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Amending United States Antidumping Laws to Create a Viable Private Right of Action: Must Fair Trade be Free?

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NOTES

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I. INTRODUCTION

On December 20, 1988, the American Telephone & Telegraph Co. (AT&T) held a news conference during which it accused several small-business telephone manufacturers from Japan, South Korea, and Taiwan of illegal pricing practices in the United States market.[1] Explaining its decision to file formal dumping charges with United States Government agencies, AT&T claimed that the alleged dumping firms had sold communications equipment in the United States at half the price charged in their home markets.[2] The resulting loss of market share[3] reduced AT&T's output and sales volume, severely decreased its profits, and necessitated cuts in its work force.[4] In an industry that produces over $4 billion in annual revenues, the alleged dumping may have contributed significantly to yearly losses approaching $800 million.[5]

United States trade laws expressly forbid the importation and sale of goods at prices that afford foreign manufacturers and domestic importers an unfair competitive advantage in the United States market. Despite this unambiguous proscription, these laws have never provided effective compensation for domestic firms that suffer monetary loss as a result of the dumping of foreign products in this country. Congress has repeatedly proposed to address this issue, most recently in the much debated "Trade and International Economic Policy Reform Act of 1987."[6] This bill contained specific provisions designed to facilitate monetary recovery for domestic manufacturers able to prove actual injury as a result of illegal

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1. Sims, *Dumping Accusation by A.T.& T.*, N.Y. Times, Dec. 21, 1988, at B29, col. 4; Guyon, *ATT to Charge Far East Firms in Pricing Case*, Wall St. J., Dec. 21, 1988, at A4, col. 1.

2. Sims, *supra* note 1, at B31, col. 4; Guyon, *supra* note 1, at A4, col. 1. AT&T filed a formal dumping complaint on December 28, 1988. *AT&T Files Antidumping Complaint Against Three Asian Telephone Makers*, [Jan.-June] Int'l Trade Rep. (BNA) No. 1, at 16 (Jan. 4, 1989) [hereinafter *AT&T Complaint*].

3. AT&T asserted that the market share of United States producers had dropped from 55% to 35% in three years, while that of the alleged dumping firms had increased from 40% to 60% during the same period. Guyon, *supra* note 1, at A4, col. 1.

4. Sims, *supra* note 1, at B29, col. 4.

5. *Id.* at B31, col. 4. This figure reflects a 20% decrease in market share in a $4 billion market. *See supra* note 3. Some analysts have suggested that decreased revenues as a result of foreign dumping have driven the International Business Machines Corp. (IBM) out of the small-business telephone market. Sims, *supra* note 1, at B31, col. 4. Indeed, in its formal dumping complaint filed with the United States Commerce Department, AT&T stated: "[T]he domestic industry has been pushed from a position of confident growth to one of painful retreat, as financial performance has moved from healthy to dim to disastrous." *AT&T Complaint, supra* note 2, at 17.

6. H.R. 3, 100th Cong., 2d Sess., 133 CONG. REC. H2642 (daily ed. Apr. 29, 1987).

dumping.[7] The Reagan Administration strongly opposed these proposals,[8] which were deleted from the final version of the bill;[9] however, a rising tide of protectionist sentiment in Congress ensures that the issue will soon resurface.

The proposed amendments to the trade laws reflect an ongoing and substantially futile Congressional effort to strike a balance between the maintenance of free markets and the availability of appropriate redress when the market mechanism breaks down.[10] Moreover, in 1986 the United States Supreme Court established a highly restrictive standard for alleged international antitrust violations in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[11] The fact that the Court applied this standard to claims for private recovery under the antidumping laws clearly demonstrates the necessity for a thoughtful reconsideration of this issue.

This Note examines the practice of dumping in the context of recent developments in existing United States trade law and explores the potential for an effective, meaningful remedy for adversely affected domestic interests. While the discussion focuses primarily on the private right of action presently found in the 1916 Antidumping Act (1916 Act),[12] the Note also addresses the administrative remedy contained in the 1921 Antidumping Act (1921 Act)[13] in order to both establish a background for the legal structure of trade remedies in general and to identify the differ-

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7. *Id.* §§ 166-67; *see infra* Part VI.

8. *Comprehensive Trade Legislation: Hearings on H.R. 3 Before the Subcomm. on Trade of the House Ways and Means Comm.*, 100th Cong., 1st Sess., pt. 2, at 661-62 (1987) [hereinafter *1987 House Hearings*] (statement of Alan F. Holmer, General Counsel, Office of the United States Trade Representative (USTR)).

9. The proposals appeared originally in the House of Representatives version of H.R. 3, but the corresponding Senate version of the bill did not include them. The joint House-Senate conference committee that considered the bills deleted the proposals entirely. *See* OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988: CONFERENCE REPORT TO ACCOMPANY H.R. 3, H.R. REP. No. 576, 100th Cong., 2d Sess. [hereinafter *Conference Report*], *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 1547.

10. *See infra* Part V.

11. 475 U.S. 574 (1986); *see infra* notes 104-24 and accompanying text.

12. Act of Sept. 8, 1916, ch. 463, § 801, 39 Stat. 798-99 (codified at 15 U.S.C. § 72 (1982)).

13. Antidumping Act of 1921, ch. 14., § 201, 42 Stat. 11, *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106 (a), 93 Stat. 193.

Although the 1921 Act was technically repealed by the Trade Agreements Act, no major substantive changes were made to the 1921 Act upon its reinsertion under relevant provisions of the Tariff Act of 1930, ch. 497, 46 Stat. 590, *as amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 701, 93 Stat. 151 (codified at 19 U.S.C. § 1673-1677g (1982)).

ences between the two laws. Part II considers the practice of predatory pricing to determine the type of activity prohibited by the 1916 Antidumping Act. Parts III and IV discuss the dissimilar policies, procedures, and remedies attending the current antidumping legislation. Following an evaluation of recent Congressional initiatives to amend these laws in Part V, this Note analyzes the amendments proposed in the 1987 Trade Act. Finally, Part VII suggests alternative amendments to existing law that might both protect the foundations of free trade and provide a viable means of redress for United States producers injured by dumping.

II. PREDATORY PRICING AS A SOURCE OF DUMPING

The term "dumping" has traditionally been defined as "price discrimination between purchasers in different national markets."[14] This practice involves the sale of goods in a foreign market at a price below that charged in the exporter's home market or in the markets of other foreign nations.[15] While some argue that dumping benefits the importing nation,[16] existing United States trade law rejects dumping under the alter-

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14. J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 4 (1923).

15. *Id.* at 3. Viner rejected alternative formulations of dumping that focused upon sales: 1) below foreign market prices; 2) which competitors cannot match; or 3) which are unremunerative to the seller. *Id.* Viner's characterization of dumping is generally recognized as definitive. *See, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1194 (E.D. Pa. 1980); Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 TEX. INT'L L.J. 265, 266-67 (1987).

16. *See* S. METZGER, LOWERING NONTARIFF BARRIERS: U.S. LAW, PRACTICE, AND NEGOTIATING OBJECTIVES (1974). Metzger regards dumping as a general benefit to the consumer, even if done for a short period. Only genuinely predatory dumping is unfair and destructive. *Id.* at 64-67; *see also Economist Friedman Advocates Trade Barrier Removal, Hits Current U.S. Antidumping Rules*, 4 Int'l Trade Rep. (BNA) 935 (1987) (dumping ineffective as a means of driving out competition; all benefit inures to the consumer). *But see* J. VINER, *supra* note 14. Viner recognized that long-term dumping provides a windfall for the importing nation, whose consumers obviously benefit from continuous underpricing of goods. *Id.* at 138. He classified dumping into three groups: sporadic, short-term, and long-term. According to his analysis, sporadic dumping is unimportant and long-term dumping beneficial. Short-term dumping, however, was the "chief menace" to the importing nation: domestic industry could be eliminated without a corresponding benefit for domestic consumers. *Id.* at 137-47.

While acknowledging that Viner's work has provided the "definitive word" on the subject of dumping, at least one commentator asserts that "Viner's assessment is flawed." R. DALE, ANTI-DUMPING LAW IN A LIBERAL TRADE ORDER 190 (1980). Dale contends that many of Viner's assertions are theoretically unsound and that his work is currently of diminished value because conditions of world trade have changed drastically since 1923, when Viner originally published his book. *Id.* As an example, Dale notes that Viner's view that sporadic dumping is harmless is specifically rejected in article

native principles of fair competition and protection for domestic industries.

Current United States trade law ostensibly provides a private right of action for injuries resulting from predatory dumping under the 1916 Antidumping Act.[17] Of the various motivations behind dumping,[18] predatory dumping is perhaps the most pernicious because it contemplates the elimination or subjugation of competition.[19] In adopting a predatory dumping program, the predator substantially decreases prices, gambling that speculative long-term benefits from an increased market share will exceed calculable short-term losses from decreased revenues.[20]

Because predatory pricing is the foundation on which predatory dumping rests, any discussion of the issue should begin with a clear definition of predatory pricing. Unfortunately, no commonly accepted definition has yet emerged.[21] While consideration of predatory pricing issues

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II(ii)(b) of the Anti-Dumping Code under the General Agreement on Tariffs and Trade (GATT). *Id.* at 10. Some analysts have also contested not only the premise of injury to the importing nation, but also the assumption that dumping per se constitutes an unfair trade practice. *See, e.g.,* Boltuck, *An Economic Analysis of Dumping*, 21 J. WORLD TRADE L., Oct. 1987, at 45, 46 n.7 (arguing that dumping is profit-maximizing behavior and not necessarily predatory); Green, *The New Protectionism*, 3 NW. J. INT'L L. & BUS. 1, 11 (1981) (noting the "elusive and subjective" characterization of the term "unfair trade").

17. 15 U.S.C. § 72 (1982).

18. Viner, for example, classifies the motive of the dumper according to the continuity of the dumping. Dumpers may reduce prices to engender goodwill in a new market, to dispose of excess inventory, or for various reasons other than to destroy competition. J. VINER, *supra* note 14, at 23-24; *see also* De Jong, *The Significance of Dumping in International Trade*, 2 J. WORLD TRADE L. 162, 167-72 (1968); Note, *Distinguishing International from Domestic Predation: A New Approach to Predatory Dumping*, 23 STAN. J. INT'L L. 621, 624-29 (1987) [hereinafter Note, *Predatory Dumping*] (discussing factors influencing dumping decision).

19. *See* J. VINER, *supra* note 14, at 120-22; *see also* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 144 (1978).

20. R. BORK, *supra* note 19, at 145. Bork notes that "it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits . . . or in future undisturbed profits. . . ." *Id.*

21. Judge Bork, for example, offers a definition that seems to focus more on the goals of predation rather than the specific conduct contributing to that goal:

> Predation may be defined . . . as a firm's deliberate aggression against one or more rivals through the employment of business practices that would not be considered profit maximizing except for the expectation either that (1) rivals will be driven from the market, leaving the predator with a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds inconvenient or threatening.

Id. at 144.

has increased dramatically since 1975,[22] jurists and legal analysts nonetheless disagree on the proper criteria for determining the existence of predation. Although the lower federal courts have focused on various product cost and value calculations advanced by the majority of academics,[23] many commentators[24]—and recently the United States Supreme Court in *Matsushita*[25]—have adopted a broader, more pragmatic approach. The conflicting, often vague standards tend to create obstacles to an accurate recognition of predation. The absence of a clearly discernible standard thus blurs the distinction between permissible competitive pricing and impermissible predation.[26]

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22. Predatory pricing reemerged as a significant issue in both case law and legal scholarship following the publication of an influential article by Professors Areeda and Turner entitled *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). Prior to 1975, legal activity and comment in this area was minimal. *See* Liebeler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 NOTRE DAME L. REV. 1052, 1052-53 (1986) (commenting on lack of activity on the subject); *see also id.* app. A, at 1077 (listing predatory pricing decisions from 1975 through 1986); *id.* app. C, at 1097 (listing predatory pricing articles from 1975 through 1983).

23. *See, e.g.*, Western Concrete Structures Co. v. Mitsui & Co. (U.S.A.), 760 F.2d 1013, 1015 (9th Cir. 1985) (alternatively describing predatory pricing as "pricing below the seller's marginal or average variable or average total cost"), *cert. denied*, 474 U.S. 903 (1985); *see also* Liebeler, *supra* note 22, at 1055 ("the courts responded to the economic approach advanced by most of that literature with an alacrity not commonly observed in the history of the relationship between academics and judges"). For an analysis of the various legal standards adopted by the lower courts, see Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981).

24. *See* R. BORK, *supra* note 19; Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981) [hereinafter Easterbrook, *Predatory Strategies*]; McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289 (1980); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958). One observer has noted that the "McGee-Bork-Easterbrook faction" represents the most conservative view, which holds that predatory pricing occurs too infrequently to justify a possible intrusion into the competitive process. Sherman, *The* Matsushita *Case: Tightened Concepts of Conspiracy and Predation?*, 8 CARDOZO L. REV. 1121, 1130 (1987).

25. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-93 (1986). The court cited Judges Bork and Easterbrook and Professor McGee. *See id.* at 589-90.

26. Erroneous classification of pricing activities arises when the Government or the courts, in attempting to promote competition and protect domestic concerns from unfair trade practices, monitor the pricing scheme too closely, often under uncertain rules of calculation. This is dangerous because predatory pricing is often indistinguishable from vigorous price competition. *See* Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76, 88 (2d Cir. 1981) (inadvertently condemning competitive

Consideration of predatory dumping issues is further complicated by the well-accepted belief that predatory pricing schemes are irrational and therefore unlikely to arise.[27] Justice Powell, writing for the Supreme Court in *Matsushita*, summarized well the underlying rationale of this view:

> [T]he success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[t]he predator must make a substantial investment with no assurance that it will pay off."[28]

Rather than relying on the cost and value standards employed by the lower courts, Justice Powell emphasized the apparent motivations for predatory pricing and concluded that no such motive appeared on the record.[29]

Justice Powell's approach to predatory pricing in *Matsushita* seems to reflect an emerging trend away from mathematical formulations.[30] It also appears laden with a presumptive doubt that predatory pricing is in

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pricing as predation inhibits competition, the exact behavior that the antitrust laws are designed to promote). The Court's decision in *Matsushita*, however, may obviate this problem by simply imposing on plaintiffs a more formidable burden of proof. *See* Note, *Predatory Dumping*, *supra* note 18, at 622-23; Note, *Predatory Pricing Conspiracies After* Matsushita Industrial Co. v. Zenith Radio Corp.: *Can an Antitrust Plaintiff Survive the Supreme Court's Skepticism?*, 22 INT'L LAW. 529, 536-37 (1988) [hereinafter Note, *Predatory Pricing*]; *see also infra* note 119 and accompanying text.

27. *Matsushita*, 475 U.S. at 589 ("there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful") (citing authorities). *Contra* J. VINER, *supra* note 14. Viner took issue with the prevailing view that predatory dumping would rarely be attempted because that view was premised on the assumption that complete world-wide monopoly would provide the sole measure of success. *Id.* at 120. He argued that predatory dumping had occurred without the slightest attempt to achieve global monopoly, noting: "Of the relatively more efficient concerns in any industry, there are often comparatively few who can offer effective competition in any given market; it is the competition of such concerns alone which needs to be eliminated if a producer is intent upon gaining monopoly control of that market." *Id.* at 121.

28. *Matsushita*, 475 U.S. at 589 (quoting in part Easterbrook, *Predatory Strategies*, *supra* note 24, at 268).

29. *Id.* at 595-98.

30. *See, e.g.*, Liebeler, *supra* note 22.

fact utilized at all.[31] Nevertheless, predatory pricing that results in predatory dumping does occur—often with disastrous consequences for domestic industries. Consider, for example, the predatory dumping scheme in *Western Concrete Structures, Co. v. Mitsui & Co.* (U.S.A.).[32] In this case, Western Concrete competed with a company called VSL in the post-tensioning industry, a construction process involving the insertion of steel tendons into concrete girders or slabs. Mitsui, a Japanese corporation, supplied VSL with steel at prices between fifteen and twenty percent lower than those charged to VSL's competitors by Mitsui, and by other importers and domestic steel suppliers. As a result, VSL consistently underbid its competition, increased its market share to nearly seventy percent of the market, and drove seven of its eight principal competitors, including the plaintiff, out of the relevant market.[33] *Western Concrete* is instructive because it demonstrates the rippling effect of dumping on different sectors of the economy. The plaintiff in *Western Concrete* did not directly compete with the dumping firm;[34] its injury, however, was no less severe than if it had. *Western Concrete* reveals that, although predatory pricing schemes may appear rarely, they can cause serious injury to domestic firms.

Whatever the relative frequency of predatory pricing schemes, the fact remains that differentiating between fair and unfair pricing is a daunting task. Even if the courts were to establish a precise standard for identifying predatory dumping, applying legal or economic principles to a specific fact situation would still be difficult. In 1987, for example, the Commerce Department implicitly threatened Japanese truck manufacturers with administrative action under the 1921 Antidumping Act because they failed to raise prices in accordance with the increased value of the yen.[35] While there might have been a dumping margin (the differ-

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31. Justice Powell seems preoccupied with the determination that evidence of the existence of predatory pricing attempts is speculative. While his observation may be facially correct, it does not justify Justice Powell's contention that "[t]he alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist." 475 U.S. at 592. The mere failure to destroy competition and monopolize a market does not mean that this result was not intended or attempted.

32. 760 F.2d 1013 (9th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985).

33. 760 F.2d at 1015. By the time the plaintiff left the market, for example, its share of the domestic commercial post-tensioning business had dropped from 15% to 4% in one year. *Id.*

34. This fact ultimately led the court of appeals to affirm the district court's dismissal of Western Concrete's claim under the 1916 Antidumping Act for lack of standing. *Id.* at 1019-20; *see also infra* notes 95-98 and accompanying text.

35. *Alleged Dumping of Japanese Trucks in U.S. Stirs Controversy, But Complaint*

ence between foreign market value and the price charged in the United States), it does not necessarily follow that the margin resulted from an unfair trade practice. In such cases, the foreign manufacturer may simply endure short-term losses to retain existing market share, a legitimate competitive desire.[36] A failure to differentiate between competitive and predatory pricing could thus unjustifiably chill competition.[37]

The difficulty encountered in identifying unfair pricing strategies goes to the heart of the traditional debate between advocates of protectionism and advocates of free trade. The protectionists assert that trade barriers offer a legitimate method for protecting American industry, safeguarding national security, and maintaining sufficient employment and living standards.[38] The free traders believe that trade barriers distort efficient resource allocation, render domestic exports less competitive, and invite foreign retaliation.[39]

These arguments naturally find their way into the debate regarding remedies for unfair trade practices. Injurious dumping may be attacked under either the protectionist or the free trade approach. The protectionist model seeks to protect American industry by imposing duties on imports, while the free trade model looks to the antitrust laws to protect

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Unlikely, 4 Int'l Trade Rep. (BNA) 1081 (1987) [hereinafter *Alleged Dumping*]. The largest domestic automakers later alleged that the Japanese were dumping light trucks in the United States, but no proceeding was initiated. Bussey, *Big Three Auto Makers Accuse Japanese of Dumping Small Pickup Trucks in U.S.*, Wall St. J., Mar. 31, 1988, at 3, col. 2.

36. J. VINER, *supra* note 14, at 25.

37. Punishing alleged predation at a low level of proof disrupts the competitive process and ultimately harms consumers. *See* Note, *Predatory Dumping*, *supra* note 18, at 640.

38. *See generally* TRADE POLICY IN THE 1980'S 6-12 (W. Cline ed. 1983).

39. *See generally id.;* D. LAMONT, FORCING OUR HAND: AMERICA'S TRADE WARS IN THE 1980'S xix (1986) ("[P]rotectionism aggravates industrial decline, creates more unemployment, and forces consumers to spend more and save less"); Ray, *Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariff Barriers*, 8 NW. J. INT'L L. & BUS. 285 (1987); Borrus & Goldstein, *United States Trade Protectionism: Institutions, Norms, and Practices*, 8 NW. J. INT'L L. & BUS. 328 (1987). For an analysis of the tension between free trade and protectionist interest groups in the formulation of United States trade policy, see S. LENWAY, THE POLITICS OF U.S. INTERNATIONAL TRADE: PROTECTION, EXPANSION AND ESCAPE (1985). For an argument that trade strategy results not only from the efforts of domestic forces, but also from a consideration of the structure of the international economy, the aggregate national trade interest, and foreign policy concerns, see D. LAKE, POWER, PROTECTION, AND FREE TRADE: INTERNATIONAL SOURCES OF U.S. COMMERCIAL STRATEGY, 1887-1939 (1988).

fair competition and, ultimately, the domestic consumer.[40] The following sections demonstrate the extent to which each of these approaches influences current United States antidumping law.

III. THE 1916 ANTIDUMPING ACT

Passed as section 801 of the Revenue Act of 1916,[41] the 1916 Antidumping Act imposes criminal and civil liability on importers and sellers of dumped products.[42] Recovery under the statute requires proof that the dumper acted with the intent to restrain or monopolize trade, or otherwise sought to injure, destroy, or prevent the establishment of an American industry.[43] This statutory language closely approximates that found in the Clayton Act, the domestic antitrust law.[44] The standard for

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40. *See* Victor, *Antidumping and Antitrust: Can the Inconsistencies be Resolved?*, 15 N.Y.U. J. INT'L L. & POL. 339, 350 (1983).

41. Pub. L. No. 64-271, 39 Stat. 756.

42. Act of Sept. 8, 1916, ch. 463, § 801, 39 Stat. 798 (codified at 15 U.S.C. § 72 (1982)). The 1916 Antidumping Act provides:

> 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 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.
>
> Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.
>
> Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.
>
> The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.

Id.

43. *Id.*

44. Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 12 (1982)).

determining the presence of dumping, however, is borrowed from general customs law.[45] Thus, the statute is often viewed as a hybrid containing both antitrust and protectionist elements.[46]

This section first discusses the history and purpose of the 1916 Antidumping Act, revealing its basic character as an antitrust measure designed to provide both deterrence and compensation while promoting fair competition. The section then analyzes the numerous flaws in the statute's language and operation that have led to its well-deserved reputation as a "dead letter." The section concludes with a brief overview of the *Matsushita* litigation, which involved a detailed examination of the 1916 Act.

A. *Antitrust Response to Dumping*

When President Woodrow Wilson signed into law the nation's first antidumping statute on September 8, 1916, he momentarily suspended a debate that had raged in Congress for years. At the time, the Democratic party controlled both houses of Congress and was violently opposed to any tariff policy that deterred trade.[47] The Republican party, however, was deeply committed to tariffs as a means of protecting nascent American industry from foreign competition.[48] Moreover, the Democrats had

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The similarities between the 1916 Antidumping Act and the 1914 Clayton Act are outlined in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1213-15 (E.D. Pa. 1980). *See also* Victor, *supra* note 40.

45. *Matsushita*, 494 F. Supp. at 1215-17.

46. 3 J. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS § 15.01, at 15-1 (1987); *see also* Neville, *The Antidumping Act of 1916: A War-Time Legacy*, 26 N.Y.L. SCH. L. REV. 535, 536 (1981) ("The Antidumping Act of 1916 is a statutory hybrid, a curious blend of substantive terms of customs law, defining dumping and antitrust law in its proviso of predatory intent and invocation of treble damages.").

The confusing composition of the 1916 Act creates problems of interpretation that carry over to potential amendments to the law. Reconciling the divergent principles underlying the antitrust laws and the trade laws is difficult, and some commentators argue that amending the 1916 Act will effectively transform it into a protectionist trade law. *See, e.g.*, Kessler, *The Antidumping Act of 1916: Antitrust Analogue or Anathema?*, 56 ANTITRUST L.J. 485, 494-96 (1987) (discussing recently proposed amendments). For a further discussion of the inherent tension between antitrust and trade law principles, see Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, 56 ANTITRUST L.J. 409 (1987); Kaplan & Kuhbach, *The Causes of Unfair Trade: Trade Law Enforcers' Perspective*, 56 ANTITRUST L.J. 445 (1987); Victor, *supra* note 40.

47. *Matsushita*, 494 F. Supp. at 1217-19; *see also* Marks, *United States Antidumping Laws—A Government Overview*, 43 ANTITRUST L.J. 580, 581 (1974).

48. *Matsushita*, 494 F. Supp. at 1218; Marks, *supra* note 47, at 581.

earlier sustained their "tariff for revenue only" stance by striking an antidumping provision contained in the Tariff Act of 1913.[49] Fearing that the provision could be employed in the future to increase basic tariff rates, the Senate Finance Committee rejected it.[50]

Party differences regarding tariffs and antidumping regulations gradually gave way to a mutual fear of unfair competition from European producers. With the outbreak of World War I, and the consequent decrease in European exports, Congress anticipated European predatory dumping in American markets as a means of rejuvenating manufacturing bases following the War.[51] In his annual report for 1915, Secretary of Commerce William Redfield clearly stated the prevailing view:

> The outreach of American industries, nay their very existence in our own land in some cases, will be resisted to the full and every stratagem of industrial war will be exerted against them. Expecting this, we must prepare for it. If it shall pass beyond fair competition and exert or seek to exert a monopolistic power over any part of our commerce, we ought to prevent it.[52]

Secretary Redfield suggested that steps be taken to protect American industry from the expected flood of European goods. He adopted the Democratic position in fashioning a solution, remarking that he preferred to confront the problem "by a method other than tariffs, classing it rather as an offense similar to the unfair domestic competition we now forbid."[53] Other evidence indicates that the Secretary's position ultimately resulted in the drafting of the 1916 Antidumping Act.[54]

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49. *Matsushita*, 494 F. Supp. at 1218. The antidumping clause would have assessed duties above a "competitive tariff basis." *Id.*

50. *Id.; see also* Almstedt, *International Price Discrimination and the 1916 Antidumping Act—Are Amendments in Order?*, 13 L. & POL. INT'L BUS. 747, 752 (1981). *But see* Neville, *supra* note 46. In an article highly critical of the *Matsushita* district court's analysis of the 1916 Act, Neville argues that Congress rejected the 1913 proposal because it was too limited and vested the Treasury Department with too much discretion, not because it was too protectionist. *Id.* at 555.

51. *Matsushita*, 494 F. Supp. at 1219.

52. *Id.* (quoting the ANNUAL REPORT OF THE SECRETARY OF COMMERCE 43 (1915)).

53. *Id.* at 1220 (quoting the ANNUAL REPORT OF THE SECRETARY OF COMMERCE 43 (1915)).

54. The *Matsushita* opinion cites specific references to the Secretary's report in both Congressional debates and contemporary analyses of the 1916 Act. *See id.* at 1220. The prevailing fear of unfair competition from Europe at the conclusion of World War I likewise supports this proposition, since an effective solution was essential if American industry was to be protected. The impassioned statement of Representative Saunders, Democrat of Virginia, illustrates the Congressional mood:

The legislative history of the 1916 Act further reveals the antitrust foundation of the antidumping provisions. Representative Kitchin, Democrat of North Carolina and sponsor of the bill, unequivocally outlined the purpose of the proposed antidumping provision: "We believe that the *same* unfair competition law which now applies to the domestic trader should apply to the foreign import trader."[55] Thus, the Democrats characterized the legislation consistent with their longstanding free trade policy, framing it in procompetition terms.[56] The Republicans, on the other hand, capitalized on the bipartisan fear of import competition and labelled the antidumping provision protectionist.[57]

Although debate on the proposed bill was limited, certain remarks illuminated the polar positions of the parties as well as the perceived limitations of the bill's language. For example, Representative Moore, Republican of Pennsylvania, complained that the bill did not go far enough toward what he believed to be its protectionist goals.[58] Because the bill provided no relief against sales of goods imported solely in the United States, he concluded: "It is a protective measure or intended so to be, though I question from the language used whether it is as protective as it would seem to be on its face."[59] Another Republican, Representative Green of Iowa, complained that the bill's intent requirement would be far too onerous a burden for plaintiffs to meet: "Intent is a purpose of the mind. It is absolutely impossible to show except from inference and deduction. . . . [I]f this antidumping clause is to be real and effective, and if it is meant actually and intended to protect the manufacturers of this country, this proviso must be taken out."[60]

The bare language of the 1916 Act also demonstrates its antitrust approach. References to price discrimination, standing, treble damages,

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> This country is likely to be confronted with a flood of cheap foreign manufactured products on the restoration of peace. In the effort to take over trade which the wise legislation of the past four years has enabled our manufacturers to secure in every portion of the globe, our competitors in Europe will be likely to resort to cut throat competition under the urge of imperious necessity.

Id. at 1222 (quoting 53 CONG. REC. app. 1911 (1916)).

55. *Id.* (quoting 53 CONG. REC. app. 1938 (1916)) (emphasis added by the court).

56. *See id.* at 1229.

57. *See id.*

58. 53 CONG. REC. 10,749-50 (1916).

59. *Id.* at 10,749. Relying on the bare language of the bill, Representative Moore explained: "Under this splendid scheme of yours all the foreigner has to do is to manufacture for export only, looking, of course, to our rich market, the best market in the world, for his customers." *Id.* at 10,750.

60. 53 CONG. REC. 10,751 (1916). Representative Helvering rejected this criticism, explaining that intent must be shown in criminal prosecutions. *Id.*

criminal liability, and the burdensome intent requirement approximate the language used in section 2 of the 1914 Clayton Act.[61] This drafting, as well as the incorporation of customs law valuation methods, caused interpretive difficulties for courts and effectively placed the potential for private recovery beyond the grasp of domestic producers.[62]

During the protracted *Matsushita* litigation, Judge Edward Becker of the District Court for the Eastern District of Pennsylvania undertook an exhaustive analysis of the 1916 Antidumping Act.[63] He found that, as a prohibition against international price discrimination, the 1916 Act "was intended to complement the antitrust laws by imposing on importers substantially the same legal strictures relating to price discrimination as those which had already been imposed on domestic businesses by the Clayton Antitrust Act of 1914."[64] The vast majority of commentators agree with Judge Becker's assessment.[65] The 1916 Act, therefore, is accurately viewed as promoting fair competition and free trade, while strictly proscribing monopolistic trade practices. The remedies available—criminal penalties and civil treble damage recovery—demonstrate the complementary policies of deterring unfair competition and compensating injured parties when deterrence fails.

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61. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1213-15 (E.D. Pa. 1980).

62. *See* J. PATTISON, *supra* note 46, § 15.01, at 15-1; Neville, *supra* note 46, at 536; Almstedt, *supra* note 50, at 755; *see also* Sidak, *A Framework for Administering the 1916 Antidumping Act: Lessons from Antitrust Economics*, 18 STAN. J. INT'L L. 377, 380 (1982) ("The language of the 1916 Act is sufficiently ambiguous to raise doubts as to whether Congress intended the Act to protect consumers or to shield American producers from foreign competition.").

63. 494 F. Supp. at 1196.

64. *Id.* at 1197.

65. *See* Victor, *supra* note 40, at 346; Kessler, *supra* note 46, at 485; J. PATTISON, *supra* note 46, § 15.01, at 15-1 n.4; Almstedt, *supra* note 50, at 751; Applebaum, *The Antidumping Laws—Impact on the Competitive Process*, 43 ANTITRUST L.J. 590, 592 (1974). *But see* Neville, *supra* note 46. Neville emphatically argues that the 1916 Act is not an antitrust law. Relying on the legislative and political history of the era, Neville refutes Judge Becker's interpretation of the 1916 Act, especially his holding on the issue of product comparison. *Id.* at 557-75. Neville maintains that the 1916 Act is simply an unfair competition law utilizing both customs law and antitrust law terminology. *Id.* at 561, 575; *see also* Sidak, *supra* note 62. Sidak would repeal the 1916 Act out of fear of judicial misinterpretation and destructive misapplication. *Id.* at 403-04. He asserts that the 1916 Act is not directly analogous to the antitrust laws, and would require proof of the defendant's market power before entertaining the issues of predatory intent and unfair pricing. *Id.* at 401-03.

B. *Failure of a Dead Letter Statute*

Because the language of the 1916 Antidumping Act is inherently flawed, it provides a meaningless right of recovery for private parties injured by the dumping practices of foreign manufacturers. Although the *Matsushita* litigation and other cases arising in the early 1970s revived interest in the long-dormant statute,[66] and led at least one observer to conclude that the 1916 Act could be effective,[67] most courts and commentators have consistently and derogatorily referred to it as a "dead letter."[68] Indeed, as one Treasury Department official noted: "The language of the statute would almost appear to be designed to render its provisions inoperable."[69] This section briefly analyzes the primary factors impeding effective application of the 1916 Act.

Intent Requirement. Recovery is possible under the 1916 Act only when the plaintiff can prove that the dumping firm acted with the specific intent to harm United States industry or to restrain or monopolize trade.[70] Because the task of establishing such motives is nearly impossible, the statute effectively creates an insurmountable barrier to recovery.[71] Moreover, the law lacks a reasonable threshold of prima facie proof that would shift the burden to the dumper to demonstrate a legitimate purpose behind the alleged dumping.[72] Accordingly, this onerous

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66. Between 1916 and 1971, the Government made four attempts to enforce the 1916 Act through criminal proceedings. *See* Marks, *supra* note 47, at 581. None of these attempts was successful. The sole reported decision regarding a civil action under the 1916 Act, H. Wagner & Adler Co. v. Mali, 74 F.2d 666 (2d Cir. 1935), concerned discovery issues and was ultimately settled. *See* Victor, *supra* note 40, at 340. Those cases reported after the onset of the *Matsushita* litigation dealt primarily with standing issues. *See infra* notes 95-101 and accompanying text.

67. *See* Hiscocks, *International Price Discrimination: The Discovery of the Predatory Dumping Act of 1916*, 11 INT'L LAW. 227, 247 (1977) ("The reappearance of the Predatory Dumping Act in modern antitrust law should herald a new era of effective enforcement by private parties injured from the pernicious effects of dumping.").

68. *See* Marks, *supra* note 47, at 582; Almstedt, *supra* note 50, at 753; *see also* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1211 (E.D. Pa. 1980) ("The observation that the Antidumping Act of 1916 has not played a prominent role in the American jurisprudence is an egregious understatement.").

69. Marks, *supra* note 47, at 582.

70. 15 U.S.C. § 72 (1982).

71. Marks, *supra* note 47, at 582. Viner also found the intent requirement particularly burdensome in light of the fact that predatory intent is usually confined to the exporter or manufacturer, whose activities are not reached under the 1916 Act. J. VINER, *supra* note 14, at 245.

72. This is particularly noteworthy because the Robinson-Patman antitrust provision, 15 U.S.C. § 13(b) (1982)—the apparent domestic counterpart of the 1916 Act—includes such a burden-shifting clause. *See* Almstedt, *supra* note 50, at 775.

burden of proof is universally cited as the 1916 Act's most egregious limitation.[73]

Exporters Not Covered. A private party injured by dumping may seek recovery from an importer or from one who assists in importing goods into the United States.[74] Despite some evidence that the drafters of the 1916 Act were concerned primarily with the actions of domestic importers rather than foreign exporters,[75] the House Report accompanying the bill clearly stated its intention that "[foreigners] whose goods are sold in this country, may be placed in the same position as our manufacturers with reference to unfair competition. . . . "[76] The statute's bare language, however, did not accomplish this purpose. By failing to include foreign manufacturers and exporters within its jurisidictional reach, the 1916 Act insulates from liability the party ultimately responsible for the competitively unfair pricing of goods. Noting that the predatory intent required by the statute was normally limited to foreign exporters,[77] one commentator concluded that the 1916 Act was ineffective primarily because it "could not be made to reach the offender if he were a foreigner operating in a foreign country."[78]

Common and Systematic Importation. The 1916 Act requires proof that the alleged dumping was "commonly and systematically" undertaken.[79] This uncertain language is consistent with the statute's intent requirement, for a sustained practice is necessary if the plaintiff is to establish, for example, an intent to monopolize trade. Nonetheless, this requirement may preclude relief when only short-term or sporadic dumping is present. Consequently, the statute does not proscribe a significant amount of the dumping that actually occurs.[80]

Valuation of Products. The 1916 Act prohibits the importation and sale of goods at prices "substantially less" than their foreign market value or wholesale price.[81] The statute does not offer guidance as to what constitutes a substantial price differential. Further, the proscription

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73. *See, e.g.,* J. PATTISON, *supra* note 46, § 15.03(2), at 15-9 & n.13 (listing citations).

74. 15 U.S.C. § 72 (1982).

75. *See* J. PATTISON, *supra* note 46, § 15.03, at 15-7; Neville, *supra* note 46, at 541.

76. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1221 (E.D. Pa. 1980) (quoting H.R. Rep. No. 922, 64th Cong., 1st Sess. 9-10 (1916)).

77. J. VINER, *supra* note 14, at 245.

78. *Id.* at 248.

79. 15 U.S.C. § 72 (1982).

80. *See* J. VINER, *supra* note 14, at 140.

81. 15 U.S.C. § 72 (1982).

applies to "such articles"[82] that are produced domestically, thereby restricting an interpretive accounting of significant variables between similar products. The 1921 Antidumping Act, for example, permits consideration of the prices of similar articles in determining whether a dumping violation has occurred.[83] Conversely, the only variables applicable to this determination under the 1916 Act concern limited pricing adjustments for costs such as transportation charges and import duties.[84] Thus, on its face, applicability of the 1916 Act appears to be restricted to imports that are identical to those produced in the United States.[85]

The *Matsushita* litigation directly addressed this issue. In *Matsushita*, the district court held that "such articles" means articles "of like grade and quality" as that term is used in section 2 of the Clayton Act.[86] Accordingly, the court found the proper focus of product comparison to be physical differences "affecting consumer use, preference or marketability."[87] Because the electronic products at issue in *Matsushita* differed in both broadcasting capability and in electrical power transmission, they were not sufficiently similar to fall within the ambit of the 1916 Act.[88] In reversing this holding, the United States Court of Appeals for the Third Circuit reasoned that the technical differences cited by the district court could not explain a price differential; therefore, the products were comparable under the 1916 Act.[89]

Necessity of a Foreign Market. Under the 1916 Act, the existence of dumping is determined by comparing prices set for goods sold in the

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82. *Id.*

83. 19 U.S.C. § 1677(16) (1982).

84. 15 U.S.C. § 72 (1982).

85. *See In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 319 (3d Cir. 1983).

86. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1232 (E.D. Pa. 1980)).

87. *Matsushita*, 494 F. Supp. at 1233 (quoting Checker Motors Corp. v. Chrysler Corp., 283 F. Supp. 876, 889 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir. 1969), *cert. denied*, 394 U.S. 999 (1969)).

88. *Id.* at 1240. For a thorough analysis of the district court's decision, see Note, *The Antidumping Act of 1916: Antitrust and Product Comparability Criteria in* Zenith Radio Corp. v. Matsushita Electrical Industrial Co., 20 COLUM. J. TRANSNAT'L L. 133 (1981).

89. *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d at 326. The Third Circuit affirmed the district court's rejection of interpretations proposed by the parties. The defendants unsuccessfully argued that only identical products were comparable under the 1916 Act. *Id.* at 325. The plaintiffs urged that functional equivalence was instead the touchstone for comparability. *Id.* As to the latter contention, the Third Circuit stated: "Prohibiting price differentials between two non-identical products that serve the same function but appeal to different consumer preferences is as likely to interdict competitive as anticompetitive pricing." *Id.*

United States market with prices charged in "the country of their production, or of other foreign countries to which they are commonly exported."[90] The statute does not provide for constructive valuation of goods for purposes of this comparison.[91] Consequently, if an exporter sells its entire output in the United States, no price comparison can be made under the 1916 Act. In *Outboard Marine Corp. v. Pezetel*,[92] the District Court for Delaware dismissed a complaint against a Polish manufacturer and domestic importers for precisely this reason. Because the products (golf carts) were sold solely in the United States market, a price comparison was impossible.[93] Relying on the plain language of the statute, the court denied relief.[94]

Standing. The 1916 Act provides a right of action for "[a]ny person injured in his business or property" by reason of a dumping violation.[95] This simple wording has spawned conflicting interpretations of the parameters of standing requirements under the Act. One line of cases limits standing to domestic manufacturers.[96] These decisions rely on the general requirement under the antitrust laws that the plaintiff's injury be direct rather than incidental,[97] as well as on the express Congressional purpose of shielding American industry from unfair competition.[98] An-

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90. 15 U.S.C. § 72 (1982).

91. The 1921 Antidumping Act obviated this problem by providing for a "constructed value" of goods when reference cannot be made to home market or third country sales. *See* 19 U.S.C. §§ 1677b(a)(2), 1677b(e)(1) (1982). Recent attempts to amend the 1916 Act have incorporated this provision. *See infra* note 253 and accompanying text.

92. 461 F. Supp. 384 (D. Del. 1978).

93. *Id.* at 410.

94. *Id.* In *Outboard Marine*, the fears of Representative Moore came to fruition. *See supra* notes 58, 59 and accompanying text.

95. 15 U.S.C. § 72 (1982).

96. *See* Western Concrete Structures Co. v. Mitsui & Co. (U.S.A.), 760 F.2d 1013 (9th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985); Schwimmer v. Sony Corp. of America, 471 F. Supp. 793 (E.D.N.Y 1979), *aff'd on other grounds*, 637 F.2d 41 (2d Cir. 1980); Bywater v. Matsushita Elec. Indus. Co., 1971 Trade Cas. (CCH) ¶ 73,759, at 91,201 (S.D.N.Y. 1971).

97. In *Bywater*, the court denied standing to former employees of an electronics manufacturer who alleged that they lost their jobs because the defendant's dumping activities had put their employer out of business. The court found that the plaintiffs had suffered no direct injury, as required under the antitrust laws. 1971 Trade Cas. (CCH) ¶ 73,759, at 91,202.

98. In *Schwimmer*, the court denied standing to a wholesaler who alleged that the defendant manufacturer sold products to other wholesalers at a price lower than that charged to the defendant's United States subsidiary, from whom the plaintiff had purchased. 471 F. Supp. at 797. The court held that, based on the legislative history of the 1916 Act, only domestic producers were to be protected. *Id. Accord Western Concrete*,

other line of cases accepts the plain meaning of the "any person" language and applies it with a view toward the overall policy of promoting competition and free trade. In *Jewel Foliage Co. v. Uniflora Overseas Florida, Inc.*,[99] for example, the court upheld the right of an importer to sue a competing importer allegedly involved in dumping.[100] The *Jewel Foliage* holding may be limited to its facts, however, since that case involved the importation of goods that were not produced in the United States.[101]

Criminal Liability. Because the 1916 Act is a criminal statute, it must be strictly construed by the courts.[102] This poses a particularly formidable barrier when one considers the problematic language of the statute.[103] Courts thus lack the interpretive leeway they might otherwise enjoy if the statute provided only a civil cause of action.

C. *The* Matsushita *Litigation*

The massive *Matsushita* litigation provides perhaps the best example of the complexity and impotence of the 1916 Antidumping Act.[104] The

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760 F.2d at 1019.

99. 497 F. Supp. 513 (M.D. Fla. 1980).

100. The court found: 1) that the plain language of the statute did not limit standing to manufacturers; 2) that the 1916 Act has a broad purpose in fostering competition in the domestic market; and 3) that no reported cases were persuasive in limiting standing to manufacturers. *Id.* at 517.

101. In Isra Fruit Ltd. v. Agrexco Agricultural Export Co., 1986-1 Trade Cas. (CCH) ¶ 66,995, at 62,110 (S.D.N.Y. 1986), the court followed *Jewel Foliage* in granting standing to an importer who alleged that its only competition, another importer, had acted with the intent to drive it out of business. *Id.* ¶ 66,995, at 62,113. The court also noted, however, that "any injury plaintiff may have incurred would have been a direct, not an incidental" result of the alleged dumping. *Id.* Thus, it appears that nonmanufacturers will have standing to sue only when they demonstrate direct injury; that is, whenever there is no domestic production of the same goods.

102. Neville, *supra* note 46, at 541 (citing Federal Communications Comm'n v. American Broadcasting Co., 347 U.S. 284, 296 (1954)).

103. Viner perhaps understated the problem when he observed that strict construction of a statute with so many uncertain terms "would inevitably render it difficult to secure conviction in the typical case of predatory dumping." J. VINER, *supra* note 14, at 244.

104. The *Matsushita* case has received a good deal of scholarly interest. Articles considering different issues posed by the case during its various stages include: Creighton, *Matsushita v. Zenith Revisted*, 15 INT'L BUS. LAW. 277 (1987); Griffin, *Zenith Leaves Major International Antitrust Questions Unanswered*, 14 INT'L BUS. LAW. 354 (1986); Liebeler, *supra* note 22; Sherman, *supra* note 24; Comment, *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.: The Death Knell for Predatory Price Fixing and the Avoidance of a Standard for the Foreign Sovereign Compulsion Defense*, 15 DEN.

suit, which involved two cases consolidated in 1975,[105] arose out of an alleged conspiracy by numerous Japanese electronics manufacturers and American importers to drive domestic manufacturers out of the market. In 1970, the National Union and Electric Corporation filed the original suit against fourteen defendants in a New Jersey District Court.[106] In 1974, the Zenith Radio Corporation brought a second suit against twenty-one defendants in the Eastern District of Pennsylvania.[107] Following consolidation, the proceedings were held in the latter forum. The plaintiffs claimed, among other things, that the defendant's had violated the 1916 Act.[108] Specifically, the plaintiffs alleged a "scheme to raise, fix and maintain artificially *high* prices from television receivers sold by [the defendants] in Japan, and at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States."[109] This conspiracy allegedly began in 1953 and was fully in place by the late 1960s.[110]

The litigation became entrenched in a morass of technical and legal issues.[111] The District Court for the Eastern District of Pennsylvania found much of the plaintiffs' evidence inadmissible and granted the de-

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J. INT'L L. & POL'Y 395 (1987); Note, *Predatory Pricing, supra* note 26; Note, Zenith Radio Corp. v. Matsushita Electrical Industrial Co.: *Interpreting the Antidumping Act of 1916*, 6 HASTINGS INT'L & COMP. L. REV. 133 (1982).

105. *In re* Japanese Elec. Prod. Antitrust Litig., 388 F. Supp. 565 (J.P.M.L. 1975).

106. National Union Elec. Corp. v. Matsushita Elec. Indus. Corp., No. 1706 Civ. 70 (D.N.J. Dec. 21, 1970).

107. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., No. 74 Civ. 2451 (E.D. Pa. Sept. 20, 1974).

108. In addition to the antidumping claims, the plaintiffs alleged violations of the following antitrust laws: sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982); section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 (1982); section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982); and the Wilson Tariff Act, 15 U.S.C. § 8 (1982). *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 244, 246 (E.D. Pa. 1975).

109. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 578 (1986) (quoting *In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 251 (3d Cir. 1983) (quoting plaintiffs' preliminary pretrial memorandum)).

110. *Id.*

111. In all, twenty opinions were reported on a broad range of legal and technical issues. *See* J. PATTISON, *supra* note 40, § 15.05, at 15-13 (listing earlier decisions). At one point in the litigation, a frustrated Judge Higginbotham, writing for the district court, stated: "Until these motions were briefed and argued, I had never before witnessed at close range such a Dionysian intoxication with the creation of intellectual chaos and confusion where none need exist." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 251, 262 (E.D. Pa. 1975).

fendants' motion for summary judgment on the 1916 Act claim.[112] The United States Court of Appeals for the Third Circuit found error in many of the district court's evidentiary rulings[113] and subsequently held that a genuine issue of material fact remained as to "whether defendants conspired to dump [electronic products] in the United States with the specific intent to injure or destroy an industry in the United States."[114]

The case reached the Supreme Court in 1985, and the Court rendered its decision[115] in 1986—sixteen years after the filing of the initial complaint. Unfortunately, the Court did not consider the Third Circuit's decision on the 1916 Act claims because they were not presented in the petition for certiorari.[116] The Court found insufficient evidence of any motive for predatory pricing by the defendants and remanded the case.[117] On remand, the Third Circuit granted summary judgment for the defendants with respect to all of the plaintiffs' claims.[118]

Although the Supreme Court did not address the 1916 Antidumping Act, the *Matsushita* opinion nevertheless hinders potential private claimants under that statute. First, the Court established an extremely high threshold of proof necessary to support an allegation of predatory pricing.[119] Consequently, plaintiffs in an antitrust suit, including those asserting 1916 Act claims, must possess strong evidence of the defendant's motive to restrict competition. This is aggravated by the fact that the

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112. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190 (E.D. Pa. 1980).

113. *In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 259-303 (3d Cir. 1983).

114. *In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 319, 329 (3d Cir. 1983).

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

116. *Id.* at 579 n. 3. The defendants had requested consideration of the issue during oral argument. *Id.*

117. *Id.* at 595-98. The Court instructed the Third Circuit to consider other evidence that might indicate a predatory pricing scheme despite the defendants' lack of motive to do so. *Id.* at 597; *see also supra* notes 27-31 and accompanying text (discussing Justice Powell's majority opinion in *Matsushita*).

118. *In re* Japanese Elec. Prod. Antitrust Litig., 807 F.2d 44, 49 (3d Cir. 1986).

119. The *Matsushita* plaintiffs, for example, presented compelling evidence that the defendants conspired to fix high prices in Japan to subsidize sales below the market price in other countries—and specifically in the United States. Sherman, *supra* note 24, at 1127. In addition, the plaintiffs offered direct evidence of formal agreements among the defendants to maintain minimum prices for exports to the United States, presumably to avoid unnecessary efforts to drive prices yet further downward. *Id.* Even this seemingly persuasive evidence was insufficient to create a genuine issue of material fact. *See* Creighton, *supra* note 104, at 247 ("The decision establishes virtually insuperable obstacles for American private treble damage plaintiffs to surmount in cases alleging foreign conspiracies directed at U.S. markets.").

Court failed to establish a certain test for predatory pricing. As one commentator noted, "the Supreme Court chose to raise the standard of proof necessary to infer such a conspiracy without defining the offense."[120]

Second, the size and complexity of the case demonstrates the enormous burden plaintiffs confront in pursuing a claim under the 1916 Act. As Justice Powell observed at the outset of the *Matsushita* opinion, the litigation produced published opinions that "would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence. . . ."[121] The expenditure of time and money required by this sort of effort should dissuade potential plaintiffs from seeking compensation under the statute.

Finally, the *Matsushita* litigation reflects an increasing judicial aversion to claims of unfair competition.[122] Consequently, any Congressional revitalization of the 1916 Act must clearly establish less stringent guidelines to be used by the courts in assessing these claims.

Notwithstanding the various questions raised by the litigation, the *Matsushita* odyssey produced a detailed and instructive consideration of the 1916 Antidumping Act, including holdings on the Act's constitutionality[123] and appropriate bases for product comparison.[124] Nevertheless, the *Matsushita* litigation reveals the need for streamlined procedures for recovery under the 1916 Act. Part VII of this Note offers one possible alternative to realize this goal.

IV. THE 1921 ANTIDUMPING ACT

Congress passed the second United States antidumping measure as part of the Emergency Tariff Act of 1921.[125] Generally known as the 1921 Antidumping Act,[126] the law provides a purely administrative rem-

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120. Note, *Predatory Pricing*, *supra* note 26, at 541.

121. 475 U.S. at 577. In an earlier stage of the litigation, Judge Becker observed that the parties had amassed over twenty million total documents, including one hundred thousand pages of depositions. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1167 (E.D. Pa. 1980).

122. *See* Sherman, *supra* note 24, at 1123 ("There is simply no denying that the tenor of Justice Powell's opinion is decidedly pro-defendant.").

123. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 251 (E.D. Pa. 1975).

124. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1226-39 (E.D. Pa. 1980).

125. Ch. 14, tit. I, 42 Stat. 9.

126. The 1921 Act was substantially amended by the Trade Agreements Act of 1979. *See supra* note 13. The most important amendments concerned decreased time

edy for dumping violations. Unlike the 1916 Antidumping Act, the 1921 Act relies exclusively on enforcement by the United States Government. The 1921 Act also differs from the 1916 Act by assessing dumping duties on imported goods rather than imposing civil and criminal sanctions. Finally, the 1921 Act focuses entirely on injury to domestic producers and lacks the 1916 Act's intent requirement.[127] In sum, the 1921 Act is an entirely prospective remedy that affects only future imports and offers no means of private recovery.[128]

A. *Protectionist Response to Dumping*

The obvious failure of the 1916 Antidumping Act led directly to the enactment of the 1921 Antidumping Act.[129] In fact, Congress considered supplementary antidumping legislation as early as 1919 in response to a United States Tariff Commission report detailing the ineffectiveness of the 1916 Act.[130] Although the 1919 bill never went before the full Senate, it received great support from many House members, including the proponent of the 1916 Act, Representative Kitchin.[131]

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periods for administrative determinations and redefinition of "material injury" and "industry" to bring United States law into conformity with definitions provided in article VI of the General Agreement on Tariffs and Trade. *Opened for signature* Oct. 30, 1947, 61 Stat. A3, A23, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 212 [hereinafter GATT]. The amendment also complied with subsequent attempts to enforce GATT antidumping provisions. Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650, *reprinted in* 18 I.L.M. 621 (1979) [hereinafter 1979 Antidumping Code]. *See* Barringer & Dunn, *Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979*, 14 J. INT'L L. & ECON. 1 (1979).

127. *See* Note, *Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076, 1079 (1981).

128. The 1921 Act provides prospective relief in that it is designed to deter future dumping. The statute does not *prohibit* dumping, however; if the appropriate duties are paid, the dumper may continue the practice indefinitely. Victor, *supra* note 40, at 347 n. 46.

129. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1225 (E.D. Pa. 1980) ("[T]he raison d'etre of the 1921 Antidumping Act was the perceived inadequacy of the 1916 Act to prevent international dumping.").

130. *Id.* at 1224.

131. *Id.* Representative Kitchin echoed the Tariff Commission's conclusion that the 1916 Act's intent requirement doomed it to failure:

> That is the trouble with this antidumping act of 1916, which is now the law. You have to show the intent of the foreigner, the intent of the importer, to injure or destroy some particular industry in the United States. The business here might be injured, might be destroyed, by such importations and sales as effectively without

The 1921 Antidumping Act created an entirely new approach to the dumping problem by assessing duties on imports through an administrative framework. Some commentators contend that the 1921 Act retained the antitrust objectives of the 1916 Act despite the fact that Congress added the new provision to the general customs law rather than simply amending the existing antitrust provision.[132] This view, however, fails to recognize the fundamental difference between the conduct proscribed by the two laws. Under the 1921 Act, price differentials are subject to duties if they might injure American industry even though they are not attributable to unfair competitive strategies approaching the level of antitrust violations.[133] Simply put, it is far easier to reach imports using the administrative approach, and the tenor of these proceedings clearly indicates a protectionist design. One observer notes the general adoption of this view: "[T]he dumping law has consistently been interpreted to protect competitors rather than competition, a goal directly at odds with fundamental antitrust policy."[134]

B. *Operation of the Administrative Remedy*

The 1921 Antidumping Act, as amended, provides a complex administrative procedure through which duties may be assessed on dumped products.[135] Dumping investigations are handled concurrently by two

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such intent as with it.

Id. (quoting 59 CONG. REC. 346 (1919)).

132. *See* S. METZGER, *supra* note 16, at 70-72 ("The sanctions of the antitrust laws were dropped because of their unworkability, not because of a divorcement of dumping and unfair monopoly practices in the congressional mind."); J. PATTISON, *supra* note 46, § 1.03[2], at 1-8 ("Congress only sought to control predatory dumping and not every instance of price discrimination."). Pattison concedes, however, that predatory intent is not relevant under the 1921 Act. Thus, the focus on predatory dumping is entirely conceptual. *Id.* § 1.03[2], at 1-9 n.10.

133. Under the 1921 Act, for example, a prohibited dumping margin—the difference between fair market value and United States price—may result from simple currency fluctuations. *See* Dickey, *Antidumping: Currency Fluctuations as a Cause of Dumping Margins*, 7 INT'L TRADE L.J. 67 (1981-2). Because material injury under the 1921 Act means "harm which is not inconsequential, immaterial, or unimportant," 19 U.S.C. § 1677(7)(A) (1982), duties could be assessed upon mere proof that a change in currency valuations threatens United States industry. *See* 19 U.S.C. §§ 1673b(a)(1)(B), 1677(7)(F) (1982 & Supp. IV 1986).

134. Victor, *supra* note 40, at 350. Even those claiming that the 1921 Act is based on an antitrust model agree that, in practice, it operates as a protectionist measure. *See, e.g.*, S. METZGER, *supra* note 16, at 72 ("The act has been applied somewhat differently than its framers intended.").

135. *See generally* T. VAKERICS, D. WILSON & K. WEIGEL, ANTIDUMPING, COUN-

governmental agencies, the International Trade Administration (ITA) of the Commerce Department and the International Trade Commission (ITC). The ITA determines whether imports are being sold in the United States at less than fair market value.[136] The ITC determines whether a domestic industry has been, or is likely to be, injured as a result of sales at less than fair market value.[137]

An antidumping proceeding under the 1921 Act usually commences when an "interested party"[138] files a petition with both the ITA and the ITC,[139] though the ITC may initiate a dumping investigation when it appears warranted.[140] Once a petition is filed, it must proceed through five distinct stages in this bifurcated system:[141]

> (1) The ITA determines whether the petition contains sufficient information to justify a full investigation.[142] If the ITA determines that the petition is lacking, the proceeding is terminated.[143]
> (2) Upon an affirmative finding by the ITA, the ITC makes a preliminary determination as to whether there is any "reasonable indication" that a domestic industry is being materially injured, threatened with material injury, or materially retarded in its establishment by reason of the alleged dumping.[144] Again, a negative finding terminates the proceeding.[145]

TERVAILING DUTY, AND OTHER TRADE ACTIONS (1987); Horlick, *Summary of Procedures Under the United States Antidumping and Countervailing Duty Laws*, 58 ST. JOHN'S L. REV. 828 (1984); Sandler, *Primer on United States Trade Remedies*, 19 INT'L LAW. 761 (1985). For a practitioner's guide to this administrative procedure, see FEDERAL BAR ASS'N, MANUAL FOR THE PRACTICE OF INTERNATIONAL TRADE LAW (W. Ince & L. Glick eds. 1984). For a comprehensive list of articles on United States antidumping procedures, see J. PATTISON, *supra* note 46, § 1.03[3], at 1-11 n.20.

136. 19 U.S.C. § 1673(1) (1982). The statute refers specifically to the "administering authority," a duty performed by the Secretary of the Treasury but which may be transferred to another Government agency. *Id.* § 1677(1). The ITA currently carries out these duties. *See* Antidumping Duties, 19 C.F.R. § 353 (1988).

137. 19 U.S.C. § 1673(2) (1982 & Supp. IV 1986).

138. The term "interested party" is defined to include foreign producers, foreign governments, domestic producers, domestic unions, and trade and business associations. *Id.* § 1677(9).

139. *Id.* § 1673a(b).

140. *Id.* § 1673a(a).

141. This simplified description of the administration process is set out in American Lamb Co. v. United States, 785 F.2d 994, 998-99 (Fed. Cir. 1986).

142. 19 U.S.C. § 1673a(c) (1982). The ITA must make this determination within twenty days after the petition is received. *Id.*

143. *Id.* § 1673a(c)(3).

144. *Id.* § 1673b(a). The ITC has forty-five days after receiving the petition to issue its finding. *Id.*

145. *Id.*

(3) Upon an affirmative finding by the ITC, the ITA makes a preliminary determination as to whether sales at less than fair value exist.[146]
(4) Whether its preliminary finding is affirmative or negative, the ITA continues its investigation, issuing a final determination regarding less than fair value sales within seventy-five days following its preliminary determination.[147] The proceeding is terminated if this final determination is negative.[148]
(5) If the ITA's final determination is affirmative, the ITC makes its own final determination regarding the existence of material injury.[149] Should the ITC find no present or threatened injury, it terminates the proceeding.[150] If, however, the ITC's final determination is affirmative, that agency issues an antidumping duty order.[151]

The 1921 Act is designed to deter dumping practiced by foreign manufacturers and exporters.[152] It does not serve, however, to compensate injured parties for losses sustained because of the dumping. First, the procedural rollercoaster outlined above requires extensive periods of time, both in preparation by petitioners and in agency proceedings.[153] Second, the petition must be based upon information alleging all elements necessary to impose an antidumping duty.[154] Because this includes, at the very least, the threat of material injury,[155] it is likely that some injury will already exist at the time of filing. Third, the costs of

146. *Id.* § 1673b(b)(1). The preliminary determination must be made within 160 days following receipt of the petition. *Id.*

147. *Id.* § 1673d(a)(1).

148. *Id.* § 1673d(c)(2).

149. *Id.* § 1673d(b)(1) (1982 & Supp. IV 1986).

150. *Id.* § 1673d(c)(2) (1982).

151. *Id.*

152. The deterrence function of the 1921 Act is often effectively employed. For example, in one of his first official speeches following his 1987 confirmation as Commerce Secretary, William Verity warned the Japanese that failure to raise export prices in line with the rise in the value of the yen would invite increased antidumping action. *Verity Sees Little Chance for Trade Bill Passage This Year, Heads to Japan for Talks*, 4 Int'l Trade Rep. (BNA) 1416 (1987). Industry officials likewise appreciate the deterrent effect of the 1921 Act. Referring to potential antidumping actions against Japanese truck manufacturers, a spokesman for Ford Motor Company observed: "Once the threat of a filing surfaces, then the dumping ceases and the prices rise." *Alleged Dumping, supra* note 35, at 1081.

153. Due to the various time extensions allowable under the 1979 amendments to the 1921 Act, as codified under 19 U.S.C. § 1673d (1982), an administrative investigation may require from 165 days to 345 days. *See* Barringer & Dunn, *supra* note 126, at 11-12.

154. 19 U.S.C. § 1673a(b)(1) (1982 & Supp. IV 1986).

155. *Id.* § 1673b(a) (1982).

pursuing administrative action may be prohibitive.[156] Finally, even if the petitioner is successful and duties are assessed, the collected duties flow into the United States Treasury rather than to the petitioner.[157]

V. Recent Proposals to Create an Effective Private Remedy

The alternative courses of action currently available to victims of dumping under United States trade law have clearly failed to meet the intended Congressional objectives of deterring unfair competition and providing adequate compensation. If the 1916 Act and the 1921 Act were designed to complement each other, they have fallen far short of the mark: cases such as *Matsushita*[158] and *Outboard Marine*[159] reveal that the 1916 Act is not a viable means of redress for domestic dumping victims. In the last few years, however, Congress has taken note of this gap in the trade laws.[160] This section analyzes some of the more ambitious attempts to amend or supplement existing law to achieve the goals of deterrence and compensation.

A. *The Unfair Foreign Competition Act of 1982*

Two bills presented to the 97th Congress offered a unique opportunity to improve the trade laws. Although the bills approached the dumping problem somewhat differently, each sought to enhance the potential for meaningful recovery through private enforcement.

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156. *See* Barringer & Dunn, *supra* note 126, at 36-37.

157. 19 U.S.C. § 1512 (1982).

158. *See supra* notes 104-24 and accompanying text.

159. *See supra* notes 90-92 and accompanying text.

160. Members of Congress presented numerous proposals to create more effective remedies for trade law violations between 1980 and 1987, including many seeking to revitalize the 1916 Act. Senator Specter, Republican of Pennsylvania, took the lead by submitting no less than seven bills to improve the 1916 Act: S. 1396, 100th Cong., 1st Sess., 133 Cong. Rec. S8393 (daily ed. June 19, 1987); S. 1104, 100th Cong., 1st Sess., 133 Cong. Rec. S5616 (daily ed. Apr. 28, 1987); S. 361, 100th Cong., 1st Sess., 133 Cong. Rec. S1066 (daily ed. Jan. 21, 1987); S. 1655, 99th Cong., 1st Sess., 131 Cong. Rec. S11,647 (daily ed. Sept. 18, 1985); S. 236, 99th Cong., 1st Sess., 131 Cong. Rec. S476 (daily ed. Jan. 22, 1985); S. 418, 98th Cong., 1st Sess., 129 Cong. Rec. S988 (daily ed. Feb. 3, 1983); S. 1267, 97th Cong., 2d Sess., 128 Cong. Rec. S3289 (1982).

Senator Specter's interest in this area undoubtedly reflects his concern over the plight of his state's steel industry, which has frequently claimed injury as a result of illegal dumping. *See Remedies Against Dumping of Imports: Hearing on S. 1655 Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 99th Cong., 2d Sess. 67-72 (1986) (statement of William H. Knoell, President and Chief Executive Officer, Cyclops Corp.).

Senator Specter, Republican of Pennsylvania, introduced S. 2167[161] on March 4, 1982. This bill would have brought the 1916 Act officially within the scope of the antitrust laws and facilitated recovery by replacing the intent requirement with a knowledge standard.[162] By the terms of S. 2167, trade conduct would violate the 1916 Act if it was "reasonably foreseeable" that importation and sale of particular articles at less than fair market value would materially injure or retard an American industry.[163] The bill further amended the 1916 Act by permitting injunctive relief "prohibiting the importation or sale of any articles which have been or will be imported or sold"[164] in violation of the Act. Domestic importation and sale could also be enjoined for failure to comply with discovery orders issued pursuant to the litigation.[165]

In keeping with the decreased culpability level (from intent to knowledge), the burden of proof in civil actions would be lowered to a preponderance of the evidence standard.[166] The bill also shifted the burden of proof to the defendant once the plaintiff made a prima facie showing of liability or upon the introduction of an affirmative determination of dumping (preliminary or final) under the 1921 Act.[167] Imported goods would be valued according to the procedures in the 1921 Act, including constructed valuation.[168] Finally, treble damages were retained for civil actions and the criminal fine was increased to a maximum amount of one million dollars.[169]

Many of the suggested amendments of S. 2167 were parroted in S. 2517,[170] introduced by Senator Mathias, Democrat of Maryland, on May 11, 1982. Like S. 2167, the Mathias bill brought the 1916 Act within the scope of the antitrust laws and removed the onerous intent requirement.[171] However, S. 2517 went further than the earlier bill by imposing liability on an importer who "knowingly and purposely" imported or sold products at substantially less than fair market value or constructed value.[172] In essence, recovery would be possible when an in-

161. S. 2167, 97th Cong., 2d Sess., 128 CONG. REC. S3289 (1982).
162. *Id.* §§ 2, 3(b).
163. *Id.* § 3(a).
164. *Id.* § 3(c)(2).
165. *Id.* § 3(g).
166. *Id.* § 3(d).
167. *Id.*
168. *Id.* § 3(j); *see supra* note 91.
169. *Id.* §§ 3(c)(3), 3(b).
170. S. 2517, 97th Cong., 2d Sess., 128 CONG. REC. S9306 (1982).
171. *Id.* §§ 2, 3(1)(a).
172. *Id.* § 3(1)(a).

jured party could prove that the defendant intended to import or sell at a competitively unfair price and that such activity had materially injured, retarded, restrained, or monopolized domestic production.[173] The bill allowed the court to enjoin further imports if the defendant failed to comply with a discovery order[174] and increased the criminal fine to fifty thousand dollars.[175]

These bills received mixed reviews in hearings before the Senate Judiciary Committee. Despite agreement that existing remedies under the 1916 Act were inadequate,[176] witnesses offered contradictory assessments of the efficacy of the proposed amendments. The timeliness of relief, for example, was considered paramount to some trade experts, who concluded that private actions would receive more prompt consideration than administrative actions.[177] A Commerce Department official, citing the pending *Matsushita* litigation and the 1979 amendments to the 1921 Act that reduced investigatory periods, refuted this contention.[178] In fact, one witness perceived great merit in the possibility that private actions would demand longer time periods for adjudication.[179]

The bills were further criticized for a variety of reasons: they failed to include exporters as parties;[180] they retained the treble damage recovery for even nonpredatory violations;[181] and they shifted the burden of proof to the defendant on the basis of preliminary determinations by the ITA or the ITC under the 1921 Act.[182] Moreover, some argued against the bills because they would invite retaliatory laws by foreign governments.[183] Nevertheless, others praised the bills for taking the United States Government out of the formula by allowing competitors to settle

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173. *Id.*

174. *Id.* § 3(4)(e).

175. *Id.* § 3(2).

176. *See generally Unfair Foreign Competition Act of 1982: Hearings on S. 2167 and S. 2517 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) [hereinafter *1982 Senate Hearings*].

177. *Id.* at 29 (testimony of Dominic B. King, Assistant General Counsel, United States Steel Corp.).

178. *Id.* at 103-04 (testimony of Lawrence J. Brady, Assistant Secretary for Trade Administration, United States Department of Commerce).

179. *Id.* at 45-46 (testimony of Peter Ehrenhaft, trade attorney).

180. *Id.* at 98-99 (statement of Richard O. Cunningham, trade attorney).

181. *Id.* at 46 (testimony of Peter Ehrenhaft, trade attorney).

182. *Id.*

183. *See, e.g., id.* at 92 (testimony of Alexander Sierck, trade attorney) ("[W]ere the United States to amend the 1916 act to create a viable remedy, the United States would certainly incur comparable legislation arising in other countries or other barriers, other impediments to U.S. export interests.").

their differences in court rather than through governmental procedures.[184]

The issues raised by S. 2167 and S. 2517 indicate the numerous technical and political considerations that must be addressed in reformulating trade policy. The bills were flawed because they failed to confront the fundamental problem of underpricing by manufacturers.[185] One might also question whether criminal liability is appropriate when deterrence value lies more in retroactive damages than in meager criminal fines.[186] Still, the bills are worth consideration because of laudable provisions such as that permitting injunctive power to compel compliance with discovery orders. Because the defendant will be in the best position to produce documentation for purposes of valuation,[187] such strict disclosure requirements are essential. In addition, the "reasonably foreseeable" language of S. 2167 strikes an appropriate balance between the interests of the parties because it would protect those defendants who were justifiably ignorant that their activities in fact violated the trade laws.[188]

B. *The Unfair Foreign Competition Act of 1985*

Senator Specter presented an innovative approach to the dumping problem in S. 1655,[189] which he introduced as an amendment to the 1916 Act on September 18, 1985. This bill utilized the injunction as the primary remedy for dumping, with monetary recovery allowed to the

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184. *Id.* at 45 (testimony of Peter Ehrenhaft, trade attorney); *id.* at 65 (testimony of William H. Knoell, President and Chief Executive Officer, Cyclops Corp.).

185. *See supra* notes 77, 78 and accompanying text.

186. *1982 Senate Hearings, supra* note 176, at 98 (statement of Richard O. Cunningham, trade attorney) ("Criminal penalties are unnecessary and excessive, and moreover are likely to be unenforceable against those who really control the dumped pricing policies—the executives of the foreign corporations.").

187. *Id.* at 24-25 (statement of Dominic B. King, Assistant General Counsel, United States Steel Corp.) (the injunction clause "recognizes the proper balance between the parties in this sort of litigation since the defendant is in a better position to obtain the information necessary to decide a dumping case, given the confidential nature of much of this material. . . .").

188. This argument is often raised by both United States Government officials and foreign manufacturing concerns. *See id.* at 104 (testimony of Lawrence J. Brady, Assistant Secretary for Trade Administration, United States Department of Commerce); *id.* at 139-41 (statement of Akio Morita, Chief Executive Officer, Sony Corp.) (given the nature of United States valuation procedures, importers and exporters are often unaware that they are violating the antidumping laws).

189. S. 1655, 99th Cong., 1st Sess., 131 CONG. REC. S11,647 (daily ed. Sept. 18, 1985). This bill appeared as an amended version of S. 236, 99th Cong. 1st Sess., 131 CONG. REC. S476 (daily ed. Jan. 22, 1985), also introduced by Senator Specter.

extent that the equitable remedy proved insufficient.[190]

The Specter bill permitted "[a]ny interested party" injured by a dumping violation to petition either the District Court for the District of Columbia or the Court of International Trade in an action "against any manufacturer or exporter . . . or any importer . . . who is related to such manufacturer or exporter."[191] Relief would be possible upon proof that sales at less than fair value or constructed value caused injury, threatened injury, or retarded the establishment of an industry.[192] The criminal element was removed,[193] meaning that less than fair value sales automatically spawned potential liability. Judgment would be based on a preponderance of the evidence standard.[194] S. 1655 departed from prior proposals by shifting the burden of proof to the defendant upon a prima facie showing of liability or an affirmative final (rather than preliminary) determination of dumping under the 1921 Act.[195] Treble damage recovery was apparently retained in the bill, though there is no specific wording to that effect.[196]

This bill made great strides toward a more workable and effective remedy under the 1916 Act. First, the criminal element of the law was jettisoned. Plaintiffs would not be required to establish predatory intent or even the alleged dumper's actual knowledge of less than fair value sales. Second, by granting injured parties a right to sue exporters, the bill sought to provide relief from the true source of the dumped goods. Third, the bill responded to concerns that a preliminary determination by an administrative agency under the 1921 Act was an inappropriate method by which to shift the burden of proof to the defendant, who might often lack the opportunity to participate fully in the administrative hearings.[197] Finally, the bill addressed the standing problems previously

190. S. 1655, *supra* note 189, § 3(C).

191. *Id.* § 3(B).

192. *Id.* § 3(A).

193. *See id.* § 3(C).

194. *Id.* § 3(D).

195. *Id.*

196. The bill did not specifically refer to treble damages but would probably permit them in accordance with the Clayton Act, 15 U.S.C. § 12 (1982), to which S. 1655 would amend the 1916 Act. In addition, Senator Specter referred to treble damages when he introduced S. 236, *supra* note 189. *See* S. REP. NO. 295, 99th Cong., 2d Sess. 14 (1986) [hereinafter 1985 SENATE REPORT] (letter of John R. Bolton, Assistant Attorney General). *But see* Note, *Revitalizing A Private Right of Action in Antidumping Cases*, 17 L. & POL'Y INT'L BUS. 847, 857 (1985) (construing bill as providing only actual damages).

197. The earlier provision was considered procedurally unfair because the rights of interested parties in preliminary proceedings of the ITA and ITC did not include access

encountered under the 1916 Act. As the bill's proponent noted, under S. 1655 "[a] company, a union, any aggrieved party could come to court to get a remedy."[198] Thus, the bill embodies the view that anyone capable of proving injury resulting from a violation of the 1916 Act may recover damages.

The glaring defect in S. 1655, however, was its primary reliance on the injunctive remedy. While one might argue that the courts involved in this new approach (the District Court for the District of Columbia and the Court of International Trade) are best qualified to rule on trade issues, the near-certain stifling of trade under such a provision would outweigh the benefits of excluding dumped products. Further, such a provision would likely violate United States obligations under the General Agreement on Tariffs and Trade (GATT)[199] by blatantly restricting

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to discovery materials and the opportunity for cross-examination. *See* 1985 SENATE REPORT, *supra* note 196, at 18 (letter of John R. Bolton, Assistant Attorney General); *see also id.* at 23 (letter of James C. Miller, Chairman, Federal Trade Commission) (burden-shifting allowed in antitrust cases only after final determination).

198. *The Unfair Foreign Competition Act of 1985: Hearing on S. 1655 Before the Senate Comm. on the Judicary*, 99th Cong., 1st Sess. 3 (1985) [hereinafter *1985 Senate Hearing*] (statement of Senator Specter). Although section 5(c)(1) of S. 1655 defined "interested party" for purposes of the customs law, no such language was applied to the 1916 Act. Senator Specter's statement, however, indicates that the cause of action was to be broadened to include anyone who could prove injury. Thus, standing would depend less on statutory construction than on causation.

199. Article VI of GATT proscribes dumping that threatens or causes material injury to, or retards the establishment of, industries within the territory of contracting parties. GATT, *supra* note 126, art. VI, para. 5. The signatories to the 1979 Antidumping code agreed to implement article VI of GATT in a uniform manner. *See* 1979 Antidumping Code, *supra* note 126, preamble. Both GATT and the 1979 Antidumping Code limit action by signatories in response to dumping. An assessment of antidumping duties is permitted only to the extent of the dumping margin, and retrospective application is permitted only in special circumstances. GATT, *supra* note 126, arts. VI, para. 1, XIX. Thus, international legal obligations would clearly prohibit Senator Specter's injunctive approach. *See 1985 Senate Hearing*, *supra* note 198, at 18 (testimony of Senator Specter) ("[T]he best way to solve the problem is to stop the goods from coming in as opposed to getting involved in who suffered the damages, whether it is the steel company, the union, or the grocer down the block.").

While injunctions appear to be inconsistent with GATT, the question remains whether other measures to strengthen the 1916 Act also conflict with that agreement. In recent years, United States Government officials have insisted that antidumping duties alone are permitted under GATT; amending the 1916 Act would, they argue, violate this commitment. *See, e.g.*, *1987 House Hearings, supra* note 8, at 661 (statement of Alan F. Holmer, General Counsel, USTR); 1985 SENATE REPORT, *supra* note 196, at 17 (letter of John R. Bolton, Assistant Attorney General). Some commentators urge a different interpretation. *See, e.g.*, Almstedt, *supra* note 50, at 778-80. Almstedt cites three

the flow of trade between nations.

The timing element also weighs against using injunctions rather than retroactive damages as the primary vehicle for recovery. During hearings on S. 1655, one commentator asserted that an injunctive remedy would be ineffective simply because a plaintiff would usually need eight to twelve months to prepare a suit, "and the damage in that case is very largely done."[200] United States Government agencies strongly opposed S. 1655 as unnecessary, violative of international agreements, anticompetitive, a possible denial of due process, and ineffective for timely resolution of disputes.[201]

C. *The Comprehensive Trade Policy Reform Act of 1986*

A private right of action for injury from dumping was included as section 158 of the "Comprehensive Trade Policy Reform Act of 1986," H.R. 4750.[202] The proposed cause of action approached the issue from a different angle by adding a new section to the 1921 Antidumping Act rather than amending the 1916 Act.[203]

A private suit could be initiated under H.R. 4750 by any manufacturer, producer or wholesaler of a like product to a kind or class of merchandise subject to an antidumping order.[204] The International Court of Trade would be the sole forum for these actions, which could be instituted against "[a]ny manufacturer of the merchandise . . . [or] [a]ny exporter, importer or consignee who knew or had reason to know that the merchandise was sold at less than fair value."[205] The bill required that actions be brought after thirty days, but within two years, following the publication of the antidumping duty order.[206] The limiting period

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propositions to support his argument that an amended 1916 Act would still comply with GATT: (1) the other signatories knew of the 1916 Act when they accepted GATT, and they have never challenged the Act's validity; (2) GATT includes a grandfather clause exempting preexisting legislation from its general proscriptions; and (3) the langauge of article VI, section 2 of GATT concerns only the *amount* of antidumping duties that may be assessed. *Id.* at 779-80. Almstedt thus concludes that "[n]either the GATT nor the Code mandates or even suggests that imposition of dumping duties is the exclusive form of relief sanctioned against dumping." *Id.* at 780.

200. *1985 Senate Hearing*, *supra* note 198, at 43 (statement of Richard O. Cunningham, trade attorney).

201. *See* 1985 SENATE REPORT, *supra* note 196, at 9-30 (statements of various United States Government agency personnel).

202. H.R. 4750, 99th Cong., 2d Sess. (1986).

203. *Id.* § 158(a).

204. *Id.* § 740(a)(2) (proposed amendment contained in § 158(a)).

205. *Id.* § 740(b)(1).

206. *Id.* §§ 740(d)(1), (3).

would not commence until all appeals on the administrative order were exhausted.[207]

This bill represented a movement away from the underlying rationale of the 1916 Act, the deterrence of predatory pricing.[208] Because recovery would be based upon a knowledge standard applying solely to the price of goods, predatory intent would be either presumed or entirely disregarded. While the House Ways and Means Committee favorably reported the bill as a "complement [to] the traditional dumping laws,"[209] it acknowledged that the traditional avenue of private recovery—the 1916 Act—was completely ineffective.[210] Thus, the bill may be more properly viewed as a new, protectionist cause of action rather than a complement to existing law. And, unlike a somewhat similar remedy appearing in the 1987 Trade Act,[211] recovery under H.R. 4750 would not be limited to duties collected under the antidumping order.[212]

Like the prior proposals outlined above, H.R. 4750 merits attention because it sought to balance the interests of the litigants in a dumping action. It offered injured domestic producers a reasonable opportunity for recovery. Costs would be relatively manageable because the data required would presumably be made available by the party initiating the administrative action under the 1921 Act.[213] Relief would therefore be timely. On the other hand, the foreign or domestic defendant might escape liability by demonstrating a lack of knowledge of sales at less than fair value. This would insulate inadvertent dumpers from civil liability even in circumstances in which an antidumping duty would be otherwise justified.[214]

The frequency of attempts to amend the existing law demonstrates both the inadequacy of that law and the difficulty of correcting it. Clearly, each of the proposals outlined above had both positive and negative aspects; analyzing these strengths and weaknesses helps to lay the groundwork for a successful statutory amendment. The following section

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207. *Id.* § 740(d)(2).

208. *See supra* notes 19-34 and accompanying text.

209. H.R. REP. No. 581, 99th Cong., 2d Sess., pt. 1, at 105 (1986).

210. *See id.*

211. *See infra* notes 231-43 and accompanying text.

212. The plaintiff's damages would be limited, however, to those incurred during the three years preceding the imposition of the antidumping duty order. *See* H.R. 4750, *supra* note 202, § 704(c)(2) (proposed amendment contained in § 158(a)).

213. The degree of camaraderie between domestic plaintiffs would undoubtedly hinge on the petitioner's decision as to whether the domestic or the foreign competitor presented a greater challenge in the market.

214. *See supra* note 188 and accompanying text.

discusses the 1987 Trade Act, the most recent—and perhaps most instructive—effort to amend the trade laws to provide private recovery for those injured by dumping.

VI. Private Recovery Under the 1987 Trade Act

Representative Richard Gephardt, Democrat of Missouri, introduced H.R. 3, the "Trade and International Economic Policy Reform Act of 1987" (1987 Trade Act)[215] on January 8, 1987. Both houses of Congress passed the controversial bill,[216] which was later amended in a joint House-Senate conference committee.[217] The revised version of the 1987 Trade Act again passed both houses as the "Omnibus Trade and Competetiveness Act of 1988" (1988 Trade Act).[218] President Reagan vetoed the legislation, primarily because of objections to a plant closing notice requirement and restrictions on Alaskan oil exports.[219] The President later signed an identical bill that excluded these objectionable provisions.[220]

The 1988 Trade Act represents the most significant overhaul of United States trade policy since the Second World War.[221] Its original text included two specific provisions that would have amended the 1916 and 1921 Antidumping Acts in order to enhance the possibility of recov-

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215. H.R. 3, *supra*, note 6.

216. The House of Representatives passed H.R. 3 by a vote of 290-137. 133 Cong. Rec. H2981 (daily ed. April 30, 1987). The Senate later voted 71-27 in favor of an amended version of the bill. 133 Cong. Rec. S10,372 (daily ed. July 21, 1987).

217. *See Conference Report, supra* note 9.

218. H.R. 3, 100th Cong., 2d Sess., 134 Cong. Rec. H1863 (daily ed. Apr. 20, 1988). The House accepted the *Conference Report* by a vote of 312-107. 134 Cong. Rec. H2375 (daily ed. April 21, 1988). The Senate voted 63-36 in favor of the *Conference Report*. 134 Cong. Rec. S4926 (daily ed. April 27, 1988).

219. President Reagan vetoed H.R. 3 on May 24, 1988. Citing his disagreement with Congress over the notice provision and Alaskan oil export restrictions, the President stated: "I am convinced this bill will cost jobs and damage our economic growth." *President Reagan's Veto of Trade Bill Met with Overwhelming Override in House*, [Jan.-June] Int'l Trade Rep. (BNA) No. 22, at 779 (June 1, 1988).

220. Pub. L. No. 100-418, 102 Stat. 1107 (1988). President Reagan signed H.R. 4848 on August 23, 1988—less than three months after he vetoed H.R. 3. Interestingly, although the new bill excluded only the two provisions noted above, the President pronounced that this trade bill would help United States competitiveness and growth. *President Reagan Signs Trade Bill into Law, Saying Nation Now Speaks with One Voice*, [July-Dec.] Int'l Trade Rep. (BNA) No. 34, at 1184 (August 24, 1988).

221. For an overview of some of the numerous changes contained in the bill, see Barshevsky & Zucker, *Amendments to the Antidumping and Countervailing Duty Laws Under the Omnibus Trade and Competitiveness Act of 1988*, 13 N.C. J. Int'l L. & Com. Reg. 251 (1988).

ery for those injured by dumping. Although the proposals were ultimately removed during the conference committee proceedings, they represented perhaps the best attempt yet undertaken to provide a workable compensatory remedy under existing law.

A. *Amendments to the 1916 Antidumping Act*

Three fundamental changes to the 1916 Act were contained in section 166 of H.R. 3.[222] First, the bill removed the criminal sanctions in the 1916 Act; unlawfulness was transformed into "an unfair competitive act"[223] and no fines or imprisonment would be imposed for less than fair value sales. Second, the bill provided that valuation of products would be determined under the standards found in the 1921 Act.[224] Third, the bill included a burden-shifting provision. If the defendant were a "multiple offender"[225] with respect to articles in the same "product monitoring category"[226] as those involved in the litigation, then the plaintiff could take advantage of a rebuttable presumption that the dumping was practiced with the intent to destroy or injure a domestic industry.[227] If this presumption were used, however, recovery would be limited to actual damages rather than the treble damages otherwise available.[228]

Although these changes would substantially modify existing law, H.R. 3 is also notable for those aspects of the 1916 Act that it failed to address. For example, the intent requirement—universally cited as the principal obstacle to recovery under the law—was left intact. This is especially surprising since the criminal status of the law was eliminated.[229] Moreover, the proscription would continue to apply only

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222. *See* H.R. REP. No. 40, 100th Cong., 1st Sess. pt. 1, at 148-50 (1987) [hereinafter 1987 HOUSE REPORT].

223. H.R. 3, *supra* note 6, § 166(1).

224. *Id.* § 166(5).

225. A "multiple offender" is a foreign manufacturer or producer against whom an affirmative final determination of dumping has been found, and on whose products an antidumping duty order has been directed under 19 U.S.C. § 1673d(c)(2) (1982 & Supp. IV 1986), at least three times during a ten year period. *Id.* § 165(a)(6).

226. A "product monitoring category" is composed of a kind or class of merchandise monitored by the ITA while an antidumping duty order is in effect. *See* 19 U.S.C. § 1673a(a)(2) (1982 & Supp. IV 1986).

227. H.R. 3, *supra* note 6, § 166(5).

228. *Id.*

229. The principal objection to the removal of the intent requirement in past bills was the fact that it would be incongruous with the retention of criminal sanctions. *See, e.g., 1982 Senate Hearings, supra* note 176, at 104 (testimony of Lawrence J. Brady, Assistant Secretary for Trade Administration, United States Department of Commerce) ("In our view, it would be inappropriate in antidumping cases for the courts to impose

against an individual or entity that "imports, sells or causes to be imported or sold"[230] articles in the domestic market; thus, the amendment apparently failed to include foreign producers, manufacturers, and wholesalers as potential defendants.

B. *Special Compensation Accounts Under the 1921 Antidumping Act*

H.R. 3 offered a logical remedy for domestic manufacturers injured by dumping in the form of compensation awards extracted from collected duties.[231] Section 167 of the bill outlined a straightforward compensation recovery procedure for those who could establish that they were "affected domestic producers"[232] who "suffered economic injury during the dumping period."[233] Payments would be made out of a "special compensation account"[234] created by the Treasury Department for that purpose.

The basic framework for relief under section 167 took the following form:

(1) An antidumping duty order is issued by the ITC.[235]
(2) The Secretary of the Treasury establishes a special compensation account on the effective date of the antidumping order.[236]
(3) All antidumping duties collected pursuant to the order are deposited into the special compensation account.[237]
(4) After a timely application by a domestic producer, the ITC determines the applicant's eligibility.[238] Only those producers that demonstrate economic injury as a direct result of the dumping will be found eligible.[239]
(5) After the ITC affirmatively determines an applicant's eligibility, it de-

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criminal sanctions without any showing of specific intent."); *see also supra* note 60 and accompanying text.

230. H.R. 3, *supra* note 6, § 166(2).

231. *See* 1987 HOUSE REPORT, *supra* note 222, at 150.

232. An "affected domestic producer" is any domestic manufacturer or producer within the industry for which an affirmative injury determination was made during proceedings that resulted in an antidumping duty order. *Id.* § 167(a)(2).

233. The "dumping period" is the period during which products subject to the antidumping duty order were sold or offered for sale at less than fair value in the United States. *Id.* § 167(a)(6).

234. *Id.* § 167(d)(1).

235. *Id.*

236. *Id.*

237. *Id.* § 167(d)(2).

238. *Id.* § 167(c)(1). The ITC is charged with establishing the appropriate application procedures. *Id.* § 167(b).

239. *Id.* §§ 167(c)(1)(A), (B); *see supra* notes 232, 233 and accompanying text.

termines the actual monetary value of the injury suffered.[240]
(6) The ITC then issues a compensation award to the applicant.[241] The compensation award states the amount of money that the applicant may claim out of the special compensation account.[242]
(7) The Secretary of the Treasury makes the appropriate payments based upon the stated amount of the compensation award.[243]

C. *Evaluation of the 1987 Trade Act Proposals*

The antidumping laws must balance competitive and protectionist concerns; any amendment of these laws should seek to foster competition while fairly compensating injured producers when the competitive process is subverted. The proposals found in H.R. 3 were perhaps not as strong as they might have been, but they nevertheless appeared to offer justifiable relief in at least a limited number of situations. This section evaluates these proposed amendments by reference to the primary flaws in the 1916 Act as outlined above.[244]

Intent Requirement. H.R. 3 retained the intent requirement. Thus, the amendment would not facilitate broader application of the 1916 Act. An injured party would encounter the precise obstacle to recovery as has always been the case under the law: proving intent to injure or destroy a United States industry.[245]

Exporters Not Covered. The bill likewise failed to provide direct action against the usual source of the unfair pricing of goods, the foreign manufacturer or exporter, unless such parties were found to have assisted in the importation of the dumped goods.[246]

Common and Systematic Importation. H.R. 3 did not address the conduct proscribed under the 1916 Act; therefore, normal, short-term dumping would not be subject to private action.[247]

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240. *Id.* § 167(c)(2)(A).
241. *Id.* § 167(c)(2)(B).
242. *Id.*
243. *Id.* § 167(d)(3). The Secretary of the Treasury must prescribe the procedure for distributing compensation awards from the compensation account. *Id.* § 167(d)(4). Pro rata payments will be made to claimants whenever the aggregate amount of claims exceeds the amount of money available in the compensation account. *Id.* Any monies remaining in the account after all timely claims have been paid will be deposited in the general fund of the United States Treasury. *Id.* Any duties collected after the compensation account is terminated will likewise flow into the general fund. *Id.* § 167(d)(5).
244. *See supra* notes 70-103 and accompanying text.
245. *See supra* notes 70-73 and accompanying text.
246. *See supra* notes 74-78 and accompanying text.
247. *See supra* notes 79, 80 and accompanying text.

Valuation of Products. Product valuation under the 1921 Antidumping Act permits "a much more expansive charter than that contained in the 1916 Act."[248] Because H.R. 3 required valuation according to 1921 Act procedures, plaintiffs would benefit from the greater discretion of the court in comparing products and determining actual market value. The court could consider, for example, similar products that it found reasonably comparable to the subject merchandise.[249] Such valuation presents a far more lenient threshold of comparison than the currently applicable antitrust procedures mandated in *Matsushita.*[250] Clearly, "reasonably comparable" articles may include differences greater than those "of like grade and quality,"[251] and would therefore ease the plaintiff's burden in a private action.

Necessity of a Foreign Market. Because H.R. 3 provided that products would be valued according to the procedures found in the 1921 Act,[252] this impediment was also removed. Under the 1921 Act, when foreign market value cannot be established by reference to home market or third country sales, product valuation may be constructed by calculating production costs, general expenses, and incidental expenses.[253] As applied to a suit under the 1916 Act, this provision ensured that recovery would not be denied solely because, as in *Outboard Marine,*[254] the dumping firm places its products exclusively in the United States market.

Standing. The current confusion regarding standing to sue for trade law violations was not addressed in H.R. 3. It seems likely, however, that courts will continue to limit standing to domestic manufacturers. *Jewel Foliage* should be limited to its facts, allowing importers standing only when there is no domestic production of the dumped products.[255]

Criminal Liability. The proposed amendments converted the 1916 Act

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248. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1225 (E.D. Pa. 1980).

249. 19 U.S.C. § 1677(16) (1982).

250. *See supra* notes 87-90 and accompanying text.

251. The district court in the *Matsushita* litigation refused to admit evidence of the defendant's prior antidumping violations under the 1921 Act precisely because the antitrust standard of valuation was far more rigorous than that applied under the 1921 Act: "[T]he fact that the Treasury Department has made certain technical comparisons is of no significance for the dumping claims in the instant litigation. Nor is the fact that the Department has assessed dumping duties on the basis of these comparisons relevant to the 1916 Act claims." *Matsushita,* 494 F. Supp. at 1225-26.

252. H.R. 3, *supra* note 6, § 166(5).

253. 19 U.S.C. §§ 1677b(a)(2), 1677b(e)(1) (1982 & Supp. IV 1986); *see* J. PATTISON, *supra* note 46, § 5.05(4), at 5-8.

254. *See supra* notes 90-94 and accompanying text.

255. *See supra* notes 95-101 and accompanying text.

into an entirely civil action. Thus, potential impediments to recovery due to strict interpretation of the statute would be obviated.[256]

Those amendments to the 1916 Act that could reasonably facilitate recovery—incorporation of the 1921 Act valuation procedures and removal of criminal status—were weakened by the retention of the requirement that the plaintiff must prove the defendant's intent to destroy or injure domestic competition. However, the provision creating a rebuttable presumption of intent after three violations of the 1921 Act obviously promoted recovery. In so doing, this innovation both respected the competitive process and enabled recovery if respect for the competitive process was undermined by dumping violations.

The burden-shifting presumption respected the competitive process because it was fair to alleged dumpers. Presumed intent would be available only after three affirmative determinations of dumping under the complex administrative procedures of the 1921 Act. Consequently, those dumpers who had done so inadvertently or in only one or two isolated instances would be immune from its operation.[257]

The new provision also expressed a certain consistency in drafting. Although the intent requirement remained, the bill's drafters were apparently willing to presume predatory intent to injure or destroy an industry on the part of one who consistently prices goods at less than fair value—even after official determinations that its conduct constitutes dumping.

Finally, this new provision was tempered by the limitation that, whenever the presumption applied, recovery would be limited to actual, rather than treble, damages.[258] This limitation recognized the apparent unfairness in meting out arguably punitive sanctions when actual intent had not been proved. An interesting situation might arise, however, if the presumption were invoked by a plaintiff who had already received duty monies out of the proposed special compensation account. Whether the plaintiff's actual damages would be decreased by an amount equal to these prior payments from the United States Treasury is uncertain.[259]

The special compensation accounts seem unassailable, for they would offer legitimate, administrable means of providing at least partial redress

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256. *See supra* notes 102, 103 and accompanying text.

257. This provision would allay the fears of those who claim that the antidumping laws are unfairly applied. *See supra* note 190.

258. H.R. 3, *supra* note 6, § 166(5).

259. Allowing double recovery for one injury is presumptively unfair to the defendant. Yet, considering that the punitive measure of treble damages is removed, and because the bill is silent on this matter, it might have been within the drafters' intent to allow full recovery of all actual damages suffered.

for injured parties. Proof of injury at both the duty determination and eligibility determination levels would ensure that collected duties benefit the proper party, the injured producer.[260] In sum, the proposed compensation program amendment to the 1921 Act was just, workable, and long overdue. As the House Ways and Means Committee recognized, "Although . . . the amount of duties collected may not be sufficient to compensate fully all parties injured by dumping, it is the view of the Committee that such funds should be channelled back to the injured parties to the extent possible."[261]

Despite many commendable aspects, H.R. 3 did not offer a truly meaningful right of action for injured parties primarily because it did not do away with the intent requirement of the 1916 Act. Nonetheless, the amendments would have put some meat onto the skeletal framework of private recovery under the current regime. If compensating injured producers is a real concern, H.R. 3 represents progress toward a reasonable solution.

VII. Toward a More Effective Private Right of Action

The current antidumping laws do not provide a viable right of action for domestic manufacturers seeking monetary compensation. The 1916 Antidumping Act is fatally flawed and has never been successfully utilized; the 1921 Antidumping Act offers only prospective relief by imposing duties on future imports. Absent appropriate amendments, prospects for private enforcement and recovery under these laws are minimal at best.

This Note has surveyed certain legislative proposals to reinvigorate the private right of action for dumping violations under the 1916 Act, as well as compensation plans under the 1921 Act. These proposals have not gone far enough in structuring an effective and politically palatable remedy for domestic interests.

The antidumping laws must be amended to provide a meaningful private right of action. The value of private as opposed to Government enforcement of the antidumping laws should not be underestimated. Private parties have far greater incentive to pursue competitors engaged in unfair pricing strategies.[262] Indeed, this vigilance is evident at various

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260. Injury determination under the 1921 Act concerns injury to the industry as a whole. 19 U.S.C. §§ 1673b(a), 1673d(b)(1) (1982 & Supp. IV 1986). H.R. 3 demands proof of injury to the specific claimant. H.R. 3, *supra* note 6, §§ 167(c)(1)(b)(A), (B).

261. 1987 House Report, *supra* note 222, at 150.

262. Senator Specter invoked the wisdom of enforcement through private attorneys general in promoting S. 1655, *supra* note 189. He stated:

ports of entry, where private investigators hired by domestic producers monitor imports to ascertain whether customs duties are properly collected.[263] Furthermore, private parties are not constrained by the political calculations that often inhibit vigorous Government enforcement.[264] Private parties have been and are being injured by dumping; they should have access to monetary remedies.

Given that amendments to the 1916 Act are in order, what form should they take? The Appendix to this Note outlines the author's proposal for an amendment of the 1916 Act that could solve the statute's historical impotence. Most importantly, the intent requirement should be replaced with a standard predicating liability upon the defendant's knowledge of dumping violations.[265] Whenever an alleged dumper "knew or reasonably should have known" that less than fair value sales would cause injury to domestic industry, it should be liable for damages. Recovery should not hinge on predatory intent, but neither can it depend entirely on simple calculations of underpricing. Under a knowledge stan-

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> [T]here is nothing like the vigor of private plaintiffs when it comes to enforcement of trade laws or other means of self-help which have long been demonstrated to be the most effective way to get enforcement and action by those who are most directly affected and injured. . . . The theory that private plaintiffs would find strong incentive to bring such antitrust suits—and in so doing would both recoup deserved compensation for their injuries and advance strong national public policy interests—certainly has proved correct. There is no reason that the same should not be true of private suits to enforce our international trade laws.

131 CONG. REC. S11,646 (daily ed. Sept. 18, 1985).

263. Shustker, *Shell Game at the Docks*, FORBES, June 29, 1987, at 34.

264. Governments are often less willing to address foreign dumping activities because this may require confronting the foreign government, which may be a political ally. *See* 131 CONG. REC. S11,646-47 (daily ed. Sept. 18, 1985) (statement of Senator Specter) (domestic industry will "receive justice when laws can be enforced through the judicial process and there is not a situation where American industry is sacrificed on the altar of foreign policy"). The courts may also provide a better forum than agency hearings. As one trade authority has noted:

> It seems to me that dumping is essentially an economic phenomenon with two producers, or more, arguing about access to the market. They ought to argue about that in a place where an impartial arbiter makes the decision. There is no reason why the Government needs to take up their cause and confront its trading partners with regard to many of these cases.

1982 Senate Hearings, *supra* note 176, at 45 (testimony of Peter Ehrenhaft, trade attorney).

265. If the foreign manufacturer or exporter is charged with notice that unfair pricing may result in injury to domestic industry, and dumping persists, then it should be presumed to recognize the foreseeable consequences of its act. *See 1982 Senate Hearings*, *supra* note 176, at 16 (statement of Laird Patterson, General Counsel, Bethlehem Steel Corp.).

dard, plaintiffs would still have to prove less than fair value sales that, under common commercial understanding, would lead a reasonable pricer or seller to conclude that United States law was being violated.

It follows, then, that an appropriate remedy must reach foreign exporters and manufacturers. These entities are the usual source of less than fair value sales precisely because they have the motive to undercut domestic competition. They should be held accountable for damages whenever they have adequate knowledge that their pricing policies are proscribed under the antidumping laws. Accordingly, any person involved in the introduction of products into the United States market should be subject to these laws.

In keeping with the decreased standard for imposing liability, plaintiffs should be permitted to introduce final affirmative determinations of antidumping violations under the 1921 Act to shift the burden of proof to the defendant. The law should, however, set out specific defenses that the defendant may invoke to justify its pricing policy.[266] Shifting the burden of proof in such situations is reasonable both because the defendant has better access to privileged information and because it has already been found guilty of dumping.

The criminal element of the statute should be removed. Criminal sanctions are inappropriate for what is essentially a commercial tort. In addition, criminal statutes demand strict interpretation. The revised law should allow courts sufficient discretion to interpret the 1916 Act expansively when warranted.

Injunctions should not be allowed because enjoining imports may harm the competitive process more than the dumper's initial violation. The court should, however, possess the power to fine recalcitrant defendants to compel compliance with discovery orders or other court orders.

Product comparability and valuation should be determined pursuant to the procedures outlined in the 1921 Act. These procedures allow potential recovery whenever products reasonably similar to those produced domestically are sold for less than fair value.

Standing should be extended to include both domestic manufacturers and importers. Importers may suffer injury from dumping, and if an importer can prove causation it should be granted a day in court. To protect against an unwarranted deluge of claims, the revised statute

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266. Specific defenses are currently available in the domestic antitrust laws. *See* Almstedt, *supra* note 50, at 776; *see also 1982 Senate Hearings, supra* note 176, at 46 (testimony of Peter Ehrenhaft, trade attorney) (suggesting enumeration of defenses). The defenses outlined in the Appendix of this Note are borrowed from Almstedt, *supra* note 50, at 776.

should include a jurisdictional minimum amount in controversy.

The recovery amount should be limited to actual damages. Because an injury must necessarily be severe enough for a plaintiff to institute an action under a revised law, the deterrent effect of treble damages would be more than satisfied by the imposition of actual damages. Treble damages would also be inconsistent with the proposed knowledge requirement.

Finally, the Court of International Trade (CIT) should have sole jurisdiction over 1916 Act claims. The CIT presently exercises exclusive jurisdiction over appeals from administrative antidumping determinations,[267] and its expertise in trade issues is well established. Thus, it is best suited to the task of deciding the complex issues that would surely arise under a rejuventated private right of action.[268]

In addition, the 1921 Act should also be amended by implementation of the special compensation accounts presented in H.R. 3.[269] While this is really a private action within the administrative process, it is nevertheless a legitimate provision that would offer concrete relief. Monetary damages under the 1916 Act, however, would have to be reduced by any amounts collected under the compensation award program.

VIII. CONCLUSION

If adopted, the proposals outlined above would certainly elicit a storm of protest from free trade adherents. Yet, dumping is a serious problem in international trade and new approaches should be considered. As United States industries struggle to adapt to a changing global economy, they should be protected from unfair price discrimination. Under the procedure set out in the previous section, the CIT could accurately and efficiently enforce the 1916 Antidumping Act by (1) distinguishing between competetitve and unfair pricing schemes, (2) shielding foreign producers from indiscriminate liability, and (3) compensating domestic interests in appropriate cases.

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267. *See* 28 U.S.C. § 1582(c) (1982). The Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified in various sections of 28 U.S.C.), established the CIT and designated it as the exclusive forum for the resolution of disputes involving international trade. Note, *Administering the Revised Antidumping Law: Allocating Power between the ITC and the Court of International Trade,* 22 VA. J. INT'L L. 883, 894 (1982).

268. The CIT's proficiency in this area results not only from specialization, but also from an apparent mission ordained by Congress. *See* Note, *supra* note 267, at 905 ("The Court of International Trade . . . views itself as responsible for effecting constitutionally mandated uniformity in trade law.") (footnote omitted).

269. *See supra* notes 231-43 and accompanying text.

These amendments seek to revitalize the private right of action under the 1916 Antidumping Act by making recovery attainable. This would undoubtedly result in a stampede to the courtroom by injured producers. If the antidumping laws are designed to deter and compensate, however, then this is precisely what is needed.

Douglas J. Varga

APPENDIX

Proposed Amendment of the 1916 Antidumping Act.

Section 801 of the Act of September 8, 1916 entitled "An act to raise revenue, and for other purposes" (15 U.S.C. § 72) is amended to read as follows:

(a) Any person importing, selling, or in any manner introducing, or assisting in the introduction of, products into the commercial markets of the United States at less than fair market value, shall be liable for any actual damages suffered by private parties located in the United States if such person knew, or reasonably should have known, that the introduction of such products at less than fair market value would:

(1) cause material injury to industry or labor engaged in commerce in the United States, or;

(2) prevent or impede the establishment, maintenance, modernization, or expansion of United States industry.

(b) Any person doing business in the United States whose business or property is injured by reason of any violation of, or conspiracy to violate, subsection (a) of this section may bring suit in the United States Court of International Trade to recover the amount of actual damages sustained and the cost of suit, including reasonable attorney's fees: *Provided*, that the actual amount in controversy exceeds $100,000.

(c) Recovery shall be provided under subsection (b) of this section if the Court of International Trade finds by a preponderance of the evidence that the defendant has violated subsection (a).

(d) Upon a prima facie showing that the defendant has violated subsection (a), or if the defendant is found to be a "multiple offender" as defined in subsection (i) of this section, the burden of proof shall shift to the defendant. The defendant shall then be liable under subsection (a) if it fails to affirmatively prove that it has not violated that subsection.

(e) The defendant in any suit commenced under this section may utilize the following defenses in affirmatively disproving liability under subsection (a):

(1) reasonable price differentials resulting from costs associated with the manufacture, sale, or delivery of products in the United States market;

(2) market conditions affecting the relative marketability of specific goods, including but not limited to, deterioration of perishables, potential obsolescence of seasonal goods, and discontinuance of product lines;

(3) reasonable reduction in prices to meet lawful price reductions of

competitors;

(4) fluctuations in the currency exchange rate affecting prices in the United States market; and

(5) good faith reliance on information contained in an invoice supplied by the United States Customs Service.

(f) If the Court of International Trade finds that a defendant in any proceeding commenced under this section has failed to comply with a discovery order or any other order issued by the court, it may assess a penalty on the defendant not to exceed $5,000 per diem until such time as the defendant complies with such order.

(g) No action may be brought under this section unless it is commenced within three years following the defendant's alleged violation of subsection (a).

(h) Definitions:

(1) As used in subsection (a) of this section, the term "products" shall include both commodities and manufactured goods.

(2) As used in subsection (a) of this section, the term "fair market value" shall be applied according to the definition contained in the Tariff Act of 1930 (19 U.S.C. § 1671 *et. seq.*). If the products introduced into the United States market are not sold in the defendant's home country or in other countries, the court shall apply the constructed value of the product in issue according to the procedures outlined in § 773(e) of the 1979 Trade Agreements Act (19 U.S.C. § 1677b(e)).

(3) As used in subsection (a)(1) of this section, the term "material injury" shall be applied according to the definition contained in the Tariff Act of 1930 (19 U.S.C. § 1677(7)).

(4) As used in subsection (b) of this section, the term "any person doing business in the United States" shall include the following:

(i) any citizen of the United States;

(ii) any corporation incorporated under the laws of any state of the United States; and

(iii) any partnership, trust, or estate authorized to do business under the laws of any state of the United States.

(5) As used in subsection (d) of this section, the term "multiple offender" shall mean any person against whom an antidumping duty order has been assessed with respect to comparable products pursuant to the Tariff Act of 1930 (19 U.S.C. § 1673d(c)(2)) at least three times during any consecutive ten year period.