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Damned If We Don't:
Some Reflections On Antidumping and Competition Policy

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Damned If We Don't:
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Executive Summary

With a view to encouraging further discussion and debate, this Paper reviews a number of issues related to the appropriateness of an antidumping regime, particularly within a free trade area, as an instrument for disciplining cross-border, corporate pricing behaviour. The benchmark chosen to address the economic adequacy of this regime is that of market power and the resulting capacity of private sector firms to engage in predatory pricing. While recognizing that antidumping is deeply entrenched in the U.S.'s trade policy and political psyche, the Paper briefly outlines (through the lens of economic efficiency) the principal deficiencies of current antidumping practice and provides several suggestions as to the technical issues that an antidumping reform process might be able to address over time.

The Paper recognizes that there is a case to be made for relying more on respective national competition (antitrust) regimes, including the development of some common, internationally binding guidelines, to govern corporate behaviour, at least within the North American free trade context. It also recognizes that some observers have raised concerns about the perceived lack of certainty that the case-by-case antitrust appproach now common internationally might create. The Paper suggests that analysts should focus this discussion on identifying which regime is more likely to lead to the greater number of false findings of "unfair" competition, and thus be more trade and investment distorting.

But the second half of the Paper does not focus primarily on whether competition policy should eventually replace antidumping regimes. Rather, it explores the antidumping-antitrust linkage from another angle: can we avoid eventual international rule-making on competition policy even if we want to? The Paper outlines several hypothetical examples of how competition policy regimes (with no treaty-based disciplines to sustain them) could be distorted if captured by import protectionists facing tighter rules governing the use of antidumping. This argues for developing, over time, a number of binding international guidelines to ensure that such a hi-jacking does not occur further down the road. With a view to encouraging further research, the Paper also presents a tentative list of such binding criteria that could guide the enforcement of competition policy within the free trade area in a manner that respects the complex nature of competitive markets, while reducing the uncertainties in that policy of which some recent critics have complained.

The Paper concludes with a brief discussion on the gradually changing dynamic in the U.S. that could increase the prospects for antidumping reform over time: the gradually growing dependence of the U.S. market on international trade and the

increasing concern in that country with the proliferation of active antidumping regimes abroad and how these are beginning to threaten U.S. exports and U.S. jobs. The Paper suggests that these changes provide some basis for careful coalition building with U.S. exporters, the users of imported inputs and consumer groups with a view to launching an incremental antidumping reform process.

Résumé

Le présent document vise à susciter un débat plus poussé sur l'utilité d'un régime antidumping, spécialement dans une zone de libre-échange, pour discipliner les entreprises dans leurs pratiques d'établissement des prix à l'exportation. Passant en revue plusieurs des questions qui entrent en jeu, l'auteur s'appuie, en vue de déterminer l'adéquation économique de ce régime, sur les critères de la puissance de marché et de la capacité qui en résulte pour l'entreprise privée de fixer les prix à des niveaux abusivement bas. Tout en reconnaissant que la notion d'antidumping est fermement ancrée aussi bien dans l'inconscient politique que dans la législation commerciale des États-Unis, l'auteur expose dans leurs grandes lignes (en se plaçant dans la perspective de l'efficience économique) les principaux défauts de la pratique actuelle en la matière et fait diverses suggestions quant aux questions d'ordre technique que pourrait régler à terme un processus de réforme du système antidumping.

L'auteur du document est d'avis qu'il y aurait peut-être lieu - à tout le moins dans le contexte du libre-échange nord-américain - de s'appuyer davantage, pour réglementer le comportement des entreprises, sur les diverses législations nationales régissant la concurrence (régime antitrust) et d'établir, notamment, des principes directeurs communs à caractère internationalement contraignant. Admettant par ailleurs que certains observateurs craignent le sentiment d'incertitude qui pourrait résulter de l'approche antitrust telle qu'on l'applique actuellement dans le monde, c'est-à-dire au cas par cas, l'auteur estime que les analystes pourraient trancher le débat en déterminant lequel des deux régimes en cause aboutit au plus grand nombre de fausses constatations de concurrence « déloyale », et est donc plus susceptible d'exercer des distorsions sur le commerce et les investissements.

Dans la deuxième moitié du document, toutefois, l'auteur ne s'attache pas à savoir si les lois régissant la concurrence devraient, à terme, remplacer les régimes antidumping. Il envisage plutôt la corrélation antidumping-antitrust sous un angle différent, se demandant s'il nous sera possible d'éviter, même en le voulant, que les politiques de concurrence fassent un jour l'objet d'une réglementation internationale.

Le document présente plusieurs exemples hypothétiques de détournement des régimes de concurrence (privés du soutien de disciplines conventionnelles) par des groupes protectionnistes qu'une plus stricte réglementation limiterait dans leur recours aux mesures antidumping. Pour éviter que de tels détournements ne se produisent un jour, il serait donc bon de s'entendre au bout du compte sur un certain nombre de principes directeurs qui soient internationalement contraignants. Afin d'encourager la recherche dans ce sens, l'auteur propose divers principes de cette nature, dont l'adoption permettrait d'appliquer les politiques de concurrence dans la zone de libre-échange d'une manière qui respecte le jeu complexe des forces du marché tout en réduisant l'incertitude reprochée par certains détracteurs récents de ces politiques.

L'auteur conclue en faisant valoir que l'évolution graduelle de la dynamique aux États-Unis pourrait accroître les chances d'assister, avec le temps, à une réforme du régime antidumping. Les États-Unis sont en effet de plus en plus tributaires du commerce international, et c'est avec inquiétude qu'ils voient se multiplier dans le monde des législations antidumping dont les effets commencent à se faire sentir sur les exportations et les emplois américains. De l'avis de l'auteur, cette évolution serait propice à la constitution d'une coalition entre exportateurs américains, utilisateurs de produits importés et groupes de consommateurs en faveur d'une réforme progressive du système antidumping.

"...And the next thing you know, you've got trouble in River City."

Professor Harold Hill

1. Introduction

What to do about trade remedy law (comprising mechanisms to address antidumping and subsidy/countervail issues) remains at or very near the top of Canada's trade policy agenda. The concern is most immediate, perhaps, with regard to the misuse of antidumping duties by U.S. authorities against Canadian exports. Some observers have suggested that the solution for Canada lies in the whole-scale replacement of the trade remedy approach by competition (antitrust) law. Others are ambivalent about outright replacement, either because they see some merit in retaining an antidumping mechanism to provide import relief in Canada (perhaps with a suitable tightening of the rules to avoid the worst abuses), or because competition law itself is perceived to rest on an imprecise economics base that creates its own uncertainty and potential for abuse, or because of concern that replacement discussions might lead to pressure for Canada to adopt certain U.S. practices that are viewed here as inappropriate (e.g., treble damages in private suits). Some simply believe that significant reform might be beyond our grasp into the foreseeable future, given that the importance of retaining a "viable" antidumping regime is deeply entrenched in the U.S.'s trade policy and political psyche. In this view, Canada could most usefully focus on seeking to launch a step-by-step approach that might, over time, lead to considerable incremental improvement.

With regard to antidumping, some international discipline already exists in the form of the respective 1980 GATT Code, tightened to a modest degree in the recently concluded Uruguay Round of multilateral trade negotiations (MTN). For their part, the FTA/NAFTA agreements did not lead to the modification of the formal legal regime in the U.S. or Canada governing the use of antidumping measures. Nonetheless, the provisions found in NAFTA's Chapter 19 include useful procedural safeguards with regard to future amendments to national antidumping statutes and, most importantly of course, establish a supra-national panel system to review final domestic antidumping duty determinations, replacing thereby more prolonged and costly domestic judicial review procedures.[1]

The NAFTA also sets up a process to move reform efforts forward. The Agreement establishes a Working Group on Trade and Competition Policy, with a mandate to report within five years on the relationship between competition laws and policies and trade within the free trade area.[2] In addition, last December the Canadian

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1 The panel review process also addresses final countervailing duty determinations.

2 See Article 1504.

government successfully sought the establishment of a new NAFTA working group on dumping and antidumping duties with a mandate to seek solutions that reduce the possibility of disputes in this area. The three governments have instructed the group to complete its work by the end of 1995.[3]

In light of the evident interest, in this Paper I plan:

- to outline briefly the principal deficiencies of current antidumping practice;
- to provide several suggestions as to what issues a step-by-step antidumping reform process might address;
- without engaging directly in the debate as to whether competition policy should eventually replace antidumping within a free trade area, to question whether eventual engagement on competition policy over the longer term is, in fact, avoidable, even if we might want to postpone detailed discussions beyond the foreseeable future as some commentators have suggested; and
- with a view to encouraging further research, to present a tentative list of binding criteria that could guide the enforcement of competition policy within the free trade area in a manner that respects the complex nature of competitive markets, while reducing the uncertainties implicit in that policy of which some recent critics have complained.

This Paper should be viewed as a preliminary attempt to push forward certain aspects of the debate on the appropriate balance between trade remedy and competition laws and practice, especially within a free trade area. The Paper recognizes that trade remedy practice is deeply entrenched in U.S. policy and that progress will be difficult. Nonetheless, the case for pursuing reform vigorously is compelling.[4]

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[3] At the same time, the NAFTA countries set up another working group on subsidies and countervailing duties with the same mandate. Moreover, in Article 1907(2) NAFTA member countries agreed to consult on the potential to develop more effective rules and disciplines concerning the use of government subsidies and the potential for relying on a substitute system of rules for dealing with unfair transborder pricing practices and government subsidization.

[4] For a companion piece on subsidies and countervailing duties, see Gilbert Gagné, "Le libre-échange nord-américain, les subventions et les droits compensateurs: la problématique et les options", Ministère des Affaires étrangères et du Commerce international, Document du Groupe des politiques, No.94/13 (Juillet 1994).

2. The Devil We Know

Antidumping procedures have been around in one form or another for several generations. Canada helped to invent and, over the years, to refine this instrument. Ours was the first country to enact an antidumping law (in 1904), and we have been among the most active users internationally.[5] The antidumping system has not been utterly irrational as some acerbic critics would portray it. Moreover, there is merit to asking whether the antidumping warts that are visible to all are sufficiently incurable as to require its holus-bolus replacement with the new Grail of national competition regimes.

Yet, the old familiar approach clearly suffers from serious inadequacies that suggest major surgery, at least, is necessary. Dumping occurs when a firm introduces a product into the commerce of another country at less than its "normal value", that is, when the export price is less than the comparable price, in the ordinary course of trade, for the same product when sold domestically in the exporting country. In GATT terms, there are three possible methods for establishing the "normal value" of a specific good: its home sale price, a representative price for the like product when exported to a third market, or a "constructed value" comprising the cost of production (both fixed and variable) plus a "reasonable" amount for administrative, selling and any other costs and for profits. This third approach has become increasingly favoured.[6] In practice, the regulatory authority will use the constructed value approach to build the required value whenever the price of the good in the exporting or third country market is not known, or when the adequacy of such price data is in question.

Antidumping duties may be imposed when the dumped imports (whatever methodology is used to determine "normal value") cause or threaten to cause material injury, or the material retardation of the establishment of, a domestic industry in the importing country. This procedure establishes the necessary "causal link" between the dumped goods and injury to the domestic industry.

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[5] According to a GATT registry, during the period between 1983-84 (July to June) and 1992-93, contracting perties initiated 1,670 entidumping ceses, of which Canade accounted for 225, the U.S. for 430, the EU for 252, Austrelie for e remarkable 472, other developed countries for 72 and developing countries for 166 (with e significent increese in use since 1990).

[6] See Leure D'Andree Tyson, **Who's Bashing Whom? Trade Conflict in High-Technology Industries**, Institute for Internetinal Economics, Weshington, D.C., 1992, p.268; end OECD, "Antidumping and Competition Policy: Competition and the EC Antidumping Reguletions", DAFFE/CLP/WP1(94)1, peregraph 13.

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.[7] 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".[8] 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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[7] 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 Sgreement", March 11, 1991, p.24.

[8] 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.

an arbitrary markup for profit and carrying expenditures.[9] In fact, firms often find it rational to price below average total cost without the slightest suggestion of abuse of market power, "unfair" practices or predatory intent. Some have emphasized that even the marginal or average variable cost approaches can be deficient when dealing with high technology industries. In these areas, significant economies of scale and learning mean that, when introducing a new product, there exists a perfectly appropriate tendency to set current prices in terms of future anticipated costs (which will be considerably lower) - the so-called forward or life-cycle pricing widely practised for products such as aircraft and semi-conductors.[10]

More generally, the emphasis on the home market price compared to the price of the imported product, whether or not the constructed value approach is followed, places inordinate focus on what is occurring in the home market of the exporter, rather than on an analysis of the import market itself. Trade remedy practice has not been able to resolve satisfactorily frequent cases of "technical dumping" (the great majority of dumping investigations initiated). This involves imports that are sold at less than the home market price (or its "constructed" approximation) in order, for example:

- to compete with a like domestic product that is being discounted (or simply sold at marginal or average variable cost, rather than average total cost per unit);[11]
- to develop local market presence when introducing a new product; or
- to act as a loss-leader involving the marketing of other products.

[9] The U.S. uses a minimum 8% profit markup. The EU usually opts for a 5% margin. See Powell, et. al, "Current Administration", p.186 and OECD, "EC Antidumping Regulations", paragraph 14 and p.29. The new MTN agreement should help to address this specific issue. Its Article 2.2.2 provides for the mandatory use of actual market data to determine the appropriate amount on a case-by-case basis. Although the mathodologies suggested remain open to abuse, they nonetheless represent a useful improvement on the 1980 Code. Average total cost is also the key concept for determining whether sales in the exporter's home market should be included in determining normal value. See Article 2.2.1.

[10] For accessible, and, given the source, more than usually interesting comments in this regard, see Tyson, **Who's Bashing Whom?**, pp.267-72. Ms. Tyson is currently Chairperson of the Council of Economic Advisors in the Clinton Administration.

[11] Even the new MTN antidumping agreement defines the impact of "dumped" - below home market price - imports on the domestic industry in terms, inter alia, of their impact on "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments" of the domestic industry (Article 3.4). Clearly, an imported product priced to compete locally could well have such impacts.

If an exporter prices his product to meet the requirements of the import market in order to carry out these and other normal competitive practices, he can, nonetheless and unlike his local competitors, run afoul of the importing country's antidumping regime. There is no requirement to determine predatory intent or capability. This is bad economics and bad public policy.

The significance of the predation concept in the antidumping debate is neatly summarized in a 1991 study:

> The underlying assumption of the antidumping laws is that dumping is justifiably prevented because its costs, i.e., the injury it causes to producers, exceed its benefits to users who acquire low priced dumped goods. This assumption is reasonable enough if dumping is predatory and hence makes a market less competitive; but it is not if dumping [technically defined as sales below home market price] is nonpredatory and enhances competition. The problem ... is that a law which condemns all "dumping" that causes injury to a domestic industry will invariably snag in its net both predatory and nonpredatory dumping.[12]

Current work in the OECD further underlines the importance of this distinction. One draft study focusses on 387 antidumping cases initiated by European Community authorities between 1980 and 1989 and applies five tests or "screens" in an effort to determine whether predation is likely. The first screen involves a proxy for "dominant position", on the assumption that a foreign firm with a small market share in the EC is not likely to behave as a predator. The first test measures whether all foreign firms subject to a specific antidumping case account for a forecasted aggregate market share of 40% or more. Sufficient data were available to apply this test to 297 of the 387 cases. Of the former number, 205 cases failed to reach the threshold and were eliminated. The second screen filters out cases terminated by negative antidumping determinations, on the assumption that the failure to identify dumping makes it highly unlikely that the trading practice in question can be considered predatory. This test eliminates another 5 cases. The third screen filters out any case involving four or more different foreign countries, given the unlikelihood of joint predatory behaviour due to difficulties in coordinating marketing strategies among firms spread across several countries. This approach eliminates another 50 cases. The fourth test considers the remaining 37 cases and screens out any involving eight or more foreign firms. This filter eliminates 10 more firms. The final screen introduces a quantitative criterion (a high domestic industry concentration level in the EC that might provide an environment in which injury from dumping could

[12] Chambers of Commerce, "Competititon (Antitrust) and Antidumping", p.16.

create market power for dumpers), refined qualitatively to a modest degree.[13] The absence of sufficiently disaggregated information precludes a definitive conclusion for 16 of these remaining 27 cases, but, with regard to the others, only one appeared to come close to what could be fairly portrayed as possible predatory behaviour.[14]

Moreover, it should be noted that the above screens merely help us to gauge whether a firm may be acquiring a large market share. A finding of a negative impact on competition would also require an analysis of whether the firm would have the capacity to exercise and keep the market power so achieved, i.e., the analyst would also want to judge the ease with which future competitors might enter the market before reaching a final conclusion on the competitive impact of present shifts in market share.

Another part of the same draft study takes a similar look at the U.S. system. This work focusses on 282 investigations between 1979 and 1989 that concluded in an antidumping order or that were suspended or terminated without reaching a final determination, likely because other protective arrangements were made (e.g., price undertakings entered into by off-shore suppliers; so-called voluntary export restraints). Once again, five screens are used, although with a greater emphasis on market concentration indexes and sunk cost data.[15] Nonetheless, the end result is very similar.

The first test eliminates all but those cases in which the U.S. industry is sufficiently concentrated to create potential market power for dumpers if injury results from the dumping. All but 86 cases are eliminated. The second screen combines the former with a concentration test applied to the exporter companies under investigation. This yields a total of only 75 cases in which both exports from the challenged country and domestic production are highly concentrated. The third screen filters out the 13 cases involving exporters from five or more countries. The fourth test eliminates those cases for which the imports are decreasing or do not comprise more than a 20% market share or have not increased by at least 15% over an immediately preceding period. This process leaves 39 cases. The final test attempts

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[13] A Herfindahl index is created and applied.

[14] OECD, "EC Antidumping Regulations", paragraphs 63-74.

[15] Herfindahl indexes are created to measure concentration in domestic production and among exporters of the challenged product. A Kessides ratio is used to measure sunk machine and equipment costs as a gauge of barriers to entry. See OECD, "Antidumping and Competition Policy: Census and Analysis of Antidumping Actions in the United States", DAFFE/CLP/WP1(92)3, pages 8-13.

to address the entry barrier issue through the use of a measure of sunk machine and equipment costs. Where potential future entry is comparatively easy, predation is unlikely. In only 23 cases are the sunk-cost ratios above the mean value of the sunk-cost-to-total-sales ratio for all U.S. manufacturing industries.

Other chapters of the same OECD study look at Canadian and Australian practices. Although the filtering is less rigorously constructed than in the U.S. and EC cases, the analysis is much the same. A review of the products subject to Canadian antidumping investigations during 1980-91 suggests that no single exporting country appears to have had a sustainable dominant share of the Canadian market, or the good was very price-sensitive, while there was a multiplicity of international suppliers of most products subject to antidumping petitions in Canada.[16] With regard to Australia, imports subject to antidumping actions either have been from diverse sources or hold only a small market share.[17]

The above analysis clearly implies that successful predation by the foreign firm would be very difficult if not impossible in almost all cases reviewed, confirming that an antidumping regime is not, in practice, an appropriate tool for addressing alleged predatory behaviour. Antidumping in practice captures too many pro-competitive activities.

3. Incrementalism Unchained

There is a convincing rationale in favour of tightening, at the very least, the international disciplines applicable to antidumping rules. Leaving aside the practicalities of how this might be done, as well as the even larger issue of reform versus replacement, what changes could we usefully explore in the context of future NAFTA discussions with the U.S.? In this section, I suggest a number of possible modifications representing various degrees of ambitiousness, without implying any ranking by importance. I do not mean to imply that such changes are easily achievable, given the very politicized nature of the trade remedy debate in the U.S..

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[16] OECD, "Competition Policy and Antidumping: The Economic Impact of Canadian Antidumping Law", DAFFE/CLP/WP1(92)4/REV1, paragraphs 55-8. The unlikelihood of predation is also the conclusion reached in S. Hutton and M.J. Trebilcock, "An Empirical Study of the Application of Canadian Antidumping Laws: A Search for Normative Rationales", **Journal of World Trade**, Vol. 24 (1990), p.129.

[17] OECD, "Competition Policy and Antidumping: Australia's Antidumping Policies and Practices", DAFFE/CLP/WP1(94)6, paragraphs 28-32.

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.

restriction against Canadian exports.[19] It is for consideration whether such a definition could be introduced into the antidumping reform process.

Fourth, we could usefully seek to strengthen injury determination standards (in addition to the industry definition issue). For example, currently it must be demonstrated that dumped imports are causing injury, but it is not necessary to demonstrate that such imports are the principal cause of injury, or even an important cause. In the NAFTA, in contrast, imports from a Party are excluded from global import surge action (against "fairly" traded goods) taken by another member country unless certain conditions are met, including that the imports "contribute importantly" to injury (defined as "an important cause, but not necessarily the most important cause", combined with a measurable trigger related to the growth rate of imports).[20] Perhaps some variation on the concept of "importance" might be feasible in the antidumping context.[21]

Fifth, could the meaning of "injury" be sharpened? The current international discipline simply refers to "material" injury, which is not directly defined but is understood to mean something less then the "serious" injury concept used in emergency import surge actions. In this latter context, injury means "significant overall impairment of a domestic industry". There may be room here to build on the concept of "material" injury so that it approximates the higher threshold of "serious" injury.[22]

For example, the MTN antidumping agreement lists several indicators that must be taken into account when determining injury, including whether there has been a "significant increase in dumped imports" or "significant price undercutting", or "whether the effect of such imports is otherwise to depress prices to a signficant

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[19] See NAFTA Article 805. The U.S.'s Statement of Administrative Action forwarded with the NAFTA implementing legislation last autumn tried to loosen this definition in a way that is clearly inconsistent with the treaty obligation. The SAA suggested that the scope of "domestic industry" could be adjusted at the discretion of the U.S. International Trade Commission by excluding firms that are related to exporters or importers of the good in question. A recent MTN-related, private members' bill tabled in Congress provides another variation of how this definition can be manipulated by creative minds. The recent Regula-Mineta proposal would allow for the exclusion of domestic production of an input "simply further processed into a downstream product" from the like input sold as a finished product, thereby narrowing the industrial production base against which injury may be determined. See "Kantor Signals Support for Dumping Demands in Regula-Mineta", in **Inside U.S. Trade**, Vol.12, No.19 (May 13, 1994), pp.1-3.

[20] See Articles 802 and 805.

[21] It is also critical that domestic antidumping law explicitly recognize the causal link between dumping and injury. U.S. law does not yet do so, despite the clear multilateral obligation in this regard, recently confirmed in the MTN Final Act.

[22] In U.S. trade law, material injury is defined loosely as harm that is not inconsequential, immaterial or unimportant.

degree or prevent price increases...to a significant degree".[23] This appears to mean that the effect on prices in the import market must be serious (almost in the sense of import surge actions). Nonetheless, the concept does not follow through necessarily to the second stage of the injury determination process when the regulatory authority examines the consequent impact of the dumped imports on domestic producers. Perhaps the concept of "significant" could be extended to the impact stage as well, requiring the "significant impairment" of the domestic industry for a finding of injury to be made.

Sixth, the sometimes misleading impact of a cumulative assessment of various supplier countries could be: (a) eliminated by requiring the individual consideration of each country (at least for free trade partners); or (b) reduced through a MTN-plus increase in the threshold applied to de minimis dumping exclusions calculated in relation to imports from each country.[24]

Seventh, several procedural improvements could be made. Pursuant to Article 5 of the MTN antidumping agreement, the petitioner must provide "such information as is reasonably available". A tighter alternative could require the provision of all the requested information that is publicly available. Moreover, when the application is made on behalf of the domestic industry, the petitioner must submit a list of "known" producers (this seems to mean "known to the petitioner"), rather than a list based on all publicly available information. More generally, the information burden on the petitioner could be made more onerous in light of the serious trade distorting impact of many antidumping actions.[25]

Finally, the definition of "interested parties" who may actively participate in antidumping hearings does not require a country to provide downstream industrial users of the product under investigation or representative consumer organizations with full standing before the regulatory body (they must, however, be allowed to provide information), nor is there explicit recognition of a broader public interest criterion.[26] Adjustments in these areas (including a requirement that the regulatory body carefully take such "other" views into account) could help to ensure that the economy-wide

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[23] See MTN/FA II-A1A-8, Article 3.2.

[24] See MTN/FA II-A1A-8, Articles 3.3 and 5.8. The latter Article outlines both the price-based and volume-based de minimis provisions.

[25] A comparison of Annex 803.3(3) of the NAFTA - emergency action proceedings - and Article 5.2 of the MTN antidumping agreement could be useful in this regard.

[26] See MTN/FA II-A1A-8, Articles 6.11 and 6.12.

impact of a proposed antidumping action is more fully aired in the determination process.

More could be written, but the above should be sufficient to indicate many of the ways by which piece-meal reform could make antidumping procedures less arbitrary and trade and investment distorting. Considerable negotiating effort and coalition building will be required to achieve credible results. Nonetheless, the reform approach is appropriate and necessary.

But here we reach an interesting stage in the present discussion. There is a case to be made that in principle we should rely more on respective national competition regimes, including the development of some common, internationally binding guidelines, to govern corporate behaviour, at least within the North American free trade context. But I do not propose to engage in this debate in this Paper. Rather, I intend to explore the antidumping-competition linkage from another angle: can we avoid eventual international antitrust rule-making even if we wanted to?

If antidumping negotiations are engaged (in the first instance, either bilaterally or through the NAFTA) and considerable progress eventually is made, does this mean that, over the longer term, supplier access problems (e.g., Canadian exporters into the U.S. market) will necessarily be lessened? I believe that this conclusion may underestimate the creativity of special interest groups and the legal profession (not to mention some honourable members of the trade policy community). As antidumping rules are gradually tightened, protectionists may well search out new instruments not yet subject to binding international disciplines and seek to recast these as tools for import harassment. Could they capture competition policy in this way? Perhaps - as I plan to explore in the following section.

4. And On The Other Hand

The impact of Canada's competition policy since the implementation of the 1986 Act is properly balanced. It does a good job of underpinning the operation of a dynamic market place and cannot be considered burdensome on Canadian business nor ineffective in its defence of the broad interests of consumers. Although somewhat more focussed on the use of <u>per se</u> illegality and more likely to fall back on a populist "big is bad" tradition (including the continuing prominence given to the numerically-based concept of market share), the practice of competition law in the U.S. has also evolved over recent years in ways that more fully recognize the

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).

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 defendent). 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).

the legal symmetry, in the real world the smaller, more trade dependent country is more exposed to harassment in practice.

Take a second example. National treatment could also be twisted vis-à-vis the presumed anti-competitive activities of oligopolies, an economic structure that more clearly typifies the Canadian market than its U.S. counterpart.[30] Under protectionist pressures (encouraged by the hoped-for tighter disciplines on the use of antidumping measures within the free trade area), the U.S. could modify its law, so that a sector in which a certain concentration level is reached in the other national market would trigger the presumption of market distortion leading to the imposition of import controls. The amendment to current law could provide for a numerical concentration level adjusted on a sectoral basis to allow U.S. industry to escape the same degree of scrutiny, while the market definition could focus entirely on the domestic economy, rather than the more logical cross-border market.

Finally, we should not assume, even where national treatment can help, that broadly populist, anti big business pressures might not, in the future, lead to a reversal of the current trend in the U.S. toward a more dynamic economic analysis of competition issues. Faced with a more disciplined trade remedy regime down the road and with no international obligations to prevent back-sliding, the U.S. Congress might reintroduce elements of a more stringent market concentration approach whereby big is more generally presumed to be bad. There is no guarantee that the U.S. will always act wisely, or even in its own longer term economic interest. There is no internationally binding system of rules to prevent the U.S. from shooting itself in the foot more frequently - and Canadian appendages as well, to the degree that we continue to depend on the U.S. market and our industrial structure remains more concentrated given the smaller size of the Canadian market.

[30] In this regard, some observers believe that oligopolies selling relatively undifferentiated products have often been unfairly treated by the courts. For example, see Donald Armstrong, "My Lady of the Law Is No Economist; My Lady Competition Law Is No Lady ", in Frank Mathewson, Michael Trebilcock and Michael Walker, eds., **The Law and Economics of Competition Policy**, Vancouver: The Fraser Institute, 1990, pp. 389-417.

5. Counterpoint

> Our limited capabilities make us want to retain flexibility, to treat anti-trust more as an art than a science, while on the other hand, we want to project and provide certainty to the public.
>
> The only way out of this dilemma is to concentrate on what we can do best and then stop...as our understanding of markets and how they work has expanded, the perceived scope for anti-trust has shrunk.[31]

Efforts are underway to reform antidumping practices within the North American free trade area. This is undeniably important work. The considerations outlined in section 4, however, suggest that eventual success in this area might also oblige us, over the medium to long term, to initiate a companion process of developing a set of binding criteria, at least within the North American context, to ensure that the operation of competition policy is not subsequently hijacked by the very special interest groups that presently aid and abet the misuse of trade remedy law. I do not suggest that this is an issue requiring immediate attention and resolution. Rather, it is an early indication that we should undertake the necessary further research and discussion needed to develop a balanced position.

What might such binding criteria encompass? In this regard, we should take into account that competition policy has been criticized most recently for its alleged lack of certainty, especially as it (correctly) has moved away from market concentration analysis and per se prohibitions. The economic realities explored are complex, requiring a careful case-by-case approach. Yet, while economics teaches the necessary lesson that competition policy should focus on dynamic efficiency gains, it does not provide many useful tools to measure such gains, expecially on an ex ante basis. While recognizing that modern competition policy must be as much art as science, and that this is superior to a more dogmatic, mechanistic reliance, for example, on the Herfindahl-Hirschman Index, can we nonetheless devise a set of criteria that could be incorporated into a North American agreement, thereby establishing clearer guidance for regulators, clear limits on the ability of legislators to

[31] Frederick R. Warren-Boulton, "Implications of U.S. Experience with Horizontal Mergers and Takeovers for Canadian Competition Policy", in Mathewson et.al, **Law and Economics**, p.360.

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.

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[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.

- The North American competition guidelines should explicity recognize the relevance of efficiency gains resulting from a firm's action that is under investigation, including the impact on innovation.

- The North American competition guidelines should also include access to an effective dispute settlement mechanism, in order to assist in the disciplining of governments in the implementation and administration of these obligations. NAFTA's Chapter 20 provides such a mechanism. Further research might suggest that other, separate instruments are more appropriate.

Finally, from a Canadian perspective, we would want to be careful to exclude from any eventual continental guidelines certain aspects of U.S. antitrust law that actually work against the effective functioning of the market place. With regard to merger policy, for example, these elements include: private suits seeking injunctive relief (including the discriminatory awarding of costs); treble damages for injury through private suits; the parallel enforcement initiative of State Attorneys General; safehavens that are less generous than in Canada; and merger notification thresholds that are also lower than in Canada. To do otherwise would undermine the strengths of Canada's approach to merger control:

- A rapid and relatively efficient process managed by a single jurisdiction which avoids unnecessary and costly litigation.

- Recognition by law of the dynamic nature of competition.[34]

6. Afterthought

While important, it is, of course, one thing to identify the elements of an appropriate approach, and quite another to deliver the goods. Even if there were full consensus in Canada about the merits of moving forward on the antidumping track, how do we engage the U.S., in light of the strength of certain import sensitive industry lobbies in that country, the diffuse, transactional nature of Congressional politics and the more self-contained reality of the U.S. economy compared to Canada's?

[34] See Dimic, "Merger Control", pp.39-40.

When all the dust has settled about the details of what we might want to negotiate, these questions remind us of the formidable task ahead. There are no easy answers, only a few considerations that might assist us over time. For example, the largely self-sufficient nature of the huge U.S. market long meant that there was little incentive to worry about how trading partners might misuse antidumping or not use competition policy. But over the last 25 years, the importance of trade (imports and exports of goods and services combined) to the U.S. economy has doubled to about one-quarter of gross domestic product. The U.S. has regained its lead as the most important exporter, with an almost 13% share of world merchandise exports and 16% of world imports in 1993. Exports have doubled to more than 10% of GDP. Trade increasingly matters for the U.S.. Moreover, more countries are adopting an antidump regime, with developing countries using it more frequently against imports, including imports from the U.S..[35]

This new reality is, perhaps, increasingly worrying certain U.S. exporters who are making their concerns known to their government authorities. Last December, for example, the CEOs from Sun Microsystems, Hewlett Packard, Cargill and Philip Morris International wrote to United States Trade Representative Kantor expressing concern about last minute changes to the MTN antidumping agreement that would weaken certain aspects of the disciplines in the text as it then stood. The CEOs warned that U.S. "[e]fforts to open foreign markets could be rendered meaningless if foreign governments are allowed to use loose antidumping rules to restrict U.S. exports." This protest is a welcome sign, although it must also be noted that the CEOs apparently were not successful in the face of more protectionist agendas supported, for example, by the U.S. steel industry.[36] More recently, over 20 trade lawyers representing many of the U.S.'s leading law firms publicly wrote urging the Administration to refuse to curry favour with certain domestic industries by drafting the MTN implementing legislation in ways that could potentially loosen the MTN text even further:

[35] The recent increase in the number of Mexican antidumping intiations against U.S.-based companies is a case in point.

[36] See "GATT Partners Work Out Compromise On Controversial Dumping Issue", in **Inside U.S. Trade**, Special Report (December 14, 1993), pp.1-6.

> At a time when many newly industrialized nations are putting in place their own trade remedy procedures as their tariff and non-tariff barriers are lowered, it is obvious that the U.S. must take the lead in restraining domestic interests which seek to substitute trade remedies for tariffs and NTBs.[37]

This heightened concern, of course, is still a long way from carrying the day in Washington. Nonetheless, it is welcome and provides some basis for careful coalition building with U.S. exporters, the users of imported inputs and consumer groups that could assist in launching an incremental reform process along the lines outlined in this Paper. Canadians, both the government and perhaps even more importantly the private sector individually and through trade and consumer associations could actively seek out those in the U.S. whose livelihood and well-being depend on truly free and unimpeded trade and work with them to build the necessary coalition of interests.

[37] See "Trade Lawyers Urge That GATT Bill Not Restrict U.S. AD, CVD Laws", in Inside U.S. Trade, Special Report (May 13, 1994), pp.S-7, S-8. Also relevant is the recent draft report prepared by the Congressional Budget Office (CBO) which strongly criticizes current U.S. trade remedy law and practice: "The analysis concludes that U.S. laws treat the pricing of imports in the U.S. market differently from how they treat the pricing of domestically produced goods... Over time, the antidumping and countervailing-duty laws have become a general source of protection for U.S. firms from foreign competition." See Congressional Budget Office, "A Review of U.S. Antidumping and Countervailing-Duty Law and Policy", Washington, May 1994, pp.1-8 and the predictably sharp response from the Department of Commerce and the congressional steel caucus, as reported in "Senior U.S. Official, Members Criticize CBO for Trade Law Study", in Inside U.S. Trade, Special Report (June 10, 1994), pp.S-5, S-6.

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