

importance of such other factors as innovation, market contestability (i.e., ease of entry) and longer run, dynamic versus short-run, static views of firm behaviour.²⁷

Of course, rules and practices can change. But those who criticize the lack of clarity and certainty in the competition rules of the game are right only to a point. The application of the rule of reason requires, by its very nature, a certain case-by-case flexibility. The replacement of this measured flexibility with rigid numerical thresholds and greater use of per se illegality would create more certainty, but this cure would definitely be worse than the perceived disease. The result would likely be more errors; more false findings of anti-competitive behaviour than under the rule of reason. Moreover, the lack of clarity criticism pales in comparison with the extraordinarily high proportion of false positives resulting from the current operation of trade remedy law. A sense of proportionality would, therefore, be wise when comparing the two systems. After all, legislators have replaced antidumping with national competition laws within the Australia-New Zealand free trade area, and with a mixture of national and regional competition rules within the European Union. There are few voices calling for the reintroduction of the antidumping system for intraregional trade in those jurisdictions.

Yet, the criticism of modern competition law's "clarity" is not entirely off-base. While antidumping reform could draw on certain lessons from modern competition policy with regard to market behaviour and pricing practices, there is no internationally binding discipline to prevent import protectionists from attempting to pollute competition policy as antidumping reform progresses. Of course, agreement based on the application of national treatment would go some way to address this issue. Under national treatment, for example, the U.S. would not be able to apply a market share focus in one case involving a Canadian firm, while using a more balanced, dynamic economic analysis with regard to a U.S. firm in a similar case. Yet, while important, national treatment is not sufficient. While not underestimating the likely resolve of U.S. antitrust authorities (including the Department of Justice) and those in other countries to resist future attempts to recast competition law as an import harassment tool, let me outline, with a view to stimulating discussion, three hypothetical examples of why more detailed, international competition rule-making

²⁷ This is not to say that there are few important differences between Canadian and U.S. practice. Clearly there is, for example, with regard to the more complex, costly and litigious nature of U.S. merger policy. See Nicolas Dimic, "Merger Control Under Trade Liberalization: Convergence or Cooperation?", Foreign Affairs and International Trade, Policy Staff Paper No.93/09 (August 1993).