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ANTIDUMPING LEGISLATION:

SOUTH AFRICA'S ANTI-TRADE POLICY

University of Cape Town

DEANE CONWAY

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University of Cape Town

Submitted in partial fulfilment of the requirements for the degree of Masters in Commerce (Economics) by coursework and dissertation. This paper counts 25% of the total Masters course.

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This mini-dissertation was typed on a Taiwan-produced American computer using a British keyboard and Japanese screen. The paper is from Malaysia while the printer is from South Korea. The author is a South African residing in Britain.

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Finally, the dedication:

To Andrew, because he makes me smile,
and to Caysee, who made everyone smile.

"'If everybody minded their own business,'
the Duchess said in a hoarse growl,
'the world would go round a great deal faster than it does.'"

Alice in Wonderland, Ch. 6
Lewis Carroll

"The sublime and the ridiculous are often so nearly
related, that it is difficult to class them separately."

The Age of Reason, II
Thomas Paine

"… so cryptic as to be almost meaningless.
If there is a meaning, it is doubtless objectionable."

British Board of Film Censors on
"The Seashell and the Clergyman" (1929)

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ABSTRACT

> "Governments of developing countries are often lectured by the big powers on how they should exercise political will to bring about market reforms at home. ... Nowhere is [the developed world's] hypocrisy greater than in the invocation of dumping and countervailing duties."
>
> Joseph Stiglitz, Former World Bank vice-president
> [Business Day, September 22nd 1999, p11]

The aim of this paper is to examine the efficiency of present antidumping legislation in South Africa, with reference to international experience. The numerous definitions used in academia, legislation and in practice are studied, as are the effects of these definitions (in theory and practice). Finally, the paper seeks to offer alternatives to the current situation and to make suggestions for their practical implementation.

PROEM

It is contended that South Africa is failing to address the issue of dumping in a number of key areas. Firstly, there are imprecisions within the structure of antidumping regulations that allow some *bona fide* cases of harmful dumping to go unrecognised and thus unprosecuted. This same lack of clarity also offers a broad scope for uncompetitive local firms to keep up artificial trade barriers by simply accusing low-cost foreign firms of anti-competitive behaviour.

Secondly, the procedural delays involved in examining each suspected case of dumping make a mockery of the entire inquiry. The goods in question may well be sold between the date an antidumping petition is first filed and the date the case is finally decided. This problem is especially acute in those industries where product life-cycles are short and competitors enjoy significant first-mover advantages.

Thirdly, remedial action is usually concerned with ensuring that the alleged dumping is stopped, and seldom involves fines or legal charges for those found guilty. Even when duties are supplemented by real penalties (such as retrospective duties), the victims within the affected industry are unlikely to be compensated. Furthermore, when those victims are in fact foreign producers who have been falsely accused, there is no sanction or action taken against the accusers.

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Finally, there is little in the way of preventative measures and no provision is made for dealing more harshly with, for example, repeat offenders. These are among the aspects which require review and are open to improvement.

STRUCTURE AND RECOMMENDATIONS

The central argument to be made is that dumping is a subset of anti-competitive behaviours and should therefore be controlled through the Competition Act. The existence of dumping implies international price discrimination, which can be a result of market power or state interventions (for example, subsidised agriculture). Only the former is dealt with in this paper; the latter is an issue for the WTO's countervailing duties laws, as explained in Chapter 2.

The paper begins with an overview of the history and context of free trade and dumping. It moves on to look at antidumping legislation internationally, before focusing on South Africa. Problems with defining, identifying and countering dumping are followed by an analysis of real-world effects. The suggested solution is to replace the current antidumping legislation with the Competition Act, and to shift the powers of industry- and consumer-protection from the Board of Tariffs and Trade to the Competition Court. The recommendations and alternative definitions are examined for consistency with other South African trade law, agreements with third-party countries and the World Trade Organisation (WTO).

University of Cape Town

CONTENTS

TABLE OF FIGURES viii

LIST OF TABLES viii

INTRODUCTION 1

CHAPTER 1: TRADE 4
1.1 Mercantilism and The Wealth of Nations 4
1.2 Opportunity costs and the comparative advantage of nations 6
1.3 Increasing opportunity costs and the gains from trade 6
1.4 More on gaining and losing from trade 7
1.5 Conclusion: The world is not at war 9

CHAPTER 2: DUMPING 10
2.1 Definitions 10
2.1.1 Prices below home-market prices 12
2.1.2 Prices below third-market prices 12
2.1.3 Prices below production costs 12
2.2 Analysis 13
2.2.1 The conventional Caves and Jones analysis 13
2.2.2 The "reciprocal dumping" model of Brander and Krugman 15
2.2.3 Ethier's analysis 17
2.2.4 The Davies and McGuinness model 18
2.3 Protection 20
2.3.1 Predatory pricing 21
2.3.2 Strategic trade theory and Infant-industry protection 22
2.4 Conclusion: Search and destroy? 23

CHAPTER 3: ANTIDUMPING 24
3.1 The GATT and the WTO 24
3.2 United States 26
3.2.1 Legislation 27
3.2.2 Procedures 27
3.2.3 Statistics 28
3.3 European Union 29
3.4 South Africa 30
3.4.1 Legislation 31
3.4.2 Procedures 33
3.4.3 Statistics 35
3.5 Conclusion: Mission not accomplished 36

University of Cape Town

CHAPTER 4: PROBLEMS **37**
4.1 Theory 37
4.1.1 Trade-reducing and inefficient 38
4.1.2 Welfare-reducing and inequitable 39
4.2 Practice 41
4.2.1 Abuse of the legislation 42
4.2.2 Political blackmail 43
4.3 Other considerations 45
4.4 Conclusion: Off target 47

CHAPTER 5: SOLUTION **49**
5.1 Stylised facts of dumping and antidumping 50
5.2 The definition(s) of "competition" 51
5.3 Dumping as an anticompetitive practice 52
5.3.1 The Competition Act (1998) 52
5.3.2 Advantages of the proposed amalgamation 52
5.4 Competition as a primary consideration 54
5.5 Political and legal considerations 56
5.6 Addressing the concerns 57
5.7 Conclusion: Identify the new target 59

CONCLUSION **60**

APPENDIX 1 ..... **62**

REFERENCES **63**

University of Cape Town

TABLE OF FIGURES

Figure 2.1: The traditional Caves and Jones analysis 14
Figure 2.2: Welfare effects of the "Reciprocal dumping" model 16
Figure 2.3: Sales maximisation causes dumping at below marginal cost 19
Figure 3.1: Post-1980 antidumping initiations and duty orders in the US 29
Figure 4.1: The price-discriminating monopolist 39

LIST OF TABLES

Table 2.1: Classification of dumping according to motive and to continuity 13
Table 3.1: Pre-1980 antidumping initiations in the US 28
Table 3.2: Antidumping investigations initiated and imposed by South Africa 35
Table 4.1: Pre- and post-1980 antidumping initiations in the US 44
Table 4.2: Number of antidumping duties imposed worldwide by sector 45
Table 4.3: Number of antidumping initiations worldwide 46
Appendix 1: Antidumping categorisation in this paper and the WTO 62

University of Cape Town

INTRODUCTION

> "I issue a call to the nations of the world to join the United States ... to expand exports ... tear down barriers, open markets and expand trade."
>
> Bill Clinton. State-of-the-union address. January 19th 1999
> [The Economist, January 30th 1999, p. 65]

It would be political suicide for a respectable leader of a respectable nation to declaim, in this day and age, anything other than the free-trade mantra. Some two centuries after it was first vigorously defended by the likes of Adam Smith and David Ricardo, the proposition that international trade enhances welfare has become economic orthodoxy. It is an orthodoxy which has allowed the World Trade Organisation (WTO) and its predecessor, the General Agreement on Tariffs and Trade (GATT) to reduce the globe's average tariff rates from about 40 percent to around 4 percent (Hudgins, 1997a). With "globalisation" a growing focus of dissent, however, proponents of the orthodoxy have found their cause under assault: though identifying and separating the would-be attackers from the avowed defenders is proving somewhat difficult.

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FREE TRADE VS. FAIR TRADE

Supporters of antidumping duties and similar tariffs often argue that dumping and other "unfair trading practices" are the antithesis of free trade. They believe that dumping into local markets is an opportunistic and predatory act by foreign firms that rely on government subsidies and monopolistic profits in their home countries to see them through trade-related short-run losses. This destabilises local competition and lowers the welfare of the local producers and of consumers in both countries.

Opponents of antidumping duties (for few would declare themselves supporters of dumping *per se*) question both the existence of dumping and the motives of the "new protectionists". They dispute the profitability and therefore the rationality of any alleged dumping, claiming that self-serving and uncompetitive local producers exploit the antidumping laws to the detriment of local consumers and foreign producers. These isolationist tendencies, they further assert, are among the biggest threats to free trade and unfettered global competition today.

Which side is "right" and which is "wrong" depends very much on how one believes that trade benefits are, or should be, apportioned. Public choice theorists have long pointed out the

inherent (and necessary) schizophrenia of governments and other institutions wielding authority over a citizenry with diverse and divergent interests. While consumers demand lower taxes and more regulations (for the sake of democracy; as a sign of transparency; in the furtherance of equity — the rationale is theirs for the choosing), producers insist on increased subsidies and fewer regulations (to improve competitiveness; to combat unemployment; for the good of the people — the rationales are, again, endless). Since government are not self sufficient, what they give with the one hand must usually be taken away with the other, although this is not to dismiss the insights of public choice theory and infant industry arguments, considered later. A democratic state's acts and actions require democratic support, and it is along these lines of consensus that a pragmatic solution is sought.

FREE TRADE IS FAIR TRADE

This paper concludes, after examining the legislation used to prevent dumping, that the costs of such regulation to society far outweigh the benefits. It appears that many business practices that are considered quite legitimate when undertaken by local producers are regarded as unacceptable when the producers in question are foreign. Furthermore, it is shown that even if those practices could objectively and unarguably be labelled "unfair", the abuse of antidumping legislation by domestic interest groups is itself a danger to the free-trade regime.

Chapter 1 outlines the ambiguities of the case for free-trade and Chapter 2 examines the issue of dumping within that context. It argues that dumping should be legislated against only when it is anti-competitive or when it occurs in a strategically important industry. Chapter 3 looks at current and historical legislation (internationally and in South Africa) which attempts to prevent dumping. It is found that instead of distinguishing pro-competitive from anti-competitive dumping, most legislation instead draws the line between injurious and non-injurious dumping. The theoretical and practical implications of this legislative mismatch are explained in Chapter 4.

Chapter 5 then proposes a solution to the problem in the form of a reworked Competition Act[1], with powers of search and seizure over local and foreign goods in the domestic country. It is suggested that the current antidumping legislation be revoked so that all questions of competition, either local or foreign, fall within the ambit of the Competition Court. This would prevent the egregious abuse which the current system faces, and would promote a level of

[1] Sections of this chapter are harvested from Conway (1998).

University of Cape Town

competition which, apart from simply being more fair, would also be more efficient. The interests of both consumers and producers would be protected. Nonetheless, it is recognised that implementing such a change in policy would require a major overhaul of the current trade legislation and due regard is given to some of the issues that will need to be addressed.

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CHAPTER 1: TRADE

"I issue a call to the nations of the world to join the United States … to expand exports … tear down barriers, open markets and expand trade."

… continued …

"I have already informed the government of Japan that if the nation's sudden surge of steel imports into our country is not reversed, America will respond."

Bill Clinton, State-of-the-union address, January 19th 1999
[The Economist, January 30th 1999, p. 65]

A BRIEF HISTORY OF TRADE[1]

This is a paper about trade. More specifically, this is a paper about the trade of goods and services between nations, the effects that this trade has on the economies of each, the legislation which those effects cause to be instituted, and the manner in which that legislation, in turn, affects the trade between nations. As befits such a paper, we begin with an overview of why, when and how nations produce and trade goods[2]. The exposition is elementary, but addresses certain economic fundamentals important to the study of why, when and how nations dump the goods they have produced.

In particular, it will be shown that trade is not as obviously beneficial as many free-traders assume: it works well, but not for everyone. On the other hand, those in the "fair-trade" camp sometimes have their own hidden agendas. Much of what passes for economics in today's political circles has been tried, tested and debunked many times over the past two centuries. Ignoring the insights of these basic models would, as Santayana said, condemn us to repeat the past simply because we cannot remember it.

1.1 MERCANTILISM AND THE WEALTH OF NATIONS

Adam Smith's 1776 classic, An Inquiry into the Nature and Causes of the Wealth of Nations, effectively replaced the pre-classical era's economic policymaking theory and methodology. The pamphleteering appeals of special interest groups gave way to a more logically- and holistically-argued synthesis of economic insight. Economics by rational inquiry took over from economics

[1] This section largely takes its order, format and content from chapters 2, 3 and 4 of Salvatore's (1998) textbook, although almost any text on international economics would contain similar information.

[2] It is true that individual business enterprises, not nations, produce and trade goods and services both nationally and internationally. Anti-dumping legislation, however, emphasises the state's responsibility in regulating such trade and so it is the interaction of nations, not enterprises, which concerns us. This point will be taken up later.

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by monarchic edict. In particular, Smith's works sought to show up the dominant dogma of mercantilism as an irrational and impoverishing policy.

The mercantilists (with Thomas Munn as a leading proponent) viewed international trade as an offshoot of international war: either one was on the winning side, or one was not. At the end of the day, the winners increased their stocks of gold, silver and other precious metals while the losers' stocks of such metals were depleted. This economic nationalism implied that imports were a sign of economic weakness and should be limited while exports, with their associated capital inflows, should be encouraged. In their defence, mercantilists of the time were aiming to maximise not social welfare (i.e. the consumption of goods and services), but the wealth, power and prestige of the crown (i.e. the stock of specie). Full import-substitution[3] was thus the mercantilists' ultimate goal.

As Smith pointed out, though, mercantilist theory ignored two issues of fundamental importance: that decisions to trade are made by individuals, not governments and that trade is voluntary. Both points might have been open to criticism in 18th and 19th century England, but they are unquestionably true today and are a cornerstone of the 'individualistic' welfare economics of Pareto and Samuelson[4]. Trade being the domain of individual tastes and preferences, rather than government decree, means that the purpose of trade is to increase one's options as a consumer[5], rather than to shore up the state revenue system or improve national self-sufficiency. Trade being voluntary implies that nobody can be made worse off by trade since (deceit, theft and outright incompetence aside) nobody would engage in trade which made them worse off. Together, these two facts suggest that trade is primarily a means of enrichment for *both* countries – either in the form of consumer goods or in the form of money which will be used to buy those goods in the future[6]. "Exports are not an objective in and of themselves: the need to export is a burden that a country must bear because its import suppliers are crass enough to demand payment" (Krugman, 1997, pp. 120-121).

---

[3] Export-orientation and import-substitution used to be seen by development economists as diametrically opposed in objective and outcome. Nowadays strategic-trade theorists believe them to be different sides of the same coin. Both strategies have similar effects on the trade balance and exchange rate, although (in modern economies) different effects on interest rates and price levels.

[4] The wealth of nations. Volume I, Book 8 calls for the welfare of the "poor and miserable" to be included in any social welfare function, while Volume II, Book 4 worries about the effects of interest group politics in "a nation that is governed by shopkeepers". The sentiments are Smith's: the terminology (quotes aside) is not.

[5] Even producers use trade in this way — if not as end users, then at least as "consumers" of intermediate goods in the production of other goods and services.

[6] A further issue was the fallacy of composition inherent in the idea that the entire nation would suffer if loss of specie were to reduce the viability of the monetary system of exchange.

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1.2 OPPORTUNITY COSTS AND THE COMPARATIVE ADVANTAGE OF NATIONS

Having asserted that trade will only take place when and if it is mutually beneficial, there is still the need to show that such a situation can indeed occur. We therefore bypass Smith's theory of absolute advantage and recount David Ricardo's more solid theory of comparative advantage. The Principles of Political Economy and Taxation (1817) explained clearly how nations could gain from trade by producing those goods in which they had a comparative advantage. That is to say, even if Country A were able to produce Good 1 and Good 2 more cheaply than Country B[7], both countries would be better off after trade if Country A specialised in the production of the good in which it had the *greater* advantage, and Country B specialised in the production of the good in which it had the *lesser* disadvantage.

Advantage is here measured by the number of units of one good which need to be forgone in order to produce a single unit of the other good[8]. So long as one country has to give up more of Good 1 to produce a unit of Good 2 than the other country does, it has a comparative advantage in Good 1 and the other country necessarily has a comparative advantage in the production of Good 2. The pattern of trade between countries thus depends upon the opportunity costs involved in the production of each good. Through trade, both countries can gain from the price-differentials incorporated into the savings made by *not* producing the good in which the *other* country has a comparative advantage[9].

1.3 INCREASING OPPORTUNITY COSTS AND THE GAINS FROM TRADE

We now need to address the question of how much each country should produce for trade and how much each country can gain from trade. The simplifying assumption of constant opportunity costs that was implied in the previous section suggests that full specialisation would optimise the potential gains. It is more realistic, however, to appreciate that opportunity costs tend to increase the more one specialises, since those factors of production which are most

---

[7] i.e. Country A has an absolute advantage in the production of both goods.

[8] Salvatore (1998, p. 37) attributes this opportunity cost theory of comparative (cost) advantage to Harberler's 1936 text, The Theory of International Trade. Ricardo's original work assumed that the labour theory of value held, but this ignores the existence and the influence of the other factors of production. Working opportunity cost into the explanation implicitly takes into account all rents paid to the other factors.

[9] Extending this theory to the case of more than two goods and the case of more than two countries is intuitively simple but expositionally complex. For the record, the former requires the cost of all goods to be converted via the reigning exchange rate into one currency which then allows for comparison with the price under autarky, while the latter requires a ranking of all the countries in terms of the opportunity cost of producing each good. Little insight is gained from such an exercise, though (Salvatore, 1998, pp. 49-51).

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efficient at producing the good in which the nation does not have a comparative advantage, will be redeployed last and at the greatest opportunity cost. As the opportunity cost of producing more of a good increases, so does the good's price. With comparative advantage being intrinsically embodied in the price of production, it should be clear that after a certain point the high price would make trade in those products unfeasible.

There is therefore still room for each nation to produce at least some of the good in which it has no comparative advantage. The workers (and land-owners and capitalists and entrepreneurs) engaged in the production of the 'wrong' good, if we may call it that, will be those who would experience the highest opportunity cost in switching production to the 'right' good. They will not move until such time as the opportunity cost of changing (otherwise known as the marginal rate of transformation or MRT) is lower than the relative price ratio of the 'right' good to the 'wrong' good. Many government policies are dedicated to changing the equilibrium levels of this fundamental formula by influencing the MRT or the relative price level of the goods in question. These issues form the basis of infant-industry protection and strategic trade theory (discussed in Chapter 2) and underlie many of the problems associated with antidumping legislation (discussed in Chapter 4).

Thus, except in the rarest of situations[10], trade does allow for the profitable exploitation of price differentials between the goods of each nation. The greater one country's price differential *vis-à-vis* the other, the greater are its gains from trade. Since a highly priced good is a highly prized good, importing it from the country where the price differential is smaller (or even reversed) offers people a greater gain than trying to increase production locally. More accurately, the previous sentence should read: "... offers <u>some</u> people a greater gain ..."; trade is not always a win-win situation game.

1.4 <u>MORE ON GAINING AND LOSING FROM TRADE</u>

The fingers of the invisible hand are not always nimble: there are economic costs to the post-autarky dislodgements and reassignments which confront the various factors of production as international prices realign themselves. Despite the Stolper-Samuelson theorem, a final

[10] 'Rarest' meaning that either both countries' tastes, factor endowments and production possibility frontiers are all exactly equal before trade, or that through pure happenstance, differences in any of these three exactly cancel each other out, transport costs and risk aside.

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judgement as to whether a nation as a whole gains or loses from engaging in trade may be nothing more than a value judgement.

To begin with, consumers as a group do not uniformly gain from trade. Those who purchase the imported good (at its new, lower price) will obviously be happy with their saving. But those who purchase the good manufactured for export (the good in which their country has a comparative advantage) will find that the increased demand offered by the world market has caused the price to rise. At this point, determining the utility effects becomes difficult. At an individual level, this is because consumers' baskets may contain both goods. In aggregate, however, the problem increases since attempts to net out these effects would require an aggregated social welfare function that would be simply quixotic. On the supply side, confusion is greater still: since households are the ultimate owners of factors of production, every consumer also has a stake in production, as a worker, an owner of land or capital, or an entrepreneurial profit-taker.

There is a further problem raised by social welfare theory. Social indifference-curve maps are necessarily based upon a given income distribution. As has been shown, however, no individual or group of individuals is a consistent winner or loser in the post-trade world. The way trade affects real income distribution is therefore unclear, as is the way it consequently influences social welfare. Any interpretation of social indifference-curve shifts will be meaningless (or, at best, ambiguous) if the pre-trade and post-trade maps intersect, which they may well do in such circumstances. Furthermore, the changes will have non-price impacts which are not always predictable. Frictional unemployment and its related costs, for example, will inevitably rise during periods of factor relocation, while structural unemployment could result from the different focus required of productive resources[11].

None of this means that a free trade world is undesirable – the increased efficiency of resource reallocation and the gains in productivity through specialisation imply significant long-term benefits. Also, the frequently voiced worry of some producers that foreign manufacturers will 'destroy livelihoods' needs to be weighed against the support offered by producers who anticipate foreign lands filled with swathes of willing consumers. Clearly, resistance from some

[11] The linkages in South Africa between trade liberalisation and unemployment are not obvious. Hayter (1999) reports that between 1993 and 1997, within the manufacturing sectors at any rate, it was export-oriented industries that saw employment losses of -7.7% compared to only -5.5% in import-competing industries.

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groups of consumers and producers is unavoidable: interest group politics and the implications of public choice theory will come into play, and in a democracy, only a foolhardy government would choose to ignore them.

1.5 CONCLUSION: THE WORLD IS NOT AT WAR

The nationalist fervour that imbues many of the modern trade policy debates (including that surrounding antidumping legislation) is a misguided patriotism. Encouraging exports and restricting imports for the sake of national pride is crude mercantilism. That is not to say that government intervention is, *per se*, indefensible, but that this intervention should be a carefully contemplated response to a well-documented market failure with a clear aim and a minimum of side-effects.

Krugman (1997, p. 106) insisted that drafters of trade policy should constantly keep in mind that "[a] country is not like a corporation". Countries as a whole do not gain or lose from the effects of competition; individual players within them are the actual winners or losers (and sometimes both simultaneously). Legislated economic policies which treat all citizens as having a common cause are almost certainly doomed to failure since the reality is that trade affects people differently. Legislation is likely to affect them differently too: the primary requirement for all such legislation should simply be that it does less harm than good. Having established these basics, we can now examine a claimed instance of market failure.

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CHAPTER 2: DUMPING

"Foreign competitors are destroying an American success story. Hundreds of thousands of American jobs are threatened ... Foreign steel is being dumped on our shores at cut-throat prices ... It must be stopped." 'Stand Up For Steel' advertisements in the American press, *circa* October 1998
[The Economist, November 7th 1998, p. 63]

DUMPING ON FREE TRADE[1]

Textbook theories of international trade, with their neo-classical outlook and laissez-faire implications, have a singularly unrealistic belief in the constancy of international trade. The real world fluctuations in available inputs and eventual output, the ever-changing equilibria of supply and demand, of price and quantity, are all averaged over and smoothed out in an attempt to make the models fully applicable to any randomly selected period of time. But this presumption of instantaneous adjustment is fallacious. Between the "short-run" and the "very short-run", there could be just enough time for a firm, or even an entire industry, to make a calculated move that will ensure its continued existence and possibly a tidy profit. One such move could be to engage in "dumping", although defining this term succinctly, analysing why it might occur, and determining its effects in practice, are not easy tasks. Since the focus of this paper is on the logic of antidumping arguments rather than dumping *per se*, the chapter engages mainly in a review of the literature and an attempt to explain the importance of dumping (and not dumping) within the theory of international trade.

2.1 DEFINITIONS

A trawl through the literature offers no universally accepted definition of dumping. With three distinct groups of users, each imposing their own meanings to the term, the bulk of this chapter follows the approach taken by academic economists. These define dumping most narrowly of the three and are the most pedantic in its application. Governments use the term somewhat less strictly in legislation and significantly less strictly in implementation (see Chapter 3). The least discerning in their definitions are the business community. Their usage is illustrated in Chapter 4, which shows what can happen when "dumping" is used as a protectionist catchall.

Within the formal confines of academic economics, dumping has had at least three standard definitions over the past century, although a fourth is introduced if one includes the most general and least contentious of these. Viner (1923, p. 4) gives a necessary, rather than sufficient

[1] The phrase comes from Stiglitz's (1997) paper "Dumping on free trade: The U.S. import trade laws".

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condition of dumping as "price-discrimination between national markets". The definition is not as simple as it seems, and requires some analysis.

Viner (1923, p. 8 ff.) notes that the phrase "price-discrimination" is preferable to "sales at different prices" since it adds to the economic rigour of the definition. In particular, the "prices" being compared must make "reasonable allowance" for differences in transportation costs, terms and conditions of sale, product quality, quantity exchanged, method of payment, risks involved and the timing of the constituent transactions. Any of these factors might well result in different prices within the ordinary course of trade. What we are seeking in any useful definition of dumping is an *unwarranted* or, as some would have it, an *unfair* difference in prices.

Apart from this potential problem of "spurious dumping", focusing exclusively on actual price levels instead of discriminatory price levels also allows for the possibility of "hidden dumping". This happens when the price of a good is the same in two countries *despite* differences in transportation costs, terms and conditions of sale and other factors which should, *prima facie*, result in non-discriminatory price differences[3].

There is one vitally important source of price differentiation whose effects should not be confused with dumping as defined in this paper: government. Differences in various government taxes (export taxes, import taxes, customs duties, sales taxes and so on) and subsidies (production subsidies, export subsidies, tax incentives and the like) must be taken into account and excluded from the dumping calculation. Any "unfairness" resulting from the efforts of government to influence production through the fiscus can be remedied via the WTO's (1998, "AD-CVD") countervailing duties laws (see Qiu, 1995, and Marvel & Ray, 1995, for more on this). The antidumping debate is about regulating individual firms' and industries' trade practices, rather than assisting them financially.

While there are important distinctions between national and international price discrimination (not least of which is the involvement of different sets of legislators and regulators), Viner's definition allows for the ready identification, explanation and discussion of what is a complex topic. Lindert (1991, p. 166) and Weinstein (1992, p. 379, quoting Harberler) both contend that for a firm to practice effective price discrimination, two conditions must be met: first, the firm needs some degree of monopoly power in its more expensive market; and second, there must

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be no possibility of the cheaper goods being re-exported from the cheaper market[5]. With this in mind, we now turn to the three most common definitions of dumping in academic usage.

2.1.1 PRICES BELOW HOME-MARKET PRICES

The *lingua franca* of the marketplace has never really accepted "dumping" as synonymous with "price discrimination" since the former implies that goods are being sold for less, not more, than in their home-market, whereas the latter includes both possibilities. The second definition in general academic use is thus "sale for export at prices lower than those charged to domestic buyers" (Viner, 1926, p. 374. Also Viner, 1931, p. 347; Palgrave, 1987, p. 937; and Reitzes, 1993, p. 745). The monopoly-power requirements pertaining to successful price discrimination also apply, and in this regard the tools used by Robinson, Harberler and Yntema in the 1920s and 1930s for the analysis of imperfectly competitive markets continue to be relevant today.

2.1.2 PRICES BELOW THIRD-MARKET PRICES

There is no guarantee, however, that producers will necessarily sell goods in their home market, or that their market-share will allow for rigorous comparison. In cases where there is no home market price against which to compare prices in an export market, "dumping occurs when the import is sold ... at less than an exporter's third-market price" (Feinberg and Kaplan, 1993, p. 152). This may be a single third-market taken as a home-market equivalent, or it may be an aggregated basket of third-market price levels.

2.1.3 PRICES BELOW PRODUCTION COSTS

Standing apart from the previous two academic definitions is the more exacting requirement of "export sales at a price below the cost of production" (Palgrave, 1987, p. 937. Also Ethier, 1982, p. 489). Sometimes called cost dumping, it is closer to what market participants regularly regard as "unfair". Simply making international price comparisons ignores the possibility of a producer dumping in *all* markets (both home and export). The question remains, though, what are "production costs". Davies and McGuinness (1982, p. 169) model dumping at "price less than short-run marginal cost" (see also Blair and Cheng (1984) and Anderson (1992 and also 1993)), while Ethier (1982, p. 490) looks at long-run average costs. This is an important distinction that most legislation fails to note (see Chapter 3 in this regard).

[4] Note the quotation beginning Chapter 4 of this paper, which alludes to a questionable dumping charge being found in favour of the applicant due to the calculation of a "reconstructed price".

[5] In fact, only the first of these "conditions" is vital since the re-export situation described in the second would necessarily undermine the monopoly power assumed by the first.

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2.2 ANALYSIS

Viner's study of international price discrimination used these definitions almost interchangeably. Since his work has formed the basis of most of the subsequent analyses, it is instructive to refer to his original classification table.

Motive	Continuity
A. To dispose of a casual overstock B. Unintentional	Sporadic
C. To maintain connections in a market in which prices are, on remaining considerations, unacceptable D. To develop trade connections and buyers' goodwill in a new market E. To eliminate competition in the market dumped on F. To forestall the development of competition in the market dumped on G. To retaliate against dumping in the reverse direction	Short run or intermittent
H. To maintain full production from existing plant facilities without cutting domestic prices I. To obtain the economies of larger-scale production without cutting domestic prices J. On purely mercantilist grounds	Long-run or continuous

TABLE 2.1: CLASSIFICATION OF DUMPING ACCORDING TO MOTIVE AND TO CONTINUITY

Source: Viner, 1923, p. 23

If the four most influential economic dumping models (Caves and Jones, Brander and Krugman, Ethier, and Davies and McGuinness) are examined, it will be seen that their conclusions all fall within Viner's table.

2.2.1 THE CONVENTIONAL CAVES AND JONES ANALYSIS

The textbook theory of dumping through most of the twentieth century centred on the home-market monopolist whose profit-maximising price and output levels involved international price-discrimination and dumping on the export market. The analysis offered by Caves and Jones (1973, pp. 212-215) builds on the early work of Robinson, Harberler and Yntema, and is summarised in Davies and McGuinness (1982, pp. 170-171) as follows:

In figure 2.1 below, the profit-maximising monopolist will produce at q_0, with a price of p_0, in the absence of a world market. This is where the upward-sloping marginal cost curve (MC) crosses the downward-sloping marginal revenue curve (MR). (Ignore the average total cost curve (ATC) for the moment).

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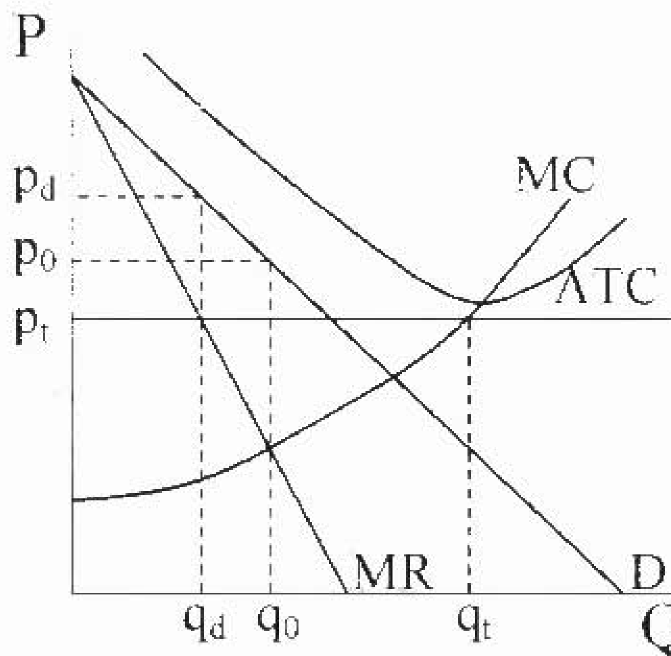

FIGURE 2.1: THE TRADITIONAL CAVES AND JONES ANALYSIS
Source: Davies and McGuinness, 1982, p. 170 (adapted)

However, if the world market is large relative to the producer's capacity levels (so he is a price-taker) then export can occur in the relevant range at the world price level (p_t), after all transport costs and tariffs. The profit maximising combination now occurs where p_t=MC, at output q_t, price p_t. Suppose, though, that price-discrimination is both possible (such that there is no re-exporting back to the monopolists home market) and legal (admittedly, this is probably of less importance). Domestic and international marginal revenues are then equal where MR=p_t, implying that q_d should be sold in the domestic market and q_t-q_d should be exported. MR=p_t must give the domestic sales volume since there is nothing gained by selling more to locals if marginal revenue is higher from international sales (MR<p_t), nor by selling less to locals if marginal revenue is lower from international sales (MR>p_t).

Consumers in the monopolist's domestic market pay a higher price (p_d instead of p_0) and have a smaller consumer surplus. In the special case where the ATC is above the domestic demand curve (D) as shown in the diagram, they might still be better off: were there no world export market, there would be no domestic production in this decreasing-cost industry. Furthermore, with the minimum ATC above the world demand curve (p_t) as shown in the diagram, production would occur only with price-discrimination.

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Exports are dumped, in this standard model, in the sense that prices are below home-market prices. According to Viner's classification, the dumping rationale would be "to obtain [and] maintain full production from existing plant facilities without cutting domestic prices" (H and I above). The result is long-run or continuous dumping in the export market. The question, though, is whether this situation is harmful to anyone. The producer is clearly better off since production exists and is at profit-maximising levels. If the home producer has his ATC above price (as shown in the diagram), then home consumers are better off than they would be under autarky, though worse off than they would be if able to import at the world price. As for foreign producers and consumers, if the world market is so competitive that all are price takers at p_w then the behaviour of a single producer in a small economy should have little effect.

If perfect international competition does not exist and this home-market monopolist has some degree of monopoly power even in the world market, then the effect on foreigners depends on whether the new entrant increases or decreases international competition. Foreign consumers could be made better off (to detriment of foreign producers) if this new entrant to the world market lowers prices by providing effective international competition. (Consider, for example, the negative effect on OPEC of Russia, Britain and west Africa entering the world oil market.) However, foreign producers may instead be made better off if the home-market monopolist is large enough to force the world market into a state of monopolistic competition (or even oligopoly) that would raises prices to detriment of foreign consumers. (To continue the previous example, consider the positive effect on Russia, Britain and west Africa's oil producers when OPEC's agrees to raise oil prices.)

2.2.2 THE "RECIPROCAL DUMPING" MODEL OF BRANDER AND KRUGMAN

The Caves and Jones analysis shows how dumping can be economically rational. Using the same definition of dumping, Brander and Krugman (1983)[4] go further by developing a model in which dumping is more than just a strategic possibility – it is the only reason for international trade. The welfare effects of this are ambiguous, but readily quantifiable. The model moves beyond the "accidental" differences in price elasticity to a situation in which imperfectly competitive producers in both countries "systematically" dump in each other's markets. The intra-industry trade consists of long-term "reciprocal dumping", despite the implied waste of resources through needless cross-transportation.

[4] All page references in this section are to Brander and Krugman (1983), unless otherwise noted.

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The model assumes two identical countries, each with a monopolist producing an identical product (p. 314). It assumes that each firm profit-maximises in each country separately, making the Cournot assumption that the other will hold output constant. Transport costs are non-trivial.

The authors show (pp. 314-317) that for any arbitrarily defined demand curve, the equilibrium is two-way trade with each firm having a greater share of its domestic market than of its foreign market. This means that each firm perceives its marginal revenue to be higher in the foreign market. Now, since marginal costs are higher in the foreign market (thanks to the inclusion of transport costs), the profit-maximising level of exports is clearly at a smaller mark-up over cost than the domestic sales. This equates to reciprocal dumping, given that the definition of dumping considers prices net of transport costs.

The solution is not Pareto-efficient in that the post-trade equilibrium is not perfectly competitive and the costly international transportation of identical goods is obviously welfare-reducing. Nonetheless, in the second-best oligopolistic world described, free trade might still be better than autarky (pp. 317-318). It depends on whether the benefits of the shift away from pure-monopoly outweigh the costs of the unnecessary transport. This is shown in figure 2.2 below.

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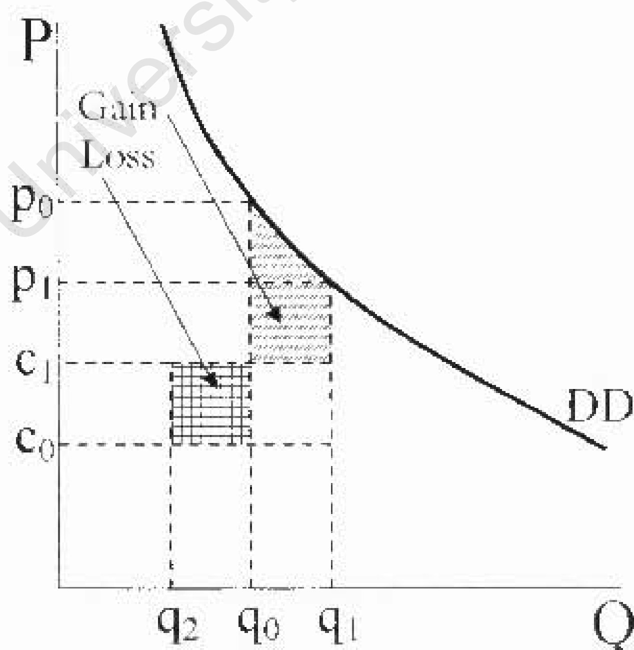

FIGURE 2.2: WELFARE EFFECTS OF THE "RECIPROCAL DUMPING" MODEL

Source: Brander and Krugman, 1983, p. 317 (adapted)

The position of each country is perfectly symmetrical, so the pre-trade equilibrium in each is given at output q_0, price p_0. Being a monopolised industry, this is above c_0, the pre-trade marginal cost. Allowing trade to occur causes domestic consumption to rise to q_1 and the domestic price to fall to p_1. The domestic production that is consumed domestically also falls, however, to q_2, and q_1-q_2 is consumed from imports. Due to transport costs, the post-trade marginal cost of the imports is c_2, whereas the price of those imports is p_1. This happens in both countries so the "reciprocal dumping" is "hidden" because the local price is the same, despite the higher costs. It should be noted that the dumping is not below cost.

The welfare effects in this model are ambiguous: the gain from the "consumption creation" q_1-q_0 may be larger or smaller than the loss from "production diversion" q_0-q_2. It depends very much on the demand elasticity and the transport costs involved. The authors go on to show (pp. 318-320) that in the case of free entry and exit involving more than the two-firm duopoly considered thus far, the post-trade equilibrium is necessarily welfare-increasing. In short, with free entry and exit ensuring zero economic profit, increased consumer surplus must mean that social welfare is higher[5].

2.2.3 Ethier's analysis

Models of dumping are essentially a subset of the models of imperfect competition. Caves and Jones allow for imperfectly-competitive producers but with perfect information and no transport costs. Brander and Krugman work with non-trivial transport costs and Cournot-style information, but do not incorporate adjustment delays, risk or uncertainty. In a stochastic, deterministic world, dumping is relatively straightforward because the theory of the firm is relatively straightforward (Blair and Cheng, 1984, p. 864). A much higher level of complexity ensues in a non-stochastic world. Ethier (1982) analyses dumping under conditions of imperfect information and imperfect adjustment mechanisms. This alternative to the traditional theory sees dumping as an integral part of international trade and the interplay "between domestic factor markets and international commodity markets" (p. 487)[6].

[5] The implicit assumption is that there is no structural unemployment, so the producers are no worse-off than before. Pinto (1983) extends and confirms this analysis in the repeated-game scenario, making the assumption unnecessary if "play" occurs often enough.

[6] All page references in this section are to Ethier (1982), unless otherwise noted.

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Ethier makes his model more realistic by moving beyond the "price discrimination" definition of dumping. He argues (pp. 488-490) that common usage only considers dumping to be "unfair" when the export sales price is below the long run average cost of production, and so uses this to define it. The model assumes (pp. 491-492) a single composite good, produced with constant returns to scale and traded at a single world price.

In the face of uncertainty in international commodity markets Ethier shows that rigidly structured domestic factor markets can lead to increased levels of dumping. Where factors of production are more "fixed" than "variable", constant production levels are a rational response to uncertainty in the product market. If domestic factor prices are higher than expected, exported output will be sold below cost in the foreign market, while if they are unexpectedly low, it will be sold above cost. The firm may have no intention of dumping, *ex ante*, but to the extent that factor prices cannot be known ahead, dumping might or might not occur *ex post*.[7]

Dumping at below cost is shown to be a sporadic or possibly intermittent phenomenon (A or C on Viner's classification). Countries can react to this uncertainty by prohibiting dumping. This may raise effective prices, but it is welfare-increasing insofar as it minimises the employment variations and the frictional and structural unemployment costs in the market being dumped on. Ethier (1982, p. 501) recognises the problems associated with measuring the gains from trade and the costs of protection, especially at a macroeconomic level. Consumers in both markets are better off in the short run, but long run harm might occur if domestic producers exit the industry because of these seasonal import surges.

2.2.4 THE DAVIES AND MCGUINNESS MODEL

Ethier showed that dumping by selling at prices below average production costs can make economic sense if there is demand uncertainty in the marketplace. Davies and McGuinness (1982) give three motives for dumping at prices below marginal cost (rather than average cost). This is a more restrictive condition and more likely to be considered "unfair trade".

Firstly, the authors show (pp. 172-174)[8] that, given strict risk-neutrality assumptions, a one-period analysis, and uncertainty in the net export price (possibly due to flexible exchange rates),

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[7] Significant improvements in the markets for trading options and futures may have negated some of these risks since Ethier's original analysis was published (1982).

[8] All page references in this section are to Davies and McGuinness (1982), unless otherwise noted.

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there is a distinct possibility of products being dumped at below marginal cost. The profit-maximising producer is rational to take the risk of low world prices so long as the costs are not too far above the lowest likely level of world prices. Unlike the Caves and Jones model, this need not require prices in the dumper's market to rise. While the proof is given only for price uncertainty, one can work demand uncertainty and even supply uncertainty into the model (p. 174). Blair and Cheng (1984) build on the model and show that this type of dumping will occur whenever the foreign market is riskier than the domestic market.

Secondly, when a firm is not obsessed with short run profit-maximisation, but rather with sales-maximisation (due, perhaps, to the owner-manager agency problem), then dumping at below marginal cost may be the rational option. In figure 2.3, the firm's profit curve is shown, with q_0 as the profit-maximising quantity. If the owners only insist on profits of π_0, then managers may produce anywhere up to q_s, at their discretion. In the absence of a world market, the sales-maximising manager would produce at q_s exactly. However, if marginal costs are below the world price (p_1), then under certain conditions sales could be maximised beyond q_s by dumping in a foreign market (pp. 176-177).

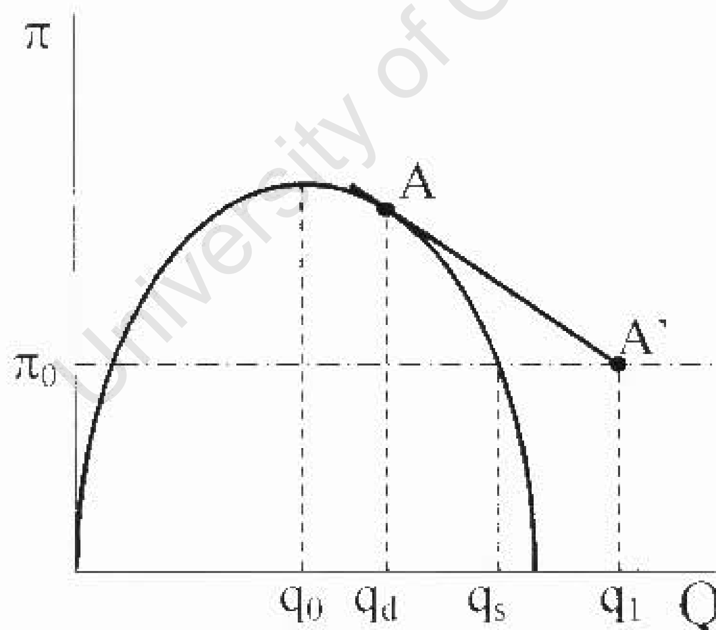

FIGURE 2.3: SALES MAXIMISATION CAUSES DUMPING AT BELOW MARGINAL COST

Source: Davies and McGuinness. 1982, p. 176 (adapted)

Because the slope of the profit curve is MR–MC, we know that when $MR=p_1$, the slope must be p_1–MC. This will be negative (beyond q_0) since $p_1<MC$ by assumption, and is shown by q_d on the diagram. Managers can now maximise sales by supplying q_d to the domestic market and

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exporting until the line AA' intercepts the π_E line at q_E. The higher domestic price will offset the losses incurred on the dumped goods and allow for sales beyond q_E.

Thirdly, firms may undertake dumping as an entry deterrent. As with most models of dumping, Davies and McGuinness assume that dumping firms have a protected home market which is imperfectly competitive. This is usually presumed to be because of legislative restrictions. If no such government barriers exist, then firms might resort to dumping as a means of protecting their home market from domestic competitors. If they can continuously dump their excess products (q_1 - q_d in figure 2.3) onto a foreign market, then the monopolistic firm can prevent its home market from appearing contestable. By virtue of the fact that sales could always be switched back to the domestic market (at the low world price), competitors will be unwilling to enter marker with the expecration of losses.[7]

2.3 PROTECTION

Clearly, dumping can be an economically rational strategic export option. Producers could gain (or lose) when products are dumped and consumers could gain (or lose) from the price differences which dumping causes. But without an agreed upon definition of dumping, there can be no agreed upon effects. Furthermore, none of the academics considered thus far has been able to agree on whether dumping is "good" or "bad" for a country: conventional theory therefore cannot conclude whether it should be allowed or prevented. The best it offers is a repetition of the trite observation of Chapter 1: "Countries as a whole do not gain or lose from the effects of competition: individual players within them are the actual winners or losers (and sometimes both simultaneously)".

In constructing an argument against dumping, let us then begin with the simplest and hopefully least contentious requirement: that someone be harmed by the alleged dumping. This has been implied in all the previous models, but never stated explicitly. John Stuart Mill argues that, in a liberal democracy, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection". In essence, dumping which causes no harm should invoke no retaliatory regulation. This leads to another definition of dumping offered in academia: dumping occurs when goods are exported "at a price low enough to cause significant harm to some interests in the importing country" (Ethier, 1987, p. 937).

[7] In game theory terms, the monopolist wins the game of chicken with the credible threat of output-switching.

But logically, if one accepts this argument against dumping, then the converse argument against antidumping legislation must also hold true: the legislation should be stopped since it causes "significant harm to [consumer] interests in the importing country". It is not a fruitful pursuit to refocus on the definition of "harm" rather than "dumping". There is, however, one clear-cut instance in which the benefits of "self-protection" outweigh the benefits of low-priced imports: where the dumping is predatory or anti-competitive.

2.3.1 Predatory pricing

Simplistic as it may sound, it is the perception of many people that the goal of any firm is to destroy its competitors. With a stable, imperfectly competitive home market bringing in excess profits (as discussed in the previous models), firms with this attitude would wish to dump their products in a perfectly competitive foreign market so as to drive all those competitors out of business and secure the resulting monopoly rents for themselves. In the short run, consumers in the importing country clearly benefit from the lower prices, even when the intent of the dumping firm is predatory. In the long run, however, everyone in the importing country suffers from the lack of competition. The dumping firm is the only winner and following the standard model of monopoly, overall social welfare is lower than in the perfectly competitive "pre-trade" scenario. In this case even the most ardent of free-traders would likely accept the need for some form of antidumping legislation in the importing country.

One needs to ask, though, why market forces are unable to prevent the destruction of the perfectly competitive industry. Hartigan (1996) presents a game-theoretic model of predatory dumping in which imperfections in the world's capital markets make dumping a multi period Nash equilibrium. Since the firm with deeper pockets is able to finance the loss for longer, it is the perfectly competitive industry with only normal profits that is forced to exit first[10]. The problem is exacerbated when the dumper's home market is showing strong growth since international capital then flows into that firm, thus boosting its chances of successful predation. The resultant dumping is anti-cyclical and relates to reason E on Viner's (1923) classification table: "to eliminate competition in the market dumped on".

[10] The situation is analogous to "gambler's ruin", which holds that even if the odds faced by individual gamblers betting at casinos were perfectly fair (which they are not), the casinos would still win in the long run. Since the casinos have greater cash reserves, they are able to continue betting even through a long (and

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Hartigan (1996, pp. 234-238) goes on to show how an antidumping law in the importing country can indeed protect the local industry. This protection is watertight in a one-period model, but only imperfect in a model of three periods or more. By raising the stakes in the decision to dump, the government is essentially giving local firms (and, more importantly, local financiers) extra time in which to recognise the dumping as cyclical rather than continuous and thus reduce its long run impact. Viner (1923, 1926 and 1931), Harberler (1937) and other early authors considered all this to be rather unnecessary due to the infrequency of predatory pricing. The undue extent to which predatory pricing continues to worry antidumping legislators, however, will be examined in Chapter 4.

2.3.2 Strategic trade theory and Infant-industry protection

The government may, furthermore, wish to shelter an industry that is not yet competitive but that has future potential. The industry might be of strategic importance or it might be competitive and socially beneficial in the long run. The age-old argument for the protection of "infant industries" and the rather newer twist of "strategic trade theory" are, confusingly, both appropriate and inappropriate items for consideration in a paper dealing with antidumping legislation.

They are appropriate because so many governments in reality do invoke antidumping laws when protecting strategic or infant industries. *Bona fides* aside, the legislation clearly serves its users well in this situation, so long as the terms "dumping" and "anti-competitive" are defined broadly enough. The arguments are inappropriate, on the other hand, because by giving a company[17] the status of "infant industry" or "strategic industry", the government has in effect deemed it worthy of protection from all competition, not just unfair competition.

In other words, whether foreigners are dumping goods in that industry or are competing on normal terms is unimportant: the decision to intervene was made on grounds that involve some prognostication (or optimism at the very least) contrary to the prevailing market view. If the market participants had had faith in that industry's future competitiveness, financing would have

not improbable) losing streak, while individuals (who have less cash at their disposal) are forced to quit sooner.

[17] Based on simple linguistics, some might dispute the notion of a "company" receiving "industry" protection. In reality there should be less dispute: the industries that are granted this protection are usually monopolistic or oligopolistic companies.

been forthcoming to fend off foreign competition. The fact that the government has found it necessary to offer protection almost inevitably implies that the market is sceptical.

In less developed countries, the market might be incomplete, rather than sceptical. The issue of "strategic trade", however, is not applicable to such markets: the Brander and Spencer (1985) theory only applies under large-country assumptions. In that instance, an export strategy – or credible threat of one – can discourage potential competitors from entering a contestable marketplace. This would presumably raise the rents by enough to offset the implicit costs to the country.

There is, however, no currently protected industry in South Africa that even purports to be a large-country producer, in the sense that they are, or might become, a dominant world leader. As Chapter 4 will show, in fact, most firms claiming antidumping protection in this country do so on the (true) grounds of their inability to compete, rather than their inherently superior capabilities. As Krugman (1993, p. 136) explains, antidumping duties, which seek to raise prices rather than increase market share above some critical mass, are logically incompatible with the strategic trade arguments.

2.4 CONCLUSION: SEARCH AND DESTROY?

The literature does not appear to offer any other convincing reasons for protection. Academics have created models showing why dumping is an integral part of international trade. They have shown that continuous, sporadic or once-off dumping can be prevented by antidumping legislation. What they have not shown is that the social costs of being dumped upon necessarily outweigh the social benefits. Without a clear measure of social welfare, this question has normative overtones that are beyond the scope of standard economic inquiry.

The lesson from liberal academia seems to be that all international trade should continue unrestricted: the only provisos being that it is not anti-competitive and the government has not specifically declared one or another industry deserving of protection for socio-political reasons. Dumping, in other words, is not wrong in and of itself: it is only undesirable if it has undesirable consequences. Even if a standard definition could be agreed upon, there is no imperative, within the theories proffered, to eliminate all dumping on sight. Providing populist justifications for such responses, though, is the stock in trade of governments around the world.

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CHAPTER 3: ANTIDUMPING

"[T]he pragmatic definition of dumping is whatever you can get the government to act against under the antidumping law." Michael Finger
[Antidumping: How it works and who gets hurt, 1993]

KEEPING FREE TRADE FAIR

The previous chapter showed that dumping products in a foreign market can be economically rational. Insofar as such dumping can cause harm in that market, there is indeed (as Viner (1923) contends) "a problem in international trade". Legislators acknowledged this centuries before Viner's seminal exposition and have taken care over the years to protect their economies from the destructive effects of dumping[1]. This chapter discusses the measures taken by various governments, and a more reasoned analysis of these actions is made in subsequent chapters.

Internationally, antidumping legislation must comply with the rules laid down by the World Trade Organisation (WTO). The WTO has set out the scope within which dumping can be determined and the scale of permissible antidumping measures. Individual countries, however, do not simply incorporate the WTO wording into their own legislation – they pass their own laws that, while similar in aim, are invariably unique in specifics and implementation. This admixture of legislation and court rulings allows for a bias towards industries that are in political vogue at the time. "Comparative advantage" and "competition" are not used as reference points, or even points of interest.

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3.1 THE GATT AND THE WTO

The Uruguay Round of GATT negotiations formalised international antidumping policy for the first time[2]. As was to be expected, most of the recommended procedures followed those of the US, although in a few instances there were differences (Stiglitz, 1997, p. 413). With the formation of the WTO, Article VI of the GATT (1994) was adopted. Since then, antidumping laws and other "non-tariff barriers" have become among the most contentious issues in international trade, although it seems unlikely that the WTO will easily change these rules in the near future[3] (Prusa, 1999, p. 3).

[1] Viner (1931) reports that charges of dumping were levelled by the English during Elizabethan times and that in the 17th century the French accused the Dutch of predatory dumping in the Balkans.

[2] The Tokyo Round agreement (1973-1979) was not signed by all members, whereas the Uruguay Round (1986-1994) is binding on all members thanks to its WTO incorporation (WTO, 1998).

[3] The very existence of the trade talks at Doha, for example, depended crucially on reaching agreement about even putting antidumping onto the agenda.

The antidumping agreement is one of the few sanctioned by the WTO in which a country's most-favoured-nation (MFN) status is completely ignored. The agreement has certain substantive and procedural rules which, if met, *allow* an importing country to impose antidumping duties. It is important to recognise that the agreement does not *require* countries to either have or implement antidumping legislation (WTO, 2001). The substantive rules are that, pursuant to a complete investigation, antidumping duties may be imposed if it is determined that:

1) there are, in fact, dumped imports; and
2) material injury to the domestic industry has occurred; and
3) a causal link between the dumping and the injury can been shown.

Dumping, as defined by the WTO, occurs under any of the three definitions explained in Chapter 2. Prices below production costs, prices below home-market prices and prices below third-market prices all qualify as dumping. Costs must be properly allocated between "administrative, selling and general costs", and must include "a reasonable amount … for profits" (GATT, 1994, art. 2.2). Furthermore, if any of these amounts cannot be determined on the basis of actual data, then "constructed values" can be used. This opens the way to manipulation of antidumping as a rent-seeking tool. The "constructed values" can be determined in a number of ways: including the weighted average of the values of other exporters and, even more vaguely, "any other reasonable method" (GATT, 1994, art. 2.4).

The "determination of injury" requirement allows the domestic industry to offer either price fluctuations or volume fluctuations as proof of injury. This injury might be experienced at the time of the investigation or there might be the threat of injury in the future. In the latter instance, all that the WTO asks is that "special care" be taken when deciding the petition. The petitioners also need to show that they have been "materially injured" (WTO, 2001). By allowing the petition to name more than one country, the group effect of the alleged dumping can be examined. Finally, what does and does not constitute a causal link between the two is also left to the discretion of the authorities (GATT, 1994, art. 3.5). Once the determination has been made, authorities may choose to prevent the sale of the dumped goods, or to impose duties to raise the price to "fair market value".

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As one-sided as the rules themselves may seem, foreign producers and local consumers do get some protection, albeit indirectly. The procedural requirements relate mainly to the transparency and objectivity of the investigating authority. Not only must both parties be kept informed of the details of the investigation, but the public must also be kept updated on the duration of the duties and the collection of those revenues. Periodic reviews of the findings are required and no duty can be imposed for more than five years without such a review. "Sunset duties", which lapse automatically after a shorter period of time, are encouraged (GATT, 1994, art. 11).

GATT prevents the imposition of any punitive damages (although retroactive duties are permitted) and a government may not impose tariffs which would raise the price above the "fair market value". In fact, the "lesser duty" rule is recommended, whereby the duty imposed is high enough to prevent a "material injury" finding, even if the final outcome is below the "fair market value". There is also a *de minimis* rule which allows antidumping investigations to proceed only if the dumped imports constitute a significant percentage of market sales. Most encouragingly, though, the current agreement does away with the export restraint arrangements (such as "voluntary export restraints") which became the protectionist measure of choice in the 1980s (Safadi and Laird, 1996, p. 1229).

By codifying the rules and procedures to be followed in an antidumping investigation, the GATT and the WTO have prevented wide-scale abuse of the free-trade system. However, different countries' laws result in different interpretations of "acceptable practice", so these are analysed in greater detail to understand the practical effects of their implementation.

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3.2 United States

South African antidumping legislation cannot be studied in isolation. In modern economic discourse, the systems and procedures followed in the United States often take pride of place. This is neither because they are the oldest nor because they are the most admirable. Rather, it is because as the largest player in the international trade market, US policies are the most important to foreign exporters and also the closest thing to a "standard" implementation of GATT and WTO-compliant rules (Stiglitz, 1997, p. 413). US economists and lawmakers are naturally the first to implement, commend or criticise any new developments in the field. Furthermore, South African antidumping authorities regularly ask their US counterparts to educate local technocrats in the latest international practice (BTT, 1996, pp. 7-8). Future South African developments might therefore be inferred from current US legislation.

3.2.1 LEGISLATION

Viner (1923, pp. 239-274) notes that antidumping legislation in the US grew from the anti-trust legislation of the late 1800s and early 1900s. It was gradually integrated into mainstream trade policy via the Sherman Act of 1890 and the Tariff Act of 1894, but was first explicitly mentioned only in the Revenue Act of 1916. It was the Antidumping Proposal of 1913, though, which resulted in a fully-fledged Antidumping Act being instituted in 1921. The tariffs structure delineated in this act culminated in an expanded Tariff Act of 1930, whose Title VII laws form the basis of modern US antidumping regulations (AD Manual, 1998, p. 31).

Although this early legislation saw predatory dumping as its main target, few economists were convinced by its sincerity. Ethier (1982, p. 488), for example, quotes Harberler (1937, p. 300) as saying that "this aggressive form of dumping is the spectre often used to frighten public opinion into imposing tariffs". The focus of the law soon changed from competition policy to trade policy and, according to Mastel (1999), has remained so ever since.

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3.2.2 PROCEDURES

In 1979 the US radically rewrote its antidumping laws (Staiger and Wolak, 1994, p. 53)[4]. Under the current legislation, a "determination" (i.e. a finding that the accused is guilty) requires two criteria to be met before duties can be imposed. First the commission has to be able to determine that the imported goods were being sold at a price which is "less than fair value" (LTFV), and second that the firms filing the petition are indeed being "injured" by the dumping. According to Staiger and Wolak (1994, pp. 54-58) the entire process typically takes about 300 days to complete. This comprises a decision to commence (20 days), a preliminary injury determination (45 days), a preliminary LTFV determination (115 days), a final LTFV determination (75 days), and a final injury determination (75 days).

The International Trade Administration (ITA), which determines whether goods have indeed been dumped, and the International Trade Commission (ITC), which determines whether the dumped goods have caused injury to a US industry, investigate the petition jointly. If both agencies agree, then an antidumping duty equal to the dumping margin may be ordered on the "unfairly-priced" imports (Moore, 1992, pp. 450-451).

---

[4] This was apparently done in an effort to tighten the definitions and legal requirements so as to prevent abuse of the system. Ironically, anti-dumping petitions have increased, not decreased, in the twenty years since then.

3.2.3 Statistics

Due to the 1979 revamp of the law, most data sources now split the US's antidumping cases into pre-1980 and post-1980 figures. Strikingly, the situation seems to have worsened, rather than improved. The data in table 3.1 are taken from the United States' International Trade Commission (US ITC) records, but the category specifications are the author's own (cf. Appendix 1), based upon the product descriptions filed by the petitioners. Most of the categories should be self-evident, but it is important to emphasise that some of the categorisations are subjective. The division into "Consumer products" and "Manufactured products" was made by asking whether the product was likely to be for final or intermediate use respectively. Also, many of the technical reasons for antidumping (AD) duties not being imposed (such as "Rejected due to insufficient information" or "Insignificant injury") have been grouped into their closest corresponding categories. Finally, it should be noted that the US ITC chose not even to initiate investigations on 107 of the 1019 petitions filed before 1980.

	Agriculture	Chemical & Photographic	Consumer products	Manufactured products	Metals & Mining	Wood products	**ALL *(as % of total)***
No AD: No dumping *(as % of total)*	65 *(50%)*	59 *(44%)*	38 *(32%)*	179 *(48%)*	49 *(42%)*	28 *(70%)*	**418 *(46%)***
No AD: No injury *(as % of total)*	26 *(20%)*	32 *(24%)*	42 *(36%)*	102 *(27%)*	18 *(15%)*	6 *(15%)*	**226 *(25%)***
No AD: Terminated *(as % of total)*	1 *(1%)*	7 *(5%)*	2 *(2%)*	24 *(6%)*	5 *(4%)*	1 *(3%)*	**40 *(4%)***
No AD: Withdrawn *(as % of total)*	2 *(2%)*	0 *(0%)*	0 *(0%)*	2 *(1%)*	11 *(9%)*	0 *(0%)*	**15 *(2%)***
AD imposed *(as % of total)*	36 *(28%)*	37 *(27%)*	35 *(30%)*	66 *(18%)*	34 *(29%)*	5 *(13%)*	**213 *(23%)***
TOTAL: *(as % of all)*	**130 *(14%)***	**135 *(15%)***	**117 *(13%)***	**373 *(41%)***	**117 *(13%)***	**40 *(4%)***	912

Table 3.1: Pre-1980 antidumping initiations in the US

Source: Data extracted from US ITC, see text for categorisation.

Manufactured products represent 41% of the petitions filed before 1980, yet tariffs were levied in only 18% of those cases. The high rate of withdrawn petitions in the metals and mining sector (9%) is also notable. The false charges of dumping in the wood products category (70%) is a reason for worry and will be studied further in Chapter 4. The ongoing US/Canadian softwood lumber disputes (the most recent having been resolved in 2004 in favour of Canada) illustrate the potential for the use of dumping charges in short term protectionist games and also the possibility of reverse-dumping by the accuser.

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Before 1980 the US's antidumping legislation was remarkably vague and the implementation procedures were rather lax. The wording of the law allowed for wide discretion on the part of the commission investigators both as regards "dumping" and "injury", yet when the records of the US ITC are examined, it is found antidumping duties were imposed in less than a quarter (23%) of all petitions filed in the first 60 years of the law (table 3.1). From 1980 to 1999, a total of 788 petitions had investigations initiated, of which 44% resulted in duties[5]. Figure 3.1 below shows how the number of petitions is invariably related to the manufacturing cycle, which leads the general economy by two or three quarters. The investigative delay thus combines to provide protection with almost exact pro-cyclical timing. This observation is returned to in the following chapter, where questions about the efficiency and objectivity of filings are raised[6].

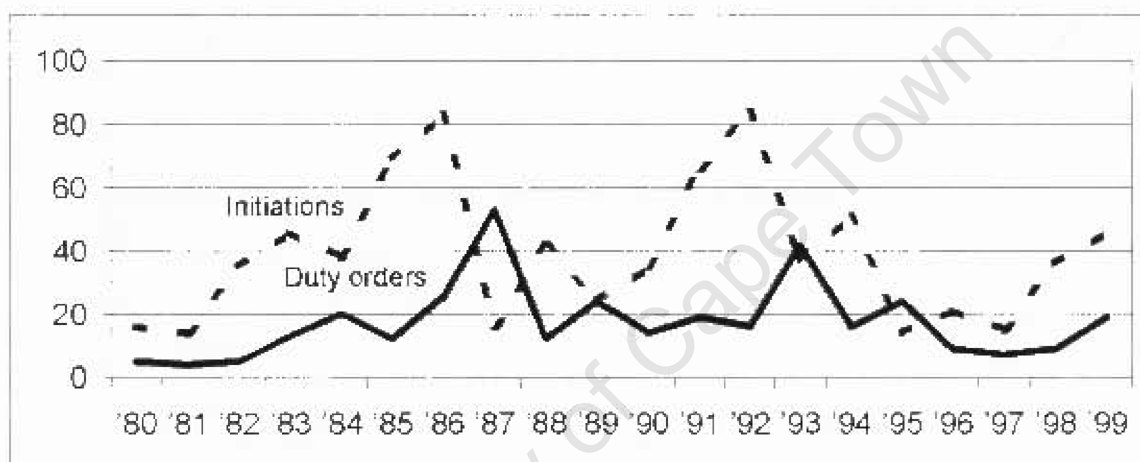

FIGURE 3.1: POST 1980 ANTIDUMPING INITIATIONS AND DUTY ORDERS IN THE US

Source: Data extracted from US ITC

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3.3 EUROPEAN UNION

Veugelers and Vandenbussche (1999, p. 3) argue that the EU legislation's focus on the injury requirement rather than the dumping requirement marks it as significantly different from that of the US. They note (p. 7) three conditions that must be met for firms to file suit under the EU's antidumping rules:

1. The EU firm or firms lodging the complaint must have more than half the total EU production.
2. There must be a positive "dumping margin", such that the foreign firm's price must be lower in the EU than in its home market.

[5] There is some inevitable overlap around the end-periods of these figures, since investigations are almost never completed in their year of initiation. This does not affect the conclusions reached, though.

[6] The US ITC does not report the post-1980 statistics in as much detail as those from before 1980.

3. There must be a positive "injury margin", such that the foreign firm's price must be lower in the EU than the complainant's prices.

While the technical details of EU-wide legislation are similar to those of the US, the effects of their implementation have been quite different. Messerlin and Reed (1995, p. 1566) suggest that this is because the gap between trade policy and competition policy is even larger in the EU than in the US. Implicit in all these rules is the assumption that the "foreign firm" is from outside the EU. An associated notion is that the rules are almost impossible to implement when the "dumping margin" is different in different countries. Trade within the US has been unrestricted for long enough to allow the reasonably free flow of products, so the law of one price tends to hold more regularly in that country (Elmslie and Milberg, 1996, pp. 46-47). With the EU's focus on the "injury margin", this becomes a rather important issue: how many producers need to be "injured" before the injury margin is high enough to allow duties to be imposed?

The original Treaty of Rome's "community interest" clause required antidumping investigators to take into account the diverse interests of the EU (then EC) economy as a whole. This was regularly undermined, however, by the investigators who would make passing reference to the clause with some bland non-sequitur such as: "the existence of at least one EC producer is in the long-term interests of the EC consumer" (Messerlin and Reed, 1995, p. 1566). At this point the discrepancies between the practice of the law and the spirit of the law should dishearten even the most accommodating of economist theorists.

3.4 South Africa

This paper aims to improve the legislation used by South African antidumping authorities. The reason for trawling through the international law books is that these tend to provide the foundation for SA laws. Furthermore, our trade laws must be acceptable (both legally and ethically) to our trading partners if we are to continue operating in the global marketplace. Unfortunately there is less academic research on the South African situation, and a lot less statistical information from the South African authorities. The following sections should thus be read with the usual *caveats* in mind: the theories are uncertain and the data might not be perfect. Nonetheless, the increasingly intrusive and anti-competitive format of South African antidumping legislation should be readily apparent.

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3.4.1 LEGISLATION

South Africa has one of the oldest antidumping statutes in the world, dating from the Customs Tariff Act (No. 26) of 1914; however it was rarely used before the dismantling of the country's protectionist import-substitution measures in the 1990s (BTT, 1997, pp. 4-5). The earliest legislation defined dumping as sales of imported goods at prices below the "true current value", suggesting (sec. 7) that prices of the goods in the dumper's home market may have been distorted and could not be relied upon for a determination. "Value" was thus very subjectively defined, to the extent that the Governor-General himself had to determine the dumping margin in any case where a third-market price needed to be used to estimate value.

If dumping was found to occur then injury was presumed and the authorities could provide protection by instituting a duty up to and including the dumping margin, though not exceeding 15%. Not only were the authorities not forced to impose a duty, they also had to give at least six weeks' notice in the Government Gazette before any duty became effective (sec. 8). This prevented sporadic dumping from being prohibited and thus protected consumer interests. The reason the legislation was only rarely invoked is clear: it offered little protection and did not offer it quickly. Indeed, it took seven years before the first reported enactment – against the dumping of Australian flour (proclamation no. 83 of 1921).

The Board of Trade and Industries that was constituted in 1921 had its powers extended in 1923 (Act no. 28, as amended in 1924 and 1944) to make rulings on all manner of tariffs and trade policy. The original intent was very much in line with modern competition policy rather than trade policy *per se*, since the Board had to report explicitly on the likelihood of success of the industry facing foreign competition both with and without government support. It also had to calculate the cost to the economy not only from the state's perspective, but in terms of "the probable cost borne by the community" (sec. 2(v)). This joint duty was made explicit in the 1944 revision (Act no. 19) where the Board was to "enquire into and advise the Government" (sec. 9(1)), *inter alia*, on:

> (f) combinations, trusts, monopolies and restraints of trade tending to the detriment of the general interest, especially by restricting production or maintaining or raising prices, and the prevention thereof;
>
> (g) the dumping of imported goods whereby Union industries are likely to be unfavourably affected.

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While this integration of competition policy and trade policy makes economic sense[7], the antidumping acts used in South Africa suffered some inherent contradictions. Thus antidumping duties themselves routinely resulted in "restraints of trade to the detriment of the general interest". Not only did the omnibus Customs and Excise Act No. 91 of 1964 (which defers to the Board on Tariffs and Trade Act, where appropriate, and forms the basis of modern South African commercial policy) retain these incongruities, it also worsened matters by expanding the definition of dumping and reducing the importance of the "general interest" clause.

Between 1964 and 1995, numerous amendments to the acts meant that "dumping" grew to refer to any import price (before taxes but after discounts and rebates) below the *sale* price in the exporter's home country or, in the absence of such a price, either:

1. Below the *highest* comparable export price in any third country; or
2. Below the *constructed* (rather than actual) cost of production, including selling costs and a reasonable profit.

The government's objective had clearly moved away from protecting competition and society's best interests, to protecting only the interests of local producers. The Board's explicit aim to "promote industrial growth" allowed it to investigate, on its own accord or by request, "any matter which affects or may affect the trade and industry" of South Africa or the South African Customs Union. It will be noted that there was no injury requirement and none of the GATT's *de minimis* rules. Section 17, "Preservation of secrecy" wholly nullified the GATT's transparency requirements too. The 15% maximum duty had been abolished and the Board's decision was not open to appeal. There was also no reference to any of the standard antidumping concepts such as "material injury", "dumping margin" or even "causation" (BTT, 1996, p. 2).

In late 1997 the Board underwent a major upheaval as the Department of Trade and Industry revamped its divisions and the supporting legislation to follow WTO directives more closely. The result of this was a new head for the Board (Leora Blumberg, who was the most frequently cited South African authority on antidumping, even before her appointment) and a new outlook which emphasised the issue of competition more than previously. Changes since then (in particular the Department of Trade and Industry reorganisation in 1999) have kept the Board's trade-minded composition and most judgements have made at least passing reference to levels of competition.

[7] This will be explicitly argued in Chapter 5.

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Although the Board now refers exclusively to the WTO rules for guidance, the South African legislation described above is still in existence and the implementation of the policies has changed very little. At the date of writing, the Board's supremacy is not in doubt, but its objectives are definitively in transition. In particular, a reader of the Board's judgements will notice less stress being placed on the presumption that lower prices equate to unfair trade and less use of antidumping powers as a *lex talonis* against foreign competition.

The Board's own "Guide to the policy and procedure with regard to action against unfair international trade practices: Dumping and subsidies" (BTT, 1994) and its annual reports (BTT, 1996 and 1997) give a good understanding of how the law is actually implemented. While the documents only distinguish infrequently between antidumping duties and countervailing duties, this paper is concerned exclusively with the former. The latter by definition involve foreign governments rather than just foreign businesses. These documents suggest that the implementation has been both better (more precisely technical) and worse (more predictable outcomes mean more targeted abuse) than the legislation itself.

3.4.2 PROCEDURES

The process required to initiate, investigate and impose antidumping duties on imported goods is complex. While the Board of Tariffs and Trade has an ongoing consultation with the government to simplify the procedures, the process remains "very comprehensive and time consuming" (BTT, 1996, p. 4). The four steps are deceptively straightforward: 1) a petition is completed by the applicant; 2) the petition's merit is assessed by the Board; 3) a preliminary determination is made; 4) a final determination is made (BTT, 1997, p. 11). Each of these, however, is open to subjectivity and informational asymmetry[8].

The petition itself is the first point of difficulty, despite the simplicity of obtaining the forms (they can be downloaded from the Internet) and help with completing them (guidance in collecting the information is offered by the Board itself). Firstly, the petitioners must constitute "a major proportion of the total domestic production". The rules side with the petitioner here by excluding from the "domestic production" all local firms associated in any way with the alleged dumping, or parties to it (BTT, 1994, p. 6). Then full details about the petitioner, the importers and the allegedly dumped products are required. These include information about the

[8] These problems are discussed further in Chapter 4

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market share of each party within the entire Customs Union, the current and projected turnover and profit figures, and the petitioners' thoughts on other factors detrimental to their market (BTT, 1994, p. 9). In the interests of fairness, these views "must, where possible, be substantiated by documentary evidence".

Once all this has been received, the Board will formally accept the petition by publishing a public notice of the initiation in the *Government Gazette* and writing to all parties known to be concerned with the product. From this date, all interested parties will have 30 days (plus 7 days for deemed postal time) within which to respond. Should no response be forthcoming, a preliminary or even final determination can be made immediately (BTT, 1994, p. 11). The "interested party" definition includes only the product's foreign exporters, their government, domestic importers and other producers of the product. Strikingly, no labour unions, downstream users, local government, trade lobby groups or academics are included in this list, although the Board asserts that evidence from other organisations is usually considered (BTT, personal correspondence).

Then, the investigation proper begins. At any stage during the investigation, the Board may decide that "urgent action is justified to prevent material injury being sustained" (by the domestic industry) and can implement a provisional antidumping duty on the product. This is automatically in place for six months (with three month extensions at the Board's instance) and requires no ministerial backing. No regard is paid to injuries suffered by the importers during the investigation. Should the final duty be lower than the preliminary duty, the difference will be refunded (BTT, 1994, p. 14). The investigation may also be abandoned if the accused dumpers offer to end their dumping by raising prices, or if they go out of business.

When determining whether dumping has taken place, the Board determines whether the foreign price is set by "normal market forces" or not. Whichever of the definitions of "dumping" examined in Chapter 2 appears relevant may then be followed, as the Board allows foreign price, costs of production, exports to third countries and even "export prices from any other country" to be used (BTT, 1994, p. 15). The final duty imposed is then the Board's determination of the lesser of the dumping margin and the amount sufficient to remove the material injury. This final recommendation is sent to the Minister of Trade and Industry[9] who will either approve the decision or return it for reconsideration. The duty may be imposed either immediately or

[9] And the Minister of Agriculture in the case of primary agricultural products.

University of Cape Town

retrospectively and may have a set end-date, be phased out over time, or have no end-date (BTT, 1994, p. 17).

3.4.3 Statistics

In the light of international sanctions and the plethora of government incentives, supports and aid schemes that coddled South African producers during the isolationist years, there was little need for antidumping charges to further protect the local industry, and very few were initiated before 1992. This is the watershed year for the BTT, with the Dumping Investigations Directorate being established in the Department of Trade and Industry (BTT, 1996, p. 9). In the nine years from 1995 to 2003 (as happened elsewhere in the developing world), antidumping initiations rose to an average of 18 a year, of which 12 usually succeeded in having duties imposed (see table 3.2 below).

	1995	1996	1997	1998	1999	2000	2001	2002	2003	**Average**
Initiations	16	33	23	41	16	21	6	4	6	18
(as % of world)	*(10%)*	*(15%)*	*(9%)*	*(16%)*	*(5%)*	*(7%)*	*(2%)*	*(1%)*	*(3%)*	*(7%)*
Imposed	0	8	18	14	34	13	5	15	1	12
(as % of world)	*(0%)*	*(9%)*	*(15%)*	*(9%)*	*(19%)*	*(6%)*	*(3%)*	*(7%)*	*(0%)*	*(7%)*

TABLE 3.2: ANTIDUMPING INVESTIGATIONS INITIATED AND IMPOSED BY SOUTH AFRICA

Source: Data extracted from WTO (2004)

One dramatic shift shown in these figures is the fall in initiations from 2001 onwards. It is unclear whether this represents a change in attitude or simply reflects the sudden fall in world trade after the bursting of the dotcom bubble and the September 11th terrorist attacks on the US. Either way, the surge during the 1990s was so unexpected and sudden that as late as 1997, a PriceWaterhouseCoopers advisory document prepared for the US government to US exporters (based on 1995 information) had only two sentences regarding South African antidumping actions:

> "The tendency is to protect local industry through ordinary customs duties where this is considered warranted; only a few products are subject to antidumping duties. These are usually applied as a temporary measure pending review of the rate of ordinary customs duty."
>
> PriceWaterhouseCoopers (1997)

The Board's own interpretation of these statistics is that current number of antidumping petitions and findings is the correct equilibrium, brought about only because the Board's policies and procedures are more use-friendly, and because other overtly protectionist supports (e.g. the GEIS) have been removed. Two other views could be taken of the increased use of antidumping protection, though. Either businesses are resorting to protectionist legislation as

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they find themselves confronting more competitive foreign producers, or foreign producers may actually be taking advantage of South Africa's newly-opened and rather fragile marketplace to dump their excesses. In all instances, however, it seems that producers have come to understand the power of the legislation since foreigners began to use it increasingly against them.

3.5 CONCLUSION: MISSION NOT ACCOMPLISHED

Even if all the Board's inquiries were fully open to inspection (which they are not), there would still be insufficient data to determine the causality in the antidumping boom. It should be clear from the foregoing discussion, however, that the primary (if not the only) beneficiaries of antidumping legislation are those producers who can convince the authorities of their need for protection. In the absence of predation (intentional or accidental), consumers are almost certainly going to be made worse off by the inevitable rise in prices. There is no explicit consideration of consumer-interest in any antidumping investigation, in South Africa or elsewhere.

Additionally, antidumping policies are far from competition policy equivalents, even when dealing with a clear-cut case of predation. A 1998 US submission to the WTO argues approvingly that "the antidumping rules are not intended as a remedy for predatory pricing practices of firms, or as a remedy for any other private anti-competitive practices typically condemned by competition laws" (quoted in Lindsey, 1999, p. 3). The submission goes so far as to say that neither consumer welfare nor allocative efficiency are, or should be, the focus of any US antidumping legislation. The South African authorities apparently agree. The following chapter argues that the antidumping legislation constitutes protectionism rather than protection, an irresistible temptation for even the most virtuous businessperson.

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CHAPTER 4: PROBLEMS

"American chicken leg quarters are being offered at the same price as they are sold domestically."

...

"A reconstructed price ... may assist in the poultry industry's antidumping application."

Zach Coetzee, Southern African Poultry Association executive director
[Business Day, March 29th 1999, p. 3]

WHEN FREE TRADE IS FAIR GAME

Within this paper, the case for free trade has been made, the issues over which antidumping authorities fret have been teased out and the legislation which they have at their disposal has been found to be lacking. However, we have not yet thoroughly demolished the case for simply tinkering with the current rules rather than overhauling the system thoroughly. The aim of this chapter is to show why such tinkering is a flawed non solution. It is the very existence of the legislation, rather than just its wording, that allows for its misuse and encourages abuse.

In theory and in practice, in South Africa and elsewhere, legal loopholes which offer businesses an easy opportunity to undermine competitors are being exploited to the detriment of consumers. Alec Erwin's departmental restructure in mid-2000 explicitly set about "achieving a fair, efficient and competitive marketplace for domestic and foreign business and consumers" (Business Day, August 24th 2000, p. 2), but antidumping duties run counter to this notion[1]. The chapter begins with a number of theoretical arguments against the legislation. These are followed by a section detailing imperfections in the implementation of the legislation. Finally, some practical comments will be made on the legislation's abuse by lobbyists and the unethical.

4.1 THEORY

The theoretical arguments against antidumping duties may be split into two broad groups: efficiency and equity. The former argue that an anti-dumping duty is an unnecessary, self-imposed cost on the importing country's citizenry. Apart from the clear waste of otherwise productive resources (in the form of lawyers, government officials and the time taken by businesses to pursue or prevent the antidumping duty), there are hidden costs in the form of forgone consumer surplus, and an increased business risk attaching to both the dumper and the antidumper.

[1] Although the international legality of "beggar-thy-neighbour" policies is debatable, it is presumed obvious that the legislation is not *intended* to benefit foreign citizens. It will be shown later that despite this, foreign citizens may be such policies' only beneficiaries.

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To oppose the current system on equity grounds is to disagree with the underlying assumption that actions taken against foreigners must be good for locals and vice-versa. Returning to the explanations given in Chapter 1 of this paper, we see that both groups are essentially of the opinion that mercantilist tendencies are no more appropriate in a modern liberal democracy than they were two hundred years ago.

4.1.1 TRADE-REDUCING AND INEFFICIENT

The WTO is creditably aware of antidumping's negative effects on world trade. To this end, as explained previously, many more requirements (including sunset clauses and *de minimis* restrictions) are now imposed upon countries wishing to use this legislation. Nonetheless, the widespread use of antidumping procedures has had a severely negative impact on trade, with Prusa (1999, p. 17) estimating that the value of US imports from countries against whom a duty was levied fell by approximately 50% in *each* of the three years thereafter. Even when a settlement was reached, a once-off fall of about 60% occurred. In short, there is little doubt that antidumping legislation has been very effective at stopping the entry of cheap goods into countries. The question is whether this is a pleasing achievement.

Tavares (2001, pp. 10-11) reports that the most complete US study of the welfare effects of antidumping was that undertaken by the International Trade Commission (the US's antidumping regulator) in 1995. Based on 1991 figures, it was concluded that antidumping and countervailing duties resulted in $1.6billion of lost welfare (or 0.03% of the US's GDP that year). The commissioners deemed this to be irrelevant, however, since the function of antidumping laws is "to protect firms and workers engaged in production activities" so that "the economic benefits of the remedies accrue to producers, and the economic costs accrue to consumers."

The inefficiency of these accrued costs is sometimes hidden, in that producers and consumers alter their behaviour in anticipation of import restrictions, rather than run the risk of lawsuits and bad publicity. Reitzes (1993) analyses how firms respond to the threat of an antidumping investigation. He finds (p. 751) that simply having such legislation available reduces the risks of overproduction for domestic firms and increases the country-risk for foreign firms. Thus both parties have an incentive to reduce trade with each other and focus production on their own

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domestic markets. The detrimental impact of encouraging local production just because it is local and discouraging foreign production just because it is foreign was examined in Chapter 1.

4.1.2 Welfare-reducing and inequitable

Extending the Caves and Jones analysis from Chapter 2 to a two-country scenario, we see again that dumping can definitely occur. Following Lindert (1991, pp. 166-167), international price-discrimination may result, legally speaking, in products being dumped abroad. It is important to note, though, that there is little evidence that this situation reduces the welfare of either country. The aforementioned analysis showed, for example, how the product's manufacture might rely upon the monopoly's differential pricing strategy. The simple existence of a price-discriminating monopoly, in other words, is not proof in and of itself that a charge of "*injurious* dumping" should be upheld. Figure 4.1 (below) is taken from an actual dumping case involving phone equipment for small businesses, which was imported from Japan into the US.

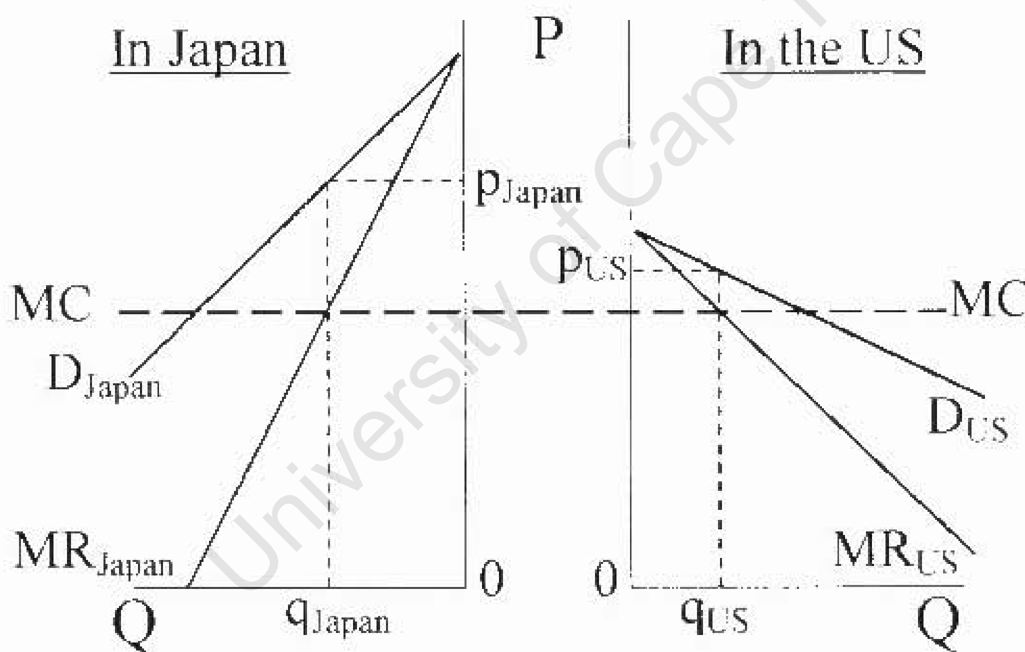

Figure 4.1: The price-discriminating monopolist
Source: Lindert, 1991, p. 167 (adapted)

The important factor here is not the quantity (q) sold in each market, but rather the price elasticity of demand. The profit-maximising price (p), where marginal cost (MC) equals marginal revenue (MR), is necessarily lower in the market with the more elastic demand curve (D). In this example, that market is the US and the Japanese firms are, by definition, dumping on the US. For this reason, the US ITC made a dumping margin determination of 120% to 180%, after the

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Japanese, Taiwanese and South Korean companies in question had raised their US market share to over 60%. Some important extensions for the general case can be inferred from this simple Pigouvian analysis, though.

Firstly, the US market has not explicitly been assumed to be perfectly competitive, so the entry of the foreign producer is not necessarily anti-competitive. To the extent that the phones are cheaper than US-produced phones, the imports are raising the elasticity of D_{US} for all US producers, which by all accounts is improving competition.

Secondly, the imports are "injurious" only in that they are increasing levels of competition and thus lowering prices for the US producers. The situation described makes no unduly short-run assumptions, so with an appropriate ATC curve, continuous dumping rather than predatory dumping, is possible[2]. This benefits all consumers and is detrimental only to producers who are uncompetitive. In fact, since the curves show economic rather than accounting costs, overall welfare levels in the US must have risen.

Finally, historical facts aside, nothing in the preceding example required that the dumping firm be foreign. In theory, no assumptions need be made about which country the manufacturer comes from, nor direction in which the goods are shipped, since transport costs are taken as negligible. Imagine, then, that the situation in the above diagram were to have involved a US firm selling phones in the US and Japan. As before, assume that the phones sold for a lower price in the US than in Japan. This would have caused no US discontent and there would have been no government decree of unfair pricing in the US. It would (correctly) have been seen as regular trade, selling from a low-price region into a high-price region, equalising prices in the process. But the two situations have identical effects and if there is any reason for believing that dumping by the Japanese is harmful to the US, then "reverse-dumping" by a US firm must logically be equally harmful. The antidumping laws as they currently stand target only foreign firms and ignore the identical reverse case as a non-issue (again, correctly). In short, selling more cheaply in the US than overseas is seen as acceptable for a US firm to do, but not for a foreign firm[3].

---

[2] The following chapter will explicitly note that it is vital for authorities to ensure that predation is not occurring.

[3] Okano (1978) makes a similar argument, asking why it is acceptable for US firms to sell their goods more expensively outside the US, but not for foreign firms to do so.

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The inefficiency and inequity then conspire to cause a further problem: foreign companies might well benefit entirely to the detriment of local consumers. Veugelers and Vandenbussche (1999) examine the incentives for firms to form cartels when faced with (EU-type) antidumping laws. Based on a numerical simulation model, they find (p. 11) that firms prefer to simply form cartels with the domestic "competition" rather than trying to define and enforce their respective antidumping rights in the courts. The extent of this cartelisation can be a full domestic and foreign cartel, when firms and products are relatively homogeneous. Given that producer lobbies are generally better resourced and organised than those of consumers, governments almost always focus their investigations on producer surpluses rather than consumer surpluses. The existence of an antidumping law then becomes moot (p. 26) since the collusive price setting is indistinguishable from government-enforced price equalisation.

4.2 PRACTICE

Antidumping duties do not ensure either equity or efficiency, and their logical anomalies can appear xenophobic. An analysis of the decisions taken by individual ITC commissioners during the 1980s (Moore, 1992, p. 464) shows that imports from less-developed countries in industries with low-wage workers or low profit levels were the most likely to have anti-dumping duties imposed, suggesting a consistent bias. Importantly, it was found (p. 465) that each commissioner "systematically favoured" his own constituencies: the law requires an objective decision of guilt or innocence to be made in what are often complex and multi-faceted cases.

The chicken-parts industry is an instructive example in how complicated the cases can be, or become. Chicken parts now have a 505% AD margin, despite the fact that before the ruling all South African producers bar one had been making profits. It was the loss-making producer (Rainbow Chickens, the country's largest) that initiated the antidumping application, although the company had been making losses for a few years already. Presumably those losses were as a result of something other than dumping (Business Day, February 1st 2000, p. 8).

Studies about the industry pointed out that South African overhead costs were far higher than those in the US or UK, and that "consumer preferences" resulted in different markets (Business Day, May 25th 1999, p. 2). These differences relate primarily to the cuts of chicken preferred by South Africans (mainly drumsticks and leg quarters) vis-à-vis Americans (mainly breast and whole chickens). The result is that demand for chicken drumsticks and leg quarters is lower in

University of Cape Town

America than in South Africa. Prices of those cuts, however, are not lower in America, but have equalised, as standard international trade theory would predict. In order to prove the antidumping charge, the South African Poultry Association's executive director (Business Day, March 29th 1999, p. 3), has relied on a reconstructed price, whereby the antidumping board estimates what the price in the US might be, were it not for the differences in consumer preference. The board's logic appears to be that with US prices strangely low, dumping *is* occurring because it *would* be occurring.[4]

A further issue is how an industry in which local production grew by 9% per year while the import percentage declined (Business Day, Feb 1st 2000, p. 2) could be "injured" by dumping. The explanation relates to one of the key issues in the anti-competitive nature of antidumping charges: a single firm may represent the entire country when laying charges, while an entire country can suffer when only a single firm is found guilty of dumping. As described in Chapter 3, petitioners must constitute "a major proportion of the total domestic production". However, no producer who is related to the alleged dumper (either the foreign exporter or the domestic importer) may be counted as part of the "domestic production" (BTT, 1994, p. 6). In industries where many producers rely on some level of international trade to smooth local demand (such as foodstuffs, where long-term inventory storage is not an option), "domestic production" which excludes so many players could comprise a tiny portion of those who actually produce domestically.

University of Cape Town

4.2.1 ABUSE OF THE LEGISLATION

As detailed in Chapter 3, the Board may decide that "urgent action is justified to prevent material injury being sustained" by the domestic industry and can implement a provisional antidumping duty on the product. What is barely considered, however, is the injury suffered by the importers during the investigation. The amount by which the final duty (if any) is less than the provisional one is eventually refunded to the wrongly accused, but the reduction in quantity demanded and the negative publicity surrounding such investigations go uncompensated.

For instance, from 1953 to 1960, the US antidumping authorities were petitioned to judge imports of "Rayon staple fiber" from the following countries (often more than once): Austria (3 times), Belgium (4 times), Cuba (twice), Czechoslovakia, France (3 times), Germany (4 times),

[4] If it is true that the US prices are low because of government subsidies, then the correct response is a Countervailing Duty investigation, as described in Chapter 2.

Italy (3 times), Japan (twice), the Netherlands, Norway (3 times), Spain, Sweden (3 times), Switzerland (twice), the United Kingdom (twice) and Yugoslavia. In all 35 investigations over this eight-year period, they found either "no injury" and/or "no sale at lower than fair value". Yet the possibility that US manufacturers were abusing the antidumping laws in order to harass those foreign producers (and scare off others) was never allowed as a legal defence.

As discussed earlier, Reitzes (1993) shows how the mere threat of antidumping action – be it substantiated or not, material or not, followed through or not, deemed guilty or not – can ruin an importer. It raises their perceived risk to prospective customers and financiers with consequent effects on their reputation and their cash flow. When the action is taken against producers from a range of countries, especially if they have a significant share of the local market, it can effectively block import competition and provide a virtual monopoly to the accusing firm. Even if the final decision is in favour of the foreign producer(s), the short-term benefits to the accuser can be substantial without any accompanying risk.

4.2.2 POLITICAL BLACKMAIL

A front-page newspaper report (Business Day, November 2nd 2000) posited a set of reasons for the 860 jobs lost when Waverley Blankets relocated to Botswana from SA: an 80% wage subsidy for 3 years in Botswana; lower rates and electricity costs in that country; Botswana's higher productivity and lower manufacturing costs; changing consumer spending patterns and increased oil prices. Finally, they mention possible dumping by China and Taiwan. Yet in a public comment, the MD, Jorrie Jordaan, cited only one: he "blamed the demise of the local industry on dumping", stating that a lobby for "'urgent and effective intervention' on illegal imports" was unsuccessful. In calling for antidumping salvation, he neglected to mention that provisional duties of between R2,50 and R30 a unit had been imposed almost 2 years previously (Business Day, January 13th 1999, p. 3) but were removed when the Board's final inquiry found that dumping had not occurred[5].

Clearly the academic and legal definitions of dumping are not those used by businesspeople and journalists. Instead, many industries refer to dumping simply as imports sold at a price which is low enough to harm local business interests (Palgrave, 1987, p. 937). The language used on both sides becomes more emotional at this point, and the scholarly reflections discussed in previous

[5] In an interesting twist, a Malaysian textiles company announced an investment which would create 10 000 new jobs in the exact area that Waverly Blankets deserted. It was mentioned only tangentially in the following day's editorial (Business Day, November 3rd 2000, p. 11).

University of Cape Town

chapters become rather less relevant. Not only are firms able to blackmail each other with such accusations, but the public (and thus political) distaste for "dumpers" is so acute that political decisions are themselves subjected to their influence. Even if the BTT is not swayed immediately (as in the Waverley case above), the scope for political convenience to outweigh economic analysis is suggested by the US's experience[5].

In the two decades since the US overhauled its antidumping laws, the more stringent proof requirements suggest that, if true dumping has not become more widespread, determinations would have become less common, encouraging fewer initiations. Instead, annual initiations have more than doubled, from 15 up to 39 (see table 4.1 below, an extended version of table 3.1). The focus has also shifted from manufacturing industries (41% pre-1980 down to 23%) to firms in the mining and metalwork industries (50% post-1980, up from 13%), most notably the steel industry.

	Agriculture	Chemical & Photographic	Consumer products	Manufactured products	Metals & Mining	Wood products	**Annual average**	No investigation
Pre-1980 *(as % of total)*	130 *(14%)*	135 *(15%)*	117 *(13%)*	373 *(41%)*	117 *(13%)*	40 *(4%)*	**15**	107
1980-1999 *(as % of total)*	43 *(5%)*	113 *(14%)*	48 *(6%)*	180 *(23%)*	396 *(50%)*	8 *(1%)*	**39**	234

TABLE 4.1. PRE- AND POST-1980 ANTIDUMPING INITIATIONS IN THE US

Source: Data extracted from US ITC, see text for categorisation.

It appears that antidumping policy is no longer driven by economics, but by politics, and the case of George W. Bush's steel duties is both contemporary and instructive. During the run-up to the 2000 US presidential elections, Mr Bush had repeatedly and loudly argued against government protectionism. He then went on to initiate duties of up to 30% to protect the US steel industries just a year after his inauguration. The combination of four political factors is suggestive:

1) The 2000 election was very closely contested;
2) Pennsylvania and West Virginia are large employers of steel workers;
3) Pennsylvania and West Virginia are considered Democrat-leaning swing-states;
4) The November mid-term elections were only eight months away at the time of signing.

[5] Unfortunately, the South African statistics are simply not robust enough to sustain a similar analysis.

University of Cape Town

In short, economic arguments for and against the protection need not have been made since the political benefits of the decision were overwhelming. Interestingly, the rise in tariffs came at the end of the industry's cyclical downturn and prices by mid-2002 were already 50% above their December 2001 lows (The Economist, May 25th 2002, p. 76). According to the Consuming Industries Trade Action Coalition (CITAC), a US lobby group for steel's consumers, an inability to source cheap international steel costs loses five times more jobs than producers would suffer from the alleged dumping (Wood and McKay, 2001, p. 21). Thus, in mid-2003, a sharp about-turn was deemed necessary for the survival of downstream steel industries such as carmakers.

4.3 OTHER CONSIDERATIONS

Pragmatists offer two rejoinders to the foregoing criticisms. The first is that an inevitable amount of horse-trading must be accepted on the road to a global economy and antidumping laws are part of the price paid. This assumes, however, that the antidumping sop is a lesser evil, outweighed by the gains from trade.

Politically, the worry is the rapid increase in the use of antidumping laws worldwide, even during times of economic boom. Table 4.2 (below) analyses the number of antidumping duties imposed worldwide from 1995 to June 2001, the last quarter before the onset of the world's post-dotcom economic malaise.

Year *(as % of total)*	Agriculture	Chemical & photographic	Consumer products	Manufactured products	Metals & Mining	Wood products	**Total**
1995	6 *(5%)*	30 *(25%)*	11 *(9%)*	20 *(17%)*	49 *(41%)*	3 *(3%)*	119
1996	1 *(1%)*	23 *(26%)*	8 *(9%)*	33 *(37%)*	25 *(28%)*	0 *(0%)*	90
1997	2 *(2%)*	33 *(27%)*	6 *(5%)*	33 *(27%)*	47 *(38%)*	3 *(2%)*	124
1998	6 *(4%)*	27 *(17%)*	16 *(10%)*	32 *(20%)*	63 *(39%)*	18 *(11%)*	162
1999	4 *(2%)*	50 *(27%)*	6 *(3%)*	28 *(15%)*	83 *(45%)*	12 *(7%)*	183
2000	4 *(2%)*	75 *(32%)*	18 *(8%)*	42 *(18%)*	87 *(37%)*	9 *(4%)*	235
2001* * Jan – Jun	7* *(8%)*	34* *(40%)*	2* *(2%)*	11* *(13%)*	31* *(36%)*	0* *(0%)*	85*

TABLE 4.2: NUMBER OF ANTIDUMPING DUTIES IMPOSED WORLDWIDE BY SECTOR

Source: Data extracted from WTO (2004). see text for categorisation.

University of Cape Town

When a single industry secures an antidumping order against its competitors, it can impact on companies from a variety of countries. Since the antidumping orders are highly specific, numerous products may be placed at risk simultaneously, multiplying the number of countries

affected. The resultant job losses and financial strains in those foreign firms encourage trade retaliation from the industry concerned, as well as upstream and downstream firms. Where the issue is emotive enough (e.g. steel), retaliatory accusations may appear in totally unconnected industries. Even though many antidumping petitions are eventually refused, damage from the short-term frictions might be substantial.

What makes these figures more frightening is that the 6½ years in question saw unprecedented economic growth in most developed countries. The slowdown in economic growth since then, and the shift of antidumping users from developed to developing nations (China and India in particular), suggests that the trend is unlikely to be reversed soon. In fact, the corresponding world totals for 2000, 2002 and 2003 (235, 212 and 220 respectively) are by far the highest three totals for the 9 year period (WTO, 2004). Table 4.3 indicates that from 1995 to 2001 developed countries have accounted for only 29% of the antidumping initiations (538 out of 1845). It also shows that developed countries deal with all the direct and indirect expenses of being the accused in 57% of all cases (1054 out of 1845).

AD initiators / Alleged dumpers	Developed countries	Developing countries	Transitional countries	Total
Developed countries	191	374	214	779
Developing countries	343	427	284	1054
Transitional countries	4	2	6	12
Totals for Jan 1995 – Dec 2001	538	803	504	1845

TABLE 4.3: NUMBER OF ANTIDUMPING INITIATIONS WORLDWIDE

Source: Data extracted from WTO (2004)

The second argument accepts that antidumping laws are often arbitrary and unfair, but contends that they are an improvement over the universal import taxes that went before. At least the current inequities and inefficiencies are inflicted only upon specified countries and not the world at large. The average compliance costs, they suggest, are lower under the present system than they might otherwise have been. The same could be said, however, of a random application of country-specific import taxes. Furthermore, the facts simply do not agree with this suggestion.

Holden (2001, pp. 5 ff.) analyses the types of antidumping actions that were successful in South Africa between 1991 and 1998. Most striking, she notes (p. 7), is that intermediate products are the most consistently rewarded with antidumping support, despite having relatively low tariff barriers both before and after the liberalisation of the 1990s. Import duties which ranged from

University of Cape Town

0% to 28% (averaging 21% from 1992 to 1994 and 16% from 1995 to 1998) have been replaced with antidumping duties ranging from 15% to 202%, with an unweighted average of 52%. These percentages are not wholly comparable, since the import duties were targeting a different set of products. Nonetheless, the direction of change is clear.

Were one able to take into account the direct costs associated with actually investigating, determining, prosecuting and policing the present slew of dumping allegations, the situation becomes even less palatable. It is the implicit costs and opportunity costs, however, that are more difficult to quantify. Since the administrative and legal burden is borne by the private sector, these are seen as less politically important, despite their consequences for individual firms. The steel industry example given earlier, has left Iscor "defiantly refusing to defend itself against an antidumping suit that threatens what was its single largest export" (Business Day, November 15th 1999, p. 17).

The Uruguay Round of the GATT effectively ended some of the severest trade distortions of the 20th century, in particular, the multi-fibre agreement (MFA) and the use of voluntary export restraints (VERs). The MFA, which for 40 years was one of the few protectionist policies which dispensed with the "fair trade" rhetoric, is being phased out over a 10-year period and the WTO's standard emphasis on "most favoured nation" status is once again applied to the international trade in yarn, fabrics, textiles and clothing. VERs, which relied on the credible threat of full trade sanctions to make them "voluntary", affected around 400 tariff lines in the US and the EU during the 1980s (Safadi and Laird, 1996, p. 1229). Almost immediately, however, protectionists turned to the previously underused antidumping laws. The progress made under the GATT is currently being undone as developing countries resort more and more often to these laws as the non-tariff barrier of choice.

4.4 CONCLUSION: OFF TARGET

The Board of Tariffs and Trade (BTT, 1996, p. 9) states that "[i]n the wake of reducing tariffs, the South African Government committed itself to strengthening antidumping and countervailing capacity, and full compliance with the World Trade Organisation rules". But the Board is deceiving itself and the public: the WTO antidumping rules set out the *most restrictive* laws permitted, not the *minimum necessary* for compliance. The Board is pleased (BTT, 1996, p. 2) with the extensive use of the legislation, rather than concerned by the possibility that though dumping is not on the rise, abuse of the antidumping legislation is increasing. The academic

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literature and public statements reported in this chapter suggest that antidumping legislation is now of greater concern than the dumping it tries to prevent.

The standing legislation and the rules currently implemented are being abused by producers to the detriment of consumers and downstream producers. Improving matters now, while the economy is in transition and the legislation is still malleable, will be easier than when the antidumping inequities become entrenched in the system. By then, the lobbyists will have more power and the sunk costs will be higher as more people will have come to rely on the flawed legislation. The target should not be dumping *per se*, but rather those producers who exploit inefficiencies (in local laws and foreign markets) to destroy competition. The next chapter examines ways of counteracting the abuse that results from placing producer interests ahead of consumer welfare.

University of Cape Town

CHAPTER 5: SOLUTION

"[I]t doesn't take a rocket scientist to avoid the imposition of dumping duties if a company is careful in the way it prices its products for overseas sale."

Charlene Barshefsky, Clinton-era U.S. trade representative
[Business Day, March 17th 1999, p. 1]

ALL'S FAIR IN TRADE AND WAR

It has been seen that the consequences of dumping can be negative, so some form of intervention may be required to counter anti-competitive practices in international trade. However, since not all cases of dumping are welfare-reducing, changes to the current form of antidumping legislation are needed. Furthermore, even where the legislation itself is reasonable, the antidumping investigations are sometimes carried out in an undemocratic and self-serving manner, lacking objectivity and transparency. This problem may stem from the authorities' almost explicit willingness to pander to the interests of local producers, with little concern for the deleterious effects this will have on local consumers and on those producers with imported inputs. All of which is to say nothing of the xenophobia inherent in a system that turns a willing-buyer willing-seller market into us-versus-them warfare.

In this chapter, it is argued that in the interests of both social-welfare and of simple fairness, South Africa should do away with the WTO related antidumping legislation and rely instead upon the Competition Act (1998) to regulate economic behaviour. Any attempts by locals or foreigners to undermine competition in the marketplace could then be prevented without regard to nationality, and with a focus firmly set on the promotion of effective competition.

To present this argument, a set of stylised points taken from Chapters 1 through 4 of this paper is offered. The Competition Act is then reviewed and the stylised facts are used to show that substituting the requirements of the Antidumping protocol with those of the Competition Act will enhance economic performance. Finally, recognising that this approach is neither novel nor uncriticised, time will be taken to address the concerns raised in the literature, both locally and internationally.

University of Cape Town

5.1 Stylised Facts of Dumping and Antidumping

1) Dumping is a problem in international trade when goods are dumped for purposes of predation, or when it involves industries in which the state has a strategic interest. The latter is not of particular concern to this paper. As discussed in Chapter 2, strategic trade theory is only economically applicable in the large-country case. The former, however, is of concern and it is right that a government should want rules to protect its economy from predatory threats.

2) There are already arrangements in place to smooth the transitional phases of industries that are in terminal decline or cannot compete with short-run import surges. Legislative intervention to support such firms in the long run is economically inefficient if the inter-country pricing differentials reflect improved productivity or significant economies of scale.

3) Even the threat of antidumping investigations can be ruinous for firms, so the legislation becomes an effective weapon in the protectionist arsenal of an entrenched firm, or cartel of firms, wishing to maintain a dominant local position. The targets of any antidumping investigation need significant resources (in terms of financing and staff-availability) to effectively defend themselves in such an investigation[1]. Furthermore, they become susceptible to the fall in customer-orders and investor-confidence which is the inevitable concomitant of any such investigation being announced.

4) There is no clear "public interest" clause in the current antidumping framework. The microeconomic focus on the firms and industries involved (in terms of prices, quantities and profits) ignores the macroeconomic implications of both the alleged dumping and the antidumping retaliation. Thus firms securing a "guilty" verdict benefit from the enforcement of higher prices, to the detriment of downstream industries and consumers generally.

Political economy aside, the US trade representative's advice that a company be "careful in the way it prices its products for overseas sale" is not a real solution for those foreign producers who are trying to sell into a protected market. One should support competition in and of itself, rather than those local producers who are uncompetitive without government protection.

[1] This is true for firms importing from abroad and for those foreign firms exporting to the country.

University of Cape Town

5.2 THE DEFINITION(S) OF "COMPETITION"

Before arguing that protecting competition should be an end in itself, "competition" has to be defined[2]. Bork (1993, pp. 58f.) gives at least 5 different meanings of the word, each with its own economic spin and downfalls.

"Competition" could be seen as a process of rivalry, although this is not to say that the absence of rivalry implies a lack of competition or that the situation must be illegal. Rivalry is not an end in itself and Bork takes an almost game-theoretic perspective in recognising that advocating rivalry for its own sake would be advocating the inefficient and thoughtless waste of scarce resources.

Another definition of "competition" is "the absence of restraint over one person's or firm's economic activities by another". This is meaningful but not useful since all contracts contain some or other form of such "restraints". Whether it relates to how the firm can enforce payment, or when the supply of goods and services is due, mutually agreed restraints underpin corporate law.

Stigler's definition, relating competition in markets to the existence of perfectly elastic supply and demand curves faced by individual buyers and sellers respectively, is theoretically more sound, but significantly less practicable. The perfect competition model is a tool of economics, not a legal construct, and it is wrong to think that any deviation from it is necessarily bad.

From an antitrust perspective, competition often means the fragmentation of markets and industries, and the promotion of small businesses. But this is to hope that fuzzy economics and a vague social conscience can lead to legal certainty. Not only is this definition without substance, but its lack of clarity offers little help to large enterprises trying to establish, *ex ante*, the behavioural limits they face.

Finally, Bork offers consumer welfare as the unit of measurement: "Competition" is that market state in which consumer welfare is maximised, while "unfair competition" is a movement

[2] The Competition Act, remarkably, fails to define the word at all. The closest it comes is at the definition of "market power" (1(1)(xiii)), which refers to "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers". This simply places us back in the definitions game, however, since "control" and "appreciable extent" are never defined.

University of Cape Town

towards an equilibrium point in which consumer welfare is reduced[3]. This has the advantage of practicality, and might appeal to SA legislators, measurement difficulties notwithstanding.

5.3 DUMPING AS AN ANTI-COMPETITIVE PRACTICE

Incorporating the current antidumping legislation into the Competition Act, would move the emphasis away from protecting producer-interests to protecting consumer-interests. This would allow "competition" to be more closely associated with the "equity" and "social justice" aspirations of the country. This section examines the Competition Act (1998) and explains why it would provide better protection than the current antidumping legislation.

5.3.1 THE COMPETITION ACT (1998)

The Competition Act has eight chapters. In Chapter 1, the definitions and objectives (both economic and social) of the Act are given. Chapter 2 deals with prohibited practices, in particular: restrictive horizontal practices, restrictive vertical practices and the abuse of a dominant position. Chapter 3 is the final one of substance and deals with the control of mergers and acquisitions. It allows for interested parties to object to any merger on the grounds of its effect on: an industrial sector or region; employment; competition by small firms; competition by the historically disadvantaged; international trade. Chapters 4 through 8 are more administrative and deal with the establishment of competent authorities, procedural requirements for each party concerned, remedies and punishment available, possible offences arising and general provisions of the Act, respectively.

It must be admitted, from the start, that the Competition Act itself is far from perfect. It was drafted and passed with sincere intent but by removing the burden of proof from the state, it seems consistently biased against the defendants. On the other hand, it allows for judicial override in the interest of fairness, so there are still a number of good reasons for replacing the requirements of the current antidumping legislation with the requirements of the Competition Act, flawed as it is.

5.3.2 ADVANTAGES OF THE PROPOSED AMALGAMATION

Firstly, the Competition Act avoids a number of pitfalls into which South Africa's antidumping authorities have regularly fallen. In particular, the Act emphasises the duties incumbent upon a

[3] The further complications of multiple equilibria and the effects of moving between them are not examined in this paper

University of Cape Town

firm in a "dominant position" to respect both the welfare of its consumers and the needs of its competitors. Antidumping legislation's sole focus on the protection of local producers is thus tempered.

Secondly, the informational asymmetries that almost oblige antidumping authorities to find in favour of local incumbents are reduced during a Competition Court investigation. The procedural requirements of the Competition Act are stricter and more transparent than those of the antidumping legislation. The former, for example, only allows the rationale and evidence for its findings to be kept secret where it is clear that the exposure of such proprietary information would significantly harm the firm. Antidumping determinations, however, are not required to make public any background or explanations other than the time-frame and percentage of the duty imposed.

Thirdly, if it is accepted that there is room for improvement in the way the authorities view competition and anti-competitive practices, then one Act is better than two. This would prevent conflicts between what are close allies (theoretically, at least) in the regulation of fair competition. Any changes made to a joint act would also have farther reaching effects and so no single interest-group would be able to hijack the legislation and amend it to reflect only their own concerns. It is true that such changes would therefore take longer to pass parliamentary muster, but this would be counterbalanced by the fact that the same arguments for and against competition, and antidumping as a subsection of it, would have to be heard only once, not twice.

In its favour, the Competition Act applies not only to local and foreign firms within the country, but also to South African firms operating abroad. Thus locals can be judged guilty of abusing competition in foreign markets and forced to comply. This prevents instances of unfair play in small countries with a limited ability to police their own markets and also in well-regulated countries that are nonetheless hampered in their efforts by time, information and foreign judicial process.

Furthermore, the Act reduces business risk by allowing for recourse to foreign precedent. It refers in section 4(2) to "applicable foreign and international law" being considered in "interpreting or applying this Act". This serves to promote consistency in trade law and so

University of Cape Town

counteracts the uncertainty that locals and foreigners might otherwise face in setting up business in South Africa.

The Act explicitly acknowledges in its preamble that the protection and promotion of competition are not its only goals. It reads:

> "The people of South Africa recognise
>
> That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, weak enforcement of anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans.
>
> That the economy must be open to greater ownership by a greater number of South Africans.
>
> That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy.
>
> That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans."

Nonetheless, antidumping considerations fall easily within the scope of the Act, since it promises to "restrain particular trade practices which undermine a competitive economy" and to "establish independent institutions to monitor economic competition". Recognition of this overlap is implicit in the directives of the European Union and the USA (Guasch and Rajapatirana, 1998, p. 23): neither trade bloc allows its member countries or states to impose antidumping duties against each other. Instead all such cross-border disputes are resolved within the framework of their competition policies. Similar arrangements are in place between New Zealand and Australia, showing that the idea is more common and less difficult to implement than many critics might believe.

University of Cape Town

5.4 COMPETITION AS A PRIMARY CONSIDERATION

Laws are envisioned, drafted, interpreted, enforced, analysed and, invariably, criticised by various members of the public (general and learned, common and cognoscenti). The protracted nature of this process means a law's initial intent often lies some distance from its final form. It appears that antidumping legislation, although intended to promote free trade and fair competition, is now at odds with that very concept. This section examines how antidumping legislation could be incorporated into the framework of the Competition Act and thereby strengthen it, rather than weaken it.

As Tavares (2001, p. 7) notes, antidumping and competition policies are presently opposed from both a legal perspective (the former allows price undertakings and trade restrictions which the latter definitely would not) and an economic perspective (they promote, respectively, producer welfare and consumer welfare to the other group's detriment). This leads to differing

assumptions being made during the investigations about, for example, the relative market power of each firm or impact of a firm's actions on the wider economy; not all of these assumptions are explicitly stated or investigated.

When firms have already been found guilty of anti-competitive behaviour they should find their antidumping petitions subject to rigorous examination of the standard economic variables described above. Although this has not been tested in South African courts, international experience suggests that firms abusing their dominant position forgo their right to antidumping protection. For example, the 1996 conviction of the three largest US producers of ferrosilicon for conspiracy to fix the US prices led the ITC to revoke the antidumping protection it had previously granted them "in the erroneous belief that the US ferrosilicon market was competitive and price sensitive" (Tavares, 2001, p. 15).

Similarly, European soda ash producers were fined in 1990 for anti-competitive practices within the EU. One of their means of restricting product flow and manipulating prices was to block US and Eastern European imports by invoking antidumping protection. As part of the competition investigation, their antidumping measure was reviewed and suspended in the same year (Tavares, 2001, p. 14). This is distinct from the European case of Pechiney, where the firm's EU-wide monopoly was deemed unimportant in granting it antidumping protection from Chinese and Russian imports of calcium metal (Tavares, 2001, p. 15).

This suggests that the antidumping assumptions of healthy competition in the domestic market are not questioned on a regular basis, but are likely to be reconsidered if firms in the industry are found guilty under competition legislation. The converse case, however, of anti-competitive behaviour being allowed to continue because of an existing antidumping measure, is unrecorded in either the EU or US (Tavares, 2001, p. 15).

This implies that incorporating the antidumping laws and the protection they offer into the Competition Act as it stands would enhance the latter and reinforce its primacy. To succeed in an antidumping petition, the only question needing answering would be whether the long-term levels of competition were being increased or reduced by the action. (A worrying commonality of the successful applications analysed by Holden (2001, p. 7) was the extreme market concentration enjoyed by domestic producers. 69% of the applicants had monopolies on their

University of Cape Town

producer in South Africa, suggesting they were using the antidumping legislation to reinforce their dominance in the face of foreign competition.)

The complaints process should, furthermore, be open to foreigners, locals or disinterested third parties (e.g. the BTT itself). The offenders, similarly, need not be foreigners. As shown previously, reverse dumping by local firms can be as anti-competitive as predatory dumping by foreign firms. The two key problems identified with antidumping legislation would hereby be countered: its single-minded obsession with producer welfare to the detriment of the economy as a whole; and the potential for individual players to abuse the legislation in order to reduce the competition they face from foreign imports.

5.5 Political and Legal Considerations

Antidumping legislation is above all, a political issue. Its economic foundations, as shown in previous chapters, are relatively weak and subject to attack on a number of fronts. So it should be no surprise that ridding the country of this legislation will depend more on political will than economic arguments. Those who have relied on it as a saviour of last (or first) resort will need to be reassured that they will not be deprived of its protection overnight.

University of Cape Town

In this regard, a phasing-out provision with a believable timetable is recommended. Granting the legislation a life of, say, five years, and insisting on sunset clauses of three years for both current and future antidumping duties would allow industries time to restructure and wean themselves off of reliance on the protection. In the interim, more reliance should be placed on safeguard measures to provide temporary protection to inefficient industries. As Tavares (2001, p. 11) explains, these are more transparent and focussed on a more efficient outcome. Safeguards allow government and industry the necessary time to either restructure or contract in a coordinated and smooth transition.

If South Africa were to be a first-mover in this area it could reap a double advantage. In addition to the benefits of freer trade, concessions could be secured from other countries in return for an undertaking by South Africa not to impose antidumping duties on their goods. As a country willing to forgo the antidumping powers granted to it, it would have a valuable bargaining chip in international trade talks (Anderson, Schmitt and Thisse, 1995, pp. 335).

Beyond the question of how the changes recommended in this paper might affect the Republic *per se*, the effects on the SACU and the SADC as a whole must also be considered. The Tariffs and Trade Act says that "'dumping' means the introduction of goods into the commerce of the Republic or the common customs area of the Southern African Customs Union at an export price which is less than the normal value of the goods".

South Africa's reliance on high tariffs and antidumping regulations has been a bone of contention between SACU members in the past. Botswana, Lesotho, Namibia and Swaziland have each refused to have representatives sit on the BTT because the current tariff structure protects South African producers to the detriment of those countries' consumers (Business Day, August 24th 2000, p. 1). It is unlikely that any Southern African country would object strenuously to the replacement of the antidumping laws with the competition act, given that none of them has instituted a single action for at least 7 years – although Mozambique was the victim of one of South Africa's 155 antidumping initiations over the same period (WTO, 2001).

5.6 ADDRESSING THE CONCERNS

Arguments for and against synchronising trade and competition policies are neither new nor narrow. Hoekman (1997, pp. 4ff.) sets out the history and scope of the debate, offering the following potential linkages between the two: replacing antidumping laws with antitrust laws; allowing antidumping actions to be mitigated by antitrust considerations; only allowing antidumping findings to be upheld against foreign firms benefiting from barriers to entry; or raising the level of proof and harm needed to institute antidumping actions. Although he does not make final recommendations one way or the other, Hoekman does suggest three considerations in the debate.

First, he urges any changes to aim at increasing rather than decreasing the contestability of markets for foreign firms (p. 8). Given the anti-foreigner bias described in Chapter 4, this seems likely to be ensured by entire replacement of antidumping legislation suggested in this paper. Contestability, as discussed earlier, has positive ramifications for equity and efficiency.

Secondly, Hoekman argues (pp. 11 ff.) that national welfare is strengthened through the adoption and enforcement of antitrust rules, but that the power of large foreign firms may allow them to influence or even dominate the decisions of a weak competition authority. This concern appears overstated for two reasons, however. The less substantial reason is that it

University of Cape Town

ignores the powerful cabals of local firms and politicians to be found in many developing countries that have already suffered decades of corruption and influence-peddling. More fundamentally, however, it presupposes that an antidumping authority would be less susceptible to such moves. If anything, the wider range of interest groups lobbying a more powerful competition authority would grant it more transparency and less insularity.

Finally, there is the question of minimum standards and cross-border regulation (p. 15). Given the diversity of competition laws versus the relative conformity of antidumping laws, could any single country plausibly replace the latter with the former and still expect multilateral cooperation? The short answer is that the WTO is possibly still too young and too dependent on the power of individual blocs to argue effectively on behalf of countries opting to change.

But a more shrewd analysis shows that even if the laws themselves are rather similar (as seen in Chapter 3), their implementation by national authorities is neither predictable nor consistent (as seen in Chapter 4). Hartzenberg and Cassim (2000, p. 19) question the sincerity of South Africa's liberal economic policy stance, given the numerous examples of "tariff increases, anti-dumping protection, and the spate of applications for protection". Holden (2001, p. 7) reports that applications for increases in tariff duties resulted in average of support of 65% in the period 1995 to 1998, up from 42% in the period 1990 to 1994, while antidumping actions rose to 74% from 45% in the same periods.

When the Board on Trade and Industry Act was introduced in 1992, the government linked three forms of trade protection for the first time: these were against "dumping", "subsidized export" and, significantly, "disruptive competition" (BTT, 1996, p. 8). Clearly some reference to competition was needed, though, as the BTT itself emphasised, the legislation against dumping is enabling, rather than prescriptive. Thus the Board *may* "investigate, report and make recommendations to the Minister of Trade and Industry" (BTT, 1996, p. 9), but the applicant does not have an automatic entitlement to protection. Some have argued that this acknowledgement of the importance of competition is sufficient to grant the Board license to act in the interests of the economy, without forcing its hand.

In practice, however, the Board appears to view market manipulation by local firms as an issue of competition, but market manipulation by foreign firms as an issue of dumping (Gillespie, 1996). This distinction makes circumvention a relatively simple matter: shift the location of

University of Cape Town

production (Safadi and Laird, 1996, p. 1233). This need not even involve the expense of moving productive resources, since the variety of imported goods needed for manufactured items makes "country of origin" a somewhat subjective term. Even primary products such as foodstuffs, minerals and chemicals can be ostensibly sold from a third country to circumvent an imposed anti-dumping duty, although the WTO's unwieldy rules-of-origin agreement attempts to counter this.

It is plausible that the two laws should work in unison rather than opposition. Guasch and Rajapatirana (1998, pp. 4-5) agree that competition in the form of imports can effectively curb market power, but that one would not want simply want to replace a set of dominant local producers with dominant foreign producers. Instead of preventing foreign competition, legislation should prevent foreign dominance. To this end, a wider application of the Competition Act would bring about "consistency and at least coordination if not integration between competition policies and trade policies." At the core of the various antidumping codes lies the worry of predatory pricing and abuse of market power, issues which are wholly covered by the Competition Act as it stands.

University of Cape Town

5.7 CONCLUSION: IDENTIFY THE NEW TARGET

It is not difficult to spot the inconsistencies of most countries' approach to free trade: it seems to be something that is good only for other countries to have. Thus, for example, the first Japanese aim at the WTO is "to set up a framework to avoid the abuse of antidumping laws because the Japanese steel industry was completely beaten up by the US Commerce Department. The second is to avoid a steep liberalisation in agricultural and timber product areas." (Takashi Nobehara, Asian Studies Centre at the Japan Research Institute, Business Day, November 22nd 2000, p. 8).

This chapter has shown how amalgamating the antidumping legislation with the competition legislation would promote the interests of both social-welfare and simple fairness. South Africa should do away with the WTO-related antidumping legislation and rely instead upon the Competition Act to regulate economic behaviour. Any attempts by locals or foreigners to undermine competition in the marketplace could then be prevented without regard to nationality, and with a focus firmly set on the promotion of effective competition.

CONCLUSION

> "A long history of industrialisation faces new challenges. … What we need to avoid is a situation where measures like antidumping and other complex support measures get used to protect industries beyond their lifespan."
> Alec Erwin, Minister of Trade and Industry
> [Business Day, September 27th 1999, p. 4]

To misquote the opening lines of this paper, one suspects it would be political suicide for a respectable leader of a respectable nation to declaim, in this day and age, anything other than the antidumping mantra. No matter how unsound the argument, or how illogical and unfair the solution, the WTO antidumping code is unlikely to be eliminated in the near future. Nonetheless, given that the WTO sets out the maximum duties permissible, not the minimum required action, any individual country, say South Africa, could in theory choose to forgo its "right" to impose such duties. This paper has shown why this would be beneficial not only to South Africa's consumers and upstream producers, but to the very concept of free trade.

THE END OF THE WAR AS WE KNOW IT

Chapter 1 explained why most economists believe that trade is not just war by other means, and that unrestricted trade is preferable to the phantasmagoria of taxes, duties, quantity restrictions and legislative interference that comprises most modern "trade policy". Chapter 2 showed why economists accept that, in a limited number of instances, there is reason to intervene when individual companies attempt to manipulate the free-trade system for their own benefit, in particular through dumping. It bears repeating, though, that this manipulation is very different from simply turning a profit or even capturing market share.

Chapter 3 gave details of the legislation that governments have put in place, in South Africa and elsewhere, to prevent this dumping. Chapter 4 argued that the antidumping rules as they now stand fail in at least two critical areas: they are open to abuse by unscrupulous local producers and are too cumbersome to prevent actual instances of anti-competitive dumping by foreign producers.

Chapter 5 offered a solution in the form of a reworked Competition Act that could replace the current antidumping code in its entirety. It looked at the practicalities involved in implementing this change and suggested ways in which to minimise the disruptions to the legal and economic participants in South Africa and our trading partners. The advantages of such action, as well as

University of Cape Town

the potential pitfalls, were examined and it was concluded that the benefits would outweigh the costs.

Little more can be done than to repeat that the problem of dumping and the solution of antidumping have been long-recognised and long-rejected, respectively, by many economists. The issues have moved beyond economics – they are now almost entirely in the realm of politics. South Africa is a heavyweight (as developing countries go) in the international debate for trade which is both free and fair. It must take a leading stand against the counterproductive inefficiencies of the WTO antidumping code: we are not at war, it is time to dismantle the barricades.

University of Cape Town

APPENDIX 1

This paper	WTO classification	
Agriculture	I	Live animals; animal products
	II	Vegetable products
	III	Animal or Vegetable Fats and Oils and Their Cleavage Products; Prepared Edible Fats; Animal or Vegetable Waxes
Consumer products	IV	Prepared Foodstuffs; Beverages, Spirits and Vinegar; Tobacco and Manufactured Tobacco Substitutes
Metals & Mining	V	Mineral products
Chemical & Photographic	VI	Products of the Chemical or Allied Industries
	VII	Plastics and Articles Thereof; Rubber and Articles Thereof
Consumer goods	VIII	Raw Hides and Skins, Leather, Furskins and Articles Thereof; Saddlery and Harness, Travel Goods, Handbags and Similar Containers; Articles of Animal Gut (Other than Silk-Worm Gut)
Wood products	IX	Wood and Articles of Wood; Wood Charcoal; Cork and Articles of Cork; Manufactures of Straw, of Esparto or of Other Plaiting Materials; Basketware and Wickerwork
	X	Pulp Of Wood or of Other Fibrous Cellulosic Material; Recovered (Waste and Scrap) Paper or Paperboard; Paper and Paperboard and Articles Thereof
Manufactured products	XI	Textiles and Textile Articles
Consumer products	XII	Footwear, Headgear, Umbrellas, Sun Umbrellas, Walking-Sticks, Seat-Sticks, Whips, Riding-Crops and Parts Thereof; Prepared Feathers and Articles Made Therewith; Artificial Flowers; Articles of Human Hair
	XIII	Articles of Stone, Plaster, Cement, Asbestos, Mica or Similar Materials; Ceramic Products; Glass and Glassware
Metals & Mining	XIV	Natural or Cultured Pearls, Precious or Semi-Precious Stones, Precious Metals, Metals Clad with Precious Metal and Articles Thereof; Imitation Jewellery; Coin
	XV	Base Metals and Articles of Base Metal
Manufactured products	XVI	Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers, and Parts and Accessories of Such Articles
	XVII	Vehicles, Aircraft, Vessels and Associated Transport Equipment
Chemical & Photographic	XVIII	Optical, Photographic, Cinematographic, Measuring, Checking, Precision, Medical or Surgical Instruments and Apparatus; Clocks and Watches; Musical Instruments; Parts and Accessories Thereof
Manufactured products	XIX	Arms and Ammunition; Parts and Accessories Thereof
	XX	Miscellaneous manufactured articles
Consumer products	XXI	Works of Art, Collectors' Pieces and Antiques
	..	Unknown

APPENDIX 1: ANTIDUMPING CATEGORISATION IN THIS PAPER AND THE WTO

Source: WTO, 2004

University of Cape Town

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University of Cape Town