

Current antidumping law is often portrayed in public as addressing certain anti-competitive or "unfair" pricing manifestations of restrictive business practices, i.e., abuse of market power. Yet in practice, its reach is much longer.<sup>7</sup> The complexity of the pricing behaviour of firms cautiously emerges in the 1980 GATT antidumping code in a number of provisions. Thus, there are references to "production and sales in the ordinary course of trade"; "due allowance...for differences which affect price comparability, including differences in conditions and terms of sale"; "an evaluation of all relevant economic factors affecting the domestic industry" when determining injury; and the requirement to examine other factors that may be injuring an industry, including "trade restrictive practices of and competition between the foreign and domestic producers". The antidumping agreement concluded last December as part of the MTN Final Act repeats these exhortations.

Nonetheless, recognition of the varying and complex realities of the marketplace has been considerably less than effective in practice. In large part, this is because the factors considered when measuring and determining the effects of dumping weigh heavily in favour of the firm in the importing country without adequate regard for its own pricing practices or for the meaning of "ordinary course of trade".<sup>8</sup> The result is the harassment of specific imports (often, although not only, related to a relatively narrow universe of goods - e.g., steel products). More importantly, the misuse of antidumping (and countervailing) duties creates a broader environment of harassment that can influence investment in favour of the larger market (i.e., the U.S.) over a Canadian location, if only to minimize the potential impact of trade remedy instruments when a producer plans to sell to the continental market as a whole.

Several of the more serious defects follow. There is an exaggerated and often inappropriate focus on the relationship between the price of the imported product and the comparable price in the home market. This is problematic. When the regulatory authority relies on constructed value, it bases the measure on average total cost plus

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<sup>7</sup> Indeed, U.S. law refers to a product sold at "less than fair value", a more elastic concept than the already troubled below-cost sales approach. See Stephen J. Powell, Craig R. Giesse and Craig L. Jackson, "Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks", in *Northwestern Journal of International Law & Business*, Vol.11, No.2 (Fall 1990), p.182; and The Committee on Canada-United States Relations of the Canadian Chamber of Commerce and the Chamber of Commerce of the United States, "Competition (Antitrust) and Antidumping Laws in the Context of the Canada-U.S. Free Trade Agreement", March 11, 1991, p.24.

<sup>8</sup> MTN/FA II-A1A-8, pp.4-5; OECD, DAFFE/CLP/WP1(92)4, pp.20, 31 (footnote 13); Chambers of Commerce, "Competition (Antitrust) and Antidumping", pp.22-4.