade through the bounty or grant.

Until 1947, other countries could do little about the absence of the injury requirement. The GATT, however, stipulated that no contracting party could levy either antidumping or countervailing duties "unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to prevent or materially retard the establishment of a domestic industry."⁴¹ Because of a grandfather clause in the protocol through which the GATT became effective, the United States was not required immediately to make its countervailing duty law conform with this provision.⁴² Changes or amendments of laws not compatible with the GATT were, however, required to comply.

For this reason, when the United States began imposing countervailing duties against nondutiable subsidized imports in 1975, it added an injury requirement to its laws.⁴³ More importantly, Congress also comprehensively reworked the U.S. countervailing duty regime when it implemented the 1979 Tokyo Round agreements. For countries either willing to sign the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and

39. In a sense, the situation is even worse: Conflicting frameworks exist. On the one side, a great deal of legislative history and statutory evidence supports the proposition that the antidumping act is protectionist—to help out U.S. industry no matter what the cost. On the other hand, the whole point of the 1979 Act was to implement the Tokyo Round agreements, the purpose of which was to facilitate free international trade and to reduce all kinds of tariff and nontariff barriers. Under the circumstances, it is understandably difficult for the ITC to know what bias it should bring to its task—the protectionist's or the free trader's.

40. Tariff Act of 1930 § 303, 19 U.S.C. § 1303 (1982).

41. GATT, *supra* note 12, at art. VI(5).

42. Protocol to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5-6, A2051, T.I.A.S. No. 1700 at 2041, 55 U.N.T.S. 308.

43. Trade Act of 1974 § 331, Pub. L. No. 93-618, 88 Stat. 2049 (codified as amended at 19 U.S.C. § 1303 (1982)).

Trade (known as the Subsidies Code) or willing to undertake equivalent obligations, the new statute introduced an injury test, in Title I, Subtitle A of the 1979 Trade Agreements Act.⁴⁴ No countervailing duty may be imposed on products from these countries unless the Commerce Department concludes that the product is benefiting from a subsidy (direct or indirect) *and* the ITC determines that an industry in the United States is materially injured, an industry is threatened with material injury, or the establishment of an industry is materially retarded, by reason of imports or sales for importation of the subsidized merchandise.⁴⁵ Countervailing duties may still be imposed upon a simple showing of prohibited bounties or grants for merchandise not originating in the specified countries.⁴⁶

The International Trade Commission does not distinguish between the injury test applicable to antidumping cases and the test applicable to countervailing duty cases, for the simple reason that the statute itself prescribes the same rules for both.⁴⁷ Thus, one often sees cases claiming that imports from certain countries both enjoyed countervailable subsidies and were being dumped.⁴⁸ The Court of International Trade's decision in *Hercules, Inc. v. United States*,⁴⁹ an appeal that raised challenges to findings of injury caused by dumped and subsidized industrial nitrocellulose from France, exhaustively reviewed the Commission's injury findings in the countervailing duty investigation, and then incorporated that discussion by reference for the antidumping portion of the decision.⁵⁰ Similarly, in *National Pork Producers Council v. United States*,⁵¹ a case brought exclusively under the countervailing duty laws, the court upheld a Commission determination of no injury, indicating that the Commission had not committed the error for which it had been criticized in an earlier decision in *USX v. United States*,⁵² (an exclusive

44. Trade Agreements Act of 1979, Title I Pub. L. No. 96-39, 93 Stat. 144, 151 (codified at 19 U.S.C. § 1671(a) (1982)) (implementing the multilateral Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, GATT BISD Supp. (No. 26), at 56 (1980)).

45. *See id.*

46. Tariff Act of 1930 § 303, 19 U.S.C. § 1303 (1982). Section 303 will not be discussed further, since the absence of an injury requirement renders it irrelevant to this article.

47. *See* Tariff Act of 1930 §§ 701(a)(2), 731(2), 771(7), 19 U.S.C. §§ 1671(a)(2), 1673(2), 1677(7) (1982).

48. *See, e.g.*, Offshore Platform Jackets and Piles from Korea and Japan, USITC Pub. 1848, Inv. Nos. 701-TA-248 (Final) & 731-TA-259, -260 (Final), 9 I.T.R.D. (BNA) 1012 (May 1986); Porcelain-on-Steel Cooking Ware from Mexico, People's Republic of China & Taiwan, USITC Pub. 1911, Inv. Nos. 701-TA-265 & 731-TA-297, -298, & -299 (Final), 9 I.T.R.D. (BNA) 1587 (Nov. 1986); Welded Steel Wire Fabric from Italy, Mexico and Venezuela, USITC Pub. 1795, Inv. Nos. 701-TA-261(A), -263(A), -264(A) (Preliminary), & 731-TA-289(A)-291(A) (Preliminary), 8 I.T.R.D. (BNA) 1537 (Jan. 1986) (example of finding of no injury).

49. 673 F. Supp. 454, 9 I.T.R.D. (BNA) 1472 (Ct. Int'l Trade 1987).

50. *See id.*, 9 I.T.R.D. at 1491-96 (countervailing duty injury analysis) & 1497 (antidumping injury analysis).

51. 661 F. Supp. 633, 8 I.T.R.D. (BNA) 2428, 2433 (Ct. Int'l Trade 1987).

52. 655 F. Supp. 487, 8 I.T.R.D. (BNA) 1979 (Ct. Int'l Trade 1988).

antidumping case) of relying exclusively on a low level of import penetration.

Thus, the lessons one can glean from practice under the antidumping duty laws—that a predatory pricing standard for injury is unacceptable for the present statutes, that the Commission may rely on economic tests such as an elasticity analysis if its approach is adequately verified, and that it otherwise looks at all the factors outlined in the statute without any systematic weighting of one over another—apply with equal force to the countervailing duty injury standard. In theory at least, U.S. consumers may now enjoy the lower prices made possible by foreign governmental subsidies, as well as those made possible by price discriminating foreign manufacturers, unless either practice inflicts too much harm on domestic producers. The GATT Contracting Parties and the U.S. Congress all understood that adding an injury requirement to the countervailing duty law would be a trade-enhancing measure. They expected that at the margin fewer countervailing duties could be imposed, since the duties would no longer be authorized when domestic industry had not suffered the minimum degree of injury required by the Subsidies Code and Title VII(A).⁵³

For the United States to implement that understanding, and to fashion predictable and sensible countervailing duty and antidumping laws, we need a clearer understanding of the kind and extent of injury that should justify imposing the duties. As a first approximation, it seems reasonable to require that the injury be of the type the trade laws were intended to prevent and that it flow from that which makes the foreign party's conduct unlawful—either the dumping or the subsidization. In other words, not all injuries that would not have occurred “but for” the unfairly traded imports should be redressable under these statutes. Only those that are connected to the unfair aspect of the dumping or subsidization should lead to tariff relief. This formulation will be familiar to an antitrust lawyer, since it paraphrases the famous “antitrust injury” test of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*⁵⁴ With this

53. Recent experience shows that parties are indeed interested in whether an injury requirement applies to a particular country. The cases concerning application of the injury requirement to Mexico clearly indicate that both the subsidizing country and the affected U.S. industry understand that the injury requirement will result in fewer countervailing duties, at the margin. See, e.g., *Cementos Guadalajara, S.A. v. United States*, 686 F. Supp. 335, 10 I.T.R.D. (BNA) 1147 (Ct. Int'l Trade 1988); *Cementos Anahuac del Golfo, S.A. v. United States*, 689 F. Supp. 1191, 10 I.T.R.D. (BNA) 1402 (Ct. Int'l Trade 1988). Cf. Meg Roggen-sack, *United States Countervailing Duty Law as Applied to Mexico: The Need for a Material Injury Test*, 18 GEO. WASH. J. INT'L L. & ECON. 183 (1984) (student author) (showing that before injury test became applicable to Mexico, U.S. imposition of countervailing duties against Mexico was erratic and contrary to the interests of both countries).

54. 429 U.S. 477, 488 (1977); see also *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986). Originally, the antitrust injury concept was used to deny recovery for economic damage resulting from an antitrust violation, when such a recovery would be perverse—that is, would award lost monopoly profits. In time, the concept came to mean that injury to a particular competitor from a violation would not justify a recovery, unless overall competition in the market was also adversely affected. For commentary on the antitrust concept, see, e.g., Wil-

general approach in mind, I turn to an examination of the reasons for condemning dumping and subsidization and the reasons for including an injury requirement in both statutes.

B. *How Injury Relates to the Unfairness of Trade Practices*

Notwithstanding the fact of international consensus, it is not intuitively obvious why either dumping or subsidization ought to be branded "unfair." Since the scope of the injury that should be legally recognized depends in significant part on the scope of the underlying problem that is being addressed, it is worthwhile to take a quick look at how dumping or subsidization might be considered an unfair method of competition.

Under the widely accepted theory of comparative advantage, the world as a whole benefits from free trade.⁵⁵ Each country should produce what it can make at a relatively lower cost and trade some of its excess production for goods that are relatively more expensive for it to make. The differences in comparative costs that exist among countries occur both because of differences in factor endowments (capital, labor, land, etc.) and because of specialization choices. Whatever the reason for the differences, international trade benefits all participants. Each imported good frees up resources in the importing country that would otherwise have been needed for the good's production. Those resources can now be devoted to some other kind of production, and the "pie" increases for everyone.

Most defenders of antidumping and antisubsidy measures would concede everything in the preceding paragraph, with a few important qualifications. The model works, they urge, only if all countries operate under a market economy that accurately prices factor endowments and only if perfectly competitive conditions assure that the most efficient producers all over the world are the ones supplying the market. Introduce complications such as state-controlled economies, monopoly power in one country's market, or protectionist measures that make it easy for a country to export huge quantities and bar imports, and the model collapses.⁵⁶ The free trade model is equally flawed if govern-

liam H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980).

55. See, e.g., RICHARD E. CAVES & RONALD W. JONES, *WORLD TRADE AND PAYMENTS* ch. 2 (4th ed. 1985); H. ROBERT HELLER, *INTERNATIONAL TRADE THEORY AND EMPIRICAL EVIDENCE* 197-200 (2d ed. 1973); PETER LINDERT & CHARLES P. KINDLEBERGER, *INTERNATIONAL ECONOMICS* chs. 2-3 (7th ed. 1982). These and other economic texts are, however, careful to point out the limiting assumptions that are necessary prerequisites to true "free" trade, and to point out that the distribution of gains from trade to specific countries or to specific producers will depend upon variables such as the terms of trade, mobility of factors of production, and initial factor endowments. These qualifications explain the skepticism expressed by some about the wisdom of a free trade policy. See, e.g., John M. Culbertson, *The Folly of Free Trade*, HARV. BUS. REV., Sept.-Oct. 1986, at 122.

56. The dependence of the classic theory of international trade on perfectly competitive industries is reflected, among other places, in H.R. HELLER, *supra* note 55, at 5-6. Problems of

ment regulation affects factor pricing—that is, if a government chooses to subsidize certain factors (such as research and development, labor, or interest costs) to give an artificial advantage to its industries.⁵⁷ In the case of dumping, it is some degree of monopoly power in the home market, coupled with legal or practical barriers to arbitrage and greater foreign elasticity of demand than home elasticity, that make it possible to charge a lower price in the export market.⁵⁸ In the case of subsidies, the government has distorted the “natural” comparative advantages that would prevail among countries and seized an “artificial” advantage for its home industries.

These arguments, however, do not refute the fact that the importing country receiving cheaper goods still enjoys a wealth increase, as long as the benefits from the cheap goods are greater than the adjustment costs for displaced industries and workers. The wealth increase is independent of the reason for the low import prices; imports may be cheap because of extraordinary efficiency in the foreign plants or because of so-called cross-market subsidization made possible by price discrimination.⁵⁹ The importing country would have reason to be con-

oligopoly and monopoly power are referred to in R. CAVES & R. JONES, *supra* note 55, at 172-75; Caves and Jones also allude to the problems of unreliable pricing that occur with nonmarket economy countries, *id.* at 274. For a general critique of the argument for free trade, see John M. Culbertson, *A Realist View of International Trade and National Trade Policy*, 18 N.Y.U. J. INT'L L. & POL. 1119 (1986).

57. See note 56 *supra*.

58. The so-called persistent dumper will have all these traits. First, the legal or practical barriers to arbitrage will prevent the lower-priced goods sold in the foreign market from returning to the home market and eventually creating one price level. In other words, the home and foreign markets must be economically segregated. Second, low elasticity of demand for the firm's product means consumers see few substitutes for that firm's product, which implies that the firm has market power at home. Acting rationally, the firm will naturally charge a high price to exploit this market power. If foreign consumers had the same low elasticity of demand, the firm would charge a high price abroad as well, which would not create a dumping situation. Only if the elasticity of demand is high abroad—that is, if foreign consumers perceive many acceptable substitutes for the firm's product—will the firm set lower prices for foreign sales. Indeed, the firm has no choice in the matter if it is to participate effectively in the foreign market, because the high elasticity implies that consumers would simply choose not to buy its product at the higher price. The economics of dumping are explained in R. CAVES & R. JONES, *supra* note 55, at 175-77. See also W. WARES, *supra* note 38, at ch. 2.

59. Cross-market subsidization refers to a firm's ability to charge lower prices in the foreign market because of its high monopoly prices at home. Thus, for example, the American television producers who sued the Japanese producers argued that the low U.S. prices for Japanese televisions could not have existed without the protected Japanese market. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 (1986). Most economists view this theory as inaccurate. Dam, for example, offers the following criticism:

Sometimes this incongruous concern for the fortunes of domestic producers is based upon the common fallacy that the foreign high price somehow facilitates the low price on imports. The foreign producer is viewed as raising the price in his home market to “subsidize” the low price abroad. This subsidization theory overlooks the foreign producer's incentive to maximize his profits at home by charging an optimum price at all times there; the optimum price at home is, of course, unrelated to the prices charged on his export sales.

KENNETH DAM, *THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 169 (1970). Andreas F. Lowenfeld makes much the same point in *Fair or Unfair Trade: Does It Matter?* 13

cerned only if successful long-term predatory pricing were possible, and if the low import prices were designed to last only long enough to drive out domestic competitors.⁶⁰ Even the defenders of strict unfair trade laws do not rely heavily on this scenario of predatory pricing, however; it seems very unlikely.⁶¹ If dumping and subsidization are unfair practices, their unfairness must depend on something other than an overall detriment to the importing country.

Two other possible reasons remain for condemning dumping and subsidization. The first reason is a somewhat imperialistic one. Assuming that U.S. antidumping and countervailing laws make foreign laws that facilitate price discrimination or that confer subsidies less effective, foreign governments may be induced to abandon these practices and make their own markets more freely competitive.⁶² Under this view, the unfair trade laws are basically a foreign policy instrument, designed to reduce this type of competitive pressure on U.S. industries.

The imperialistic justification for branding dumping and subsidization as unfair must be rejected for two reasons. One practical objection is that countries generally have not adopted or rejected tariffs, subsidies, or other measures affecting their international trade solely to please a particularly powerful trading nation. To take a current example, subsidies affect virtually all international trade in agricultural commodities. There is little doubt that these subsidies are wasteful and that all countries would be better off if they could be abandoned.⁶³ The

CORNELL INT'L L.J. 205, 206 (1980). See also *Matsushita*, 475 U.S. at 593, 595-97 (discussing relationship between high domestic prices and low foreign prices).

60. Indeed, one commentator has argued that the only time a country need be concerned with dumping is when it is an instrument for predatory pricing. See Barceló, *The Antidumping Law: Repeal It or Revise It*, *supra* note 7, at 64-66. He then argues that there are better vehicles for attacking predation, principally the antitrust laws and secondarily the 1916 Antidumping Act, and that the general antidumping law should be repealed. *Id.* at 66-69.

61. Predatory pricing can be defined roughly as the practice of selling goods below some economically reasonable measure of cost in order to drive out a rival and ultimately control the market oneself. It requires that the predator be able to finance the below-cost sales campaign long enough to eliminate the rival, and it requires entry barriers sufficiently high to prevent new firms from entering to replace the target. Without those entry barriers, the predator would never be able to reap the benefits of its campaign. Today's antitrust literature is replete with discussions of predatory pricing, most of which argue that price predation is rare and, when present, unlikely to succeed. See, e.g., 3 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS* ¶¶ 710-715 (1978); Joseph F. Brodley & George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981); Paul G. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979). The Supreme Court adopted an exceedingly skeptical attitude about the practice in *Matsushita*, 475 U.S. at 574, although it has been unwilling to eliminate predatory pricing altogether as a theory that would support an antitrust recovery. See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 n.2 (1986).

62. See, e.g., Epstein, *supra* note 5, at 9-13; Bart S. Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 LAW & POL'Y INT'L BUS. 85, 144-47 (1973).

63. As the Ministerial Declaration on the 1986 Uruguay Round announced, "Contracting Parties agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including

U.S. proposal to phase out such subsidies by the year 2000, however, has received little more than a polite nod.⁶⁴ When the United States threatened to impose countervailing duties on pasta from the European Economic Community (the "E.C."), the E.C. did not apologize for its preexisting policies; it threatened an unspecified retaliatory measure.⁶⁵ Retaliation—not acquiescence—is the predictable reaction by other countries when an internal policy is attacked or undermined.

The other objection to the imperialistic justification is the fundamental reality that the United States does not have the power to ban dumping and subsidization directly. Because of the constraints of international jurisdiction, most of the arrangements that are targeted by antidumping or countervailing duties are clearly beyond the direct scope of U.S. regulation. Thus, the most that the duties can do is to contribute to the persuasiveness of diplomatic efforts to urge another country to change its behavior. Yet the insult to a co-equal sovereign that a coercive effort to change a system of economic regulation implies is likely to be counterproductive. Other kinds of efforts are much more likely to effectuate a change, such as the issuance of agreed guidelines within an organization (like the GATT or the Organisation for Economic Cooperation and Development (OECD)), multilaterally agreed principles negotiated by the United Nations or the United Nations Conference for Trade and Development (UNCTAD), or bilateral negotiations.⁶⁶

those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets." 25 INT'L LEGAL MATERIALS 1623, 1626 (1986). It then specifically urges "increased discipline" on the use of all direct and indirect subsidies. *Id.* For a general description of the Uruguay Round agenda, see *The General Agreement on Tariffs and Trade—Decisions on Negotiating Structure and Plans for the Uruguay Round*, 26 INT'L LEGAL MATERIALS 850 (1987), reprinted in 29 HARV. INT'L L.J. 199 (1988).

64. After the formal commencement of the Uruguay Round, the United States proposed a plan whereby all countries would eliminate their agricultural subsidies by the year 2000. See *All Farm Subsidies Would End by Year 2000 Under U.S. Proposal Submitted to GATT Talks*, 4 INT'L TRADE REP. (BNA) 860 (1987); *Major Farming Nations Applaud U.S. Subsidy Reform Plan, Yet Question Its Feasibility*, 4 INT'L TRADE REP. (BNA) 861 (1987); *United States Proposal for Negotiations on Agriculture*, 4 INT'L TRADE REP. (BNA) 884 (1987). To date, there appears to be little likelihood of the plan's adoption.

65. See, e.g., 4 INT'L TRADE REP. (BNA) 843, 926, 978, 1227 (1987) (various articles describing some of the moves and countermoves in the long-running U.S.-E.C. pasta dispute). For the agreement that resolved a dispute concerning U.S. citrus exports to the E.C., in which the U.S. retaliated against an alleged lack of market access for its citrus fruit exports by imposing duties on a variety of products from the E.C. (including anchovies, various cheeses, olive oil, and olives), see *EC Moves to Drop Trade Restrictions on U.S. Citrus and Walnuts as Pasta Dispute Settled*, 3 INT'L TRADE REP. (BNA) 1024 (1986). The 1988 Act should resolve both of these disputes. See Omnibus Trade and Competitiveness Act of 1988 § 1122, Pub. L. No. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1143-46 (a statutory implementation of the U.S.-E.C. agreement on citrus and pasta).

66. See, e.g., note 63 *supra* (the GATT Uruguay Round); ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (rev. ed. 1984); ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *Second Revised Decision of the Council on the Guidelines for Multinational Enterprises*, in INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: THE 1984 REVIEW OF THE 1976 DECLARATION AND DECISIONS 11 (1984); U.N. CONF. ON TRADE AND DEVELOPMENT (UNCTAD), SET OF MULTILAT-

Finally, in considering the imperialistic justification, it should be noted that the justification is a smokescreen. The political pressure favoring unfair trade statutes comes from interest groups seeking protection from low-priced foreign competition in the U.S. market.⁶⁷ The reason for the low prices, one suspects, is of little interest to these interest groups.⁶⁸ Rational U.S. policy, however, should not condemn dumping and subsidies merely at the behest of these interest groups.

Rejection of the imperialistic justification leaves a second possible reason for condemning dumping and subsidization. This reason is that firms should be required to compete against only the natural advantages that foreign firms enjoy, not against artificial advantages like governmentally protected monopoly power or public subsidies. The argument goes that the most "naturally" efficient firm should win the competitive battle, not the firm whose efficiency is dependent on a boost from its government. Over the long run, worldwide allocations of resources would be optimized if "real" efficiency, not artificially induced advantages, determined success in the marketplace. Since an importing country cannot compel a separate sovereign to abandon public policies like high tariff walls or governmental subsidies, the second-best solution is to neutralize the exporting country's policies by eliminating the advantage its firms enjoy in the importer's market.⁶⁹

ERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES, U.N. Doc. TD/RBP/CONF/10/Rev, U.N. Sales No. E.81.II.D.5 (1981); Canada-United States: Free-Trade Agreement, *reprinted in* 27 INT'L LEGAL MATERIALS 281 (1988); Japanese-United States Agreement on Semiconductor Trade, *reprinted in* 25 INT'L LEGAL MATERIALS 1408 (1986).

67. Two authors suggest that the evidence shows that the industries pressing hardest for import protection tend to be highly concentrated. See Walter Adams & Joel B. Dirlam, *Dumping, Antitrust Policy, and Economic Power*, BUS. TOPICS 20 (Spring 1966). Adams later wrote an article demonstrating the link between the non-import-related woes of the U.S. steel industry and the industry's intensive effort to secure protectionist measures. See Walter Adams, *Import Restraints and Industrial Performance: The Dilemma of Protectionism*, 1 MICH. Y.B. INT'L LEGAL STUD. 34 (1979).

68. Two examples of specific industries seeking relief from import competition of any kind are the automobile industry's resort to the "escape clause" of section 201 of the Trade Act of 1974 and the existence of the worldwide textile cartel represented by the Multifibre Arrangement (MFA). The U.S. automobile industry tried strenuously to obtain relief from import competition through the use of section 201, which, as noted above, presumes fairly traded imports. See note 9 *supra* and accompanying text. But the International Trade Commission concluded that the industry's problems were not caused by imports and therefore it was not eligible for relief. See *Certain Motor Vehicles and Certain Chassis and Bodies Therefor*, USITC Pub. 1110, Inv. No. TA-201-44, 2 I.T.R.D. (BNA) 5241 (Dec. 1980). In early 1981, the industry pressured Congress to pass import relief legislation. Eventually, trade relief was forthcoming in the form of a "voluntary restraint agreement" agreed to by the Japanese in mid-1981. For a detailed description of these events, see A. LOWENFELD, *supra* note 14, at §§ 8.1-8.4. The textile industry provides a similar example. The MFA is an umbrella organization under which textile and clothing importers (such as the E.C., the U.S., and Canada) negotiate quotas with the exporting countries to soften the impact of foreign competition on the importing countries' industries. See Gary Sampson, *Market Disturbances and the Multifibre Arrangement*, in ISSUES IN WORLD TRADE POLICY: GATT AT THE CROSSROADS 61 (R. Snape ed. 1986). In short, the sole purpose of the MFA is to keep low-priced, fairly traded textiles out of the importing countries.

69. This argument is spelled out in deKieffer, *supra* note 38.

I shall assume for purposes of the rest of this article that the unfair trade laws are designed to neutralize artificial economic advantages. This is the only goal that is simultaneously consistent with Congress's insistence that these laws are not purely protectionist and with the obvious purpose of the laws to nullify a defined set of foreign practices. While, from an academic standpoint, it is easy to show that the line between artificial and natural advantage is elusive at best, it is nonetheless possible to identify subsidies and price discrimination as indicative of imperfectly competitive markets. The present statutes characterize those causes or symptoms of imperfect competition as "unfair." Without a complete overhaul of the statutory system (in a direction at odds with the 1988 revisions), it seems best to attempt to give the most economically sensible content to the structure we have.

The artificial advantages argument outlined above relies, albeit imperfectly, on an efficiency-based approach. Logically, this argument concedes that there is nothing unfair about a U.S. firm's loss of business to a more efficient foreign competitor. Furthermore, this conclusion should hold even if that foreign competitor is receiving governmental subsidies or if it is engaging in price discrimination, as long as the "unfair" practices do not change the firm's efficiency or make the dispositive difference in the competitive battle.⁷⁰

From this viewpoint, the fundamental problem with the unfair trade practices addressed in the antidumping and countervailing duty laws is that the practices of price discrimination and subsidization allegedly distort comparative economic advantages between nations.⁷¹ Accord-

70. It is important to note that this point is at best controversial under present law. There has been debate for many years over whether the ITC, in determining whether injury exists, should look at the effect of the unfairly traded imports on the U.S. industry, or if it should look at the marginal effect of the unfair trade practice. In practical terms, this debate has been translated into a question whether the level of subsidies or margin of dumping is pertinent to the injury determination. See, e.g., Bello & Holmer, *supra* note 18, at 698. (To be perfectly accurate, one would also need to know the elasticity of demand for the products in question, since a one percent margin for a product with a high elasticity would be more competitively significant than the same one percent margin for a product with a low elasticity.) The Court of International Trade held in *Maine Potato Council v. United States*, 613 F. Supp. 1237, 9 Ct. Int'l Trade 293 (1985), that the ITC was not required to consider dumping margins in deciding whether injury existed. See also *Republic Steel Corp. v. United States*, 591 F. Supp. 640, 8 Ct. Int'l Trade 29 (1984) (dicta to same effect for subsidy cases). However, in *Copperweld Corp. v. United States*, 682 F. Supp. 552, 9 I.T.R.D. (BNA) 2610 (Ct. Int'l Trade 1988), the court held that the ITC is permitted to consider margins as one relevant economic factor. The relationship between margins analysis and the approach to injury suggested in this article is explored below. See notes 109-112 *infra* and accompanying text. See generally N. David Palmetier, *Countervailing Subsidized Imports: The International Trade Commission Goes Astray*, 2 UCLA PAC. BASIN L.J. 1 (1983); Edward R. Easton & William C. Perry, *The Causation of Material Injury: Changes in the Antidumping and Countervailing Duty Investigations of the International Trade Commission*, 2 UCLA PAC. BASIN L.J. 35 (1983).

71. As indicated in notes 56-58 *supra* and accompanying text, dumping and subsidization distort comparative advantage only if one draws a distinction between permissible advantages and impermissible ones. For purposes of my argument, it is enough to accept the nonnormative proposition that subsidization and price discrimination can change the pre-existing advantages among countries.

ing to the artificial advantages argument, firms are somehow entitled to the advantages they derive from sources like historical specialization, skills in the workforce, supply of laborers, natural resource endowments, and technological developments, but they are not entitled to advantages derived from targeted favorable tax laws, interest-free loans from the government, subsidized export credits, high tariff walls preventing competitive imports, or state-conferred monopolies. The problem of drawing a line between "natural" and "artificial" advantages should be obvious from the foregoing list, but I shall assume again for the sake of argument that a meaningful distinction can be made between the two kinds of advantage.⁷² This distinction, however inelegant it seems, is forced on us by the existing legislation. In a perfect world, under this approach, efficient firms in countries with relatively lower comparative costs will tend to export their products, whereas relatively inefficient firms in countries with higher comparative costs will tend to have their production replaced by imports.

The conception of unfairness on which this model rests underlies the approach that I shall take as to the kind of injury that should give rise to relief. As I explain below, the injury that should be legally recognized is the injury suffered because the practice in question causes lost market share or sales to a competitively structured industry. If the competing foreign firm is more efficient, adjusting for any advantage conferred by the unfair trade practice, or if the U.S. industry does not conform roughly to the model of a competitive (and hence efficient) market, a closer look at the injury suffered is required. Only the injury that corresponds to the loss that a competitive industry would suffer should be recognized—should "count" toward satisfaction of the injury requirement in the statutes.⁷³

72. Perhaps the best distinction would be between differences arising out of governmental interference in the economy and differences that are independent of governmental action (*i.e.* "free market" advantages). The only problem with such a purist approach is that it would not correspond to the understandings that underlie the trade laws. Technological development, for example, is facilitated by laws that protect intellectual property. A country with highly advanced technologies may have a comparative advantage in that sector because its laws have encouraged innovation. Technology, therefore, would be considered an artificial advantage under the purist approach, not a natural advantage. Most people, however, assume that technology is a natural, or "legitimate," advantage, and view only the more obvious governmental actions as artificial.

73. This is slightly different from saying that the industry in the United States must prove that it is efficiently and economically operated, as was required for recovery under section 337 of the Tariff Act of 1930 until the passage of the 1988 Omnibus Act. *See* note 8 *supra*. My argument would allow for recovery even by an inefficient industry, though only to the extent that its losses would have been felt by a competitively structured industry. Furthermore, my proposed approach does not require courts to examine foreign producers to see if they are engaging in predatory acts. As the Court of International Trade recognized recently, the statutes as written do not include such a requirement. *See* *USX Corp. v. United States*, 682 F. Supp. 60, 68, 10 I.T.R.D. (BNA) 1016, 1022 (Ct. Int'l Trade 1988). The point in the text is also different from the old "technical dumping" argument. Technical dumping was said to exist when the foreign firm was simply meeting U.S. prices. *See* note 122 *infra*. Under my system, the unfairly trading foreign firm's ability to undercut U.S. prices without incurring

III. PROPOSED APPROACH TO DETERMINING INJURY

The ITC should be required to find injury only when a competitively pricing industry would have suffered from the unfair trade practice. Unlike physical injury, "injury" in the economic sense cannot be described in the abstract. As we know from the *Brunswick* case in antitrust, it is not enough to prove an unlawful act and to prove in a "but for" sense that a firm has suffered from that act.⁷⁴ Statutes regulating competition must be more precise. Every indicium of injury mentioned in the unfair trade statutes is ambiguous because it may stem from healthy and fair competition or it may stem from predatory or unfair competition.

Heretical as it may sound to mainstream trade lawyers, every "pinch" due to dumping or subsidization should not automatically justify tariff relief. The statutes themselves do not permit the imposition of duties every time a firm in an import-competing industry suffers financial reverses. On the contrary, the statutes require a finding that an entire U.S. industry has been injured "by reason of" the unfairly traded imports. To take this one step further, even when the injury was literally by reason of the unfairly traded imports (or better, the unfair trade practice itself), relief should be granted only when the evil that the statutes are directed against is taking place. That evil I take to be the loss that an efficient, competitively pricing U.S. industry would suffer when either dumping or subsidization prevent it from successfully operating in the market. Nothing in either the trade statutes or in any underlying economic rationale requires the assumption that injury must always be measured against the status quo, no matter how monopolistic and inefficient it may be. Tariff relief should not be ordered when the effect of the unfairly traded imports is simply to force monopoly price levels in the U.S. market down to more competitive rates.

The proposed approach requires three basic inquiries, which combine the questions of injury and causation. First, the group of like products must be identified. This ought to be, although it is not at present, equivalent to an antitrust product market determination. Second, the firms in the market must be identified, including domestic firms, fairly trading foreign firms, and unfairly trading foreign firms.⁷⁵ Two evaluations of market structure can then be undertaken: (1) How concentrated is the market as a whole? and (2) Does the U.S. industry

antidumping or countervailing duties would depend upon the competitive structure of the U.S. industry. See notes 95-128 *infra* and accompanying text.

74. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

75. The necessity of identifying all unfairly trading foreign firms makes this approach compatible with the cumulation requirement that Congress imposed in the Trade and Tariff Act of 1984, § 612(a)(2)(A), Pub. L. No. 98-573, 98 Stat. 3033 (codified at 19 U.S.C. 1677(7) (Supp. IV 1986)), and expanded upon in the Omnibus Trade and Competitiveness Act of 1988 § 1330, Pub. L. No. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1206-07.

portion of the market have the ability to exercise market power? Third, the Commission must determine whether the U.S. industry has suffered the kind of injury that warrants tariff relief by looking at whether the unfair trade practice itself has given the foreign firms any advantage. If the unfair trade practice has only forced a U.S. industry with market power to behave competitively, relief should be denied; if it has forced (or threatens to force) prices below the U.S. industry's marginal costs, relief is warranted.

The basic data needed to implement this approach is already available to the ITC under the present statutes, although it is likely as a political matter that my proposed approach would require such a significant reorientation of the statutes that legislative action would be appropriate. Assuming that carefully tailored statutory changes could be made, there are several such changes which could even more precisely tailor the fit between the economic objections to dumping and subsidization and the unfair trade remedies.⁷⁶

A. *Industry Definition*

As with the antitrust laws, the first step in determining whether injury exists under the antidumping and countervailing duty laws is to define the affected industry. The statute defines the term "industry" as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product"⁷⁷ A "like product," in turn, is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title."⁷⁸ The ITC has no coherent, predictable approach to industry definition.⁷⁹ The most that can be said is that the Commission begins with the question of which products are "like," and after delineating the product market it identifies the U.S. producers of those products. Foreign producers who are trading fairly, as well as foreign producers who are under investigation, are excluded from consideration at this stage.

The ITC's approach to the critical problem of identifying "like" products seems to focus on demand-related factors, rather than the ease with which other suppliers could enter a market. However, in a recent decision concerning seven different kinds of cut flowers, the Court of International Trade disparaged the probative value of evi-

76. See notes 142-151 *infra* and accompanying text.

77. 19 U.S.C. § 1677(4)(A) (Supp. IV 1986) (special rule for wine and grape products deleted). Note also that regional industries may be isolated when certain criteria are satisfied: The producers within the region must sell almost all of their production there, and demand must not be supplied by producers located elsewhere in the United States. See *id.* § 1677(4)(C) (1982). Regional market analysis is not particularly important to my thesis; where it makes a difference, I so indicate.

78. *Id.* § 1677(10) (1982).

79. For criticism of ITC practice, see, *e.g.*, Palmeter, *supra* note 18.

dence of substitution by ultimate consumers for the determination of whether or not products are "like" for purposes of the statute.⁸⁰ One commentator claims that the only consistency in the Commission's determinations is, reminiscent of Justice Potter Stewart's immortal remark about some antitrust cases, that the petitioner almost always wins.⁸¹ The cited examples are compelling: Galvanized carbon steel sheet is not "like" ungalvanized carbon steel sheet, but galvanized carbon steel wire nails are "like" ungalvanized carbon steel wire nails; welded pipe is not "like" seamless pipe except in oil industry uses.⁸² In a November 1986 decision concerning porcelain-on-steel cooking ware, the Commission concluded that all such cooking ware—skillets, frying pans, sauce pans, roasters, and teakettles—were "like products."⁸³ Two months later, in January 1987, the Commission was faced with complaints concerning top-of-the-stove stainless steel cooking ware. There it found "one like product consisting of all top-of-the-stove stainless steel cooking ware, excluding teakettles, ovenware, and kitchen ware."⁸⁴ Why the teakettles were so different in the two cases, not to mention why cooking ware made of other materials was consistently excluded, was not adequately explored.

In other instances, the Commission defines markets that appear remarkably narrow to readers accustomed to product market definition in antitrust cases. For example, one countervailing duty case defined a domestic industry made up of shop towel producers. Shop towels are cloths used for wiping and cleaning functions in industrial and commercial establishments. Entry into this market would probably be quite easy, since it appears to require only access to cotton or cotton-acrylic blend fabric and the necessary finishing equipment. Nevertheless, this industry convinced the ITC that it was injured by imports subsidized by Pakistan.⁸⁵ In another case, the Commission decided that the "like product" was "red raspberries packed in bulk containers for sale to

80. Specifically, the court stated "[i]f one has to choose a single basis upon which to make a like product determination, consumer preference would seem to be a poor choice." *Asociacion Colombiana de Exportadores de Flores v. United States*, 693 F. Supp. 1165, 1168 (Ct. Int'l Trade 1988). The debate was over whether there were seven "like products" represented by standard carnations, miniature carnations, standard chrysanthemums, pompon chrysanthemums, alstromeria, gerberas, and gypsophilia, or whether all cut flowers were the "like products." The Commission had split on the issue, with those favoring seven industries in the majority. *But see* *Certain Spirits from Ireland*, USITC Pub. 1165, Inv. No. 104-TAA-3, 3 I.T.R.D. (BNA) 1040, 1042 (July 1981) (finding one industry for liqueurs rather than a different one for each type of cordial).

81. *Palmer*, *supra* note 18, at 15-16.

82. *Id.* at 15.

83. *See* *Porcelain-on-Steel Cooking Ware from Mexico, People's Republic of China & Taiwan*, USITC Pub. 1911, Inv. Nos. 701-TA-265 & 731-TA-297, -298, & -299 (Final), 9 I.T.R.D. (BNA) 1587, 1590 (Nov. 1986).

84. *Top-of-the-Stove Cooking Ware from Korea and Taiwan*, USITC Pub. 1936, Inv. Nos. 701-TA-267, -268 (Final), & 731-TA-304, -305 (Final), 9 I.T.R.D. (BNA) 1768, 1770 (Jan. 1987).

85. *Cotton Shop Towels from Pakistan*, USITC Pub. 1490, Inv. No. 701-TA-202 (Final), 6 I.T.R.D. (BNA) 1494 (Feb. 1984).

remanufacturers," and it excluded all other types of berries, fresh-market red raspberries, and retail/institutional packed berries.⁸⁶

The Commission might argue that it actually follows a clear test, under which it looks at the interchangeability of use between the imported product and similar domestic products, at demand shifts as prices change between the two (*i.e.*, cross-elasticity of demand), and at the ability of suppliers to shift their production as prices change (*i.e.*, supply elasticity).⁸⁷ The only problem is that the Commission has no general standard against which it measures the results of its inquiry.

For any statute in which it is necessary to define a relevant market or the industry producing a like product, one must know where to draw the line: How much interchangeability of use is enough to group two products together? The answer to this question is critically important to anyone who wants meaningful protection for an industry faced with unfair dumping or subsidization. If the industry is defined very narrowly to encompass only the firms producing an identical product, then it may be easier for firms to demonstrate injury. On the other hand, the price of such a narrow definition is ease of evasion: If consumers consider some non-identical products to be acceptable substitutes, then an antidumping or countervailing duty will have no effect on the health of the industry, because consumers will simply switch to the substitute product. Instead of losing sales to the identical imported product, the U.S. firms will lose sales to the substitute product. If, on the other hand, the industry is defined very broadly, through broad definitions of "like products," then the opposite problem is raised. Since injury to one or to a few firms in a multiple firm industry will not satisfy the standard in the unfair trade laws, a broad market definition will make it harder to prove injury to the industry as a whole.⁸⁸ As more firms producing a wider variety of products are included in the industry definition, the odds increase that many of them will not be injured from the

86. Certain Red Raspberries from Canada, USITC Pub. 1707, Inv. No. 731-TA-196 (Final), 7 I.T.R.D. (BNA) 1969, 1970 (June 1985).

87. See, *e.g.*, Certain Steel Wire Nails from China, USITC Pub. 1842, Inv. No. 731-TA-266, 8 I.T.R.D. (BNA) 2165 (May 1986); Natural Bristle Paint Brushes from China, USITC Pub. 1805, Inv. No. 731-TA-244 (Final), 8 I.T.R.D. (BNA) 1529, 1530-32 (Jan. 1986); Radial Ply Tires for Passenger Cars from Korea, USITC Pub. 1572, Inv. No. 731-TA-200 (Preliminary), 6 I.T.R.D. (BNA) 2389, 2390-91 (Sept. 1984). The leading antitrust case applying the cross-elasticity of demand test is still *United States v. E.I. du Pont de Nemours (Cellophane Case)*, 351 U.S. 377, 393-404 (1956). See also *Brown Shoe v. United States*, 370 U.S. 294, 325-28 (1962); *United States v. Aluminum Co. of America (Rome Cable)*, 377 U.S. 271, 273-77 (1964).

88. In one case, for instance, the Commission employed a broad market definition of "frozen french fried potatoes," rather than one which would have excluded french fries sold to fast food chains and to retail supermarket chains. In addition, the Commission rejected an assertion that a regional industry existed, and instead based its analysis on the entire United States. The Commission found no injury to the industry as defined thus. See *Frozen French Fried Potatoes from Canada*, USITC Pub. 1259, Inv. No. 731-TA-93 (Preliminary), 4 I.T.R.D. (BNA) 1393 (June 1982). See also *Sodium Hydroxide—West Germany*, USITC Pub. 1040, Inv. Nos. 731-TA-8, -9, -10, & -11 (Preliminary), 1 I.T.R.D. (BNA) 5240 (Feb. 1980) (only one complaining firm, not joined by others in industry).

import competition.⁸⁹

Since the ultimate injury determination will depend on the scope of the "like product" definition found by the Commission, the first step the Commission can take toward improving the predictability and economic accuracy of its decisions is in refining its market definition process. Because the statute requires it to identify only the U.S. producers of the like products, the ITC is free to disregard other foreign sources and competitive products.⁹⁰ It should first define the products that are "like" the one that is being sold at less than fair value, or that is being subsidized, and then identify the U.S. producers who make this product (or occasionally, who are seeking to enter the industry). To do this, the Commission must find a test that will provide an economically and thus practically meaningful answer to the question of what kinds of similar characteristics and uses must exist before other products will be deemed to be "like" the import at issue.

The best-known such test at present can be found in the Department of Justice's product market definition rules in its 1984 *Merger Guidelines*, as elaborated and applied to non-merger cases in the Department's revised *Antitrust Enforcement Guidelines for International Operations*.⁹¹ By asking, as the *Merger Guidelines* do, what products are so closely related that a hypothetical monopolist could successfully raise prices, without either causing consumers to switch to substitutes or inducing entry from other suppliers in a relatively short period of time, one can determine which products should be grouped together.⁹² In a practical sense, this information can be (and is) gathered by asking producers which products they regard as competitive and by asking consumers how they have reacted to actual price changes in the past. At least for

89. This phenomenon is difficult to document from the trade cases, because the Commission so rarely adopts an extremely broad market definition. It was clearly the effect, however, in the antitrust *Cellophane* case, in which the Court's decision to define a market as "flexible wrapping materials" instead of as high-grade cellophane products resulted in a finding of lack of monopoly power. 351 U.S. at 377. More precise economic tests that take into account the elasticity of demand for a product, supply substitution, and market shares for a given defined market avoid the problem of product market manipulation. See, e.g., R. POSNER & F. EASTERBROOK, *supra* note 35, at 347-354. The problem with the more rigorous tests lies in the difficulty of obtaining accurate data on elasticities.

90. In an industry with three groups of competitors—the U.S. firms, the fairly trading foreign firms, and the unfairly trading foreign firms—this focus on U.S. producers means that the Commission may fail to identify acceptable substitutes being produced by the fairly trading foreign firms. The fairly trading foreign firms become relevant, however, when the Commission determines whether the alleged injury to the U.S. producers was "by reason of" the unfairly traded imports.

91. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, *MERGER GUIDELINES* (1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103 (1984); U.S. Dep't of Justice, *Antitrust Enforcement Guidelines for International Operations*, Trade Reg. Rep. (CCH), Extra Ed., No. 24, Nov. 10, 1988.

92. In antitrust circles, this approach is a widely accepted way to define a relevant market. Professor Hovenkamp, for example, describes the same approach: "A relevant market is the smallest market for which the elasticity of demand and supply are sufficiently low that a firm with 100% of that market could profitably reduce output and increase its price substantially." HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* § 3.2, at 59 (1985).

this purpose, the unfair trade statutes clearly have the same goal as the antitrust laws: to determine which products are competing with the products manufactured by the firms under investigation.

Another, less precise measure also exists for evaluating whether two products are close substitutes. In antitrust case law, the courts frequently assess "cross-elasticity of demand" between a product and other products with similar characteristics or uses.⁹³ To evaluate the cross-elasticity between products A and B, we would ask how many consumers presently purchasing product A will turn to product B if the price of A rises. The greater the cross-elasticity—that is, the more people that switch from A to B when a small price increase occurs—the closer the two products are as substitutes. Cross-elasticity must be used with care, however, because almost every good has substitutes if its price soars to a high enough point. Cross-elasticity is thus a problematic measure when the question is whether a firm is presently monopolizing a relevant market. In order to use this measure accurately, it would be necessary to estimate what the competitive price of each product would be, and then to assess cross-elasticity—a task problematic enough that most courts do not attempt it.

The problems with cross-elasticity might be less important for trade law purposes than they are for monopolization cases. Any substitution between the domestic industry's products and the imported product that is currently taking place is relevant, even if substitution is occurring only because the U.S. product is priced at monopoly levels. Nevertheless, given a choice between the traditional cross-elasticity approach and the newer *Merger Guidelines* approach, the latter is preferable for the trade statutes. The questions asked are similar—what substitutes exist, how readily will consumers turn to them, at what prices do they become attractive—but the *Merger Guidelines* give a greater sense of the boundary lines that ought to be drawn, which in the end is the most important point.

Once the industry that produces the competitive products is identified, it becomes possible to discern whether the U.S. firms in the industry possess market power, either collectively or individually. In some cases it is even possible to observe market power directly, through evidence about the performance of firms in the industry.⁹⁴ When a firm or group of firms with market power complains about competition from unfairly traded imports, the typical response of the trade laws has been to treat this complaint just like all others. Such a response, however,

93. See, e.g., *United States v. E.I. DuPont de Nemours (Cellophane Case)*, 351 U.S. at 380-81, 399-401; *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910, 918-19 (8th Cir. 1976).

94. See, e.g., *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (noting that "proof of actual detrimental effects, such as a reduction of output" can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects.") (quoting 7 PHILLIP AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986)).

fails to take into account the fundamental reason why the antidumping and countervailing duty laws exist, which appears to be to prevent efficient U.S. industries from being harmed by these kinds of imperfect import competition. The basic policy question ought to be what trade law response is appropriate in this kind of case, or, put differently, what kind of injury ought to be sufficient to justify the tariff relief that the statutes authorize.

At least two approaches are possible. First, one might refuse to consider the monopolized U.S. product as a "like" product, and thus exclude that producer and its alleged injuries from the trade proceeding. The obvious problem with this solution is its counterfactual nature: The monopolized U.S. product certainly belongs in the relevant market, and it makes little sense to exclude it artificially. Alternatively, one could accept the "like product" definition at face value but refuse to give relief for loss of monopoly power over price. This approach would be easier to administer, since it permits reliance on actual evidence of consumer behavior. It can only work, however, with the addition of the next step I propose, which is designed to estimate the degree of market power the U.S. firms in an industry can exercise.

B. *Market Power Inquiry*

Once the Commission has defined "like products" and can identify the domestic producers of those products, the additional market power step that I propose would be inserted. Unless direct evidence of market power existed, this step would begin with the ITC's characterization of the market structure of the industry. At this point, unlike the first-stage identification of U.S. producers of the like product, the Commission should include in the market all foreign firms. It should then identify the proportion of that market held by U.S. firms and by foreign firms that are not engaging in unfair trade practices. The fairly trading foreign firms should be included because the efficiency-based rationale of the unfairness of dumping or subsidization implies that import competition from them is a legitimate part of the U.S. market.⁹⁵ The purpose of this step is to arrive at a rough calculation of how competitively the U.S. industry is behaving. More formally, its purpose is to determine how likely it is that the prevailing prices charged by U.S. firms correspond to the ideal of competitive pricing.⁹⁶

95. Notably, injury from such firms is not included in the mandatory cumulation provision of the statute, under which the Commission must cumulatively assess "the volume and effect of imports from two or more countries of like products *subject to investigation* if such imports compete with each other and with like products of the domestic industry in the United States market." 19 U.S.C. § 1677(7)(c)(iv) (Supp. IV 1986) (emphasis added).

96. Under perfect competition, price will be equal to the industry's marginal cost of production. See, e.g., H. HOVENKAMP, *supra* note 92, at § 1.1; R. POSNER & F. EASTERBROOK, *supra* note 35, app. at 1062-63 (appendix by W. Landes). As firms begin to acquire market power, they begin to acquire the ability to price above their marginal cost. The monopolist prices substantially above marginal cost, by limiting output to the point where its marginal

At the two extremes, the Commission might find that there is only one firm, from the United States, producing the like product, or that there are a great number of small firms. In the former case, the market is monopolistic, and it is reasonable to infer that the prices in the market either are anticompetitively high, or would be in the absence of the unfairly traded imports.⁹⁷ A monopolistic market, of course, is inefficient: Society bears a deadweight loss of some dimension, and wealth is transferred from the rest of society to the monopolist, thereby diminishing the consumer surplus that would exist at competitive price levels. At the other extreme—an atomistic U.S. market structure, taking into account both U.S. firms and foreign firms that are trading fairly—it is reasonable to assume that prices are at competitive levels.⁹⁸ The likelihood of inefficiency in the U.S. industry is quite low, because any firm whose costs were too high to survive at the prevailing market price would go out of business, and its output would easily be replaced by the output of the remaining firms in the market. These results would also obtain in a fully contestable market — one that was so easy to enter that it would never be possible to sustain supracompetitive prices over any significant period of time, because new entry would always force prices back down.⁹⁹

Two intermediate kinds of market structure are also possible: oligopoly and monopolistic competition. In an oligopolistic market, the number of sellers is small enough that each is consciously and perceptibly influenced in its price and output decisions by the actions of the other. If effective cooperation is possible, oligopolistic industries will tend to maximize the collective profits of each firm, by approaching the monopoly price level.¹⁰⁰ Under monopolistic competition, relatively

revenue will equal its marginal cost. At that point, due to the downward sloping demand curve, consumers will pay a price above marginal cost. The problem is not so much to identify these ideal extremes as it is to ascertain where on the spectrum actual industries and firms fall. For a discussion of some of the evidence that might be used, and its pitfalls, see PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS* ¶¶ 128-130 (4th ed. 1988).

Marginal cost itself is a term that requires some definition, since short-run marginal cost will tend to be lower than long-run marginal cost, in industries where fixed assets are replaced over the longer run. Economic texts tend to look at the long run, in their descriptions of ideal prices and output. See, e.g., EDWIN MANSFIELD, *MICROECONOMICS* 216, 241-53 (6th ed. 1988); F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 13-20 (2d ed. 1980). These cost figures are extremely difficult to calculate in practice, which is why a more elaborate approach to the inquiry is almost always necessary in antitrust law, and will be equally necessary here.

97. Formally, one would expect to find price at the point where the firm's marginal cost of production equals its marginal revenue. See F.M. SCHERER, *supra* note 96, at 12-13.

98. Scherer describes the conditions of a perfectly competitive market: homogeneity of the product, insignificant size of individual sellers and buyers relative to their market, absence of barriers to the entry of new firms, and mobility of resources employed or potentially employable in the industry. *Id.* at 11.

99. For a discussion of contestability, see WILLIAM J. BAUMOL, JOHN C. PANZAR, & ROBERT D. WILLIG, *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* (1982).

100. For a discussion of the economics of oligopoly, see F.M. SCHERER, *supra* note 96, at chs. 5-8; RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 39-77 (1976).

many small firms compete in the market for their general class of products, but the products themselves are differentiated. Product differentiation allows firms to affect price to some degree by their output decisions—the less they produce, the more consumers will be willing to pay for each unit.¹⁰¹ These intermediate kinds of market structures are the most interesting for present purposes, since they best describe most real-world situations.

Once the structure of a correctly defined market has been characterized, it becomes possible to determine whether firms within that market are likely to be exercising market power over their pricing. In other words, this step would allow the ITC to determine whether the particular U.S. industry in question is behaving competitively. Since the ITC gathers information about the U.S. industry as a whole, including key facts such as the number of firms in the market, sales figures, and capacity figures, it should be relatively easy for the Commission to come to a judgment about market structure. The more difficult problem has to do with the reliability of inferences about market performance from market structure: Firms in contestable markets have little or no ability to exercise market power, even though there may be only a few of them. The best available way to address this problem is in the process of market definition, by including as producers presently in the market those who can enter quickly and easily. Another option would be to try to assess market power on the basis of direct performance information, such as profitability or rate of return data. Persistent rates of return above those in comparable industries may indicate the presence of market power; again, this kind of data exists in published statistics, and it can be gathered by the ITC during an investigation. I remain skeptical about the reliability of profitability measures, however, given the difficulty of matching profits to particular product lines and the elusiveness of the risk element.

This part of the injury test would not require the ITC to determine what the firms in question were doing with their monopoly profits,¹⁰²

101. In other words, there is a downward-sloping demand curve for the firm's product. To the extent that other firms in the broader market manufacture products that are acceptable substitutes for the firm's product, the firm's power over price is reduced. An equation expressing the relationship between market power and market share helps to give an idea of this interrelationship among the firms:

$$e_{d(f)} = [e_{d(mkt)} + e_s(1-S)] / S$$

where $e_{d(f)}$ is the elasticity of demand facing the firm, $e_{d(mkt)}$ is the market elasticity of demand, e_s is the elasticity of supply of the firm's competitors, and S is the firm's market share. See R. POSNER & F. EASTERBROOK, *supra* note 35, at 352. The virtue of this equation is that it adjusts automatically for how broadly or narrowly the market is defined, and thus the choice of market definition will not skew the ultimate determination of the firm's own market power. The vice of the equation is simply that these figures are difficult to obtain in practice, particularly within the time limits available to the ITC. For a description of ITC procedures, including the strict statutory timetable, see Gary W. Horlick, *Summary of Procedures under the United States Antidumping and Countervailing Duty Laws*, 58 ST. JOHN'S L. REV. 828 (1984).

102. Of course, if every firm in the U.S. industry were transferring its ability to earn extra profits to its input suppliers, the marginal cost curve would be affected. In that case, it might

nor would it need to engage in the difficult process of calculating marginal cost, or average variable cost. The goal, through whatever the best mechanism proves to be, is to identify market power in the U.S. industry. To the extent that market power can successfully be exercised, some deadweight loss can be predicted for the economy, along with some transfer payments from consumers to the industry. With this information in mind, we can turn to the effect that the unfairly traded imports have on the industry, and to the central questions of whether and to what extent that effect should qualify as legal injury.

C. *Determination of Trade Injury*

Under the artificial advantages rationale for condemning the practices of dumping and subsidization, injury suffered by a U.S. industry that is inflicted by a more efficient foreign competitor (excluding the effects of the price discrimination or the governmental largesse) should not suffice to prove injury within the meaning of the statute. In addition, regardless of the efficiency of the foreign competitors, if the U.S. industry's complaint in whole or in part rests on the loss of its ability to exercise market power, then to that extent its injury claim should be rejected.

1. *More efficient foreign competitor.*

If, after adjusting for the margin of dumping or subsidization, the foreign firm would still have bested the U.S. firms in the marketplace, it is reasonable to infer that the foreign firm is the more efficient competitor and is entitled to whatever market share it can capture. Thus, the law should relate trade injury to the margin of dumping or subsidization that exists, to the effect on demand caused by that margin (*i.e.*, elasticity of demand for the products), and to the overall level of import penetration. Injury should not be found when the mere presence of imports that have been either dumped or subsidized is all that can be shown.¹⁰³ The statutes say that the injury must be "by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation."¹⁰⁴ A number of people have argued that the plain meaning of this provision favors the more protectionist approach—namely, that the existence of the unfairly

be true that the U.S. industry was uniformly selling at marginal cost. Although in principle competitive pressures from foreign suppliers ought to force some trimming of those costs, this situation would count as a "competitive" industry for my proposal. The key factor to look for, in any case, is the ability to sell at a price above marginal cost.

103. As noted in note 70 *supra*, the ITC and the courts appear at present to have rejected this interpretation of the statutes. See *Maine Potato Council v. United States*, 613 F. Supp. 1237, 9 Ct. Int'l Trade 293 (1985); *Republic Steel Corp. v. United States*, 591 F. Supp. 640, 8 Ct. Int'l Trade 29 (1984); *Copperweld Corp. v. United States*, 682 F. Supp. 552, 9 I.T.R.D. (BNA) 2610 (Ct. Int'l Trade 1988). See generally *Bello & Holmer*, *supra* note 18.

104. Trade Agreements Act of 1979 §§ 701(a)(2), 731(2), 19 U.S.C. §§ 1671(a)(2), 1673(2) (1982 & Supp. IV 1986); see text accompanying note 16 *supra*.

traded import in the U.S. market constitutes the injury, whether the margin of dumping or subsidization is one percent or one hundred percent.¹⁰⁵ It would also be possible, however, to read the statute in the broader context of the international agreements regulating antidumping and countervailing duties, with an understanding of the overall economic effect of any additional tariff.

There are a number of problems with the literalistic, plain meaning argument. First, it is inconsistent with the rationale underlying the condemnation of dumping and subsidization—that these practices distort world markets and cause deviations from the production patterns to which natural comparative advantage would otherwise lead. Second, it probably conflicts with the 1979 Antidumping Code, adopted by the United States and many other countries after the Tokyo Round.¹⁰⁶ Although Congress reserved the right to override the Codes in the implementing U.S. legislation, one should find that it did so only on the basis of the clearest evidence.¹⁰⁷ That kind of evidence is lacking here.¹⁰⁸ Third, to the extent that injury is easier to find when the margin of dumping or subsidization is ignored and duties are thus easier to impose, an anti-consumer bias is introduced into the law. Even if anti-consumer measures may be necessary to protect local producers

105. See, e.g., Charles J. Goetz, Lloyd Granet, & Warren F. Schwartz, *The Meaning of "Subsidy" and "Injury" in the Countervailing Duty Law*, 6 INT'L REV. L. & ECON. 17, 26-29 (1986); Jameson, *supra* note 18, at 562-73; Palmetier, *supra* note 18; Perry, *supra* note 18; *Cumulation of Imports in Antidumping and Countervailing Duty Investigations*, 17 GEO. WASH. J. INT'L L. & ECON. 463, 479 (1983) (student author). As noted above, it is necessary to know the elasticity of demand for the product before one can evaluate the effect of the dumping margin. See note 70 *supra*. Even one percent may be very significant if demand is highly elastic.

106. The Antidumping Code states that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, 4927, T.I.A.S. No. 9619, GATT BISD Supp. (No. 26), at 174 (1980). Similarly, the Subsidies and Countervailing Duties Code states that "[i]t must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of this Agreement." Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, 528, T.I.A.S. No. 9619, GATT BISD Supp. (No. 26), at 65 (footnote omitted). While this language may be slightly ambiguous in its references to the dumped or subsidized imports, the references to the effects of the dumping or the subsidy provide stronger support to the argument in the text than to the literal approach.

107. See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1988); *Diggs v. Shultz*, 470 F.2d 461, 465-66 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). See also Trade Agreements Act of 1979 § 2, Pub. L. No. 96-39, 93 Stat. 147-48 (codified at 19 U.S.C. § 2503 (1982)).

108. Knoll argues forcefully that the evidence is clear that Congress intended to implement the Codes in the 1979 Act, and that it certainly did not intend to override them. See Knoll, *supra* note 18, at Part IV. See also Peter D. Staple, *Implementing "Tokyo Round" Commitments: The New Injury Standard in Antidumping and Countervailing Duty Laws*, 32 STAN. L. REV. 1183 (1980) (student author). Jameson, while apparently opposed to my position, never argues that Congress intended to flout the 1979 Codes in enacting the Trade Agreements Act. He simply ignores the international background of the statute altogether. See Jameson, *supra* note 18.

against unfair distortions of international trade, it seems clear that consumers should not be penalized disproportionately.

The broader and more economically sophisticated interpretation of the statute is usually referred to as "margins analysis." Using margins analysis, the Commission would attempt to isolate the effect of the unfair trade *practice* on producers in the U.S., rather than the effect of all *products* being sold by the unfairly trading producer. If the margin of dumping or subsidization is very low, then all other things being equal it is less likely that any injury suffered by the U.S. industry is due to the unfair trade practice. Thus, the Commission would focus on the practice being attacked instead of on the simple fact of import competition, some of which may be perfectly fair. The unfair trade practice will arguably cause the affected products to be priced lower than they otherwise would have been. The effect of that lower price, however, cannot be predicted unless one has some idea of the elasticity of demand for the product in the U.S. market. Where demand is inelastic (i.e. a small change in price will have little effect on quantities demanded), any given margin of dumping or subsidization will have a more injurious effect on the U.S. industry, because of price depression unaccompanied by any important increase in output. When demand is elastic, the same lower price would lead to increased amounts demanded, and thus a lesser degree of injury. One way, then, in which the Commission could use evidence concerning margins is to eliminate cases where the small size of the margins, in the light of demand elasticity, indicates that the unfair trade practice could not have caused the injury to the U.S. producers.¹⁰⁹

The ITC also uses margins to compare the U.S. price of the imports with the margin of dumping or subsidization. If, for example, the margin of dumping is ten percent, but the imported product's price is twenty percent lower than the like U.S. product's price, margins analysis requires the conclusion that any injury suffered by the U.S. industry could not have been "by reason of" the unfairly traded imports.¹¹⁰

109. See, e.g., Heavy-Walled Rectangular Welded Pipes and Tubes from Canada, USITC Pub. 1808, Inv. No. 731-TA-254 (Final), 8 I.T.R.D. (BNA) 1779, 1783 (Feb. 1986) (no injury found where the weighted average dumping margin was 0.65% and where no other special circumstances existed); Certain Red Raspberries from Canada, USITC Pub. 1707, Inv. No. 731-TA-196 (Final), 7 I.T.R.D. (BNA) 1969, 1974 (June 1985) (setting forth five-factor test for the injury determination, one factor of which is size of dumping margin). See also Anhydrous Sodium Metasilicate from France, USITC Pub. 1118, Inv. No. 731-TA-25 (Final), 2 I.T.R.D. (BNA) 5616, 5620 (Dec. 1980) (a majority of the Commission concluding that amount by which imports "undersold" the domestic product was accounted for by the dumping margin). See also cases cited in note 70 *supra*.

110. See Anhydrous Sodium Metasilicate from France, 2 I.T.R.D. at 5620. As noted above, the Commission must consider whether there has been significant price undercutting by imports, which leads to the temptation to compare the price differences between imports and domestic products with the margin of dumping or subsidization. See text accompanying notes 18-23 *supra*.

Even without the advantage of unfair trade practices, the importer could still have undersold its U.S. competitors.

This use of margins analysis also has its flaws, however. It ignores critical factors like the effect of product differentiation on pricing, the ability of the foreign firms to meet the U.S. demand created by lower prices, the elasticity of the U.S. demand itself in the relevant price range, and the market share in the U.S. held by the imports in question. In the example above, the ten percent lower price that we presume would have existed in the absence of dumping may not have materially affected the import market share. The injury to the U.S. industry may have arisen only because of the additional reduction made possible by the dumping. Every case will be different, of course. The important point is that a superficial comparison of the margins of dumping or subsidization and the U.S. price of imports is essentially uninformative.

If, however, upon a sufficiently sophisticated examination of the effects of the unfair trade practice, we can conclude that the practice did not reverse the relative efficiency of the U.S. and the foreign industry, there should be a finding of no injury.¹¹¹ Interestingly, the Treasury Department went even further than this during the period when the steel trigger price mechanism (TPM) was in effect. The trigger prices were the prices at which different kinds of steel could be manufactured in the world's most efficient facilities, which the Government decided were located in Japan.¹¹² The Treasury Department promised to self-initiate a dumping investigation if steel were imported into the country at a lower price. Imports from other, less efficient, foreign countries—such as those in the E.C.—could as a practical matter enter at the trigger price without risking an investigation. The Treasury Department nevertheless refused to develop a two-tiered trigger price to prevent dumping by European producers, in part because it refused to believe that the U.S. industry could be injured by European sales at prices that were legal for the Japanese.¹¹³ Absent the special circumstances of the TPM, however, the correct rule would focus on the competitive relationship between the U.S. industry and a particular foreign competitor in the absence of unfair trade practices. If the marginal advantage conferred on foreign producers either because of the practice of dumping or because of subsidies makes no difference to the competitive outcome, that should be the end of the Commission's inquiry. If the unfair trade practice did make a difference, a more detailed examination of

111. See Knoll, *supra* note 18, at Part III.

112. See generally Jacqueline M. Nolan-Haley, *The Trigger Price Mechanism: Protecting Competition or Competitors?* 13 N.Y.U. J. INT'L L. & POL. 1 (1980); Joseph Wetlin, *The Steel Trigger Price Mechanism*, 33 S.C.L. REV. 593 (1982) (student author); *Protecting Steel: Time for a New Approach*, 96 HARV. L. REV. 866 (1983) (student author).

113. European imports of steel entered at the trigger price even though their costs exceeded the Japanese costs. See, e.g., J. JACKSON & W. DAVEY, *supra* note 4, at 717. See also A. LOWENFELD, *supra* note 14, at § 6.2.

the extent to which firms in the U.S. industry can exercise market power ought to be the next step.

2. *Market power of U.S. firms.*

Whenever a market in the United States is less than perfectly competitive—which occurs almost all the time—the prevailing U.S. price level will probably be above industry long-term marginal cost. For the sake of simplicity, I shall first consider the limiting case where there would be a single monopolist in the United States if the unfair foreign competition were disregarded. I shall then consider lesser degrees of market power, most of which arise from a form of tacit cooperation.¹¹⁴

A U.S. monopolist, M, will attempt to charge a price for its product that equates marginal cost and marginal revenue.¹¹⁵ Until new entry is attracted into that market, the monopolist will succeed in maintaining this price. During the period of monopoly pricing, society as a whole will incur a deadweight loss, and there will be a wealth transfer from consumers to M. Suppose now that a hypothetical foreign firm, F, wishes to enter the U.S. market with a competitive product that has been subsidized by F's government. Suppose also that the product in question is homogenous, that F can make no U.S. sales at any price above M's price, and that F is unable to price below M without the benefit of the subsidy (thus indicating that F has failed the first screen). If F refrains from selling in the United States, of course, then U.S. consumers will continue to pay monopoly prices to M. If, however, F takes advantage of its subsidy and undercuts M's price, M will begin to lose sales to F. M will experience some or all of the adverse effects mentioned in the countervailing duty law, such as decline in sales, market share, profits, and capacity utilization.¹¹⁶ M decides to file a countervailing duty petition with the Department of Commerce and the ITC, complaining that F is the recipient of subsidies and that the domestic industry—M itself—has been injured "by reason of" the subsidized imports.

Assuming that the petition is facially sufficient, the ITC should nonetheless reject this petition on injury grounds. The effect of the imports from F is to drive M's former monopoly price down toward a competitive price level. This effect is unambiguously good for U.S. consumers, since it tends to eliminate the deadweight loss and lessen the transfers of wealth from the consumers to M. The only question is whether the U.S. government should intervene to cut off that consumer

114. Under the trade statutes, it is not necessary to find an actual "agreement" among the market participants. The problems that have arisen under Section 1 of the Sherman Act, dealing with conscious parallelism, plus factors, the search for the "smoking gun" memorandum, and the like, need not arise. See R. POSNER, *supra* note 100, at ch. 4; R. POSNER & F. EASTERBROOK, *supra* note 35, at 331-44.

115. See note 96 *supra*.

116. See text accompanying note 22 *supra*.

benefit in the interest of a greater good that can be conferred on M, the U.S. producer. Using the efficiency-based artificial advantages argument for condemning the subsidies, the answer must be no.

There are only two potential greater goods that might be served by intervening to help M. First, preventing F from competing in the United States would help M retain its monopoly position in the U.S. market. This alleged benefit is easy to reject: nothing in U.S. competition policy or trade policy expresses an interest in preserving M's monopoly rents. Quite to the contrary, there is a strong interest in eliminating those rents, even if the competitive pressure that accomplishes this end comes from a foreign producer.

There is also a second potential benefit to intervention, one which is more complicated to assess. By ensuring that M does not cede any market share to F, the U.S. government ensures that M will not suffer the potential costs of contracting its capacity. This alleged benefit is illusory, however. To the extent that the subsidization or dumping is a long-term phenomenon, society is probably better off adjusting to the new allocation of resources.¹¹⁷ If entry and exit are relatively easy in the affected industry, then adjustment costs are likely to be less than the consumer benefits gained by more effective competition and lower prices. In an industry where entry and exit are costly and time-consuming, the legal regime should certainly seek to minimize the costs of adjustment. The question is how to accomplish this. Are antidumping or countervailing duty laws the best tools to use to facilitate adjustment, or are other laws such as adjustment assistance and the escape clause better? Unlike the antidumping and countervailing duty laws, which are premised on unfairness, the escape clause and the adjustment assistance provisions are specifically designed to insulate U.S. competitors from excessive foreign competition, or to help U.S. workers adjust to new competitive conditions.¹¹⁸ Relief under the escape clause is more difficult to obtain, however, in part because the injury requirement is much stricter and in part because executive discretion to deny or fine-tune protection is far greater.¹¹⁹

117. Most commentators today agree that dumping, at least, is likely to be a long-term phenomenon. See W. WARES, *supra* note 38, at 7-12; Barceló, *The Antidumping Law: Repeal It or Revise It*, *supra* note 7, at 60. Viner was more skeptical about the probability of dumping as a long-term strategy. See J. VINER, *supra* note 12, at 122-26. If the history of U.S. sugar subsidies is any measure, subsidies also may become politically entrenched, and thus may best be considered long-term phenomena. See generally G. HUFBAUER & J. SHELTON-ERB, *supra* note 38.

118. See Omnibus Trade and Competitiveness Act of 1988 §§ 1421-1430, Pub. L. No. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1242-57 (strengthening provisions for worker adjustment assistance) (amending 19 U.S.C. §§ 2271-2397 (1982 & Supp. IV 1986)); see also Trade Act of 1974 § 201, 19 U.S.C. §§ 2251-225(3) (1982 & Supp. IV 1986) (escape clause), and the comprehensive amendment of that law in the 1988 Omnibus Act § 1401, 102 Stat. 1225-41.

119. The President's discretion is now spelled out in section 203 of the 1988 Omnibus Act, 102 Stat. 1234-38. He may follow the ITC's recommended remedy; he may provide alternative relief; or he may refuse to give any relief at all.

Since there is no social benefit to be gained in the preservation of a U.S. industry's monopoly rents, it is important to avoid an interpretation of the unfair trade laws that has the practical effect of rent preservation. In the antitrust field, courts reject a firm's claim when the gist of its complaint is that it will lose its ability to charge high prices; the claim is directly contrary to the purposes of the law.¹²⁰ The trade laws can be applied in the same way, using evidence that the ITC already has. This approach would go a long way toward harmonizing antitrust policy and trade policy, and at the same time it would respect the congressional decision that efficient, competitively structured U.S. industries should not lose their advantage over foreign firms because of artificial advantages enjoyed by their foreign competitors.

The approach which I propose avoids the perverse results that the existing interpretation of the injury requirement brings about. Discussing the antidumping laws then prevailing, Kenneth Dam pointed out in 1970 that "the less efficient the local firms, or the greater their local monopoly, the more easily the requisite injury can be shown (even though the local consumer's need for the low-priced imports is comparatively greater)."¹²¹ There is no reason why the trade laws should supply this kind of affirmative protection of market power, even if the foreign firm happens to be engaging in price discrimination or enjoying subsidies from its own government. In the example of M described above, until F forces M's prices down to the point where M is setting price equal to its marginal cost of production, M has not suffered the kind of injury that should be redressable under the antidumping and countervailing duty laws.

If F, however, succeeds in eventually forcing M to price at M's marginal cost, and F continues to underprice because of its unfair trade practices, M's injury should be redressable. To the extent that M loses market share to F solely because F is selling at LTFV or is enjoying subsidies, an antidumping or countervailing duty would be appropriate. Market share information would again be useful, this time looking at all firms in the market. If M's share drops so low in comparison to the unfairly trading firms that an inference of market power is no longer reasonable, there is no reason to suspect continuing monopoly rents.

The question then becomes how to measure the duty. The statute dictates that the duty must reflect the entire margin of dumping or subsidization, even though this measure often results in a price too high to meet local competition in the United States.¹²² The better practice, if it

120. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

121. K. DAM, *supra* note 59, at 169.

122. There is no "meeting competition" defense under the trade laws, despite the fact that this creates a lack of symmetry between the antidumping laws (international price discrimination) and the Robinson-Patman Act, 15 U.S.C. § 13(b) (1982) (domestic price discrimination). See Victor, *supra* note 5; Gary N. Horlick & Shannon S. Shuman, *Nonmarket Economy*

were feasible as a practical matter, would be to impose duties only to the extent that the unfair practice enables the foreign firm to undercut an efficient price level in the U.S. industry.

The approach I propose applies to the oligopolist as well as the monopolist. Suppose that instead of the single firm M in the U.S. industry, we have a small group of firms $G_1, G_2, \dots, G_n$, that produces the kinds of products and faces entry conditions that are conducive to oligopolistic behavior. This example introduces an additional complication, because of the way that the overall market is potentially divided among domestic firms, fairly trading foreign firms, and unfairly trading foreign firms. For simplicity, I begin with the assumptions that the oligopoly presently controls 100% of the U.S. market, there are no fairly trading foreign firms seeking to enter, and the unfairly trading foreign firm F is trying to enter. Here again, the ideal approach would be to compute an industry marginal cost and to deny trade relief for unfair practices that simply drive U.S. prices down to the level of marginal cost. I discuss below, in Part IV, ways in which this might be implemented as a practical matter.¹²³

The history of the steel industry's use of the unfair trade statutes illustrates the advantages of the proposed approach. The steel industry historically exemplified an oligopolistic industry, in which prices apparently had risen to levels well above marginal cost. The high prices may have been due in part to excessive payments for certain factors of production, particularly labor (*i.e.*, higher costs), but the prices may also have been due to an unwillingness to invest in new technologies at a critical time, or to an ability to charge generous prices to direct purchasers such as the automobile companies.¹²⁴ Whatever the reasons, it is clear that the steel industry has been suffering for some time from foreign competition. It is equally clear that the industry's problems have not been alleviated by its long history of success in obtaining various kinds of trade protection—tariffs, orderly marketing agreements, voluntary export restraints, and the present steel import stabilization program.¹²⁵ In fact, the import protection measures have imposed

Trade and U.S. Antidumping/Countervailing Duty Laws, 18 INT'L LAW. 807 (1984). The Commission appears today to be less sympathetic to so-called "technical dumping" than it was in the past. "Technical dumping" refers to the foreign producer's practice of charging a lower price in the United States solely to match competitive prices in the United States. See S. REP. NO. 1298, 93d Cong., 2d Sess. 179 (1974); Peter D. Ehrenhaft, *The "Judicialization" of Trade Law*, 56 NOTRE DAME LAW. 595, 604 (1981).

123. See text accompanying notes 130-141 *infra*.

124. Walter Adams has written over the years about the economic performance of the steel industry. See Adams, *supra* note 67; see also A. LOWENFELD, *supra* note 14, at §§ 4, 5, 6, 8.5; John William Hargrove, *The Steel Import Stabilization Act of 1984: Protectionism or Correctionism?* 18 VAND. J. TRANSNAT'L L. 149 (1985) (student author); *Protecting Steel: Time for a New Approach*, *supra* note 112.

125. The Steel Import Stabilization Act, which was part of the Trade and Tariff Act of 1984, Title VIII, Pub. L. No. 98-573, 98 Stat. 2948, 3043-47 (codified at 19 U.S.C. § 2253 (Supp. IV 1986)), has provided the authority for an impressive network of bilateral quantitative restriction agreements between the United States and various steel exporting countries.

high costs on consumers of steel (such as the U.S. auto industry and manufacturers of consumer durable goods) and have simultaneously retarded the industry's adjustment to stiff worldwide competition.

The steel industry's antidumping and countervailing duty petitions should have been resolved by determining the amount by which the industry prices were above the industry marginal cost. This approach would have allowed legitimate competitive pressure to reduce prices to marginal cost, and perhaps would have induced procompetitive reductions in costs that were excessively high as a result of sharing oligopoly rents with suppliers of labor and other inputs. Only to the extent that the unfairly traded steel was still undercutting the hypothetical competitive (*i.e.*, marginal cost-based) U.S. price would a finding of trade injury have been justified. Tariff relief would have been appropriate to redress that injury, measured by the amount necessary to bring foreign prices up to the competitive U.S. price level.¹²⁶

Several further considerations arise if we suppose that some of the competition in the U.S. market comes from fairly traded imports. In this case, we might have a four-firm market in which firms G_1 and G_2 are U.S. firms, and firms G_3 and G_4 are fairly trading foreign firms. Firm F again is a non-U.S. firm engaging in LTFV sales or benefiting from subsidies. From the point of view of consumer welfare in the United States, we still want to know if G_1 through G_4 are pricing competitively or not. Oligopoly cooperation may well be more difficult if some firms are located in other countries, with different languages, marketing practices, price and delivery constraints, and the like. Nonetheless, the empirical question is the same as it was when all the firms were U.S.-based and foreigners had not yet entered the market: To what extent is the status quo—excluding the effect of the unfair trade practice—one that reflects some market power in U.S. price levels? As before, injury to the U.S. producers should be recognized only to the extent that a firm is unable to survive using marginal cost pricing.

It is important to note that evaluating the structure of the industry may prove problematic. If the market is unconcentrated, it is safe to presume that the prevailing price being charged by the U.S. firms cannot be significantly above marginal cost over the long run.¹²⁷ But as

On February 27, 1986, the United States Trade Representative announced that agreements with the E.C. and 17 other countries were in force. See 51 Fed. Reg. 6965 (1986); see also note 124 *supra*.

126. An even more ambitious approach would be to compute a hypothetical competitive level of costs for the U.S. industry, and then to derive the competitive price from it. This approach, however, goes beyond the trade injury standard that I am proposing, and data problems would render it far more difficult administratively.

127. One way that industry structure could be categorized would be to borrow the thresholds established by the Department of Justice in its 1984 *Merger Guidelines*. The Herfindahl-Hirschman Index, or HHI, is calculated by summing the squares of the individual market shares of all the firms included in the relevant market (or, for trade law, of all firms producing the "like product"). The Justice Department offers several reasons why this is preferable to a simple computation of the market shares:

the market becomes more concentrated, and as the share held by the U.S. firms becomes higher, the U.S. firms are more likely to be able to exercise market power.¹²⁸ At that point, the problem should be treated the same way as the first oligopoly situation I discussed.

Finally, assume that the U.S. firms and the fairly trading foreign firms, taken together, occupy only a small percentage of the U.S. market. As noted above, if the foreign producers are more efficient than the U.S. firms, disregarding the effects of the unfair practices, there should be a finding of no injury. The U.S. firms are probably not charging prices above their own costs,¹²⁹ so it is not difficult to identify the "efficient" price level. That price can be computed as before, and duties could be imposed on the dumped or subsidized goods as before. Unfortunately, the greater the proportion of the U.S. market that is served by the dumped or subsidized goods, the greater the loss in U.S. consumer welfare when the low prices made possible by the unfair practice are negated. A fourth step could therefore be added to the trade injury determination: Tariff relief should be rejected whenever consumer benefits, less any adjustment costs, outweigh producer benefits.

This potential fourth step should be rejected, however, for two reasons. First, it is inconsistent with the comparative efficiency argument that I have assumed to be the purpose of the antidumping and countervailing duty laws. Second, adoption of this step would be tantamount to the repeal of both statutes. Short of repeal, the best compromise is to follow the approach I have outlined above. First, define "like products" in an economically meaningful way. Second, ascertain the structure of the product market that has been defined. Finally, determine whether any injury has been suffered because of the unfair trade practice. To the extent that the unfair practice has influenced the level of the foreign firms' participation in the U.S. market, and to the extent that the U.S. industry is behaving competitively (*i.e.*, following a standard of marginal cost pricing), tariff relief should be awarded.

Unlike the traditional four-firm concentration ratio, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms. It also gives proportionately greater weight to the market shares of the larger firms, which probably accords with their relative importance in any collusive interaction.

ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, MERGER GUIDELINES, *supra* note 91, at § 3.1. A variant of my proposal using HHIs is described in Part IV as a way that this approach to injury could be implemented without undue administrative burden. See text accompanying notes 142-146 *infra*.

128. It would be possible to consider problematic only those cases in which the U.S. firms and the fairly trading foreign firms, taken together, have market power. But given the likelihood that foreign competition cannot provide as strong a check on market power as domestic competition can, it seems better to focus on the U.S. firms alone.

129. It is possible, if there is a foreign monopolist, that the U.S. firms are pricing above cost under the monopoly "umbrella."

IV. IMPLEMENTATION

Without amending the trade statutes, it would be possible to implement a rough version of the approach to injury that I have described. With some statutory modification, it would be possible to solve some of the inevitable administrative problems without undermining the commitment to a general antidumping and countervailing duty regime. In this part of the article, I first describe how this approach to the meaning of material injury would apply under existing laws, and then I suggest more far-reaching changes.

A. *Operation Under Existing Laws*

There are virtually no limitations, other than time constraints, on the ITC's ability to collect relevant economic evidence about the U.S. industry that claims it is suffering from unfairly traded imports. In some cases, the time limitations would be no more difficult to observe under my approach than they are at present. In others, particularly cases where the preliminary economic evidence indicates that an industry is performing inefficiently or is pricing at supracompetitive levels, the present timetable would be more difficult to observe. Putting administrative constrictions to one side, however, the Commission is quite well equipped to implement this approach to injury.

In a perfect world, the Commission would begin by constructing an economically sound definition of the like products affected by its investigation. It then would collect data on the actual marginal cost for each U.S. producer of the like products, and it would compare prices in the market with marginal costs to see how much of a discrepancy existed.¹³⁰ Finally, it would look at the unfairly traded imports to see whether the effect of the unfair trade practice was to reverse the comparative advantage that would exist between the two industries in the absence of the unfair practice. Even if the U.S. industry were relatively inefficient (either because of higher costs or because the unfair practice reversed preexisting competitive advantages), it would be entitled to relief if it collectively had no market power. Trade injury would exist because the imports were injuring the U.S. industry as a result of the unfair trade practice.

It is worth noting how this test differs from the similarly worded requirement that existed until recently in section 337 of the Tariff Act of 1930. Section 337 declared unlawful "[u]nfair methods of competition and unfair acts in the importation of articles into the United States,

130. Since this step is exceptionally difficult as a practical matter, the ITC in practice would either develop presumptions about market power from other evidence (e.g., market structure, rates of return) and assign "overcharge" figures accordingly, or it would need to examine some surrogate for marginal cost, such as average variable cost. Cf. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

... the effect or tendency of which is to destroy or substantially injure an industry, *efficiently and economically operated*, in the United States ...”¹³¹ Although the ITC never found a complaining industry not to be efficiently and economically operated, presumably such a finding would have barred relief altogether. In my proposal, on the other hand, relief would be available even to an inefficient firm, if a competitively structured industry would also have suffered. In addition, my proposal does not require the destruction of, or crippling injury to, the U.S. industry before relief can be awarded. Rather, my approach mandates only that “material injury,” as the term is defined in the statute, must be shown, together with the causal link to the unfair trade practice.

My proposal is also consistent with the existing law’s conception of the public interest, as it is expressed in the provisions allowing the termination or suspension of a proceeding. For both antidumping and countervailing duty situations, a case may not be terminated or settled by means of a quantitative restriction unless termination is in the public interest.¹³² The public interest factors include “the relative impact on the competitiveness of the domestic industry producing the like merchandise,” and “whether, based upon the relative impact on consumer prices and the availability of supplies of the merchandise, the agreement would have a greater adverse impact on United States consumers than the imposition of . . . duties.”¹³³

Furthermore, most of the evidence that the ITC presently collects would continue to be of great importance. Industry output levels, the market shares of the firms that have accurately been determined to be in the industry, measures of productivity that suggest how efficiently factors of production are being used, and of course domestic price levels, are all significant. Other data are less useful, particularly measures derived from accounting rates of return, such as profit levels, negative cash flow, and the ability to raise capital.¹³⁴

In addition, the ITC is capable of making the additional judgments that would be required. For example, the ITC may want to compare the performance of the industry in question to other industries with similar resource needs. The Commission could look at the ratio of the market value of the firms in the industry to the replacement cost of their assets—the measure of profitability referred to in the economic

131. 19 U.S.C. § 1337(a) (1982), *repealed by* the Omnibus Trade and Competitiveness Act of 1988 § 1342, Pub. L. No. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1212 (emphasis added). See also Harold Brandt & Wilhelm A. Zeidler, *Unfair Import Trade Practice Jurisdiction: The Applicability of Section 337 and the Countervailing Duty and Antidumping Laws*, 12 LAW & POL’Y INT’L BUS. 95 (1980).

132. See 19 U.S.C. §§ 1671c(d)(1), 1673c(d)(1) (1982 & Supp. IV 1986).

133. *Id.* §§ 1671c(a)(2)(B), 1673c(a)(2)(B) (Supp. IV 1986).

134. See Franklin Fisher & John McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 AM. ECON. REV. 82 (1983).

literature as Tobin's q .¹³⁵ The critical point is that economists are quite accustomed to making judgments about how competitive particular industries are.¹³⁶ In antitrust actions for damages caused by a monopoly or a cartel, economic evidence on the amount of the overcharge—the basis of the damages—is essential.¹³⁷ Although those judgments are no more likely to be infallible than any other product of human labor, the Commission could use the results to create broad performance categories. Competitively performing industries would be entitled automatically to a finding of trade injury. The ITC would need to examine industries that do not perform competitively. If, after discounting for the noncompetitive pricing that those industries are displaying, the Commission concludes that they would still have been injured by the unfair trade practice, then it should issue an affirmative finding of injury. If the Department of Commerce has also concluded that the unfair practice actually occurred, then duties would follow, measured by the margin of dumping or subsidization.

The Commission could not continue its present treatment of evidence of lost sales, price undercutting, or price depression, however. Such findings currently provide the strongest evidence of injury from the unfair trade practice under investigation.¹³⁸ If the customers of a U.S. firm tell the government that they chose an imported product over the product of the U.S. firm because of price, the ITC assumes that something bad has occurred. Even if the imported product is priced the same as, or slightly higher than, comparable U.S. products, the Commission may still find price depression or suppression, if the import prices prevented increases in the U.S. prices.¹³⁹ The discredited

135. See James Tobin, *Monetary Policies and the Economy: The Transmission Mechanism*, 37 S. ECON. J. 421 (1978); see also Mark Hirschey, *Market Structure and Market Value*, 58 J. Bus. 89 (1985); Eric Lindenberg & Stephen Ross, *Tobin's q Ratio and Industrial Organization*, 54 J. Bus. 1 (1981); Henry McFarland, *Did Railroad Deregulation Lead to Monopoly Pricing? An Application of q* , 60 J. Bus. 385 (1987); Stephen Salinger, *Tobin's q , Unionization, and the Concentration-Profits Relationship*, 15 RAND J. ECON. 159 (1984); Michael Smirlock, Thomas Gilligan, & William Marshall, *Tobin's q and the Structure-Performance Relationship*, 74 AM. ECON. REV. 1051 (1984). I am indebted to Professor William M. Landes for the suggestion that q ratios may be useful in this connection.

136. The entire industrial organization field in economics is devoted to this issue. Commonly studied industries include the steel industry, the automobile industry, the aluminum industry, the oil industry, railroads and air carriers, and shipping conferences.

137. 3 ANTITRUST COUNSELING AND LITIGATION TECHNIQUES §§ 36.02[1], 36.05[3] (J. von Kalinowski ed. 1988); see also H. HOVENKAMP, *supra* note 92, § 14.2 at 359 (the monopoly overcharge is the damage suffered), § 14.4 at 366 (discussing the importance of determining the overcharge, despite difficulty of calculation).

138. See, e.g., Forged Steel Crankshafts from West Germany and U.K., USITC Pub. 2014, Inv. Nos. 731-TA-351, -353 (Final), 10 I.T.R.D. (BNA) 1179, 1186 (Sept. 1987); Malleable Cast-Iron Pipe Fittings from Thailand, USITC Pub. 2004, Inv. No. 731-TA-348 (Final), 10 I.T.R.D. (BNA) 1037, 1041 (Aug. 1987); Welded Carbon Steel Pipes and Tubes from Philippines & Singapore, USITC Pub. 1907, Inv. Nos. 731-TA-293, -294, & -296 (Final), 9 I.T.R.D. (BNA) 1361, 1369 (Nov. 1986); Agricultural Tillage Tools from Brazil, USITC Pub. 1761, Inv. No. 701-TA-223 (Final), 8 I.T.R.D. (BNA) 1028, 1030-31 (Oct. 1985).

139. See, e.g., Porcelain-on-Steel Cooking Ware from Mexico, People's Republic of China, and Taiwan, USITC Pub. 1911, Inv. Nos. 701-TA-265 & 731-TA-297, -298, & -299

antitrust price discrimination opinion in *Utah Pie Co. v. Continental Baking Co.* similarly condemned price competition because it led to a "drastically declining price structure" in the market for frozen pies.¹⁴⁰ A declining price structure is, however, at least as likely to reflect a movement in prices down toward competitive levels as it is to indicate that local firms will be forced to price below their own marginal cost.¹⁴¹ Thus, evidence of price undercutting, lost sales, or price depression should not support any inference of trade injury. Much of the time, those phenomena will signal a beneficial competitive adjustment by the U.S. industry, not the kind of trade injury that justifies tariff relief.

B. Statutory Changes

Two changes in the antidumping and countervailing duty laws would help assure that they address only situations in which a less efficient foreign industry is assisted by an unfair practice. The first change is a more far-reaching use of market structure data to determine the appropriate remedy; the second is an open recognition of the trade-off between consumer welfare and producer interests that is now only weakly implicit in the injury requirement.

The relationship between market structure and market performance has been studied for years. Although there are problems with inferring likely performance from particular market structures, careful assumptions from market structure data are still likely to be informative. The 1984 *Merger Guidelines*, for example, still use a structural test as the starting point for determining when mergers are likely to lead to excessive market power in the successor firm or are likely to facilitate anticompetitive collusion in the reconfigured market. Using the Herfindahl-

(Final), 9 I.T.R.D. (BNA) 1587, 1593 (Nov. 1986); Malleable Cast-Iron Pipe Fittings from Thailand, U.S.I.T.C Pub. 2004, Inv. No. 731-TA-348 (Final), 10 I.T.R.D. (BNA) 1037, 1042 (Aug. 1987).

140. 386 U.S. 685, 703 (1967). For criticism of this decision, see, for example, ROBERT BORK, *THE ANTITRUST PARADOX* 210, 386-87 (1978); H. HOVENKAMP, *supra* note 92, § 6.12 at 188-89; LAWRENCE ANTHONY SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 687 (1977); Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967). Professor Sullivan's remarks about the perversity of the Court's result in *Utah Pie* apply with equal force to the price depression theory of the antidumping and countervailing duty laws:

One can hardly conceive of an approach better calculated to protect oligopolistic price structures against erosion; as soon as any multi-market firm begins to "cheat" on the cartel or to undercut interdependent prices in any market, the other firms there can sue to recover their lost monopoly profits. There is little doubt, on the *Utah Pie* facts, that the plaintiff's profits . . . were lower, as a consequence of the falling price levels, than they would have been had the large firms refrained from any local reductions; but the healthy profits still being earned in the market strongly suggested that all that happened was that some of the monopoly profits previously being earned in an oligopolistic market had been squeezed out.

L. SULLIVAN, *supra*, at 687 (footnote omitted).

141. Note again that one should focus not on the relationship between the cost of the import and its price, but on the cost of the like U.S. product, and whether the price of that product is consistently well above marginal cost.

Hirschman Index ("HHI"),¹⁴² the Guidelines identify three kinds of market structures: unconcentrated (HHI below 1,000); moderately concentrated (HHI between 1,000 and 1,800); and highly concentrated (HHI above 1,800).¹⁴³ Although the Department of Justice looks at a great deal of industry-specific evidence after identifying what kind of market is involved in a case, this taxonomy provides a rough sense of which mergers are likely to be troublesome.¹⁴⁴

The ITC could compute HHIs for the U.S. industry in a trade proceeding, just as the Department of Justice does in pre-merger review. The Commission has, or can get, data on firms in the U.S. industry in much the same way that the Department learns about the line of commerce affected by a merger. Furthermore, the time constraints on the ITC are no greater than those on the Department of Justice.¹⁴⁵ Even without statutory change, a sense of the resulting HHI would help the Commission evaluate the possibility of noncompetitive pricing in an industry. With statutory change, however, the Commission could attack the trade protection problem more directly. The Commerce Department would remain responsible for determining whether LTFV sales or prohibited subsidies were present and for calculating the amount of the margin of dumping or subsidization. The ITC would be responsible, in connection with the injury finding, for ascertaining how competitively the U.S. industry is structured.

An amended statute could divide available tariff relief into three categories, corresponding to the three regions of industry structure. (This concededly is somewhat arbitrary, but it has the advantage of easy administrability. Congress could of course choose other levels.) However, one might decide that for industries that are unconcentrated, any

142. See notes 91 & 127 *supra*.

143. See ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, MERGER GUIDELINES, *supra* note 91, at § 3.1.

144. The general approach of the *Merger Guidelines* is widely accepted. Current debate has more to do with the particular thresholds that should give rise to a legal challenge to a merger or to close scrutiny. See, e.g., John DeQ. Briggs, *An Overview of Current Law and Policy Relating to Mergers and Acquisitions*, 56 ANTITRUST L.J. 657, 664-65 670 (1988) (asserting that the Department of Justice actually uses much higher thresholds than those published in the *Guidelines*); *Horizontal Merger Guidelines of the National Association of Attorneys General*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1306, at S-1 (Mar. 12, 1987) (the state attorneys general, while adopting HHI methodology, endorse a more aggressive enforcement policy and stricter market definition approach). The same debate would be important for the ITC, if a market structure system were adopted.

145. Mergers and acquisitions above certain size thresholds are covered by the Hart-Scott-Rodino Act, 15 U.S.C. § 18a (1982). The act imposes a 30-day waiting period for most transactions, with the possibility of an additional period of 20 days if either the Federal Trade Commission or the Assistant Attorney General issues a "second request." By way of comparison, the ITC presently has 45 days from the date of the filing of a countervailing duty petition, 19 U.S.C. § 1671b(a) (1982), or an antidumping petition, 19 U.S.C. § 1673b(a) (1982), to make its preliminary determination on the question of material injury or threat thereof. The final determination of injury in a countervailing duty case may come at any time between 205 and 270 days, depending upon whether the case is considered extraordinarily complicated and upon certain other factors. See A. LOWENFELD, *supra* note 14, at 373 (timetable); Horlick, *supra* note 101. The length of time is comparable for antidumping cases.

resulting tariff would simply be the full amount of the margin of dumping or subsidization. For moderately concentrated industries, the ITC would impose a tariff that is only 66 percent of the relevant margin. For highly concentrated industries, perhaps with HHIs between 1800 and 4,000, the tariff would be 33 percent of the margin. Finally, for industries with HHIs above 4,000, no tariff at all would be imposed.

For the unconcentrated industries, the full tariff is justified because price levels in the United States probably reflect a presently efficient U.S. industry.¹⁴⁶ If the foreign firms are able to take market share from the U.S. firms because of the unfair trade practice, it is reasonable to conclude that the unfair trade practice caused a shift in comparative advantage away from the U.S. industry. The tariff then negates that shift and restores the "natural" relative efficiency that would exist without the dumping or subsidization.

The reason to discount the tariff for more concentrated industries, up to a full disallowance of the tariff in cases of extreme concentration, is to maintain some competitive pressure on U.S. prices. This kind of pressure benefits U.S. consumers both immediately, because it allows the imported products to continue to enjoy somewhat lower prices, and in the long run, since it forces U.S. industry to find ways to cut costs or reduce profit levels. Complete disallowance of the tariff for industries with U.S. HHIs above 4,000 is beneficial even if the U.S. firms alone do not have the ability to exercise market power. In almost all such situations, the consumer welfare that would be sacrificed by imposing a tariff on all imports would exceed the gains to producer welfare, including the avoided costs of adjustment to imports.¹⁴⁷

Since both the antidumping and countervailing duty laws mandate that the duty be "equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise,"¹⁴⁸ or "equal to the amount of the net subsidy determined or estimated to exist,"¹⁴⁹ it is clear that the sliding scale tariff based on market structure could be implemented only through statutory amendment. One of the beneficial results of such an amendment would be to bring the unfair trade practice rules of the United States closer to those

146. This would be particularly true if, in addition to competition among domestic firms, competition existed from fairly traded imports.

147. For example, suppose a properly defined market had three firms: a foreign firm (F1) with 50% of the market, another foreign firm (F2) with 40% of the market, and a U.S. firm (D) with 10% of the market. Suppose further that both F1 and F2 are enjoying significant subsidies from their home governments, and that D is suffering injury as a result of those subsidies. As the law presently stands, and under the approach outlined in this article, D would be entitled to have countervailing duties imposed on F1's and F2's imports. However, there is a great loss in U.S. consumer welfare on these facts, since consumers are now paying a higher price for 90% of the products they purchase. Whether the U.S. as a whole would benefit or suffer from a tariff on these facts is ultimately a policy question; the answer proposed here is that a tariff is not desirable.

148. 19 U.S.C. § 1673e(a)(1) (1982).

149. 19 U.S.C. § 1671e(a)(1) (1982).

of the E.C. The E.C. regulation permits the administering authority to balance the injury to an E.C. industry against the interests of the Community as a whole.¹⁵⁰ It specifically permits the Council to order a duty less than the margin of dumping or the amount of the subsidy "if such lesser duty would be adequate to remove the injury."¹⁵¹

Indeed, the fact that the E.C. already has the kind of discretion to look more broadly at Community interests and to adjust the level of duty on a case-by-case basis indicates that nothing in the nature of highly industrialized, developed societies would prevent the adoption of the trade injury standard advocated here. In the end, it is a matter of choice. We can either use an injury approach in the trade statutes that takes as a given the existing industry structure, and preserves the monopolist along with the efficient small competitor, or we can refine our notion of trade injury so that only the injury that flows from the distortions of comparative advantage will serve as a predicate to the imposition of antidumping or countervailing duties.

V. CONCLUSION

I have proceeded throughout this article on the premise that U.S. industries in some cases have legitimate complaints about the disadvantages that they suffer when they must compete against dumped or subsidized foreign goods. It is also true, however, that U.S. consumers always lose over the short run, and almost always lose over the long run, when low-priced foreign goods are denied to them. I see no justification for depriving consumers of low-priced goods every time a producer must lower its price to meet foreign competition. Correction of the effects of the "unfair" trade practices of dumping and subsidization should occur only when competitively structured U.S. industries are materially injured or threatened with material injury. When the U.S. producers are monopolists or oligopolists, a principal effect of an antidumping or countervailing duty is to preserve some level of monopoly rents. U.S. society as a whole is hurt, not helped, when this happens. Important subgroups in society are particularly hurt, including producers that use the protected products as inputs and final consumers.

Attention to the kind of injury the U.S. industry has suffered can prevent these undesirable results and at the same time help the producers that Congress, with strong political support, wishes to assist. I do not address the way that LTFV margins should be measured or the in-

150. See Comm'n Dec. No. 2177/84/ECSC, arts. 11(1), 12(1), 27 O.J. EUR. COMM. (No. L 201) 17, 28 (1984); Council Reg. (EEC) No. 2176/84, arts. 11(1), 12(1), 27 O.J. EUR. COMM. (No. L 201) 1, 11-12 (1984). See generally Greyson Bryan & Dominique Boursereau, *Antidumping Law in the European Communities and the United States: A Comparative Analysis*, 18 GEO. WASH. J. INT'L L. & ECON. 631 (1985); Larry Loftis, *United States-European Economic Community Antidumping Laws: The Need for a Comprehensive Approach*, 15 GA. J. INT'L & COMP. L. 453 (1985).

151. Council Reg. (EEC) No. 2176/84, art. 13(3), 27 O.J. EUR. COMM. (No. L 201) 1, 12 (1984).

tractable problem of detecting and estimating countervailable foreign subsidies, only because these are wholly separate problems under the trade laws. Margins are not irrelevant, of course, since the margin of dumping or subsidization may reveal that the foreign industry is more efficient than the U.S. industry no matter what, or that the problems in the U.S. industry could not have been caused by the unfair trade practice. However, for now I take as a given whatever margin is determined to exist under the present statutes.

With careful attention to the competitive structure of the U.S. industry affected by unfairly traded imports and better use of the data already available to the International Trade Commission, a new concept of trade injury can be implemented. This new concept helps to keep the unfair trade statutes from indiscriminately expanding into areas better addressed by frankly protectionist laws, and therefore legitimates them as levelers rather than tilters of the playing field. If Congress and the Commission adopted the trade injury standard, scholars and policymakers alike could stop worrying about the alleged fundamental inconsistency between the trade laws and the antitrust laws, and begin serious work on new ways to reap the advantages of international trade without penalizing efficient and competitive U.S. industries.