

*Could Predatory Pricing Rules Substitute for Antidumping Laws in the Proposed
China-Japan-Korea Free Trade Agreement?*

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Antidumping law has been widely criticized for its potential for protectionist abuse. A group of scholars have turned to competition law and policy to seek solutions to prevent the risk of abuse. They have proposed that the trade rules under antidumping law should be substituted with predatory pricing rules under competition law. This substitution proposal has successfully been put into practice in several regional trade agreements such as the EU/the European Free Trade Association (“EFTA”)/the European Economic Area (“EEA”), the Australia New Zealand Closer Economic Relations Trade Agreement (“ANZCERTA”), and the EFTA-Singapore Free Trade Agreement (“FTA”), etc.

Professors Bi and Van Uytsel’s present paper purports to examine the intriguing question of whether predatory pricing rules could substitute for antidumping laws in the proposed China-Japan-Korea Free Trade Agreement (“CJK FTA”). It concludes that the dual conceptualization of predatory pricing in China, Japan and Korea will present hurdles for harmonizing predatory pricing rules.

Their paper analyzes the question in a logical manner. After a general introduction in Section I, Section II reviews fundamental elements of the antidumping system and predatory pricing. It then determines whether regulating dumping through competition law would lead to less protectionist abuse. It conducts a sophisticated comparison of antidumping laws and predatory pricing

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rules in terms of their objectives, substantiality and remedies. The authors essentially support substituting antidumping laws with predatory pricing rules.¹ Nevertheless, they are aware that further specific and targeted study is needed to confirm whether substitution would be feasible in the proposed CJK FTA, as addressed in Sections III, IV and V of the paper. A detailed and comprehensive analysis has been conducted of competition laws, regulations, administrative awards and judicial determinations in China, Japan and Korea. It also refers to material produced by influential international entities such as the International Competition Network (“ICN”). The authors determine that a dual conceptualization of predatory pricing (Criteria I and II) exist in China, Japan and Korea.

Section VI aims to demonstrate why the substitution debate meets obstacles in the proposed CJK FTA. It first examines Criterion II, concluding that its rules have been proved by those successful substitution practices in the EU and ANZCERTA in that, it could strengthen the case for substituting antidumping law with specific rules of competition law. However, Criterion I is rather unique for the three countries. This is exactly where the complication lies for CJK FTA to abolish antidumping laws by harmonizing predatory pricing rules. The authors argue from both normative and empirical perspectives to demonstrate the hindering effects of Criterion I. With respect to the normative perspective, four arguments are identified. First, the objective of unfair predatory pricing rules is similar to that of antidumping laws. Second, the substantive rules of Criteria I and II are different in the requirement of market power. Third, the cost calculation is not clear or well-founded in these countries although it is possible to narrow the application of predatory pricing rules of Criterion I by referring to the conditions of intent and pricing below cost. Lastly, the three countries emphasize upon different issues with regard to the harm caused to competition, which would broaden, instead of narrowing, the scope of predatory pricing rules. With respect to empirical perspective, the paper nestles seven illustration tables in between the arguments. It finally defines the two different forms of predatory pricing rules in the three countries as unfair predatory pricing (Criterion I) and dominance-oriented predatory pricing (Criterion II).

Competition law is one of the key elements in the ongoing negotiation of the CJK FTA. Instead of following the common trend of studying antidumping law