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The Korean Chip Dumping Controversy: Are They Accused of Violating an Unjust Law

Cover Page Footnote

International Law; Commercial Law; Law

The Korean Chip Dumping Controversy: Are They Accused of Violating an Unjust Law?

Yeomin Yoon†

This Article reviews a recently decided International Trade Commission antidumping case involving Korean computer chips.¹ Part I reviews and analyzes the controversy. Part II points out some of the most serious problems with the current United States antidumping policy from a law and economics perspective. Such problems include the inherently problematic and untrustworthy nature of determining the average foreign market value or the cost of production on which the antidumping duty is based. In addition, Part II addresses the costs of protectionist measures in U.S. antidumping policy. Part III discusses ethical and philosophical issues bearing upon U.S. antidumping policy. It points out that using antidumping laws to restrict competition is a perversion of the law and yet such perversions are often advocated in the name of the "public interest." Part III also addresses the antidumping law from a utilitarian perspective, which is the usual methodology used by law and economic theorists. Finally, Part IV concludes not only that the legal methodology by which the Korean chip manufacturers were found liable is deeply flawed, but that the law itself is unjust and harms American consumers.

I. The Controversy

A. *An Overview*

Over the past few years, a number of South Korean industries have been hit with antidumping actions for allegedly selling their products in the United States at prices that are too low. Korean products allegedly dumped on the U.S. market include automotive batteries,² ball

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¹ DRAMs of One Megabit and Above from the Republic of Korea, USITC Pub. 2629, Inv. No. 731-TA-556 (May 1993) (final admin. review) [hereinafter Korean DRAM Case].

² 12-Volt Lead-Acid Type Automotive Storage Batteries from the Republic of Korea, USITC Pub. 1710, Inv. No. 731-TA-261 (June 1985) (prelim. review).

bearings,³ brass sheet and strip,⁴ cast-iron pipe fittings,⁵ cold-rolled carbon steel,⁶ color picture tubes,⁷ flat-rolled carbon steel,⁸ industrial belts,⁹ motorcycle batteries,¹⁰ nitrocellulose,¹¹ offshore platform jackets and piles,¹² photo albums,¹³ polyethylene terephthalate film, sheet and strip,¹⁴ stainless steel butt-weld pipe fittings,¹⁵ steel pipes and tubes,¹⁶ sweaters,¹⁷ telephone systems and subassemblies,¹⁸ tubular goods,¹⁹ and welded stainless steel pipes.²⁰ While the number of antidumping actions that have been brought against Korea in recent

³ Ball Bearings, Mounted or Unmounted, and Parts Thereof, from Argentina, Austria, Brazil, Canada, Hong Kong, Hungary, Mexico, the People's Republic of China, Poland, the Republic of Korea, Spain, Taiwan, Turkey and Yugoslavia, USITC Pub. 2374, Inv. Nos. 701-TA-307, 731-TA-498 - 511 (Apr. 1991) (prelim. review).

⁴ Certain Brass Sheet and Strip from Brazil, Canada, and the Republic of Korea, USITC Pub. 1930, Inv. Nos. 701-TA-269, 731-TA-311, 312, 315 (Dec. 1986) (final admin. review).

⁵ Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, USITC Pub. 1845, Inv. Nos. 731-TA-278 - 280 (May 1986) (final admin. review), *aff'd*, *Fundicao Tupy S.A. v. United States*, 678 F. Supp. 898 (Ct. Int'l Trade), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988).

⁶ Certain Cold-Rolled Carbon Steel Products from the Republic of Korea, USITC Pub. 1634, Inv. No. 701-TA-218 (Jan. 1985) (final admin. review).

⁷ Color Picture Tubes from Canada, Japan, the Republic of Korea, and Singapore, USITC Pub. 2046, Inv. Nos. 731-TA-367 - 370 (Dec. 1987) (final admin. review).

⁸ Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, USITC Pub. 2549, Inv. Nos. 701-TA-319 - 354, 731-TA-573 - 520 (Aug. 1992) (prelim. review).

⁹ Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, the United Kingdom, and West Germany, USITC Pub. 2194, Inv. Nos. 701-TA-293, 731-TA-412 - 419 (May 1989) (final admin. review).

¹⁰ 12-Volt Motorcycle Batteries from the Republic of Korea, USITC Pub. 2203, Inv. No. 731-TA-434 (July 1989) (prelim. review).

¹¹ Industrial Nitrocellulose from Brazil, Japan, People's Republic of China, Republic of Korea, United Kingdom, West Germany, and Yugoslavia, USITC Pub. 2194, Inv. Nos. 731-TA-439 - 444 (June 1990) (final admin. review).

¹² Offshore Platform Jackets and Piles from the Republic of Korea and Japan, USITC Pub. 1708, Inv. Nos. 701-TA-248, 731-TA-259 - 260 (June 1985) (prelim. review).

¹³ Photo Albums and Photo Album Filler Pages from Hong Kong and the Republic of Korea, USITC Pub. 1660, Inv. Nos. 731-TA-240 - 241 (Mar. 1985) (prelim. review).

¹⁴ Polyethylene Terephthalate Film, Sheet, and Strip from Korea, and Taiwan, USITC Pub. 2292, Inv. Nos. 731-TA-458 - 460 (June 1992) (prelim. review); Polyethylene Film, Sheet, and Strip from Japan and the Republic of Korea, USITC Pub. 2383, Inv. Nos. 731-TA-458, 731-TA-459 (May 1991) (final admin. review).

¹⁵ Certain Stainless Steel Butt-Weld Pipe Fittings from Korea and Taiwan, USITC Pub. 2534, Inv. Nos. 731-TA-563 - 564 (July 1992) (prelim. review).

¹⁶ Certain Circular, Welded, Non-Alloy Steel Pipes and Tubes from Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela, USITC Pub. 2564, Inv. Nos. 731-TA-532 - 557 (Oct. 1992) (final admin. review).

¹⁷ Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan, USITC Pub. 2312, Inv. No. 731-TA-448-450 (Sept. 1990) (final admin. review), USITC Pub. 2577, Inv. No. 731-TA-448-450 (Nov. 1992) (on remand).

¹⁸ Certain Telephone Systems and Subassemblies Thereof from Korea, USITC Pub. 2554, Inv. No. 731-TA-427 (Jan. 1990) (final admin. review).

¹⁹ Oil Country Tubular Goods from Brazil, Korea, and Spain, USITC Pub. 1633, Inv. Nos. 701-TA-215 - 217 (Jan. 1985) (final admin. review).

²⁰ Certain Welded Stainless Steel Pipes from the Republic of Korea and Taiwan, USITC Pub. 2585, Inv. Nos. 731-TA-540 - 541 (Dec. 1992) (final admin. review).

years is cause for concern, this paper will focus on one antidumping action involving computer chips, *DRAMs of One Megabit and Above from the Republic of Korea*.²¹

B. Facts of the Case

By 1992, Korean competitors of Micron Technology, Inc. (Micron), of Boise, Idaho, represented twenty-eight percent of the U.S. market for dynamic random access memory computer chips (DRAMs).²² In an attempt to prevent further loss of U.S. market shares, in April 1992, Micron filed a petition with the U.S. Commerce Department asking it to rule that these competitors were selling their chips in the U.S. market for less than fair value, and to assess appropriate tariffs.²³ Micron proceeded under the Tariff Act of 1930.²⁴

²¹ Korean Dram Case, USITC Pub. 2519, Inv. No. 731-TA-556 (June 1992) (prelim. review).

²² U.S. companies bought \$800 million worth of Korean chips in 1992. See Robert Keatley, *U.S. Duties on Korean Semiconductors Raise Double-Edged Sword to Dumping*, WALL ST. J., Feb. 19, 1993, at A10.

²³ Korean DRAM Case, USITC Pub. 2519, at B-4, Inv. No. 731-TA-556 (June 1992) (prelim. review). Micron accused three Korean producers—Samsung Electronics Co., Goldstar Electronic Co., and Hyundai Electronic Industries—of selling below their cost of production. *Id.* Selling below the cost of production is a generally accepted reason for filing an antidumping suit. See, e.g., Geoff Crane, *Micron Technologies' Dram Dunk*, KOREA ECON. REP., June 1992, at 49. The items covered by this petition included processed wafers, uncut die, cut die, and assembled 1 Meg and above DRAMs produced in Korea and imported directly or indirectly into the United States; processed wafers produced in Korea and further processed into finished or semi-finished 1 Meg and above DRAMs in a third country before exportation to the United States; and finished or semi-finished DRAMs assembled in Korea from wafers produced in another country. 57 Fed. Reg. 18,163 (1992). The scope of this petition included memory modules, such as Single In-Line Processing Modules (SIPs) and Single In-Line Memory Modules (SIMMs), containing more than 1 Meg or above DRAMs mounted on their own small printed circuit board; memory cards, which are memory modules about the size of a credit card designed to be easily inserted into portable computers, printers, and similar hardware; video random access memory (VRAM), which is DRAM designed to improve the video performance of computers; and any future packaging and assembling of DRAMs. *Id.*

²⁴ Antidumping laws have been on the books in the United States for many decades. The first antidumping law was the Antidumping Duty Act of 1916, codified at 15 U.S.C. § 72 (1992). Because this Act was a criminal statute and had an intent requirement, it was difficult to convict anyone of dumping. Thus, it was necessary to enact another antidumping law, civil in nature, that would lower the level of proof needed for liability. The Antidumping Act of 1921 was passed for this purpose. See Antidumping Act of 1921, Pub. L. No. 67-19, 42 Stat. 11, codified at 19 U.S.C. §§ 160-171 (repealed 1980). The Antidumping Act of 1921 established the sanction of an offsetting duty against imported products dumped in the U.S. market. This Act also established a two-pronged legal process, still used today, by which one government agency (originally the Treasury Department but now the Commerce Department) determined whether a product was being dumped and another government agency (originally the Tariff Commission but now the International Trade Commission) determined whether the dumping caused injury. See Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 TEX INT'L L.J. 265, 268 (1987). Most provisions of the Antidumping Act of 1921 were later merged into the Tariff Act of 1930. See S. REP. NO. 249, 96th Cong., 1st Sess. 1, 60-61 (1979), reprinted in 1979 U.S.C.C.A.N. 341, 446-47.

Under the current law concerning antidumping proceedings, the Commerce Department is required to make a preliminary determination within 160 days from the time the petition is filed and a final determination 235 days from the time the petition is filed. 19

As a result of Micron's petition, the Commerce Department found sales below fair value and assessed final weighted average margins as follows: Goldstar, 4.97%; Hyundai, 11.45%; Samsung, 0.82%; others, 3.89%.²⁵ Some expect the move to save four thousand jobs in the American chip industry.²⁶

II. Legal and Economic Problems and Costs of U.S. Antidumping Policy

A. The Problems

1. Determining "U.S. Price" and "Foreign Market Value"

Determinations of dumping are found when sales of the foreign product are made at less than fair value (LTFV), which occurs when the foreign market value of the product is more than the product's U.S. price.²⁷ In the *Korean DRAM Case* Micron calculated the U.S. price based on observed price quotes of DRAMs by U.S. distributors, making deductions for the distributors' markups and movement expenses.²⁸ Foreign market value (or fair market value) can be determined based upon home market price, constructed value, or third country prices.²⁹ Micron demonstrated home market price by using:

U.S.C. § 1673b (1980 & Supp. 1992). The Commerce Department may extend a preliminary antidumping determination for 50 days and the final determination for 60 days, under certain circumstances. *Id.* On the other hand, the final determination by the International Trade Commission may be made as late as 420 days after the petition is filed. See U.S. INTERNATIONAL TRADE COMMISSION, SUMMARY OF STATUTORY PROVISIONS RELATED TO IMPORT RELIEF 8-16 (no date).

²⁵ *Korean DRAM Case*, USITC Pub. 2629, Inv. Nos. 731-TA-556 (May 1993) (final admin. review). The final margins were erroneously reported in 58 Fed. Reg. 15,481 (1993).

The European Community Commission has also charged Korean DRAM manufacturers with dumping. The EC assessed them with a 10.1% tariff. The small penalty is seen by some people in the industry as sending a message to the Koreans that the EC does not want to derail Korean advances against the Japanese, who dominate the market. See Naomi Freundlich, *The Korean Semiconductor Boom Boomerangs*, Bus. Wk., Oct. 5, 1992, at 107. In the 1 Meg DRAM segment of the market, one Korean company, Samsung, supplies about half of Europe's needs. Samsung and the other Korean companies are able to undercut the competition in Europe by between 18% and 120%. See *EC Sets Korean DRAM Duty, Floppy Probe*, ELECTRONIC NEWS, Sept. 21, 1992, at 1, 4. The European complaint was filed on behalf of Siemens AG, SGS-Thomson Microelectronics, and Motorola's U.K. unit, all of which stand to lose business if the Korean companies keep their prices low. *Id.* at 4. One day after the Commission imposed the 10.1% antidumping tariff, the Korean Trade and Industry Ministry (MTI) made an attempt to appease the Commission by introducing a check price system on the three Korean chip manufacturers. Kim Nak-Hieon, *EC Slaps Tax on Korean DRAMs*, ELECTRONICS, Sept. 28, 1992, at 3. In March, 1993, the EC and the Korean DRAM producers entered into an agreement to set minimum floor prices for exports to the European Community for five years. See, e.g., *Korean DRAM Case*, USITC 2629, Inv. No. 731-TA-556 (May 1993) (final admin. review).

²⁶ Keatley, *supra* note 22.

²⁷ See 57 Fed. Reg. 21,231 (1992); 58 Fed. Reg. 15,468-15,470 (1993); see also *ICC Indus., Inc. v. United States*, 812 F.2d 694, 697 (Fed. Cir. 1987).

²⁸ See, e.g., *Korean DRAM Case*, USITC Pub. 2519, Inv. No. 731-TA-556 (June 1992) (prelim. review).

²⁹ *Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, The Re-*

(1) average home market prices it obtained from Dataquest,³⁰ and (2) company-specific home market price quotes it received from an unidentified company.³¹ Micron also calculated the cost of production, i.e., constructed value, of one and four megabit DRAMs for each Korean manufacturer.³² Micron's computations included an assumed eight percent profit.³³

Micron argued that because the chips were being sold for less than the calculated cost of production, home market sales and third country sales were an inadequate basis for computing the foreign market value. Micron thus argued that the foreign market value should be set at cost of production.³⁴ Because the three Korean competitors defending the antidumping charge did not report to the Commerce Department all the financial data needed to make accurate cost of production computations, Micron's cost of production calculation was accepted under the "best available information at the time" rule.³⁵ Hence, Micron's computation of the cost of production was used as the foreign market value.

Cost of production calculations are, however, inherently problematic and are not necessarily trustworthy. First, differences in U.S. and Korean accounting methods pose problems. In Korea, companies are allowed a great deal of flexibility in spreading costs such as depreciation and research and development over several years. In the United States, companies must abide by strict depreciation schedules and claim other costs in the fiscal year during which the money is actually spent. Applying U.S. accounting standards could significantly raise Korean costs of production as defined by the Commerce Department.³⁶ A larger problem is simply determining which costs apply to which products. Korean manufacturers invested \$1.7 billion in new production equipment over the last three years. But some of that equipment is used for research and development and other semiconductor devices as well as for DRAMs. The technical rules for calculating costs lead to many arbitrary allocations.³⁷

public of Korea, and Taiwan, USITC Pub. 2312, Inv. Nos. 731-TA-448 - 450 (Sept. 1990) (final admin. review).

³⁰ Dataquest is a California-based company that provides information services for the computer industry.

³¹ Korean DRAM Case, USITC Pub. 2519, Inv. No. 731-TA-556 (June 1992) (prelim. review).

³² *Id.*

³³ 57 Fed. Reg. 21,232 (1992). An 8% profit margin assumption is permitted under the current antidumping policy. Such an assumption is unrealistic. Industry sources doubt that any maker, Japanese and U.S. included, is making an 8% profit off current prices for the 1 megabit or even the 4 megabit DRAM. See Crane, *supra* note 23, at 50.

³⁴ *Id.*

³⁵ See Plastic Animal Identification Tags from New Zealand, USITC Pub. 1094, Inv. No. 303-TA-14 (Sept. 1980) for an example of the application of the "best available information at the time" rule.

³⁶ See Crane, *supra* note 23, at 50.

³⁷ *Id.*

Second, the drop in the world market price of 1 Meg DRAMs from \$26.00 to about \$3.20 between 1988 and the time the antidumping action was filed in the first quarter of 1992³⁸ further complicates the computations.³⁹

2. *Using Average Foreign Market Value*

The use of an average foreign market value to determine whether dumping has occurred is analytically improper because it compares the foreign market value, usually the average foreign price, to an individual U.S. sale price, rather than comparing the average foreign price to the average domestic price. The Commerce Department can compute a dumping margin if the foreign company sells *any* units in the U.S. market for less than the average foreign price for the period being investigated.⁴⁰ Thus, if the foreign company charges a reasonable range of prices that includes the U.S. price over some relevant period of time, which is usually the case, it is possible that about half of the prices will be below the U.S. price and half will be above the U.S. price, resulting in fifty percent of the U.S. sales qualifying for a dumping margin.

The *Korean DRAM Case* is an excellent example of this analytically irrational comparison. One hundred comparisons were made between the prices Korean companies charged and the prices U.S. companies charged. In forty-seven cases, the Korean companies undersold the U.S. company by between 0.1% and 28.0%. In forty-eight cases, the Korean product had a higher price than the U.S. product by 0.3% to 69.2%. In the other five cases, the prices of the Korean and U.S. chips were identical.⁴¹ Overall, it would appear that the Koreans are not dumping at all, but are merely being competitive. In nearly half of the cases, the Korean price was actually more than the domestic company's

³⁸ *Id.*

³⁹ Chip prices have been volatile. Prices more than quadrupled in the late 1980s and dropped dramatically to become the cheapest ever in the early 1990s. In the first half of 1993, a 4 megabit chip sold for \$10.50 to \$11.00 in the spot market. By early August of 1993, the price had jumped to about \$20.00. Part of this price rise is attributable to a fire at the Sumitomo plant in Japan. Sumitomo provides about 60% of the world supply of a certain kind of epoxy, a glue that is used in chip packaging. See Peter H. Lewis, *Memory Chip Prices Take the Up Stairs Again*, N.Y. TIMES, Aug. 15, 1993, at 12F.

Another issue concerning price drops is cause and effect. As the dissenting opinion in the *Korean DRAM Case* pointed out:

The fact that prices for domestic DRAMs decreased during the period of investigation tells us nothing about whether the subject imports caused price depression or suppression. . . . DRAM prices decline as more firms progress along a learning curve, and so in the later stages of the product life cycle, as more firms move down the curve, DRAM prices will fall regardless of unfair trade practices. Later entrants will receive lower prices. These market forces, combined with the other factors discussed in this opinion, lead us to conclude that the price depression or suppression, if any, caused by subject imports is not significant.

USITC 2629, 48-49, Inv. No. 731-TA-556 (May 1993) (final admin. review).

⁴⁰ JAMES BOVARD, THE FAIR TRADE FRAUD 120-21 (1991).

⁴¹ *Korean DRAM Case*, USITC 2519, Inv. No. 731-TA-556 (June 1992) (prelim. review).

price.⁴²

The General Accounting Office has criticized the practice of using average prices because of the tendency to increase existing dumping margins or create dumping margins where none previously existed.⁴³ The Court of International Trade has stated that this method of price comparison is not reasonably fair.⁴⁴ In a 1989 case, the court stated:

When Congress amended the 1979 provision to authorize Commerce under section 1677f-1 to average both U.S. price and foreign market value in making comparisons, Congress did not direct Commerce to apply a stricter set of prerequisites when ascertaining the U.S. price. Legislative history discloses that by extending the use of averaging with respect to the U.S. price, the lawmakers wanted to "expand the instances in which the administering authority may use sampling and averaging techniques." . . . Despite this, it appears that Commerce almost universally averages only the foreign market value. The Court questions whether the impact of Commerce's current averaging policy relieves administrative burden to the extent that it leads to "loss of reasonable fairness in the results."⁴⁵

3. *Computing the Antidumping Tariff*

In computations of the antidumping tariff, there is a built-in bias against foreign companies.⁴⁶ When the U.S. price is more than the average foreign price, the Commerce Department assigns a "less than fair value" amount of zero, as if the average foreign price were equal to the U.S. price.⁴⁷ Conversely, if the U.S. price is less than the average foreign price, the Commerce Department assigns a positive LTFV equal to the amount the foreign market price exceeds the U.S. price.⁴⁸ By calculating the average LTFV, the Commerce Department arrives at the antidumping tariff.⁴⁹

To illustrate, if it is determined that the average foreign price is

⁴² The dissenting opinion in the final determination raised another point:

Although the underselling/overselling comparisons are almost evenly split, we do not place much weight on evidence of underselling. . . . [T]he confluence of demand for memory and the point in the product life cycle largely explain the price of DRAMs at any particular point in time. As a result of these market forces, price comparisons are only meaningful if they are contemporaneous, i.e., at the same point in the DRAM product life cycle. In this investigation, the price comparisons between domestic DRAMs and subject imports are not contemporaneous. Accordingly, the price comparisons do not constitute substantial evidence that any underselling is significant.

Korean DRAM Case, USITC 2629, 49, Inv. No. 731-TA-556 (May 1993) (final admin. review).

⁴³ See BOVARD, *supra* note 40, at 122, 163 n.59 (citing U.S. GENERAL ACCOUNTING OFFICE, U.S. ADMINISTRATION OF THE ANTIDUMPING ACT OF 1921, Mar. 15, 1979, at 21).

⁴⁴ NAR, S.p.A. v. United States, 13 Ct. Int'l Trade 82, 88 (1989).

⁴⁵ *Id.* (quoting H.R. REP. NO. 725, 98th Cong., 2d Sess. 1, 45-46 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5172-73 (1984)).

⁴⁶ See Knoll, *supra* note 24, at 278.

⁴⁷ See, e.g., Serampore Indus. Pvt. Ltd. v. United States Dep't of Commerce, 675 F. Supp. 1354, 1360 (Ct. Int'l Trade 1987).

⁴⁸ See, e.g., Carlisle Tire and Rubber Co. v. United States, 622 F. Supp. 1017, 1073 (Ct. Int'l Trade 1985).

⁴⁹ See, e.g., *id.*

ten dollars and the foreign supplier sells the product for twelve dollars in the U.S., then the sale is considered to be made at ten dollars. But if the sale is at eight dollars, then the sale is considered to be made at eight dollars. So if half the sales are made at eight dollars, with a LTFV of two dollars, and half are made at twelve dollars, with an LTFV of zero, then the LTFV margin will be ten percent.⁵⁰

4. *Applying the Exchange Rate Retroactively*

Changes in the exchange rates can cause a company to be guilty of dumping through no fault of its own—retroactively.⁵¹ In order to compare foreign and domestic prices, it is necessary to convert to a common currency. It is impossible, however, for foreign manufacturers to predict exchange rates in advance, as exchange rates constantly fluctuate. Nevertheless, it is the Commerce Department's view that exchange rates can be applied retroactively, thereby creating cases of dumping where none previously existed and making determination of safe prices by foreign manufacturers impossible.⁵² Hence, if exchange rates shift in the wrong direction, a foreign seller can be found guilty of dumping even if there was no intent to dump. Furthermore, manufacturers importing into the United States from countries experiencing hyperinflation can be severely penalized by the Commerce Department's methodology.⁵³

B. *The Costs*

1. *Monetary Costs*

Dataquest has estimated that the computer industry in the United States will have to pay ten to fifteen percent more for computer chips as a result of the ruling in the *Korean DRAM Case*.⁵⁴ They will have to

⁵⁰ The LTFV margin = $(\$2 \times 0.5 + \$0 \times 0.5) / \$10 = 0.1$ or 10%. The final LTFV margins as found by the Commerce Department are: Goldstar, 4.97%; Hyundai, 11.45%; Samsung, 0.82%; and all other manufacturers, 3.89%. See *Korean DRAM Case*, USITC Pub. 2629, I-II, Inv. No. 731-TA-556 (May 1993).

⁵¹ Commerce Department regulations provide that the rate used in foreign currency conversions is the rate in effect on the date of the sale. 19 C.F.R. §§ 353.46, 353.49, 353.50, 353.60 (1993). Because different rates were probably in effect throughout the production of the goods at issue, the application of a rate determined at a later date can distort the outcome of the investigation.

⁵² For more on this point, see N. David Palmeter, *Exchange Rates and Antidumping Determinations*, 22 J. WORLD TRADE, Apr. 1988, at 73.

⁵³ Some commentators have suggested that the Commerce Department use a different methodology in cases involving a hyperinflationary currency. See Gilbert B. Kaplan et al., *Cost Analysis under the Antidumping Law*, 21 GEO. WASH. J. INT'L L. & ECON. 357, 409-10 (1988). It should also be noted that a decision by the Federal Reserve Board to drive down the value of the dollar in comparison to other currencies can trigger antidumping margins where none previously existed. This means, in effect, that the Commerce Department is delegating exchange rate determination to the Federal Reserve Bank which, nominally, at least, is a private organization. Is such delegation constitutional? N. David Palmeter mentions this point in *Exchange Rates and Antidumping Determinations*, *supra* note 52, at 75.

⁵⁴ *DRAM Dumping: A Sudden Blockade?*, KOREA ECON. REP., Dec. 1992, at 27.

either pass on this cost to consumers, if they can, or absorb the extra cost in their profit margins.

Comparing antidumping laws to protectionist policies supports this proposition. Studies on protectionism are consistent in their findings that there is a deadweight loss as a result of protectionist policies, and that the losses consistently outweigh the gains. For example, a Brookings Institution study found that voluntary export restraints placed on cars cost consumers approximately \$14 billion in 1984.⁵⁵ Domestic automobile manufacturers gained only \$9 billion as a result of the restraints, which means the deadweight loss was \$5 billion dollars.⁵⁶ Another study estimated the loss from a certain auto quota arrangement to be between \$200 million and \$1.2 billion.⁵⁷ Studies of protectionism in steel,⁵⁸ textiles,⁵⁹ and agricultural products⁶⁰ also conclude that protectionism has a net cost rather than benefit.

In the present case, companies that use products containing computer chips will be hurt by the action because they must pay more for computer products, which will either reduce their profit margins or force them to raise prices, which will adversely affect their customers. It will also make a wide range of U.S. industries less competitive because of their increased cost structure.

The antidumping action is also expected to have an adverse effect on the trade balance.⁶¹ Interestingly, the Korean semiconductor industry specializes in memory chips, whereas the U.S. industry focuses on non-memory chips.⁶² The two segments of the industry complement each other. Until the early 1990s, Korea had been importing about \$600 million worth of U.S. chips each year, and U.S. companies

⁵⁵ Clifford Wilson and Assoc., *Blind Intersection? Policy and the Automobile Industry* 65-66 (1987), summarized in Thomas D. Hopkins, *Cost of Regulation*, ROCHESTER INSTITUTE OF TECHNOLOGY WORKING PAPER B8-9 (December 1991).

⁵⁶ *Id.*

⁵⁷ Jaime de Melo & David Tarr, *Welfare Costs of U.S. Quotas in Textiles, Steel and Autos*, 72 REV. ECON. & STAT. 489, 489-97 (1990).

⁵⁸ C. FRED BERGSTEN ET AL., AUCTION QUOTAS AND UNITED STATES TRADE POLICY 42 (1987); GARY CLYDE HUFBAUER ET AL., TRADE PROTECTION IN THE UNITED STATES: 31 CASE STUDIES 178-79 (1986); Robert C. Feenstra, *How Costly is Protectionism?*, 6 J. ECON. PERSPECTIVES 159-78 (1992); Susan Hickok, *The Consumer Cost of U.S. Trade Restraints*, 10 QTR. REV. 1, 8 (Summer 1985), Federal Reserve Bank of New York; Janet Novack, *Does Big Steel Really Need Protection?*, FORBES, March 16, 1992, at 37.

⁵⁹ WILLIAM R. CLINE, THE FUTURE OF WORLD TRADE IN TEXTILES AND APPAREL 14-16 (revised ed., 1990); HUFBAUER ET AL., *supra* note 58, at 146-48; Hickok, *supra* note 58, at 6, 18-19; Irene Trela and John Whalley, *Global Effects of Developed Country Trade Restrictions on Trade and Apparel*, 100 ECON. J. 1190, 1190-1205 (1990); Melo, *supra* note 57, at 493.

⁶⁰ Bruce L. Gardner, *The United States, in AGRICULTURAL PROTECTIONISM IN THE INDUSTRIALIZED WORLD* 52 (Fred H. Sanderson ed., 1990); CLIFTON B. LUTTRELL, THE HIGH COST OF FARM WELFARE 121-22 (1989); James E. Anderson, *The Relative Inefficiency of Quotas: The Cheese Case*, 75 A. ECON. REV. 178, 178-90 (1985); Feenstra, *supra* note 58, at 163.

⁶¹ Note that it has been argued that the trade balance is an irrelevant statistic. For an exposition of this view, see Robert W. McGee, *Trade Deficits and Economic Policy: A Law and Economics Analysis*, 11 J.L. & COM. 159, 159-74 (1992).

⁶² *DRAM Dumping: A Sudden Blockade?*, *supra* note 54.

had been buying about \$700 million a year in Korean-made chips.⁶³ In addition, Korean chipmakers were importing about \$600 million a year in semiconductor manufacturing equipment from American suppliers and paying about \$200 million in royalties for the semiconductor technologies imported from the United States.⁶⁴ Reducing Korean chip imports could result in reducing the income that American-based semiconductor companies receive.⁶⁵ Besides, the current dumping ruling will discourage Korean chipmakers who are trying to shift imports of manufacturing equipment and materials from Japan to the United States.⁶⁶ Currently, Korean semiconductor firms are heavily relying on Japanese suppliers.⁶⁷

Finally, note that the Japanese, who already have fifty-three percent of the U.S. market for DRAM chips,⁶⁸ appear to gain the most, since the Koreans now have one hand tied behind their back.⁶⁹ The Japanese will be able to raise their prices and still sell their chips for less than the Koreans, who must now contend with the antidumping tariffs.⁷⁰ Furthermore, Micron and other U.S. chip producers will also be able to raise their prices.

2. Nonmonetary Costs

The Commerce Department's action against the Korean DRAM producers was estimated to save 4,000 U.S. jobs.⁷¹ However, that is only part of the story. If DRAM chips cost more as a result of the antidumping action, then U.S. companies that use DRAM chips will have to either pass on this added cost to their customers or absorb the cost and take a reduced profit on whatever they sell. If they pass on the added cost, it is likely that they will sell fewer units of their product. It

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Keatley, *supra* note 22. The Japanese also have a dominant position in other segments of the computer and electronics market. However, it should be remembered that the leader of today is not necessarily the leader of tomorrow. For example, in the flat-panel display segment of the industry, Japan now has a near monopoly, but that monopoly is being strongly challenged by the Dutch. See Richard L. Hudson, *Philips Refits Dutch Plant in Bold Plan to Unseat Rivals*, WALL ST. J., July 28, 1993, at B4.

⁶⁹ In 1988, the Japanese controlled an estimated 90% of the DRAM market in the United States. *The Secret of Success*, KOREA ECON. REP., June 1992, at 51. Since then, the Korean chip manufacturers have eaten into this near monopoly, to the benefit of both the U.S. companies that use chips and the consumers who buy products containing chips. Yet the Koreans are being penalized for helping to keep the cost of chips down. American consumers are being penalized as well, because they must now pay higher prices for chips and products made with chips.

⁷⁰ American companies that use the Korean chips say that the Korean chips are as good as or better than the Japanese chips, and that the service the Korean companies provide is also quite good. *Id.* Thus, U.S. companies that use Korean chips might likely have to choose between incurring the added expense due to the antidumping duty or sacrificing quality.

⁷¹ Keatley, *supra* note 22.

is a basic principle of economics that if you raise the price, you will sell fewer units.⁷² Thus, the companies that use DRAM chips may have to cut back production, or at least not expand it as fast as would otherwise be the case if the chip prices were not artificially raised as a result of the increased duties. The same thing happens if the DRAM chip users absorb the added cost into their bottom lines. With reduced profit margins, they cannot raise as much capital, which would otherwise be available for expansion, so their growth rate is reduced. They will not be able to hire as many employees because they will not grow as fast as would otherwise be the case. The net effect, then, of the antidumping action is arguably to retard the growth of U.S. companies that use DRAM chips, which are a significant part of the cost of the final product.⁷³ The move also makes these U.S. companies less competitive, because foreign companies will be better able to compete against the U.S. companies once the U.S. companies have an increased cost of production. Thus, the Commerce Department's attempt to help U.S. DRAM chipmakers is at least partially offset by the harm the antidumping action causes to U.S. companies that use DRAM chips. The question is, will the Commerce Department's action do more harm than good?

The gains and losses are difficult to predict. However, one U.S. company, AST Research, Inc., of Irvine, California, adversely affected by the present antidumping action, estimates that it could cost them 700 jobs.⁷⁴ AST makes computers using Korean and other DRAM chips.⁷⁵ Besides having to pay more for DRAM chips generally,⁷⁶ AST and similar companies that use imported subassemblies containing Korean chips must also pay the extra duties.⁷⁷ AST and other companies thus have a greater incentive to ship more manufacturing overseas in order to keep the cost of their computers low. Although apparently no studies have been made on the number of jobs that would be lost or gained by imposing an antidumping duty on Korean chip manufacturers, it is reasonable to expect that there would be a deadweight job loss, given that the studies measuring gains and losses in other industries with protectionist policies consistently find that job losses exceed job gains.⁷⁸

One study of a particular trade restraint in the apparel industry

⁷² PAUL A. SAMUELSON, *ECONOMICS* 60 (9th ed. 1973).

⁷³ *The Secret of Success*, *supra* note 69, at 51.

⁷⁴ Keatley, *supra* note 22. AST is only one of many DRAM users that stand to be adversely affected by the tariff. *Id.* It should be pointed out that AST's suppliers will also be harmed if AST moves jobs to other countries.

⁷⁵ Keatley, *supra* note 22.

⁷⁶ Not only would U.S. companies have to pay more for Korean DRAM chips because of the antidumping duty, but the fact that Korean chips cost more makes it easier for other DRAM chip producers to raise their prices, as the Koreans are no longer as competitive.

⁷⁷ Keatley, *supra* note 22.

⁷⁸ *See infra* notes 79-82 and accompanying text.

estimated that the policy, if implemented, would save 36,000 apparel manufacturing jobs but destroy 58,000 jobs in the apparel retailing industry, for a net loss/gain ratio of more than 1.6 to 1.⁷⁹ A study of the 1984 voluntary restraints in the steel industry estimated that 17,000 jobs would be saved in the steel industry but 52,000 jobs would be destroyed in the industries that use steel, for a loss/gain ratio of 3.1 to 1.⁸⁰ Another study of steel import restraints estimated that a particular policy would save approximately 27,000 jobs and destroy approximately 41,000 other jobs, a ratio of slightly more than 1.5 to 1.⁸¹ A study of the proposed fifteen percent import quota in the steel industry estimated jobs saved in the steel industry at 26,000 and jobs destroyed in the steel-using industries at 93,000, a loss/gain ratio of 3.6 to 1.⁸²

3. *Other Costs*

While often overlooked by economists and others, there are other costs associated with the adoption of a protectionist policy. One such cost might be called "social harmony" cost. Protectionist measures pit producers against consumers. And it is the producers that wield the most power. They are a concentrated group and they have the ear of the legislature whereas consumers are dispersed and relatively powerless. What results is resentment on the part of consumers. Legislators are then caught between two colliding groups: consumers and producers. Protectionism serves to perpetuate and heighten this conflict.

Another cost of protectionist policies is reduced choice. In the case of cars, for example, a quota policy makes it impossible for all consumers to buy the foreign car of their choice because the government will not allow the foreign manufacturer to ship the car into the country. And if the protectionist policy takes the form of a tariff rather than a quota, the effect is basically the same, since the increased price resulting from the tariff will price some consumers out of the market. In the case of computer chips, a dumping duty acts much like a tariff, since it raises the price of foreign-produced chips. But antidumping penalties can also prohibit foreign producers from sending their chips

⁷⁹ LAURA M. BAUGHMAN & THOMAS EMRICH, INTERNATIONAL BUSINESS AND ECONOMIC RESEARCH CORP., ANALYSIS OF THE IMPACT OF THE TEXTILE AND APPAREL TRADE ENFORCEMENT ACT OF 1985, June 1985, tbl. 4, cited in I.M. DESTLER AND JOHN S. ODELL, ANTI-PROTECTION: CHANGING FORCES IN UNITED STATES TRADE POLITICS 54 n.40, 56 n.43 (1987). This 1.6 to 1 ratio is conservative because it does not measure the secondary effects, i.e., the job losses that would occur in other industries as a result of implementing the policy. But the policy would have a ripple effect throughout the economy, affecting many industries indirectly and adversely.

⁸⁰ ARTHUR DENZAU, CENTER FOR THE STUDY OF AMERICAN BUSINESS, HOW IMPORT RESTRAINTS REDUCE EMPLOYMENT 12 (1987).

⁸¹ Jose A. Mendez, *The Short-Run Trade and Employment Effects of Steel Import Restraints*, 20 J. WORLD TRADE L. 554, 564 (1986).

⁸² See ARTHUR T. DENZAU, CENTER FOR THE STUDY OF AMERICAN BUSINESS, AMERICAN STEEL: RESPONDING TO FOREIGN COMPETITION 16-17 (1985).

across the border, which has the effect of a quota. Either way, domestic consumers of computer chips have reduced choice as a result of antidumping policy.

III. Ethical and Philosophical Issues Concerning U.S. Antidumping Policy

A. *Unethical Use of the Antidumping Laws to Restrict Competition*

Domestic companies that are feeling the pressure of competition may abuse the antidumping laws by using them to restrict competition at the expense of consumers and the general public. Micron, for example, may have been so motivated when it used the antidumping laws once before, in 1985, to pressure Japanese manufacturers of 64 kilobit DRAMs to raise their prices.⁸³

Using antidumping laws to restrict competition is a perversion of the law. Yet such perversions are often advocated in the name of protecting consumers. In effect, companies that bring antidumping actions are using the law to batter the competition, because enforcement of such laws makes it more difficult for foreign companies to compete, to the detriment of consumers. Such rent-seeking behavior⁸⁴ is likely to appear whenever the costs are low and the potential returns are high, which is the case with antidumping laws: All that a domestic producer need do to initiate an investigation is to write a letter to the Commerce Department to complain about some foreign producer dumping its products on the domestic market.⁸⁵ The Commerce Department (i.e., the American taxpayers) will pick up the costs of the investigation from there. The complaining company incurs practically no further expense, although the accused company might have to incur millions of dollars of legal and administrative expenses to satisfy the Commerce Department that no dumping has occurred. Causing companies to incur such costs to defend against frivolous charges is unethical because it deprives that company's shareholders of a portion of their wealth, i.e., dividends or shareholder equity. Furthermore,

⁸³ 64K Dynamic Random Access Memory Components from Japan, USITC Pub. 1862, Inv. No. 731-TA-270 (June 1986) (final admin. review).

⁸⁴ Rent-seeking behavior may be loosely defined as seeking special privileges or protection from government or getting someone else to pay for your benefits. See generally *THE POLITICAL ECONOMY OF RENT-SEEKING* (Charles K. Rowley et al. eds., 1988) (discussing the economic theory of rent-seeking and policy); *TOWARDS A THEORY OF THE RENT-SEEKING SOCIETY* (James M. Buchanan et al. eds., 1980) (discussing the economic theory of rent-seeking); GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT-SEEKING* (1989) (discussing the economic theory of rent-seeking and social choice).

⁸⁵ The government does not initiate many antidumping investigations. Only seven of the many hundreds of antidumping investigations initiated between 1979 and 1990 were initiated by the government: six of these involved the trigger price mechanism for steel; the other one was for semiconductors. For a listing of the antidumping cases between 1979 and 1990, see I.M. DESTLER, *AMERICAN TRADE POLITICS* 326 app. C (1992).

taxpayers finance any and all of these antidumping investigations, none of which lead to consumer benefits.

A few years ago, two economists wrote an article explaining how this abuse works.⁸⁶ Although their article concerned abuse of the antitrust laws, the same could easily be said of antidumping laws. To illustrate this point, just substitute "antidumping" for "antitrust" in the following quote:

There is a specter that haunts our antitrust institutions. Its threat is that, far from serving as the bulwark of competition, these institutions will become the most powerful instrument in the hands of those who wish to subvert it. More than that, it threatens to draw great quantities of resources into the struggle to prevent effective competition, thereby more than offsetting the contributions to economic efficiency promised by antitrust activities. This is a specter that may well dwarf any other source of concern about the antitrust processes. We ignore it at our peril and would do well to take steps to exorcise it.⁸⁷

B. Philosophical Issues: The Illusory Foundation of Antidumping Policy

1. The Concept of Harm

The legal standard in antidumping investigations requires the International Trade Commission (ITC) to determine whether there is a reasonable indication of material injury or a threat of material injury to a domestic industry because of the imported items, based on the best available information at the time of the determination.⁸⁸ Theoretically, any domestic company can be injured whenever a foreign company makes a sale that the domestic company would otherwise make.⁸⁹ So, in theory at least, there is a plausible case whenever any foreign

⁸⁶ See generally William J. Baumol and Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985) (discussing abuse of antitrust laws).

⁸⁷ *Id.* at 247.

⁸⁸ See 19 U.S.C. § 1673b(a) (1993); see also *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986) (stating that the statute calls for a reasonable indication of injury).

⁸⁹ Section 771(7)(F)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(7)(F)(i) (1988), provides in relevant part:

In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the merchandise, the Commission shall consider, among other relevant economic factors—

(I) If a subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement),

(II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States.

(III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,

(IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,

(V) any substantial increase in inventories of the merchandise in the United States,

supplier makes a sale in the United States. Yet the threat of harm is inherent in any competitive system, so the only logical way to eliminate potential harm is to eliminate competition. The ITC need not determine whether imports are the sole, or even a principal or substantial cause of material injury. All it must do is determine whether imports are contributing minimally to a material injury.⁹⁰

Another aspect of the concept of injury, or harm, that needs to be discussed is that although a harm may be inflicted, it may be that nobody's rights are violated.⁹¹ For example, if Joe wants to open a deli across the street from Sam's Deli, Sam stands to be harmed, yet his

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country,

(VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,

(VIII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under section 1671 or 1673 of this title or to final orders under section 1671e or 1673e of this title, are also used to produce the merchandise under investigation,

(IX) in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1671(b)(1) or 1673(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both)

(X) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advance version of the like product.

⁹⁰ See, e.g., *Metallwerken Nederland v. United States*, 13 Ct. Int'l Trade 471, 480 (1989) (stating "[i]t is sufficient that the imports contribute" minimally to the material injury); *accord Citrosuco Paulista, S.A. v. United States*, 12 Ct. Int'l Trade 1196, 1228 (1988); see *Hercules, Inc. v. United States*, 11 Ct. Int'l Trade 710, 742-43 (1987); see also *Maine Potato Council v. United States*, 9 Ct. Int'l Trade 293, 300-01 (1985) (stating that the Commission must reach an affirmative determination if it finds that imports are more than a "*de minimis*" cause of injury).

⁹¹ When looking at the rights aspect of antidumping legislation, one might ask the following question: If the antidumping laws grant a right to domestic producers, are not their rights violated when a foreign producer engages in dumping? Therefore, is there not a conflict between the rights of domestic producers and the rights of foreign suppliers and American consumers? On the surface, this question might appear to be a legitimate one. But a closer examination soon reveals that there is indeed no conflict of rights. The key to answering this question lies in clearly defining rights.

Rights are of two types: negative and positive. Examples include the rights to life, liberty, and property, which when stated in negative terms, include the rights not to be killed, not to be confined, and not to have your property taken without consent. These rights are inherent—they do not come from government, but before it. Indeed, the reason for government in the first place is to protect these negative rights, and any government that does not protect them is failing in its duties.

Positive rights, on the other hand, are granted by the government. Examples include for example the right to food, health care, and employment. The difference between negative rights and positive rights is that negative rights cannot conflict with each other whereas positive rights can conflict. A negative rights regime is a positive-sum regime because there are no losers. But in a positive rights regime, there are both winners and losers. Positive rights regimes are basically zero-sum games because for every winner there is a loser. Those who have rights granted by government have them granted at the expense of someone else. In

rights are not violated. Likewise, if a Korean company wants to sell computer chips in the domestic American market, American chip sellers might be harmed, although their rights are not necessarily violated. Yet under current policies, the Commerce Department might punish the Korean supplier anyway. If the purpose of government is to protect life, liberty, and property and otherwise leave people alone, such an action by the Commerce Department, and the underlying statute itself, seem inappropriate.

2. *The "Public Interest"*

Another philosophical problem, not only with the U.S. antidumping policy, but with all antidumping policies, is the belief that laws restricting dumping are somehow in the "public interest." But what, exactly, is the public interest? Some commentators would argue that there is no such thing. As Ayn Rand puts it:

Since there is no such entity as "the public," since the public is merely a number of individuals, any claimed or implied conflict of the "public interest" with private interests means that the interests of some men are to be sacrificed to the interests and wishes of others. Since the concept is so conveniently undefinable, its use rests only on any given gang's ability to proclaim that "The public, *c'est moi*"—and to maintain the claim at the point of a gun.⁹²

John Hospers makes the following point:

People speak of "the public interest." But what is the public interest? Strictly speaking, there is no such thing. There is only the interest of each individual human being. There are interests that many or all people share, but these are still the interests of individuals. When politicians say that something is "to the public interest," they usually mean that it serves the interests of some people but goes against the interests of others—and usually the interests of the people with the most political pull win out. Is it to the public interest for some to be forced to die so that others may be saved? Is it to the public interest

order to be on the receiving end of a positive right, someone else's property rights may be violated.

The antidumping law is an example of a positive rights regime. If government grants domestic producers the right to punish foreign suppliers for selling products at prices that are too low, they do so by violating the negative right of American consumers to obtain the property they desire. They also violate the negative right of the foreign suppliers to trade their property as they see fit. So the rights of the parties in question do not conflict from a negative rights perspective because domestic producers have no negative right to prevent American consumers (or users) and foreign suppliers from exchanging their property. Domestic producers can prevent such transactions from taking place only if they use the force of government to violate the negative rights of American consumers and foreign suppliers to trade their property.

For a concise discussion on the difference between a negative rights and positive rights regime, see Robert W. McGee, *The Right to Not Associate: The Case for an Absolute Freedom of Negative Association*, 23 U. WEST L.A.L. REV. 123, 136-38 (1992). For more detailed discussions, see TIBOR MACHAN, *INDIVIDUALS AND THEIR RIGHTS* (1989); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

⁹² AYN RAND, *THE VIRTUE OF SELFISHNESS* 88 (1961); *THE AYN RAND LEXICON: OBJECTIVISM FROM A TO Z* 396 (Harry Binswanger ed. 1986).

for a hundred crazed men to lynch one man in the public square? Is it to the public interest for all the citizens of the nation to be taxed to pay for a federal dam on one section of it? . . . Just as there are only individual rights, so there are only individual interests.⁹³

Michael Novak questions whether a pluralist society can have a common good.⁹⁴ In the context of antidumping laws, it seems that the interests of the domestic companies that stand to be harmed by foreign competition are being pitted against the interests of consumers, who stand to pay lower prices if foreign companies are permitted to sell their products in the domestic market. Thus, there is no common interest, but conflicting interests.

3. *The Concept of Fair Value*

The Commerce Department determines "fair value" based on the foreign exporter's home market prices, third country prices, or constructed value.⁹⁵ The Korean chip manufacturers were accused of selling below fair value, implying that the Korean manufacturers' U.S. price was unfair to competing U.S. producers. However, the argument that the foreign exporter's U.S. price is unfair to competing producers because the exporter sells below fair value is untenable.⁹⁶ The foreign producer's export price depends only on the demand curve it faces in the U.S. market and marginal (delivered) cost, and not on the price charged in the home market or in the third market, or the constructed value.⁹⁷ Contending that the ultimate measure of the fairness of a price to competing U.S. producers is the foreign manufacturer's home market price or its price charged in the third country market, or constructed value, the calculation of which is "fraught with pitfalls,"⁹⁸ is unconvincing.⁹⁹ For example, if the price charged in the U.S. is "unfair," can it be made fair by the exporter lowering the price in a separate market such as Korea or Singapore?

A variation of this "selling below fair value" argument is the myth that a firm can benefit by engaging in "predatory pricing."¹⁰⁰ The predatory pricing literature is fairly clear in its conclusion that predatory pricing does not exist, because it is irrational behavior, or, if it

⁹³ JOHN HOSPERS, *LIBERTARIANISM: A POLITICAL PHILOSOPHY FOR TOMORROW* 84 (1971).

⁹⁴ MICHAEL NOVAK, *FREE PERSONS AND THE COMMON GOOD* 19-22 (1989).

⁹⁵ See *supra* note 29 and accompanying text.

⁹⁶ Knoll, *supra* note 24.

⁹⁷ *Id.*

⁹⁸ *Id.* at 279.

⁹⁹ *Id.* at 285.

¹⁰⁰ Predatory pricing occurs when a firm temporarily reduces the price of its product to drive competitors out of business. When the firm succeeds in establishing a monopoly position, price is then raised commensurate with its market power. The new price level must be sufficiently high to offset any losses that occurred during the period of low pricing. The firm would presumably be confident in its ability to prevent the entry of potential competitors long enough for it to obtain economic profits. ROBERT J. CARBAUGH, *INT'L ECON.* 126 (1980).

does exist, it has failed whenever it has been tried.¹⁰¹ If a company did manage to drive the competition out of business by selling below production cost, it would lose money on every sale. Because its prices were so low, it would gain market share, thus selling more units and driving itself closer to bankruptcy. If it did attempt to raise its prices after the competition had been decimated, new competitors would likely enter the market to take advantage of the profit opportunities that come with high prices, and in the long run prices would return to competitive levels. Thus predatory pricing is irrational, self-defeating behavior. Furthermore, even if predatory pricing did exist, it is questionable whether the practice should be prohibited because there are no identifiable "victims."¹⁰² Although some companies might be driven out of business by the practice, consumers benefit from the lower prices. The competitors that are driven out of business lose sales because consumers vote with their dollars to give their business to someone else, so no "rights"¹⁰³ are violated by the practice. The basic right in a market economy is to outsell and outdo competition, not to be protected from competition.

4. *The Utilitarian Approach*

Economists tend to be utilitarians, meaning that they base their determinations on whether a policy is good or bad on whether the good outweighs the bad.¹⁰⁴ One might say that they aim at policies that produce the greatest amount of good for the greatest number. But there are several drawbacks to this approach. For one thing, there is no way to accurately measure precisely how much is gained or lost by a particular policy. Domestic chip makers gain something if foreign suppliers are assessed a dumping tariff, and foreign suppliers lose something, but that is an incomplete picture. There are secondary effects that are more difficult to quantify. For example, antidumping tariffs also have an adverse effect on companies that use products containing computer chips because they have to pay higher prices to obtain such products. These companies must either pass on these costs to their customers in the form of higher prices or absorb the added cost in their bottom line. Higher costs have a drag on growth, which in turn has an adverse effect on competitiveness and employment growth. Thus, although assessing antidumping duties helps some groups and

¹⁰¹ See Ronald H. Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105, 105-23 (1971); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 137-69 (1968). There are no known cases where any company has dropped its prices so low as to drive the competition out of business, then raised its prices over an extended period of time. See BOVARD, *supra* note 40, at 157.

¹⁰² Franklin M. Fisher, *On Predation and Victimless Crime*, 32 ANTITRUST BULL. 85, 85-92 (1987).

¹⁰³ See *supra* note 90.

¹⁰⁴ MURRAY N. ROTHBARD, *MAN, ECONOMY AND STATE: A TREATISE ON ECONOMIC PRINCIPLES* 260-68 (1970).

harms other groups, it is not easy to determine what the total gains and losses are, or whether the total gains exceed the total losses.

But perhaps the major drawback of using a utilitarian approach is that the adverse effect on individual rights is totally ignored. In a utilitarian-based approach, it is not even an issue whether someone's rights are violated by a policy of assessing an antidumping charge. Yet the possibility that a particular policy might violate property or contract rights is a very serious question, one that should not be ignored. And a policy that levies tariffs against foreign suppliers that sell their products to willing buyers without violating the rights of third parties (such as domestic producers) violates both the rights of the American firms that purchase from the foreign suppliers and the rights of American consumers. All antidumping duties force consumers to pay higher prices for products, thus depriving them of property (cash), and the foreign sellers have their rights infringed upon because antidumping policies make it more difficult to enter into contracts in the first place, which unnecessarily infringes on their right to contract. Any approach that ignores this aspect of the issue, as does the utilitarian approach, is questionable.

IV. Unjustly Accused of Violating an Unjust Law?

Could it be said that domestic producers that stand to be harmed by competition from foreign producers are victims? No. There is a crucial difference between being harmed by some activity and being a victim. While domestic producers stand to be harmed by competition, they are not victims, because being a victim involves having one's rights violated.¹⁰⁵ In a free enterprise economy, it is illogical to say one has a "right" to be protected from competition, and harm that results from loss of sales to a competitor does not constitute the violation of a viable right.

Ideally, statutes follow and support the rights of individuals in a given society. In the case of antidumping law, outdated (and harmful) statutes have been appropriated, interpreted, and extrapolated to suggest a "right" (i.e., protection from foreign competition) that is antithetical to a free enterprise economic system.

Domestic producers have no inherent claim on the funds of American consumers. The only ethical way that domestic producers can obtain the funds of American consumers is through voluntary trade. Using the force of the government to obtain the funds (by prohibiting foreign suppliers from competing) puts domestic producers in the role of the aggressor, and makes American consumers, in fact, the real victims. That is exactly what happens when a domestic producer appeals to the government to request an antidumping inves-

¹⁰⁵ See *supra* note 91 (discussing rights).

tigation against some foreign producer that is merely taking business away.

From the evidence, it is questionable whether Korean chipmakers have ever violated the existing statute in most cases. If domestic producers are losing sales, it is because domestic users of the products and ultimately consumers are willing to give foreign producers the business. Hence, not only are Korean (foreign) companies faced with unjust accusations, but they are also faced with an unjust law, which in the end, does the greatest harm to American consumers.