

First, the cost of production (whether for the purpose of constructed value or for identifying normal value in the home market of the exporter) should be based on per unit average variable, rather than average total, costs. This would reduce the number of positive antidumping determinations and be more in keeping with the realities of business economics and practice.

Second, even if the export price is below the home market's normal value (redefined as average variable cost), there should be a predation filter. Predatory intent is likely too difficult a concept to define in the abstract. But we could develop a reasonable proxy for predatory capability, drawing on the multiple layer screening frameworks briefly summarized at the end of section 2 above. Even the use of just one or two of the proposed screens would be helpful and logical.

Third, the definition of "domestic industry" is central both to the initiation of a dumping investigation and to the determination of injury. In this regard, regulators can apply the current definition (including that found in the new MTN agreement) differently on a case-by-case basis. With respect to the product in question, domestic industry can be "domestic producers as a whole", or those representing "a major proportion of total domestic production", or those producers that are not related to the exporters or importers or that are not importers themselves (at the discretion of the regulating authority),¹⁸ or regional producers in certain circumstances. In the NAFTA provisions addressing fairly traded import surges (Chapter 8), domestic industry is defined much more tightly as "the producers as a whole of the like or directly competitive good operating in the territory of the Party." This positive result limits the flexibility of the regulatory authority in shaping procedures to accommodate domestic petitioners who may not adequately represent an industry's overall interests. It lessens the likelihood that the U.S. can successfully implement a safeguard

¹⁸ Note that the concept of "control" is introduced in this regard, but is not defined. The U.S. uses a 5% stock ownership threshold, although the OECD convention for exercising control in practice is 10%. Both the U.S. and Canada follow the 10% rule for data collection purposes with regard to foreign direct investment. See Powell, et. al, "Current Administration of U.S. Antidumping and Countervailing Duty Laws", footnote 60, p.188.