shift the rules of the game unilaterally, and thus greater certainty for firms producing and investing within the free trade area?[32]

The following criteria for incorporation in a binding North American instrument are offered as a starting point for furthering the necessary analysis:

- There should be a national treatment provision.

- Regulators and the courts should focus on ex post facto corrective remedies, rather than ex ante pre-emptive action including extensive recourse to a per se illegality approach, except in very clear cases of close to certain market abuse (such instances are likely to be rare, e.g., bid rigging or certain market sharing agreements). The ex post facto approach could be coupled with very high fines, so that adequate incentive not to abuse market power exists.[33]

- Given the difficulty of demonstrating whether or not predatory intent exists, the presumption of the regulatory authority and the courts should be that general welfare/efficiency gains are the principal result of an action by a firm unless the opposite can be reasonably established.

- Thus, the burden of proof should always rest with the regulator, not the firm.

- If the action investigated relates to pricing, there should be no initiation unless the sales price over a defined representative period is less than average variable cost.

- Market contestability (ease of firm exit/entry) should weigh more heavily than market concentration or firm size.

- The ease of product substitutability should also weigh importantly.

- Geographic market definition should extend across national borders, particularly but not exclusively within a free trade area.

[32] The Herfindahl-Hirschman Index (HHI), used in merger guidelines to measure concentration and screen mergers, equals the sum of the squares of the market shares of the firms in the market. The HHI is higher, the lower the number of firms and the greater the dispersion of market shares.

[33] Drawing on his U.S. experience, Warren-Boulton suggests that even moderate ex ante predatory pricing policing in merger activity leads to many "false positives". See his "Implications of U.S. Experience", in Mathewson, et.al, Law and Economics, pp.344-5.