

2013

Petitioning for Cash: How Domestic Industries Exploit Antidumping Procedures and Antitrust Exceptions to Force Their Foreign Competitors into Lucrative Settlement Agreements

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Recommended Citation

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COMMENTS

PETITIONING FOR CASH: HOW DOMESTIC INDUSTRIES EXPLOIT ANTIDUMPING PROCEDURES AND ANTITRUST EXCEPTIONS TO FORCE THEIR FOREIGN COMPETITORS INTO LUCRATIVE SETTLEMENT AGREEMENTS

DANIEL FULLERTON*

The United States' international trade laws strictly enforce antidumping ("AD") rules, and its antitrust laws effectively oversee private settlement agreements. However, these two distinct, yet related, areas of law both fail to adequately address the legality of private post-order settlement agreements that occur in the shadows of the AD process. This Comment investigates the legality of such settlements and reveals how domestic firms are exploiting the overlap between AD and antitrust laws so as to circumvent both. Being fully aware that AD administrative reviews create costly uncertainty for foreign firms, domestic firms exploit this uncertainty and pressure their foreign competitors into agreeing to lucrative cash settlement agreements. Though these settlements frustrate the object and purpose of AD laws by incentivizing unfairly priced imports, the settlements sidestep existing AD laws and are not prohibited. Normally, such collusive efforts to disrupt trade would create immediate antitrust

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liability, but the Noerr-Pennington Doctrine, with its First Amendment foundations, immunizes domestic firms from liability. This Comment takes a closer look at the legal implication of these settlement agreements in both antitrust and international trade contexts. It then suggests ways to restore the functional effectiveness of AD laws.

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INTRODUCTION

Within the United States’ international trade framework, domestic industries can exploit U.S. antidumping (“AD”) laws to seek private monetary gain, restrain trade, and harm competition.¹ Though this practice is not new, it operated almost entirely in secrecy until the International Trade Commission (“ITC”) recognized its existence during a recent investigation.² The discovery of this practice even caused one ITC Commissioner to proclaim, “I cannot figure out for the life of me how [this practice is] actually legal.”³ The ITC, however, lacked the jurisdiction to

1. See Kenneth J. Pierce & Robert E. DeFrancesco, *The New Big Thing in Trade Law: Post-Order Antidumping and Countervailing Duty Settlements*, METRO. CORPORATE COUNSEL (Sept. 1, 2006), <http://www.metrocorpcounsel.com/pdf/2006/September/05.pdf> (describing a “new” international trade practice).

2. See *Wooden Bedroom Furniture from China*, Inv. No. 731-TA-1058, USITC Pub. 4203, at 16 (Dec. 2010) (Review) [hereinafter *Chinese Furniture*] (acknowledging the existence of this practice); James R. Hagerty, *Cash Softens a Trade Blow*, WALL ST. J. (Feb. 15, 2011), <http://online.wsj.com/article/SB10001424052748704081604576144401022132530.html>.

3. Transcript of Record at 86, *Wooden Bedroom Furniture from China*, Inv. No. 731-TA-1058, USITC Pub. 4203 (Oct. 5, 2010) (Review) [hereinafter *Transcript*] (statement of Comm’r Lane).

address the legality of this practice.⁴

The United States maintains a system of trade laws to facilitate international commerce and protect domestic industries from unfair competition.⁵ Specifically, AD laws strive to overcome the harmful effects of dumping, a practice that occurs when a foreign firm sells goods in the U.S. market at unfairly low prices.⁶ To prevent these artificially low-priced goods from affording an unfair competitive advantage to foreign firms at the expense of domestic industries, the U.S. government assigns AD duties to foreign goods that are dumped in the U.S. market.⁷

The duty rates, however, are non-permanent and are subject to annual administrative reviews.⁸ These reviews create costly uncertainty for foreign firms, and domestic industries are quick to exploit this uncertainty by pressuring foreign firms into lucrative settlement agreements.⁹ Under these agreements, those foreign producers subjected to the AD order ("subject foreign producers") make cash payments to domestic producers, who then withdraw the petitions for administrative reviews, allowing foreign producers to avoid the costly review process.¹⁰

4. See Chinese Furniture, *supra* note 2, at 16–17 (asserting that the ITC need not consider the ramifications of such settlement agreements); Simon Lester, *More on Anti-Dumping Payments*, INT'L ECON. L. & POL'Y BLOG (Feb. 21, 2011, 8:37 PM), <http://worldtradelaw.typepad.com/ielpblog/2011/02/more-anti-dumping-payments.html> (explaining that both the ITC and the Department of Commerce lack jurisdiction over the related antitrust issues).

5. See Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N.C. L. REV. 357, 364–68 (2009) (detailing the history and purpose of the U.S. trade laws and arguing that the U.S. AD regime has a pervasive protectionist nature).

6. 19 U.S.C. § 1677(34) (2006); see Maurizio Zanardi, *Antidumping Law as a Collusive Device*, 37 CAN. J. OF ECON. 95, 96 (2004) (noting that dumping determinations account for product quantity, quality, and sale circumstances).

7. Marion B. Schnerre, *Antidumping, A Choice Between Unilateral Duties or Negotiation of a Suspension Agreement*, 4 IND. INT'L & COMP. L. REV. 497, 497–98 (1994); see STAFF OF H. COMM. ON WAYS AND MEANS, 111TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 108 (Comm. Print 2010) (describing how AD duties are designed to curtail the effects of international price discrimination); Cho, *supra* note 5, at 370–73 (acknowledging that AD remedies are intended to stop predatory pricing schemes, but pointing to flaws in the rationale behind AD laws).

8. See Patrick F. J. Macrory, *Administration of the U.S. Antidumping Law by the Department of Commerce*, 722 PLI/COMM 9, 27–28 (1995) (explaining that original duty rates and final AD liability are subject to change if the Department of Commerce conducts an administrative review of an AD order).

9. See HARVEY KAYE & CHRISTOPHER A. DUNN, INTERNATIONAL TRADE PRACTICE § 31:4 (2011) (articulating how firms weigh the costs of uncertainty against their duty rates and final AD liability); Cho, *supra* note 5, at 388 (examining how duty rate uncertainty increases transaction costs for foreign firms).

10. See KAYE & DUNN, *supra* note 9 (describing settlements as "attractive options")

These collusive settlement agreements raise important antitrust concerns because they involve private price and quantity agreements that actively restrain commerce, as well as efforts to use government processes for improper purposes.¹¹ However, due to retrospective AD procedures and First Amendment exceptions to antitrust rules, these settlements are likely permissible under both AD and antitrust laws.¹² Thus, though the ITC may be “very troubled by [such] settlement agreement[s],”¹³ an unlikely intersection of international trade and antitrust laws allows domestic industries to circumvent both sets of laws and thus immunize themselves from any actionable liability.

This Comment addresses whether these private post-order settlement agreements are, in fact, legal under existing AD and antitrust frameworks and, if they are legal, how U.S. laws can adapt to account for these settlements. Section II of this Comment discusses the history, purpose, and function of U.S. AD laws. Then, it examines how the administrative review process gives rise to private settlement agreements. Section III analyzes whether these settlements are legal under U.S. antitrust laws and how these settlements frustrate the object and purpose of AD laws. Finally, Section IV recommends ways to adapt U.S. trade laws to account for these settlement agreements. This Comment employs a recent ITC case (“Chinese furniture case”)¹⁴ as an example of how post-order AD settlement agreements operate.

I. AD LAWS EVOLVED TO PRODUCE EFFECTIVE MEANS OF PROTECTING DOMESTIC FIRMS FROM UNFAIR IMPORTS, AND THESE LAWS ARE CLOSELY TIED TO ANTITRUST CONCERNS

This Section begins by exploring the history and purpose of AD laws and how they grew in both scope and effectiveness over the last century to build today’s complex trade law regime.¹⁵ In particular, this Section

for foreign and domestic firms); Zanardi, *supra* note 6, at 96 (describing how domestic producers “threaten and induce” foreign producers into agreeing to settle).

11. See KAYE & DUNN, *supra* note 9 (observing that private pricing agreements can themselves be considered conspiracies in restraint of trade); Terry Calvani & Randolph W. Tritell, *Invocation of United States import relief laws as an antitrust violation*, 31 ANTITRUST BULL. 527, 548 (1986) (arguing that the abuse of import relief mechanisms violates the spirit of the Sherman Act); Schnerre, *supra* note 7, at 498 (outlining the purposes of AD legislation).

12. See *infra* Section II.

13. Transcript, *supra* note 3, at 86 (statement of Comm’r Lane).

14. Chinese Furniture, *supra* note 2.

15. See JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 763 (Jesse H. Choper et al. eds., 5th ed. 2008) (noting the complex and formalized nature of modern AD rules and

focuses on the AD administrative review process and its retrospective method of determining final AD duty liability. Then, this Section turns to a discussion of antitrust laws and how their regulation of private settlement agreements creates an important juncture of AD and antitrust concerns. Additionally, this Section introduces the Chinese furniture case as an example to describe AD procedures.

A. The Evolving History, Purpose, and Function of AD Laws Created an Effective System of AD Enforcement

Congress first contemplated “dumping” in the Antidumping Act of 1916 (“1916 Act”), which allowed domestic firms to bring suits against foreign firms dumping goods in the U.S. market at less than fair value (“LTFV”).¹⁶ The elements of the 1916 statute, however, were difficult to satisfy, and Congress introduced new AD legislation in 1921.¹⁷ Though AD mechanisms continued to strengthen, they remained largely unused until the 1970s.¹⁸

1. The Trade Agreements Act of 1979 Established the Modern International Trade Law System

Congress ushered in a new era of AD policy with the Trade Agreements Act of 1979 (“1979 Act”), which repealed the 1921 Antidumping Act.¹⁹ Since the implementation of the 1979 Act, the Department of Commerce (“Commerce”) and the ITC share the responsibility of investigating and enforcing U.S. AD laws; Commerce determines whether dumping occurred, and the ITC determines whether the dumping caused a domestic industry to suffer a material injury.²⁰ Today, American industries use AD laws more than any other import relief mechanism.²¹

procedures).

16. See U.S. INT’L TRADE COMM’N, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK IV-3 (13th ed. 2008) (recognizing that domestic firms could seek damages against foreign firms in federal court under the 1916 Act).

17. See *id.* (suggesting that the intent requirements of the 1916 Act were especially difficult to demonstrate).

18. Macrory, *supra* note 8, at 15.

19. See U.S. INT’L TRADE COMM’N, *supra* note 16, at IV-4 (describing the 1979 Act as a codification of the GATT Antidumping Code); Macrory, *supra* note 8, at 15 (noting that the 1970s brought both procedural and substantive changes to U.S. AD laws).

20. JACKSON, DAVEY & SYKES, *supra* note 15, at 763–64; see U.S. INT’L TRADE COMM’N, *supra* note 16, at IV-4 (explaining that Commerce took over its antidumping administration role from the Department of the Treasury).

21. See Macrory, *supra* note 8, at 15 (noting that AD duties, together with countervailing duties, are the most commonly used import relief mechanism).

2. *The Byrd Amendment Added Cash to the AD Equation*

The Byrd Amendment, or Continued Dumping and Subsidy Offset Act, changed AD laws so that the cash from foreign firms' duty payments went directly to the pockets of domestic firms, instead of being paid into the federal treasury.²² Thus, "domestic interested parties"²³ had a new reason to bring AD investigations: direct cash payments.²⁴ Congress, however, repealed the Byrd Amendment, effective October 1, 2007, leaving domestic industries with a "whetted appetite for cash" and contributing to the recent influx in cash settlement agreements.²⁵

3. *AD Laws Are Built Around the Important Purpose of Limiting the Harmful Effects of Unfair Imports*

AD laws strive to maintain fair competition by ensuring foreign goods are not sold at unfairly low prices in the U.S. market.²⁶ If goods enter the United States at unfairly low prices, foreign firms could drive domestic firms out of the market and create barriers to keep them from reentering the market.²⁷ Foreign firms could then raise prices well beyond previous market rates, and no domestic competition would exist to quell skyrocketing prices.²⁸ By providing only administrative remedies, AD laws are not designed to incentivize action by domestic firms seeking direct duty payments; rather, the incentive is supposed to be protection from unfair trading practices.²⁹

22. See Pierce & DeFrancesco, *supra* note 1 (contending that the Byrd Amendment altered trade litigation by changing the incentives associated with bringing AD investigations).

23. 19 U.S.C. § 1677(4)(A) ("[P]roducers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.").

24. *Id.*

25. See *id.* (arguing that the Byrd Amendment, and its subsequent repeal, was a primary cause of the increasing prevalence of settlement agreements). But see JACKSON, DAVEY & SYKES, *supra* note 15, at 812 (questioning the Byrd Amendment's association with private settlement agreements).

26. See Schnerre, *supra* note 7, at 497–98 (explaining that AD laws pursue a "level playing field" for international trade).

27. See JACKSON, DAVEY & SYKES, *supra* note 15, at 756–63 (providing examples of how the AD process is supposed to function and thus further the underlying policies of AD laws).

28. See Schnerre, *supra* note 7, at 497 (identifying the threat of a foreign country gaining an unfair advantage in the domestic market as the primary incentive for domestic industries to initiate AD cases).

29. Cf. *id.* at 517 (explaining that AD laws no longer afford monetary damages for domestic producers but instead incentivize domestic action by eliminating unfair competition).

B. The AD Process Operates Through a System of Petitions, Investigations, Duties, and Reviews

Under U.S. trade law, “dumping” occurs when a foreign firm sells a good in the U.S. market at LTFV.³⁰ Together, Commerce and the ITC determine whether dumping occurred and whether the dumping materially injured domestic industries.³¹ If both decisions are affirmative, Commerce imposes AD duties on all imports from the subject country being unfairly dumped in the U.S. market (“subject imports”).³²

When domestic interested parties believe foreign firms from a specific country are dumping goods in the U.S. market, the domestic interested parties can file AD petitions with Commerce and the ITC.³³ Commerce will issue an affirmative determination and calculate AD duty margins if it finds that subject imports enter the U.S. market at LTFV.³⁴ Then, the ITC determines whether subject imports cause, or are likely to cause, material injury to a domestic industry.³⁵ If both Commerce and the ITC reach affirmative final determinations, Commerce assigns AD duties to all subject imports from the subject country.³⁶ The initial duty rates, however, are not permanent, and domestic interested parties can petition to have them retroactively changed to reflect the actual dumping margins.³⁷

Generally, U.S. AD law provides two primary methods for “settling” an AD duty case during the initial investigation process: (1) a suspension agreement, or (2) a withdrawal of the domestic interested party’s petition.³⁸ For suspension agreements, Commerce will stop an investigation so long as

30. 19 U.S.C. § 1677(34). See Zanardi, *supra* note 6, at 96 (describing dumping as selling a product for cheaper in its own domestic market than the amount for which it is sold in a foreign market); STAFF OF H. COMM. ON WAYS AND MEANS, *supra* note 7, at 108–11 (stating that the LTFV determination involves a comparison of a foreign good’s “normal value” and its “export price” and describing how those values are calculated).

31. See, e.g., JACKSON, DAVEY & SYKES, *supra* note 15, at 763–64.

32. See Zanardi, *supra* note 6, at 96 (noting AD orders require affirmative final determinations by both Commerce and the ITC).

33. U.S. INT’L TRADE COMM’N, *supra* note 16, at II-4.

34. Macrory, *supra* note 8, at 21.

35. *Id.* at 23.

36. INT’L TRADE ADMIN., IMPORT ADMINISTRATION ANTIDUMPING MANUAL, ch. 1, subdv. (IV)(A)(3) (last updated Oct. 13, 2009). To satisfy duties imposed by Commerce, cash deposits, not bonds, must accompany all subject imports and must be assessed at the estimated dumping margin. See Macrory, *supra* note 8, at 16, 23.

37. See JACKSON, DAVEY & SYKES, *supra* note 15, at 766–67 (describing initial duties as mere provisional estimations that can be later changed through annual administrative reviews).

38. Macrory, *supra* note 8, at 24–26.

“substantially all” foreign producers of the subject imports agree to remove the dumped goods’ harmful effects.³⁹ Commerce’s approval of a suspension agreement is also contingent upon Commerce’s determination that a cessation of the investigation is in the public interest.⁴⁰

Unlike suspension agreements, the cessation of AD investigations via a withdrawal of a petition requires the domestic producers’ consent.⁴¹ A petitioner can stop an investigation by withdrawing an AD petition at any point before Commerce’s final determination.⁴² However, as with suspension agreements, the ultimate cessation of the investigation depends upon Commerce’s determination that ending the investigation is in the public interest.⁴³

Moreover, an AD duty order can still be removed after it is put in place.⁴⁴ Both Commerce and the ITC must conduct reviews of AD orders every five years after the publication of an AD order, and Commerce must revoke an AD order if the agencies find that the order’s termination would not lead to a likely continuation or recurrence of dumping or material injury.⁴⁵

*C. By Request, Commerce Can Reevaluate Final AD Duty Liability
Through Administrative Reviews*

The margin rates assigned under original AD duty orders are non-permanent estimates.⁴⁶ If domestic interested parties want the dumping margins and associated import duties to be retroactively adjusted, they can

39. See KAYE & DUNN, *supra* note 9, § 27:3 (explaining that suspension agreements typically require foreign producers to either raise their prices or reduce their import volume); Macrory, *supra* note 8, at 24–25 (detailing a step-by-step process for AD suspension agreements).

40. 19 U.S.C. § 1673c(d)(1).

41. Macrory, *supra* note 8, at 24.

42. *Id.* at 25.

43. *Id.* at 24–25.

44. See *id.* at 22, 24, 30–31 (providing several examples for how an AD order can be removed or revoked).

45. 19 U.S.C. § 1675(c); see Macrory, *supra* note 8, at 30–31 (outlining Commerce and the ITC’s decision-making process as part of the “sunset review” process); see also *Five-Year (“Sunset”) Review Status*, U.S. INT’L TRADE COMM’N (May 31, 2010), [http://info.usitc.gov/oinv/sunset.nsf/0a915ada53e192cd8525661a0073de7d/a161c6791613f35b852567750054a793/\\$FILE/May%2031%202010%20Sunstatus.pdf](http://info.usitc.gov/oinv/sunset.nsf/0a915ada53e192cd8525661a0073de7d/a161c6791613f35b852567750054a793/$FILE/May%2031%202010%20Sunstatus.pdf) (detailing Commerce and the ITC’s revocation rate under sunset reviews and revealing that many more dumping orders are maintained than are revoked).

46. See Macrory, *supra* note 8 (explaining that because original margin rates are non-permanent, foreign firms’ duty payments do not necessarily represent their final liability).

petition Commerce for an annual administrative review of the duty rates.⁴⁷ Under such a review, Commerce examines the actual import data from the previous year to determine whether the original cash deposit rate was higher or lower than the actual dumping margin.⁴⁸ If there are too many foreign firms to review individually, Commerce uses a sampling technique to gather trade data from selected firms and uses that data to generate a nationwide AD duty rate for those firms not investigated individually.⁴⁹

After an administrative review, U.S. Customs and Border Protection ("Customs") provides subject foreign producers with a refund if their initial deposits were too high.⁵⁰ Alternatively, if the initial deposits were too low, Customs collects the difference.⁵¹ From then on, cash deposits assessed at the new duty rates must accompany all subject imports.⁵²

Requests for administrative reviews occur in a majority of AD cases.⁵³ However, if Commerce receives no requests for an administrative review, the original estimated AD margins remain, and all subject foreign producers continue to pay their original duty rates.⁵⁴ Similarly, a domestic producer's timely withdrawal of a petition for administrative review stops the review process, leaving the original duty rates in place.⁵⁵

Importantly, domestic interested parties can choose which foreign producers are included in a petition for administrative review, causing Commerce to treat foreign producers differently during an administrative review.⁵⁶ Foreign producers not listed in a petition continue to pay their

47. See 19 C.F.R. § 351.213 (2011) (describing the administrative review procedure as the most frequently used method of retrospectively calculating final duty liability after goods are imported); see also Daniel Ikenson, *Tony Soprano Meets the Antidumping Law*, CATO INST. (Feb. 18, 2011, 12:18 PM), <http://www.cato-at-liberty.org/tony-soprano-meets-the-antidumping-law/> (distinguishing the United States as the only major economy to determine 'retrospectively' final AD liability).

48. 19 C.F.R. § 351.213.

49. See Pierce & DeFrancesco, *supra* note 1 (describing Commerce's sampling of certain "mandatory" respondents to determine actual import practice).

50. JACKSON, DAVEY & SYKES, *supra* note 15, at 767; see Macrory, *supra* note 8, at 28–29 (indicating that Customs refunds or collects the difference between the cash deposits paid by foreign producers and the liquidated amount, plus interest).

51. JACKSON, DAVEY & SYKES, *supra* note 15, at 767.

52. Macrory, *supra* note 8, at 28–29.

53. JACKSON, DAVEY & SYKES, *supra* note 15, at 767.

54. See Ikenson, *supra* note 47 (clarifying that neither domestic nor foreign companies are required to request reviews).

55. See 19 C.F.R. § 351.213(d)(1) (explaining that petitions for review may be lawfully withdrawn within ninety days and that the administrative review ceases upon a timely withdraw of the petition, with no changes in the duty rates).

56. See Macrory, *supra* note 8, at 27–29 (noting that a petition for review must specify which foreign producers to review).

original rates, but those chosen for review face greater uncertainty about their future liability.⁵⁷ Also, domestic interested parties may choose to withdraw only a petition for specific foreign producers while continuing the review process against others.⁵⁸

U.S. AD law does not contemplate private-to-private post-order settlements for administrative reviews.⁵⁹ Nonetheless, these settlements are increasingly common, and neither Commerce nor the ITC have taken a stance on their permissibility despite, or perhaps because of, their antitrust implications.⁶⁰

D. Like AD Laws, Antitrust Laws Promote Fair Competition

That the ITC and Commerce avoid addressing the antitrust concerns related to private post-order AD settlements does not imply that antitrust concerns do not exist or are not worth investigating.⁶¹ Decades of court decisions recognize that America's national economic policy centers on faith in the value of fair competition.⁶² Consequently, U.S. antitrust laws support a general policy that fair trade is desirable.⁶³ Alongside this broad public interest in maintaining fair competition, courts established that there is a legitimate state interest in identifying and regulating injurious practices in commercial affairs.⁶⁴ Therefore, to protect competition and promote

57. See JACKSON, DAVEY & SYKES, *supra* note 15, at 767 (noting that requests for review occur in fifty to sixty percent of AD cases).

58. See KAYE & DUNN, *supra* note 9 (providing examples of where administrative review petitions were withdrawn for some, but not all, foreign producers).

59. See 19 U.S.C. § 1673; see also Macrory, *supra* note 8, at 24–46 (outlining the statutorily provided-for settlement methods).

60. See Lester, *supra* note 4 (noting that the ITC and Commerce did not rule on these settlements because they lacked proper jurisdiction); Pierce & DeFrancesco, *supra* note 1 (observing the increasing prevalence of these settlements).

61. See Heath E. Combs, *ITC Member Scrutinizes Settlement Agreements*, FURNITURE TODAY (Jan. 18, 2011), http://www.furnituretoday.com/article/534949-ITC_member_scrutinizes_settlement_agreements.php (explaining that the ITC only “sidestepped” addressing the legality of these settlements because of their antitrust nature).

62. See, e.g., *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (establishing, in the immediate wake of the Sherman Act, that American economic policies rely on principles of fair competition); see also *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992) (maintaining that the preservation of a fair market free of price fixing or cartels is essential to American principles of economic freedom).

63. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951) (reiterating that antitrust legislation reflects the policy that international trade is both possible and necessary).

64. See *Alt. Pioneering Sys., Inc. v. Direct Innovative Prods., Inc.*, 822 F. Supp. 1437, 1445 (D. Minn. 1993) (finding a public interest in fostering open and fair competition); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 431 (S.D.

public and state interests, U.S. antitrust laws promote trade by suppressing unfair attempts to hinder competition.⁶⁵

1. The Sherman Act Is the Primary Piece of U.S. Antitrust Legislation at Issue in AD Cases

Generally, the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”⁶⁶ For a court to find antitrust liability under the Sherman Act, three elements must be satisfied: (1) at least two parties must have been acting together as a conspiracy; (2) the co-conspirators must have intended to unreasonably restrain trade; and (3) a party must have suffered actual injuries resulting from the restraint in trade.⁶⁷

2. The Federal Trade Commission Act Expands upon the Sherman Act

The Federal Trade Commission Act (“FTC Act”) prohibits unfair or deceptive practices affecting commerce and is used to prosecute conduct that directly violates the Sherman Act or otherwise violates the “spirit” of U.S. antitrust laws.⁶⁸ The Sherman Act and the FTC Act apply to both domestic and foreign firms that restrain either domestic or foreign commerce.⁶⁹

E. Private Settlements Can Violate Antitrust Laws

Generally, private settlement agreements raise antitrust concerns when the agreements involve implications for pricing standards or market

Ohio 1980) (holding that states have a legitimate interest in regulating commercial affairs that restrain competition).

65. *See, e.g., Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796, 801 (S.D. Cal. 1952) (accentuating the relationship between antitrust concerns, competition, and trade).

66. Sherman Antitrust Act, 15 U.S.C. § 1 (2006).

67. *See, e.g., Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 501–02 (9th Cir. 2009) (amend. July 9, 2012) (describing the three elements necessary to state a claim under Section 1 of the Sherman Act); *accord A Fisherman’s Best, Inc. v. Rec. Fishing Alliance*, 310 F.3d 183, 189 (4th Cir. 2002) (using similar elements to establish Sherman Act liability).

68. *See* 15 U.S.C. §§ 41–45; Calvani & Tritell, *supra* note 11 (viewing the FTC Act as an extension of the Sherman Act).

69. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 2–4 (Apr. 1995), *available at* 1995 WL 1146233. *See Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1269 (D.C. Cir. 2005) (explaining that the Foreign Trade Antitrust Improvements Act creates limited Sherman Act liability for foreign conduct that harms domestic commerce).

allocation.⁷⁰ In such cases, the settlement itself may be considered a conspiracy in restraint of trade that violates antitrust law.⁷¹ For example, in *Music Center v. Prestini Musical Instrument Company*, a foreign firm claimed that a U.S. competitor threatened to request an AD investigation if the foreign firm did not accept specific terms.⁷² Though the court did not rule on the merits of the collusion via threat of an AD petition, it noted that an AD settlement affecting either the price or quantity of subject imports would violate U.S. antitrust laws.⁷³

F. Abuse of Process Implications Can Heighten Antitrust Concerns

Abuse of process concerns arise when a private party uses a legal process against another party to serve a purpose for which that process was not designed.⁷⁴ The common law tort of abuse of process is closely related to antitrust concerns because courts can impose antitrust liability upon a party initiating a legal process to hurt its competition instead of using that process for its legitimate and intended purposes.⁷⁵ The most common method of abuse of process in antitrust cases is some form of extortion, in which one party uses a legal or administrative process to compel another party to make some sort of payment or to take some specific action that it would not have otherwise.⁷⁶ Under an abuse of process standard, the unlawful use of legal action to restrain trade can constitute anticompetitive

70. See *United States v. Singer Mfg. Co.*, 374 U.S. 173, 175 (1963) (finding Sherman Act antitrust liability for firms using collusive license agreements to disrupt a competitive market); see also *Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 816 (D.C. Cir. 2001) (indicating that efforts to keep competitors out of a market violate antitrust laws).

71. See KAYE & DUNN, *supra* note 9, § 31:1 n.2 (observing that AD settlements necessarily involve relative pricing schemes amongst competitors and pointing to similar private settlement circumstances where such schemes were themselves found to violate antitrust laws).

72. See 874 F. Supp. 543, 543, 547 (E.D.N.Y. 1995) (addressing issues of unfair trading, trade secrets, abuses of process, wrongful proceedings, and prima facie torts).

73. See Christopher T. Taylor, *The Economic Effects of Withdrawn Antidumping Investigations*, FED. TRADE COMM'N 1, 2 (2001), <http://www.ftc.gov/be/workpapers/wp240.pdf> (explaining the decision in *Music Center*). See generally *Music Center*, 874 F. Supp. 543 (noting that private agreements involving price fixing, price lists, and quantity allotments can create antitrust liability).

74. See RESTATEMENT (SECOND) OF TORTS § 682 (1977).

75. See *id.* § 682 cmt. b; Calvani & Tritell, *supra* note 11, at 532–33 (quoting James D. Hurwitz, *Abuse of Government Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEORGETOWN L.J. 601 (1985)); see also *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471–73 (7th Cir. 1982) (using an abuse of process analysis to propose that courts should focus more on the petitioning parties' subjective intent to harm competition).

76. RESTATEMENT (SECOND) OF TORTS § 682 cmt. b.

conduct subject to antitrust liability.⁷⁷

In *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, the Seventh Circuit found that even if legal procedures have a legitimate basis in the law, such procedures can still amount to an actionable restraint of trade because an overt harassment of competitors via legal procedures qualifies as an abuse of process that could violate antitrust laws.⁷⁸ As Judge Posner explained, for an abuse of process to be actionable under antitrust laws, it does not have to be "malicious" in the tort sense, nor must there be a lack of probable cause for the legal action.⁷⁹ The court found, instead, that antitrust concerns arise when a plaintiff does not care about the outcome of the suit itself and is instead concerned with maintaining the suit to force a competitor to perform some act it would not otherwise perform.⁸⁰ Though the Supreme Court effectively overruled *Grip-Pak* in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,⁸¹ Judge Posner's analysis established the idea that litigation supported by improper anticompetitive purposes should not necessarily be immunized from antitrust liability just because the claim is not entirely baseless.⁸²

G. The Noerr-Pennington Doctrine Provides an Important Immunity from Antitrust Liability

The Noerr-Pennington doctrine arose out of two Supreme Court decisions as a judicially created means of exemption from antitrust liability for most lawful attempts to obtain government action.⁸³ The First

77. See *Scooter Store, Inc. v. SpinLife.com, LLC*, 777 F. Supp. 2d 1102, 1116 (S.D. Ohio 2011) (holding that a firm using trademark litigation to destroy competition was engaged in anticompetitive conduct); see also *Clipper Exxpress v. Rocky Mountain Tariff Bureau, Inc.*, 690 F.2d 1240, 1251 (9th Cir. 1982) (explaining that the intentional harassment of competitors through administrative processes creates the same antitrust liabilities as harassing competitors through the judicial system).

78. See *Grip-Pak, Inc.*, 694 F.2d at 471-72 (insisting that the defendant's suit was not necessarily barred by the Noerr-Pennington doctrine simply because the suit was non-malicious).

79. *Id.*

80. See *id.* at 472 (noting the difficulty of drawing lines between lawful and unlawful competitive purposes in filing a suit).

81. See generally *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) (discussing that a plaintiff's subjective intent was not relevant in an antitrust case involving otherwise lawful litigation unless the plaintiff's suit was first found to be objectively unreasonable).

82. See *Grip-Pak, Inc.*, 694 F.2d at 471 ("If abuse of process is not constitutionally protected, no more should litigation that has an improper anticompetitive purpose be protected, even though the plaintiff has a colorable claim.").

83. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); see also Thomas J. Prusa, *Why Are So Many Antidumping Petitions Withdrawn?*, 33 J. INT'L

Amendment strongly influenced the doctrine's limitations on antitrust liability.⁸⁴ Under this doctrine, as long as a private party petitions the government for a lawful form of redress, that party is exempted from antitrust scrutiny, even if the petitioned-for government action might harm competition.⁸⁵ Noerr-Pennington protection extends to cover private parties' petitions that result in settlement agreements between the petitioning parties and the government.⁸⁶

When assessing the scope of Noerr-Pennington's antitrust liability protection, courts look at the impact, source, context, and nature of the anticompetitive activity at issue.⁸⁷ However, even if the underlying purpose of the activity is to achieve an anticompetitive restraint of trade, the Noerr-Pennington doctrine immunizes that activity from antitrust liability so long as it is a lawful solicitation of government action.⁸⁸ Though many courts hold that a petitioner's "bad intent or anticompetitive motivation" in seeking government action is "irrelevant" for purposes of Noerr-Pennington protection, others question this reasoning.⁸⁹

ECON. 1, 6–7 (1992) (describing the Noerr-Pennington doctrine's origins).

84. *E.g.*, *Grip-Pak, Inc.*, 694 F.2d at 471; *see* Prusa, *supra* note 83, at 6–7 (clarifying that under the Noerr-Pennington doctrine, antitrust liability is subordinate to the constitutionally protected right to petition any branch or department of government, or otherwise participate in the legislative process).

85. *See* Cho, *supra* note 5, at 361 (explaining that any anticompetitive effects of a lawful petition are irrelevant for Noerr-Pennington purposes).

86. *See* VIBO Corp., v. Conway, 669 F.3d 675, 683–84 (6th Cir. 2012) (explaining that the actions protected by the Noerr-Pennington doctrine include settling with the government, but making no mention of private-to-private settlement agreements). *But cf.* Cho, *supra* note 5, at 361 (arguing that courts interpret the Noerr-Pennington doctrine so narrowly that its protections would probably extend to cover private AD settlements).

87. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504 (1988).

88. *See* Freeman v. Lasky, 410 F.3d 1180, 1184 (9th Cir. 2005) (stating that "conduct incidental to" a petition is still protected by the Noerr-Pennington doctrine so long as the petition itself would be protected); *Marina v. Fisher*, 338 F.3d 189, 197 (3rd Cir. 2003) (emphasizing that Noerr-Pennington immunity protects lawful petitioning of government regardless of improper motives); *Grip-Pak, Inc.*, 694 F.2d at 471 (asserting that the *Noerr* Court viewed collective efforts to influence legislation as a form of petitioning, regardless of their purpose).

89. *Compare* Assoc. Container Transp. Ltd. v. United States, 705 F.2d 53, 58–59 (2d Cir. 1983) (stating that lawful efforts to influence government are immune from Sherman Act liability regardless of anticompetitive purposes), *and* VIBO Corp., 669 F.3d at 684 (holding that subjective anticompetitive intent is irrelevant in Noerr-Pennington determinations), *with* *Grip-Pak, Inc.*, 694 F.2d at 471–72 (proposing that subjective intent should be given more consideration in Noerr-Pennington decisions).

H. Shams: An Exception to the Noerr-Pennington Rule

Noerr-Pennington immunity is not absolute because courts created a 'sham' exception, which removes the doctrine's protection for 'sham' petitions that are solely intended to hurt competition.⁹⁰ Specifically, the sham exception applies when parties use a governmental process itself, instead of the outcome of that process, as an anticompetitive weapon.⁹¹

Traditionally, courts use a two-prong test to determine whether a petition for lawful governmental action qualifies as a sham: (1) the petition must be objectively baseless; and (2) the petitioner's subjective motivation must be to conceal its intent to use the governmental process for anticompetitive purposes.⁹² If both prongs are satisfied, courts will not afford petitioners the Noerr-Pennington doctrine's antitrust immunity.⁹³

Some courts characterize the use of sham actions as a form of "abuse of process."⁹⁴ For instance, Justice Stevens, in his *Professional Real Estate Investors* concurrence, recognized that many sham cases involve an abuse of process, and he argued that the distinction between sham and genuine litigation should not be the only difference between lawful and unlawful conduct.⁹⁵ As Justice Stevens explained, the sham exception's objective

90. Cho, *supra* note 5, at 361. See generally *Prof'l Real Estate Investors, Inc., v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) (applying the sham exception).

91. See *VIBO Corp.*, 669 F.3d at 685–86 (differentiating between using a lawful process itself and the outcome of a process to harm competitors); *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370, 401 (2d Cir. 2005) (insisting that Noerr-Pennington immunity applies when an anticompetitive effect is a consequence of some governmental action, but not the means for obtaining such action); *Winterland Concessions Co. v. Trela*, 735 F.2d 257, 263–64 (7th Cir. 1984) (quoting *Gainsville v. Florida Power & Light Co.*, 488 F. Supp. 1258, 1265–66 (S.D. Fla. 1980)) ("[T]he prerequisite motive for the sham exception is the intent to harm one's competitors not by the *result* of the litigation but by the simple fact of the *institution* of the litigation." (emphasis maintained)).

92. See *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 60–61 (1993) (establishing the two-prong test for defining sham litigation under Noerr-Pennington, holding that courts must satisfy the first prong—that the petition was objectively baseless—before examining a petitioner's subjective intent, and explaining that objectively baseless petitions occur if a petition has no reasonable expectation of success on its merits).

93. See Calvani & Tritell, *supra* note 11, at 536–37 (using a hypothetical situation to explain how courts conduct Noerr-Pennington analyses).

94. See *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259 (9th Cir. 1982) (holding that some form of abuse of process must be found in order to invoke the sham exception); *Grip-Pak, Inc.*, 694 F.2d at 471–72 (comparing the Noerr-Pennington doctrine to the tort of abuse of process and applying abuse of process standards to show that litigation can be improper even if it is supported by probable cause); *Ad Visor, Inc. v. Pac. Tel. & Tel. Co.*, 640 F.2d 1107, 1109 (9th Cir. 1981) (examining Noerr-Pennington case law and characterizing courts' sham exception analyses as tests for an abuse of process).

95. See *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 75–76 (1993) (Stevens, J.,

reasonableness test may not be appropriate for determining the lawfulness of a petition in complicated antitrust cases involving an abuse of process.⁹⁶

Judge Posner, in *Grip-Pak*, partially inspired Justice Stevens's reasoning by questioning other courts' use of the Noerr-Pennington doctrine to grant antitrust immunity to parties petitioning the government for purely anticompetitive purposes.⁹⁷ Employing an abuse of process analysis, Judge Posner reasoned that if Noerr-Pennington immunity is applied too broadly—to the point that all non-malicious litigation is immunized from government regulation—the tort of abuse of process will itself become unconstitutional.⁹⁸ Judge Posner further noted that the language surrounding abuse of process laws precisely embodies the types of legal activity that courts usually do not protect under the First Amendment.⁹⁹

Other courts offer varying interpretations on the scope of the Noerr-Pennington sham exception.¹⁰⁰ For instance, the court in *Music Center* held that a domestic firm's filing of multiple AD and administrative review petitions against its foreign competitors did not qualify as a sham activity because there was no evidence that the domestic firm lacked a reasonable expectation of success on the merits of its petition.¹⁰¹ Additionally, three U.S. courts of appeals require that shams be legally unreasonable, others hold that no successful litigation can be a sham, and still other courts of appeals consider some meritorious litigation to be a sham.¹⁰²

concurring) (providing examples of how objectively reasonable lawsuits can still violate antitrust laws).

96. See *id.* at 74–76 (building upon the abuse of process analysis in *Grip-Pak*, disagreeing with the majority's equation of objective baselessness, and encouraging the Court to avoid making unnecessarily broad holdings in complicated sham exception cases).

97. See *Grip-Pak, Inc.*, 694 F.2d at 470–71 (evaluating whether a lack of probable cause is necessary to create actionable antitrust liability).

98. See *id.* at 471 (examining the Supreme Court's analysis in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)).

99. *Id.*

100. *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 55 n.3 (1993) (explaining how the various courts of appeals apply different standards in their Noerr-Pennington sham analyses).

101. See *Music Center S.N.C. Di Luciano Pisoni & Co. v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 549–50, 554–55 (E.D.N.Y. 1995) (holding that the domestic firm would be immune from liability, even if the sole purpose of its petition was to injure a foreign competitor).

102. *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 55 n.3 (1993) (acknowledging various courts of appeals' inconsistent and often contradictory definitions of “sham” litigation).

I. The Chinese Furniture Case Reveals How AD Investigations Actually Operate

In October 2003, an ad hoc association of twenty-seven U.S. furniture producers filed AD petitions with Commerce and the ITC concerning imports of certain wooden bedroom furniture from China.¹⁰³ After a full investigation, Commerce made an affirmative determination, finding that wooden bedroom furniture imports from China were being dumped in the U.S. market at LTFV.¹⁰⁴ The ITC found that the LTFV imports of Chinese furniture materially injured the domestic wooden furniture industry.¹⁰⁵ Commerce issued an AD order with respect to imports of certain wooden bedroom furniture from China on January 4, 2005.¹⁰⁶ From then on, cash deposits accompanied all imports of wooden bedroom furniture from China.¹⁰⁷ Commerce assigned different cash deposit rates to Chinese furniture producers depending on their estimated dumping margins, but because so many Chinese producers were included in the investigation, Commerce applied its sampling procedure; thus, some producers received lower individualized rates, but most Chinese producers received the much higher “China-wide” duty rate.¹⁰⁸

By the ITC’s first sunset review of the orders in December 2009, Commerce had already completed four administrative reviews, with a fifth review pending.¹⁰⁹ When choosing which Chinese producers to review, the domestic interested parties petitioned for reviews of nearly every Chinese producer with relatively low deposit rates.¹¹⁰ For the firms not listed in the

103. See Chinese Furniture, *supra* note 2, at I-2 & n.6.

104. Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People’s Republic of China, 69 Fed. Reg. 67, 313 (Dep’t of Commerce Nov. 17, 2004); Chinese Furniture, *supra* note 2, at I-2.

105. Wooden Bedroom Furniture from China, 69 Fed. Reg. 77, 779 (Int’l Trade Comm’n Dec. 28, 2004); Chinese Furniture, *supra* note 2, at I-2.

106. Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People’s Republic of China, 70 Fed. Reg. 329 (Int’l Trade Admin. Jan. 4, 2005).

107. See generally Chinese Furniture, *supra* note 2 (describing the history of the AD orders on certain wooden bedroom furniture from China and the associated duty payments).

108. See Chinese Furniture, *supra* note 2, at tbl. I-2 (displaying the various margins assigned to specific Chinese furniture producers, ranging between 0.4% and 39.46% as well as the “PRC-Wide Rate” of 216.01% that was assigned to the majority of Chinese producers under Commerce’s sampling procedures).

109. Chinese Furniture, *supra* note 2, at I-8 to I-10, app. E.

110. See Posthearing Brief of Guandong Furniture Ass’n at 10, Wooden Bedroom Furniture from China, Inv. No. 731-TA-1058, USITC Pub. 4203 (Dec. 2010) (Review) (revealing that, on average, domestic interested parties requested reviews of 158 Chinese producers in each administrative review petition).

petitions for review, Commerce automatically applied the duty rates assessed from the original investigation or the previous administrative reviews.¹¹¹ For firms listed in the petitions, Commerce investigated the past years' import data and calculated new dumping margins.¹¹² Every year, however, most Chinese producers reached settlement agreements with the domestic interested parties, and the domestic parties removed every Chinese producer that settled from the petition for review.¹¹³

II. THE ADMINISTRATIVE REVIEW PROCESS INCENTIVIZES QUESTIONABLY LEGAL SETTLEMENT AGREEMENTS THAT FRUSTRATE THE OBJECT AND PURPOSE OF EXISTING AD LAWS

This Section explores how the inherent uncertainty of AD administrative reviews creates a system in which domestic firms can pressure their foreign competitors into post-order settlement agreements that put cash in the pockets of domestic producers. This Section then analyzes how these collusive settlements generate important antitrust concerns that are, however, likely mitigated by insufficiently particular AD laws and courts' narrow application of the Noerr-Pennington doctrine. This Section also describes how, antitrust legality notwithstanding, these settlements run afoul of the intended goals of AD orders and frustrate the object and purpose of existing AD legislation.

A. *Through Uncertainty, the Administrative Review Process Opens the Door to Cash Settlement Payments*

Under the United States' unique retrospective AD duty assessment system, subject foreign producers begin paying AD duties immediately after affirmative final determinations by Commerce and the ITC, but their final liability is often unknown for more than another year.¹¹⁴ Thus, the real sting of an AD order is in the inherent uncertainty of the hard-to-predict final duty liability because the opaque administrative review process may ultimately require foreign producers to retroactively pay much higher duty rates.¹¹⁵

Commerce's AD investigations and administrative reviews are,

111. See *Chinese Furniture*, *supra* note 2, at I-8 n.14.

112. *Id.* at I-8 n.14, I-9.

113. *Id.* at 16, III-2, III-3.

114. See Ikenson, *supra* note 47 (noting that final liability determinations may be delayed for as long as eighteen months, or even, sometimes, for several years).

115. See AFMC's Answers to Commissioners' Questions at 41, *Wooden Bedroom Furniture from China*, Inv. No. 731-TA-1058 (Dec. 2010) (Review) (arguing that final liability uncertainty harms foreign producers by raising their transaction costs).

therefore, extremely costly for foreign producers—often generating millions of dollars in legal fees—and their outcomes are difficult to predict.¹¹⁶ This is especially true when domestic parties petition for reviews of many foreign firms, causing Commerce to employ its sampling techniques to determine dumping margins.¹¹⁷ In addition to the upfront legal fees and costs of satisfying the administrative review requirements, subject foreign producers face costly uncertainty over their ultimate AD duty liabilities.¹¹⁸ Domestic interested parties use this heightened uncertainty to pressure foreign producers into accepting collusive settlement agreements.¹¹⁹ The burden of administrative reviews' unpredictable costs is so large that the mere threat of a review petition often causes subject foreign producers to settle.¹²⁰

When settling, domestic interested parties and subject foreign producers work out a system in which the foreign producers that agree to make cash payments to domestic producers are removed from the administrative review petition; thus, those foreign producers retain their prior, and thus predictable, duty rates.¹²¹ These agreements are especially effective because domestic interested parties target foreign producers paying relatively low duty rates and who thus are especially fearful of the much higher country-wide duty rates.¹²²

At first, it may seem that domestic interested parties would not pursue such agreements because they do nothing to curtail the harmful effects of dumped subject foreign imports; however, these agreements do provide domestic interested parties with something that past trade laws conditioned them to associate with AD orders—cash.¹²³ Congress's repeal of the Byrd

116. KAYE & DUNN, *supra* note 9; Cho, *supra* note 5, at 388.

117. See Pierce & DeFrancesco, *supra* note 1 (detailing how the broad spectrum of firms included in the sampling process makes it more difficult to predict what new duty rates might be).

118. KAYE & DUNN, *supra* note 9.

119. See *id.*, *supra* note 9 (describing how domestic producers consciously leverage the heightened uncertainty of administrative reviews to encourage settlements and how foreign producers view their original deposits as 'sunk costs' that they weigh against the uncertainty of administrative reviews).

120. See B. Peter Rosendorff, *Voluntary Export Restraints, Antidumping Procedures, and Domestic Politics*, 86 AM. ECON. REV. 544, 544–45 (1996) (observing that petitions for review are withdrawn for nearly one-third of all subject foreign producers in AD cases, and nearly every withdrawal is associated with a private settlement agreement). Cf. Cho, *supra* note 5, at 396 (describing the uncertainty costs of non-price predation).

121. Ikenson, *supra* note 47; Pierce & DeFrancesco, *supra* note 1.

122. See INT'L TRADE ADMIN., *supra* note 36, at 4; Hagerty, *supra* note 2.

123. See Pierce & DeFrancesco, *supra* note 1 (noting that, because of the Byrd Amendment, domestic producers grew accustomed to receiving cash from AD orders).

Amendment forced domestic industries to look elsewhere for easy cash. Their solution? Private settlement agreements.¹²⁴

Overall, four key factors enable these private post-order settlement agreements: (1) relatively low AD rates that exporters do not want to see increase; (2) annual petitions for review of nearly every subject foreign producer; (3) Commerce's use of sampling to assign duty rates; and (4) the absence of Byrd Amendment payouts.¹²⁵

1. The Chinese Furniture Case Reveals the Full Extent and Effects of These Settlements

The Chinese furniture case demonstrates how AD rules and procedures enable private post-order settlement agreements and reveals the full extent and effects of these settlements. Every year after Commerce issued the original AD duty order, the domestic furniture industry took advantage of Commerce's administrative review system and submitted petitions for the review of hundreds of Chinese furniture producers.¹²⁶ The domestic industry used those petitions to induce Chinese producers to enter into lucrative settlement agreements in which the domestic industry removed Chinese producers from the petition if they agreed to pay cash to the domestic producers.¹²⁷ Knowing that many Chinese producers could tolerate their current rates and would like to avoid paying the much higher China-wide duty rate, the domestic producers conveyed to the Chinese producers that the petitions would be withdrawn if they agreed to pay off the domestic producers.¹²⁸ This extortive process was so effective that

124. *See id.* (pointing to the repeal of the Byrd Amendment as an incentive for AD settlement agreements).

125. *Id.*

126. *See* Prehearing Brief of Dalian Haufeng Furniture Group at 9, Wooden Bedroom Furniture from China, Inv. No. 731-TA-1058, USITC Pub. 4203 (Dec. 2010) (Review) (describing the domestic furniture industry as "strategic" and "coordinated" in their efforts to compel settlements with Chinese competitors).

127. *See id.* (describing these settlements as a "reward" for the Chinese producers willing to either enter into exclusive trading arrangements with domestic producers or make settlement payments, and, in contrast, describing the review process as a punishment for those Chinese producers refusing to settle); *see also* Posthearing Brief of Guandong Yihua Timber Industry Co., Wooden Bedroom Furniture from China, Inv. No. 731-TA-1058, USITC Pub. 4203, at 10–11 (Dec. 2010) (Review) (providing a first hand account of how domestic furniture producers refused to remove one company from an administrative review petition because it would not settle; thus, that company was selected as a mandatory respondent and subjected to higher rates).

128. *See* Posthearing Brief of Furniture Retailers of America at 3–4, Wooden Bedroom Furniture from China, Inv. No. 731-TA-1058, USITC Pub. 4203 (Dec. 2010) (Review) (explaining that domestic furniture producers "let it be known" that they would withdraw administrative review petitions, effectively preserving original duty rates of 7.24% or less, for Chinese producers willing to meet the domestic petitioners

within five years of the original order, a majority of Chinese furniture producers chose to settle with domestic producers.¹²⁹ Over that time, Chinese furniture producers paid tens of millions of dollars to twenty domestic furniture producers in exchange for removing their names from the petitions for review.¹³⁰

Domestic producers carefully calculated the size of each Chinese producers' settlement payments as a percentage of the value of each producers' imports.¹³¹ This incentivized domestic interested parties to encourage more subject imports because higher import volumes meant even larger settlement payments.¹³² This calculation method, however, was not strictly standardized, and some Chinese furniture producers received discounted settlements because of their special commercial relationships with domestic producers.¹³³

B. These Increasingly Common Private Post-Order Settlements Raise Far-Reaching Legal Concerns

Though the ITC only recently recognized the existence of these settlements, economists long suspected that withdrawals of AD petitions

settlement terms); Ikenson, *supra* note 47 (describing the domestic industry's exploitation of those Chinese producers that could tolerate the duties they were already paying as "clever shakedowns"); *see also* Transcript, *supra* note 3, at 196 (Leslie Thompson, owner of an American furniture firm with production facilities in China, recounting a conversation with an attorney for the domestic interested parties where he "asked [her] what [she] could give him that would entice his client, the Petitioners, to drop [her firm] from the review"); Ellen Croibier, *From China, an end run around U.S. tariffs*, TRADEREFORM.ORG (May 23, 2011), <http://www.tradereform.org/2011/05/6233/> (noting that once Chinese producers paid the domestic firms, they were dropped from the review petitions).

129. *See* Chinese Furniture, *supra* note 2, at III-2, III-3; Posthearing Brief of Guangdong Furniture Ass'n, *supra* note 110, at 10 (revealing that domestic interested parties withdrew fifty-one percent of subject Chinese producers from the first review petitions, seventy-nine percent from the second review, ninety-one percent from the third review, and eighty-nine percent from the fourth review, and all withdrawals were made in exchange for making cash payments to the domestic producers).

130. Posthearing Public Report to Commission at III-10, Wooden Bedroom Furniture from China, Inv. No. 731-TA-1058, USITC Pub. 4203 (Dec. 2010) (Review). *Cf.* Ikenson, *supra* note 47 (noting that an even larger, unspecified amount of money was paid directly to the domestic interested parties' attorneys).

131. *See* Posthearing Brief of Furniture Retailers of America, *supra* note 128, at 4, 7 (reflecting the understanding of the Furniture Retailers of America after their investigation of Commerce's import data and specific annual settlement amounts).

132. *See id.* at 7 (describing the "perverse incentives" produced by the order and how these settlements allowed domestic producers to increase their profit without re-employing any workers to curtail the harmful effects of subject imports).

133. *See id.* at 63 (claiming domestic firms use special commercial relationships to effectively regulate import volumes).

signaled some type of collusive agreement between domestic and foreign producers.¹³⁴ Those economists were largely correct because the settling of administrative reviews is not new, and the prevalence of private post-order settlement agreements is growing rapidly.¹³⁵ Notably, in every recent AD case involving post-order settlement agreements, the domestic interested parties represented such sufficiently aligned interests that the domestic industry could speak with one voice and control the process of submitting and withdrawing the petitions for review; it is not clear whether this settlement scheme will work if domestic interested parties are unorganized or divided in their goals or motives.¹³⁶

1. The Collusive Nature of These Settlements Raises Many Antitrust Concerns

Fair competition is a central tenant of U.S. economic policy, and U.S. antitrust laws support this policy by protecting both domestic and foreign competition.¹³⁷ Therefore, actions that encourage unfair trade or disrupt market competition raise serious antitrust concerns.¹³⁸ U.S. trade law accounts for two primary methods of settling AD cases, and Commerce must oversee both methods.¹³⁹ In contrast, private post-order settlements are conducted without any agency oversight.¹⁴⁰ Without agency oversight, any discussion of price or quantity restraints runs significant risks of

134. Cho, *supra* note 5, at 394; see Combs, *supra* note 61 (noting that although the ITC formally recognized the settlement process in the furniture case, Commerce continues to deny knowledge of their existence).

135. See Ikenson, *supra* note 47 (explaining that these agreements operated “in the shadows” for years). Cf. Pierce & DeFrancesco, *supra* note 1 (tracing the rise of these settlements back to the Byrd Amendment and its repeal).

136. See Pierce & DeFrancesco, *supra* note 1 (questioning whether these settlement schemes will be as effective if domestic industries are less organized); see also KAYE & DUNN, *supra* note 9 (noting that no public or private party has yet challenged these post-order AD settlement agreements in court).

137. See *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (establishing that American economic policy relies on principles of fair competition); *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796, 801 (S.D. Cal. 1952) (connecting antitrust concerns with fair trading practices).

138. See Calvani & Tritell, *supra* note 11, at 530–31 (illustrating how the most pressing issues arise when private AD settlement agreements bring about collusive outcomes because antitrust violations are “unavoidable” when domestic and foreign firms act together to restrain trade).

139. See 19 U.S.C. § 1673c(d)(1) (establishing a public interest requirement for suspending an AD investigation); Macrory, *supra* note 8, at 24–25 (explaining that suspension agreements and AD petition withdrawals both require Commerce’s approval before AD cases can be ‘settled’).

140. KAYE & DUNN, *supra* note 9.

violating antitrust laws.¹⁴¹

The most prominent piece of antitrust legislation at issue is the Sherman Act, which explicitly prohibits collusive acts that restrain trade or harm competition.¹⁴² Post-order AD settlement agreements run afoul of the three central elements of the Sherman Act.¹⁴³ First, the Sherman Act's contract, combination, or conspiracy element is easily satisfied: because these settlements involve direct agreement and cooperation amongst foreign and domestic industries, and each of those industries is comprised of multiple firms, there are almost always multiple parties acting together to restrain trade.¹⁴⁴ Second, the restraint of trade or commerce element is satisfied because these private settlement agreements usually involve some type of relative pricing or quantity agreement amongst market participants.¹⁴⁵

Finally, the restraints on trade caused by the post-order settlements inflict actual injuries on certain foreign and domestic competitors, satisfying the final element for antitrust liability under the Sherman Act.¹⁴⁶ Domestic producers not participating in the AD case suffer because they do

141. Cf. KAYE & DUNN, *supra* note 9 (recounting how, in an AD case involving a private settlement agreement, there were no antitrust concerns because neither the negotiations nor the agreement involved any market price or quantity restrictions).

142. 15 U.S.C. § 1.

143. See *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 501–02 (9th Cir. 2009) (describing the three primary requirements for stating a claim under the Sherman Act: the existence of a conspiracy, intent to restrain trade, and actual injury to competition or trade).

144. See *A Fisherman's Best, Inc. v. Rec. Fishing Alliance*, 310 F.3d 183, 189 (4th Cir. 2002) (explaining that for success on a claim alleging violations of the Sherman Act, a plaintiff must show that two persons acted in concert and that their actions constituted an unreasonable restraint on commerce); *Calvani & Tritell*, *supra* note 11, at 546 (clarifying that, under the Sherman Act, there cannot not be an antitrust violation if a single firm petitions the government in an effort to restrain trade or commerce because there could not possibly be two or more actors joined under a contract, combination, or conspiracy); *Cho*, *supra* note 5, at 398 (noting that multiple domestic firms discuss prices and costs among themselves when filing AD petitions because the petitions must be filed by a representative number of domestic producers of like products).

145. See *Music Center v. Prestini Musical Instrument Company*, 874 F. Supp. 543, 557 (E.D.N.Y. 1995) (holding that price fixing in order to control market access violates antitrust laws); KAYE & DUNN, *supra* note 9 (noting that AD settlements raise antitrust concerns because they involve relative pricing agreements amongst market participants and explaining that when private settlement agreements involve implications for pricing standards or market allocation, the settlement itself may be considered a conspiracy in restraint of trade); see also *Taylor*, *supra* note 73, at 3 (claiming that, though there is little precedent, a private AD settlement attempting to increase prices or decrease imports, absent some sort of joint venture, is illegal).

146. See, e.g., *Coalition for ICANN Transparency, Inc.*, 611 F.3d at 501–02 (9th Cir. 2009) (holding that, to establish Sherman Act liability, a party must suffer actual injuries resulting from the restraint in trade).

not receive the cash payouts, and the settlement agreements do nothing to limit the flow of unfair subject imports, which continue to injure the sales of their goods in the U.S. market.¹⁴⁷ Moreover, foreign producers with special relationships with the domestic petitioners receive better settlement terms; this effectively raises the relative costs for the foreign producers that receive the relatively less favorable terms by limiting their ability to compete in the U.S. market.¹⁴⁸

Expanding upon the Sherman Act, the FTC Act raises additional antitrust concerns by imposing antitrust liability on conduct that “violates the spirit” of the Sherman Act.¹⁴⁹ The use of AD settlements to restrain trade violates the “spirit” of the Sherman Act because these settlements represent intentional and collusive efforts to harm competitors and restrain commerce in exchange for economic benefits.¹⁵⁰ This effect epitomizes the exact opposite of the Sherman Act’s intended purpose of promoting competition and prohibiting collusive acts that restrain trade.¹⁵¹

In addition to straightforward Sherman Act or FTC Act violations, these settlements may create additional liability as an abuse of process.¹⁵² Generally, an abuse of process occurs when a private actor uses a legal process, against another party, primarily to accomplish a purpose for which

147. See *Chinese Furniture*, *supra* note 2, at 29 (Additional Views of Comm’r Daniel R. Pearson) (analyzing the AD order’s effects and how the volume of subject Chinese furniture imports remained substantial, in both absolute terms and in terms of relative market share).

148. See *Posthearing Brief of Furniture Retailers of America*, *supra* note 128, at 7, 63 (connecting some foreign firms’ relatively lower settlement rates with special business relationships); JACKSON, DAVEY & SYKES, *supra* note 15, at 767–68 (affirming that administrative reviews cause foreign producers to face heightened, and costly, uncertainty); see also *United States v. Singer Mfg. Co.*, 374 U.S. 174, 193–95 (1963) (finding that collusive efforts to treat specific foreign competitors differently, in order to hurt those competitors’ imports to the United States, violated the Sherman Act).

149. See *Calvani & Tritell*, *supra* note 11, at 548–50 (citing *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962)) (explaining that the FTC Act prohibits unfair or deceptive methods of competition or practices affecting commerce).

150. *Id.* (arguing that the abuse of import relief mechanisms frustrates the intended purpose of the Sherman Act).

151. See *Standard Oil Co. v. FTC*, 340 U.S. 231, 247–50 (1951) (looking to congressional intent surrounding the Sherman Act, and other antitrust laws, to determine that the purpose of antitrust laws is the protection of fair trade and competition).

152. See *RESTATEMENT (SECOND) OF TORTS* § 682 cmt. b (finding that the most common instances of abuse of process, as it relates to antitrust concerns, arise in cases of extortion where one party uses a lawful governmental process to unlawfully pressure its competitors into making some sort of debt payment or partaking in some specific action).

that process was not designed.¹⁵³ The intended purpose of the administrative review process is not to transfer wealth from foreign to domestic producers.¹⁵⁴ Rather, the review process is supposed to further the goals of AD laws in general; for example, to protect domestic industries from unfair import competition.¹⁵⁵ The domestic industries' use of administrative reviews to pressure foreign competitors into lucrative settlement agreements is thus not a purpose that the review process was intended to achieve, especially since the repeal of the Byrd Amendment revealed Congress's intent to keep AD duty revenues out of the hands of domestic industries.¹⁵⁶ The review process is supposed to help protect domestic industries, but both domestic production volume and employment decrease after these settlements transpire; thus, the agreements fail to further a primary goal of the administrative review process.¹⁵⁷

Admittedly, domestic interested parties are well within their rights to file administrative review petitions in most AD cases.¹⁵⁸ However, as Judge Posner proposed in *Grip-Pak*, the use of a legal process does not have to be "malicious" in order to violate antitrust laws, and the use of legal procedures to harass competitors can qualify as an abuse of process that

153. *See id.* § 682.

154. *See* Lester, *supra* note 4 (explaining that the repeal of the Byrd Amendment raises antitrust concerns because domestic producers are not supposed to receive AD duty payments anymore, but through private settlements domestic producers found a way to do what Congress tried to stop).

155. Schnerre, *supra* note 7, at 497–98.

156. *See* Pierce & DeFrancesco, *supra* note 1 (claiming that the Byrd Amendment's repeal incentivized these settlement agreements); Schnerre, *supra* note 7, at 498 (explaining that AD laws only provide administrative remedies and are thus not designed to facilitate direct payments to domestic parties); *see also* Prehearing Brief of Guandong Furniture Ass'n at 5–6, Wooden Bedroom Furniture from China, Inv. No. 731-TA-1058, USITC Pub. 4203 (Dec. 2010) (Review) (noting that even under the Byrd Amendment, domestic producers were only entitled to AD duty funds through some government action). *But cf.* Tudor N. Rus, Recent Development, *The Short, Unhappy Life of the Byrd Amendment*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 427, 434–38 (2007) (arguing that international pressure and the WTO played a large part in causing Congress to repeal the Byrd Amendment).

157. *See* Chinese Furniture, *supra* note 2, at 29 (observing the failure of the settlement agreements to improve domestic performance indicators). Moreover, the payments from foreign competitors were only distributed amongst a certain subset of domestic producers, and the domestic industry did not use the funds in an effort to offset the harmful effects of the subject imports. *See id.*; *see also* Croibier, *supra* note 128 (reporting that, in the Chinese Furniture case, the U.S. furniture industry lost jobs at an even faster rate after the settlements began).

158. *See* 19 C.F.R. § 351.213 (showing that domestic parties may have valid interests in petitioning for administrative reviews and explaining the rules for implementing such reviews).

violates antitrust laws.¹⁵⁹ Judge Posner maintained that, even if there is probable cause for pursuing the legal action, petitioning parties could still violate antitrust laws if those parties are not actually concerned with winning a favorable judgment but instead are concerned with harassing competitors.¹⁶⁰ In private administrative review settlements, domestic interested parties are not necessarily concerned about the outcomes of the reviews because, even if the review decisions are not in their favor, they still receive some protection from subject imports because the original AD orders are not removed.¹⁶¹ Instead, domestic parties are more concerned with using the threat of a costly review process to compel foreign competitors into settling because domestic producers are seeking the cash they grew accustomed to under the Byrd Amendment.¹⁶²

2. *The Noerr-Pennington Doctrine Probably Stands in the Way of Antitrust Liability*

Though post-order settlements of AD cases raise many antitrust concerns,¹⁶³ these settlements are likely protected from antitrust liability by the Noerr-Pennington doctrine.¹⁶⁴ Under this doctrine, a private party petitioning the government for some lawful action is generally exempted from antitrust scrutiny, even if the petition acts to restrain commerce.¹⁶⁵ In AD cases, a petition for an administrative review is a lawful action, and domestic interested parties may lawfully pick which foreign firms to include in the review.¹⁶⁶ Moreover, domestic interested parties' withdrawal of a review petition within ninety days is also a lawful action.¹⁶⁷ Thus, petitioning for administrative reviews is lawful under AD law and likely

159. See *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472–73 (7th Cir. 1982) (referring to the “malicious” requirement for the common law tort of abuse of process).

160. See *id.* (claiming that a majority of court decisions on the topic support such an opinion).

161. See Macrory, *supra* note 8, at 30–31 (describing the sunset review process, not administrative reviews, as the means by which AD orders can be removed). Cf. Prusa, *supra* note 83, at 7 (observing the special role of domestic parties in the administrative review process and proposing that they use their role with the explicit intent to obtain a settlement offer).

162. See *Pierce & DeFrancesco*, *supra* note 1 (tracing the domestic parties' motivations for AD settlements to the Byrd Amendment).

163. See *infra* Section II.B.1.

164. See, e.g., Prusa, *supra* note 83 (proposing that AD settlements are protected by Noerr-Pennington immunity).

165. See Cho, *supra* note 5, at 361 (insisting that the Noerr-Pennington doctrine obstructs the Federal Trade Commission's antitrust regulation of trade remedies).

166. See Macrory, *supra* note 8, at 27–29.

167. 19 C.F.R. § 351.213(d)(1).

enjoys Noerr-Pennington immunity.

Many courts strictly uphold Noerr-Pennington immunity, even if the petitioning party was motivated by anticompetitive purposes designed to restrain trade.¹⁶⁸ Such a narrow application of the doctrine essentially allows domestic producers to use the administrative review process to extort foreign competitors without any threat of antitrust liability because the doctrine exempts the domestic producers' lawful attempts to obtain government action from any antitrust liability.¹⁶⁹

However, domestic interested parties do not necessarily enjoy absolute protection from antitrust liability because of the Noerr-Pennington doctrine's "sham" exception.¹⁷⁰ Generally, courts invoke the sham exception in situations where parties use a governmental process itself, and not the outcome of that process, as an anticompetitive weapon.¹⁷¹ Because courts vary in their application of the Noerr-Pennington sham exception, it is not clear whether AD administrative review petitions filed in an attempt to compel private settlement agreements qualify as a sham for Noerr-Pennington purposes.¹⁷²

Generally, to qualify as a sham, an administrative review petition must fulfill both elements of the two-prong test courts traditionally use to evaluate whether an action falls under the Noerr-Pennington sham exception.¹⁷³ First, a court must determine whether the petition was objectively baseless.¹⁷⁴ A petition for administrative review is considered objectively baseless if a court finds that an objective petitioner could not

168. See Cho, *supra* note 5, at 361 (reasoning that courts' narrow interpretation of the Noerr-Pennington doctrine's sole exception would make that exception ineffective in AD cases); *Associated Container Transp. Ltd. v. United States*, 705 F.2d 53, 58-59 (2d Cir. 1983) (considering petitioning parties' subjective motivations to be irrelevant for Noerr-Pennington purposes).

169. See Prusa, *supra* note 83 (suggesting that Noerr-Pennington protection effectively provides domestic parties with a "right" to pursue or attain private settlement agreements).

170. See, e.g., Cho, *supra* note 5, at 361 (describing the sham exception as a limitation on the Noerr-Pennington immunity).

171. See, e.g., *VIBO Corp., Inc. v. Conway*, 669 F.3d 675, 684-85 (6th Cir. 2012); *Knology, Inc. v. Insight Commc'n Co.*, 393 F.3d 656, 658-59 (6th Cir. 2004). Cf. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) ("If the end result is unlawful, it matters not that the means used in violation may be lawful.").

172. See *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 55 n.3 (1993) (observing that several courts of appeals demand that an alleged sham be legally unreasonable, other courts hold that successful litigation by definition cannot be a sham, and still other courts of appeals sometimes consider certain meritorious litigation to be a sham).

173. See *id.* at 60-61 (establishing the two-prong test).

174. *Id.* at 60.

reasonably expect the petition to be successful on its merits.¹⁷⁵ Then, if a court somehow finds an administrative review petition to be objectively baseless, it could apply the second prong and assess the petitioners' subjective motivations to use the administrative review to harm foreign competitors.¹⁷⁶ It would be difficult to show that an AD administrative review petition is objectively baseless because it is difficult to predict the outcome of an administrative review; thus, it would be difficult to prove that a petitioner could not expect at least a reasonable chance of success.¹⁷⁷

Though the first prong makes it difficult for post-order settlement agreements to escape Noerr-Pennington immunity, some courts show movement away from a strict application of the sham exception test by incorporating an abuse of process analysis in Noerr-Pennington decisions, potentially making it easier to overcome Noerr-Pennington immunity.¹⁷⁸ Applying Justice Stevens's reasoning in *Professional Real Estate Investors*, the sham exception's first prong test of objective reasonableness might not be appropriate for determining whether the domestic parties should be subjected to antitrust liability because it is too difficult to effectively apply the first prong in complicated abuse of process situations.¹⁷⁹ In *Grip-Pak*, Judge Posner similarly distinguished the applicability of Noerr-Pennington immunity in abuse of process situations, arguing that Noerr-Pennington immunity is applied too broadly in abuse of process cases.¹⁸⁰ Though some question the two-prong sham exception test, courts are yet to collectively move away from this two-prong analysis and its objective baselessness requirement.¹⁸¹ Thus, the sham exception would likely be ineffective in

175. *Id.*

176. *Id.* at 60–61.

177. *Cf.* *Pierce & DeFrancesco*, *supra* note 1 (explaining that the lengthy review process, court appeals, and sampling practices contribute to the unpredictability of administrative reviews).

178. *See Prof'l Real Estate Investors, Inc.*, 508 U.S. 49, 67–76 (Stevens, J., concurring) (questioning the majority's strict two-prong test); *see also Grip-Pak, Inc. v. Illinois Tool Works*, 694 F.2d 466, 471–73 (7th Cir. 1983) (suggesting the use of an abuse of process analysis to give more consideration to anticompetitive purposes in sham situations).

179. *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 74–76 (Stevens, J., concurring).

180. *See Grip-Pak, Inc.*, 694 F.2d at 471–73 (refusing to rule that the difficulty in distinguishing between lawful and unlawful anticompetitive purposes is so acute that any anticompetitive purpose with the smallest basis in law can never be actionable under the Noerr-Pennington doctrine).

181. *See Prof'l Real Estate Investors, Inc.*, 508 U.S. at 55 n.3 (1993) (observing the multiple approaches courts of appeals have taken in determining Noerr-Pennington immunity under its sham exception yet applying the two-prong analysis); *Music Center S.N.C. Di Luciano Pisoni & Co. v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 548–49 (E.D.N.Y. 1995) (maintaining the two prong analysis for the sham

AD cases.¹⁸²

3. *The Chinese Furniture Case Raises Many of These Antitrust and Anti-Competition Concerns*

In the Chinese furniture case, the ITC recognized that the administrative review process led to annual settlements between domestic and Chinese producers.¹⁸³ However, Commerce and the ITC refused to do more than briefly comment on the settlements, leaving the question of their legality open-ended.¹⁸⁴ This lack of administrative attention, however, does not necessarily imply that these settlements do not create antitrust liability for the domestic producers.

The domestic furniture industry's efforts to compel settlement agreements through threats of costly administrative reviews seem to openly infringe upon antitrust laws. With respect to the Sherman Act, these settlements involve collusive agreements amongst multiple parties that directly affect market price and volume conditions by artificially skewing the assigned dumping rates and assuring an uninterrupted flow of LTFV Chinese furniture.¹⁸⁵ On the price side, these agreements create additional costs and distortions that can force foreign producers to raise prices.¹⁸⁶ On the volume side, because the size of the settlement payments are based on the value of each Chinese firm's imports, a system of perverse incentives causes domestic producers to encourage more Chinese furniture imports so they can demand higher settlement payments.¹⁸⁷ These perverse incentives

exception).

182. See Cho, *supra* note 5, at 361 (finding the sham exception to likely be ineffective in AD cases because of courts' narrow interpretation of the exception).

183. Chinese Furniture, *supra* note 2, at 16.

184. See *id.* at 17, n.106 (observing that the ITC is not charged with enforcing antitrust laws); Combs, *supra* note 61 (reporting that Commerce, after repeated inquiries, continues to deny knowledge of the settlement arrangements); Hagerty, *supra* note 2 (quoting a Commerce spokesperson who did not approve of the settlements but explained that Commerce lacked the appropriate authority to investigate such agreements).

185. See Posthearing Brief of Furniture Retailers of America, *supra* note 128, at 1, 5-7 (describing how a subset of domestic producers worked together to create these settlement "schemes" that enabled a continuous and substantial flow of subject imports into the U.S. market and allowed subject Chinese producers to maintain low deposit rates); see also Combs, *supra* note 61 (describing how multiple international and domestic parties were involved in designing the settlements).

186. See Chinese Furniture, *supra* note 2, at 29 (Additional Views of Comm'r Daniel R. Pearson) (observing that the furniture settlements imposed higher costs on the AD process, in addition to the costs normally associated with AD investigations).

187. See Posthearing Brief of Furniture Retailers of America, *supra* note 128, at 7 (describing the "perverse incentives" of the settlements and how they do not serve the purpose of AD laws). But see Chinese Furniture, *supra* note 2, at 29 n.1 (Additional

are important because the Noerr-Pennington doctrine does not protect actions used to achieve a purpose that legislation is intended to curtail,¹⁸⁸ which, in this case, is the influx of subject Chinese imports. Most courts, however, apply Noerr-Pennington immunity regardless of the petitioning party's subjective intent for bringing the petition.¹⁸⁹ Thus, the exception would be ineffective in these settlement disputes unless courts begin to interpret the sham exception less strictly and focus more on the petitioners' subjective intent.¹⁹⁰

These settlement agreements further restrain trade by treating some Chinese producers differently than others, depending on their relationships with domestic producers.¹⁹¹ This abuse and restraint of trade carries over into the domestic furniture industry's exploitation of the administrative review process.¹⁹² AD orders are intended to protect U.S. producers by limiting the volume of subject imports, but, because of these settlements, domestic furniture producers were able to manipulate market quantities and encourage the importation of subject Chinese furniture so they could line their pockets with more settlement cash.¹⁹³

Views of Commissioner Daniel R. Pearson) (noting that the record did not indicate a clear connection between the settlements and the volume of subject imports).

188. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972).

189. *See Assoc. Container Transp. Ltd. v. United States*, 705 F.2d 53, 58–59 (2d Cir. 1983) (considering petitioning parties' subjective motivations to be irrelevant for Noerr-Pennington purposes). *See generally* *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) (holding that the Noerr-Pennington sham exception does not turn on subjective intent, but instead turns on objective reasonableness).

190. *Compare* Cho, *supra* note 5, at 361 (observing that AD petitions would likely be protected from antitrust liability by courts' strict sham exception analyses), *with* *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471–72 (7th Cir. 1982) (applying abuse of process reasoning to a sham exception analysis so as to focus more on the petitioners' subjective intent).

191. *See* Posthearing Brief of Furniture Retailers of America, *supra* note 128, at 63 (suggesting that some Chinese furniture firms may receive different settlement terms because of their commercial relationships with domestic firms); Hagerty, *supra* note 2 (finding potential for abuse when settlements permit U.S. furniture producers to treat Chinese producers differently because Chinese producers with more favorable settlement terms could gain an unfair advantage in the U.S. market); *see also* Posthearing Brief of Guangdong Yihua Timber Industry Co., *supra* note 127, at 2 (explaining that AD laws and regulations fail to consider that settlement fees can vary depending on the commercial relationship between a foreign and domestic firm).

192. *See* Posthearing Brief of Furniture Retailers of America, *supra* note 128, at 3–4 (describing domestic petitioners' use of the petitioning process as a "shakedown" of as many Chinese producers as possible).

193. *See* Prehearing Brief of Guangdong Yihua Timber Industry Co., *Wooden Bedroom Furniture from China*, Inv. No. 731-TA-1058, USITC Pub. 4203, at 11 (Dec. 2010) (Review); *Wooden Bedroom Furniture from China*, Inv. No. 731-TA-1058, USITC Pub. 4203, at 29 (Dec. 2010) (Review) (contrasting the purpose of AD laws

4. *These Settlement Agreements Severely Frustrate the Object and Purpose of U.S. Trade Laws*

The primary purpose of AD orders is to protect domestic industries from unfairly priced imports being dumped into the U.S. market.¹⁹⁴ However, when private parties agree to post-order settlement agreements without any agency oversight, the AD orders no longer serve the purpose of the AD laws.¹⁹⁵ Instead of limiting the flow of subject foreign imports, these settlements actually encourage the opposite outcome by tying the size of settlement payments to subject import volumes.¹⁹⁶

Moreover, AD laws specifically describe certain distinct types of AD settlements, but these private post-order agreements do not qualify as any of those statutorily authorized settlement methods.¹⁹⁷ Plus, through these settlement agreements, domestic producers manage to circumvent Congress's intent by retrieving duty revenues from the cash settlement payments.¹⁹⁸

III. BY ACCOUNTING FOR POST-ORDER SETTLEMENT AGREEMENTS, THE FUNCTIONAL PURPOSE OF AD LAWS CAN BE RESTORED

This Section describes several methods by which AD laws can change to properly account for the existence of private post-order settlement agreements. Above all, the function and purpose of U.S. AD laws need to be restored so that domestic industries can effectively compete without the threat of unfairly dumped goods.¹⁹⁹

with the effects of the settlements).

194. *E.g.*, Schnerre, *supra* note 7.

195. *See* Chinese Furniture, *supra* note 2, at 29 (Additional Views of Commissioner Daniel R. Pearson) (believing that the settlement agreements did nothing to limit the harmful effects of subject imports).

196. *See* Posthearing Brief of Furniture Retailers of America, *supra* note 128, at 7 (arguing that the domestic producers' use of settlement agreements to both encourage subject imports and turn a profit violates the purpose of AD laws); *see also* Chinese Furniture, *supra* note 2, at 29 (Additional Views of Commissioner Daniel R. Pearson) (explaining how these settlement agreements do not benefit the domestic industry or economy).

197. KAYE & DUNN, *supra* note 9; Macrory, *supra* note 8, at 24–26.

198. *See* Lester, *supra* note 4 (observing that, with the repeal of the Byrd Amendment, Congress did not intend for U.S. producers to receive AD duty payments, but they still manage to do so through these settlement agreements).

199. *See* Chinese Furniture, *supra* note 2, at 29 (Additional Views of Commissioner Daniel R. Pearson) (elucidating how these settlement agreements do not provide the domestic benefits that AD orders are designed, but not necessarily required, to encourage); Posthearing Brief of Furniture Retailers of America, *supra* note 128, at 7 (arguing that AD settlements incentivize unfairly priced imports).

A. Recommendation 1: Expressly Prohibit Private Post-Order Cash Settlement Agreements Under AD Law

AD laws could be amended to expressly limit the available settlement methods for AD cases and prohibit private post-order settlement agreements.²⁰⁰ If private post-order settlements are expressly prohibited, then administrative reviews would still be available, but they could not act as a means of coercing foreign industries into settlement agreements.

A domestic interested party's withdrawal of a petition for administrative review could signal Commerce to investigate whether the withdrawal was related to a settlement agreement. Commerce and the ITC are well-positioned to investigate any potential post-order settlements because they have extensive access to domestic industry information via the questionnaires they send to domestic producers.²⁰¹ Commerce and the ITC's questionnaires could ask domestic firms if they are party to, or otherwise aware of, any private settlement agreements. Moreover, both Commerce and the ITC have broad powers to investigate domestic industries' business data, so they would be well-positioned to notice suspicious petition withdrawals.²⁰² Under this method, private post-order settlement agreements would violate AD laws; therefore, antitrust concerns and Noerr-Pennington immunity would not be as important.²⁰³

If Recommendation 1 were applied in the Chinese furniture case, once the domestic interested parties withdrew their petitions for an administrative review, Commerce would begin investigating whether any domestic firms were involved in any settlement agreements with foreign producers as part of the administrative review process.²⁰⁴ Commerce would then refuse to acknowledge any withdrawals of petitions for review that were related to collusive settlement agreements and would proceed with those administrative reviews.

200. Cf. KAYE & DUNN, *supra* note 9 (describing private, non-statutory methods of settling AD administrative reviews); Macrory, *supra* note 8, at 24–26 (listing the methods for settling AD cases and administrative reviews under AD laws).

201. See Cho, *supra* note 5, at 395 (clarifying that these questionnaires are not optional and that the ITC and Commerce can investigate further to verify the questionnaire responses).

202. See Schnerre, *supra* note 7, at 497.

203. Cf. Combs, *supra* note 61 (admitting that Commerce and the ITC cannot investigate antitrust violations because of jurisdiction restrictions, but they can both investigate AD issues).

204. Cf. Schnerre, *supra* note 7, at 497 (noting that Commerce and the ITC already have “powerful” administrative and investigative powers).

B. Recommendation 2: Give Commerce and the ITC Greater Oversight Over How the Settlements Proceed

Because the administrative review process generates costly uncertainty for both domestic and foreign producers, there are benefits to settling and avoiding this uncertainty;²⁰⁵ to preserve these benefits, Congress could change AD laws to create a standardized mechanism for settling post-order AD agreements. By providing strict agency oversight over the settlement process, the agencies can ensure the agreements do not frustrate the purpose of AD laws. The statutory provisions for suspension agreements could act as a model because they already require Commerce to determine whether settlements are in the public interest before approving the agreements.²⁰⁶

Agency oversight may also correct the perverse incentives created by the unregulated private post-order agreements and refocus the purpose on limiting subject imports.²⁰⁷ Questionnaires could again identify the relevant domestic and foreign producers and ensure that all interested parties included in the settlement receive equal or similar settlement terms.²⁰⁸

In applying Recommendation 2, the agreements between domestic and Chinese furniture producers would be subjected to strict agency oversight. Before any settlement could be reached, Commerce would have to investigate the agreement to ensure that its effects would be in the interests of the public and the domestic industry. If the settlements do not to serve those interests, Commerce would not allow a withdrawal of the petitions and would proceed with the administrative review.

C. Recommendation 3: Change the Retrospective Nature of AD Duty Assessments

It is the retrospective liability determinations' inherent uncertainty that

205. KAYE & DUNN, *supra* note 9.

206. 19 U.S.C. § 1673c(a)–(c); Schnerre, *supra* note 7, at 503.

207. See Posthearing Brief of Furniture Retailers of America, *supra* note 128, at 7 (arguing that the unregulated settlements incentivize subject imports); KAYE & DUNN, *supra* note 9 (explaining that since these settlement agreements occur without any agency oversight, neither the settlement process nor its terms are subject to agency approval or public interest analysis).

208. See Posthearing Brief of Furniture Retailers of America, *supra* note 128, at 63 (suggesting that Chinese furniture firms receive different settlement terms because of their commercial relationships with domestic firms); Hagerty, *supra* note 2 (observing that Chinese producers with more favorable settlement terms could gain an unfair advantage in the U.S. market).

encourages post-order settlement agreements.²⁰⁹ Therefore, if the retrospective liability determination is removed, or at least reformed, the parties will not be incentivized to circumvent statutory mechanisms. However, the initial duty rates should not act as permanent rates for the life of the AD order because that would enable foreign firms to freely increase their dumping margins after an order is assigned. To avoid this, AD duties should be adjusted through the administrative review process, but there should be a limit as to how much the duty liability can change every year, i.e., allow the new duty rates to fluctuate only by a certain percentage in either direction, year-over-year.²¹⁰ This will prevent subject foreign producers from raising their dumping margins after an order is implemented, and it will reduce the foreign producers' uncertainty about their future liability.

Under Recommendation 3, Chinese producers would have had less incentive to agree to the domestic producers' terms because they would not have faced such costly uncertainty about future liability.²¹¹ Therefore, the agreements may not have transpired in the first place, but if they had, and either Recommendation 1 or Recommendation 2 was also in place, it would ease the investigative burden on Commerce and the ITC because fewer Chinese producers would likely settle.

CONCLUSION

This is a case where the overlap between two distinct, yet related, areas of the law does not increase the laws' respective utilities; instead, the overlap allows private actors to circumvent both. Though post-order AD settlement agreements precisely fit the description of the types of collusive and anticompetitive behavior that antitrust laws are designed to prevent, the procedures and processes of trade laws make them permissible. Likewise, these settlement agreements frustrate the object and purpose of AD laws, but exceptions to antitrust laws prevent that frustration from being mitigated.

Under current antitrust and AD laws, these settlement agreements are likely legal because of the protection afforded by the Noerr-Pennington doctrine and courts' narrow application of its sham exception. Unless

209. See *infra* Section II.A.

210. Cf. Pierce & DeFrancesco, *supra* note 1 (arguing that the lack of a "cap" on foreign producers' exposure to AD duty liability under the administrative review system increases the relative cost of the uncertainty faced by those foreign producers subject to review).

211. See Ikenson, *supra* note 47 (reporting that domestic furniture producers effectively enhanced threats of heightened uncertainty and higher duties by requesting reviews of Chinese firms with relatively low AD duties).

courts make a concerted effort to incorporate an abuse of process analysis into Noerr-Pennington decisions, these settlements will continue until the AD laws are changed. If the laws are not changed, domestic industries will continue extorting their foreign competitors and lining their pockets with cash, all while encouraging the very same unfair imports that AD laws are supposed to curtail.