

might eventually be necessary, even if some observers suggest putting such rule-making far into the future.²⁸

First, national treatment does not necessarily provide an adequate guarantee in the case of an export cartel based in a small economy (country A) selling into a much larger economy (country B). Assume that the activities of such a cartel are not subject to a per se prohibition under competition policy in North America.²⁹ The competition authorities in the import market may suspect that the cartel sells its goods into country B in a manner that creates a restraint on trade. Currently, there are evidentiary difficulties in successfully prosecuting such a case, as the gathering of crucial evidence may well depend on the cooperation of authorities in country A who may be reluctant to be forthcoming because the action of the export cartel is legal in the home market. Legislators in country B could "fix" this situation by providing in law for a presumption of illegal market power whenever an export cartel sells into country B and these sales account for an arbitrarily low market share (thereby, at the least, shifting the burden of proof to the defendant). An absence of recourse to a dynamic efficiency gains defence could be part of the package. National treatment does not help in this case, because, of course, the sales activities of an export cartel affect only the export market by definition.

The logic of this approach could be extended to other instances of so-called strategic cross-border market behaviour, i.e., to any sector in which a firm from country A can be "presumed" to enjoy supra-normal profits in its home market (because of a specific domestic barrier to full competition) and thus access to deeper pockets to finance "anti-competitive" behaviour into the import market. Assume further that the "barrier" in question does not exist in country B. It might then be tempted to apply the same "presumed distortion/low market share" approach on a "national treatment" basis, knowing full well that its firms would escape scrutiny because of the absence in country B of the market distortion allegedly found in country A. Of course, country A could introduce the same regime, focussing on a different sector, and use it against imports from country B. But here we run into the same marketplace imbalance that plagues the use of antidump in practice. Whatever

²⁸ I should emphasize that the examples chosen do not occur under current antitrust regimes. They are meant to highlight possible distortions that could arise if enough protectionist pressure is applied. The fact that parallel antidumping and antitrust relief is now occasionally being sought in the U.S. with regard to the same import activity is perhaps indicative of the kind of pressure that antitrust might see more of in the future, especially as antidumping practices are disciplined further.

²⁹ In fact, export cartels currently enjoy an exemption under both Canadian and U.S. competition law. See William Ehrlich and I. Prakash Sharma, "Competition Policy Convergence: The Case of Export Cartels", Foreign Affairs and International Trade, Policy Staff Paper No.94/3 (April 1994).