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Antitrust-Based Remedies and Dumping in International Trade

A proposal that governments apply competition-policy-based disciplines to unfair-trade allegations before turning to "standard" antidumping remedies.

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Summary findings

Hoekman and Mavroidis explore the possibility of governments' seeking to agree to apply competition-policy-based considerations and disciplines in addressing unfair-trade allegations before turning to "standard" antidumping remedies.

The premise of proponents of antidumping actions is that the existence of market power in exporters' home markets, or potential market dominance in the importing (host) market, is an important source of perceived "unfairness." But antidumping authorities do not investigate the existence of such situations.

Hoekman and Mavroidis propose that allegations of dumping first be investigated by competition authorities to determine the contestability of the relevant markets. Their proposal does not involve harmonization of competition laws.

All that would change from the status quo is that a necessary condition for an antidumping action is that competition authorities find that the exporting firm's home market is not contestable, and conclude that no remedial action is possible through the application of competition law.

Ideally, agreement along these lines would be sought in the multilateral (GATT) context, but bilateral or regional trade agreements could also be concluded. For example, European Union cooperation or association agreements might be extended along the lines proposed.

This paper — a product of the Europe and Central Asia, Middle East and North Africa Regions Technical Department, Private Sector and Finance Team — is part of a larger effort to monitor and analyze developments in global trade policy affecting the Europe and Central Asia and the Middle East and North Africa regions. Copies of the paper are available free from the World Bank, 1818 H Street NW, Washington, DC 20433. Please contact Faten Hatab, room H8-087, extension 35835 (29 pages). August 1994.

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Antitrust-based Remedies and Dumping in International Trade*

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Summary

This paper explores the possibility of seeking multilateral agreement to implement competition policy-based considerations and disciplines in the context of 'unfair trade' allegations before turning to standard antidumping remedies. The paper builds on the arguments of proponents of antidumping actions who defend it as a second best solution to the exploitation of excessive market power by exporting firms. Simplifying somewhat, the argument that is made is that exporting firms are able to price-discriminate and/or sell below cost because they benefit from a sheltered, non-contestable home market. In many instances the implicit claim is that the barriers to contesting the exporter's home market stem from the non-enforcement of local competition laws, from a decision (tacit or formal) to exempt certain practices from the reach of competition policy disciplines, or from the inadequacy of competition laws/enforcement.

It is sometimes maintained by proponents of antidumping remedies that the first best solution would be the application of common competition laws. Whatever the merits of this proposition, it is generally perceived to be impracticable, especially in the multilateral context. This paper accepts that premise. Harmonization is a very far-reaching approach, and can be argued to be unnecessary in any event. The role of competition policy disciplines in the unfair trade context can be substantially enhanced through positive comity. This paper proposes a scheme whereby allegations of dumping must first be investigated by the competition authorities of the two countries concerned before antidumping investigations can be launched. A corollary of the 'market closure' justification for antidumping offered by proponents – whatever its economic merits – is that the existence of market power in exporter's home markets, or potential market dominance in the importing, host market should be a criterion in investigations. The competition authorities of the exporter's home country should then seek to determine whether the exporting firm or industry engages in anticompetitive practices or benefits from government-created or supported entry barriers. Concurrently, the competition office of the importing-competing industry petitioning for antidumping would determine whether the domestic market is contestable.

The importing country's competition authorities should be kept fully informed of the investigation and findings of the exporting country's authorities, and would be provided with all relevant data collected and used. If an exporter is found by its competition authorities to violate the applicable competition law, standard remedies will be applied, consistent with the law and practice. If the importing country's competition authorities find the relevant market not to be competitive and contestable, this would constitute evidence that dumping, if it occurred, is not a danger to competition. While the competition law of the exporter's home country is unlikely to be perfect in the eyes of the importing country, both a legal and economic case can be made for limiting the application of competition laws to their respective territories.

The proposal avoids any need for harmonization. This calls for mechanisms that allow the inevitable disagreements regarding the findings of the antitrust investigation in the exporter's home market to be addressed. If the importing country's competition authorities disagree with the conclusion of the investigation by the exporter's competition authorities, the government of the former has the option of

It is then left to multilateral mechanisms to determine the facts of the case, i.e., whether the government supports or tolerates anti-competitive behavior, and whether this has a detrimental effect.

Alternatively, if the investigation by the exporter's competition authorities has revealed the existence of barriers to entry in the exporter's home market, but these do not violate the law, an antidumping action may be started by the importing country. Although in such circumstances a non-violation complaint is preferable from an economic welfare and systemic perspective, if the government concerned is willing to accede to the request for antidumping by the import-competing lobby, it should be able to do so. All that would change in comparison to the status quo is that a necessary condition for antidumping is a finding by the competition authorities that the exporting firm's home market is not contestable, and the conclusion that no remedial action is possible through the application of competition law.

While ideally agreement along these lines would be sought in the multilateral (GATT) context, bilateral or regional trade agreements could also be pursued. EU Cooperation or Association agreements might be extended along the lines proposed. There is increasingly a perception that many countries are interested in joining regional agreements so as to 'safeguard' their access to the regional market. However, recent agreements (e.g., the Europe Agreements) maintain antidumping and future agreements with other partners are likely to do so as well. While accepting that 'political realities' may prevent the abolition of antidumping in such agreements, the far-reaching liberalization that is achieved under them should at least allow something along the lines suggested to be implemented.

Antitrust-based Remedies and Dumping in International Trade

I. Introduction

The recently concluded Uruguay round of multilateral trade negotiations, once fully implemented, will lead to substantial liberalization of global trade flows. In conjunction with ongoing restructuring, liberalization, and privatization programs in major developing and former centrally-planned economies, adjustment pressures in OECD countries will increase. As the Uruguay round also includes a prohibition on the further use of voluntary export restraint agreements, the resulting lobbying for protection can be expected to focus largely on antidumping. This is already the instrument of choice for industries seeking to reduce competition from imports, some 2,000 cases having been initiated since 1980 by OECD countries. Disciplining this trade instrument will be among the most important 'market access' issues facing policymakers in the post-Uruguay round world. The protectionist biases that are inherent in the application of antidumping are well known, but economists have not had much impact on weakening its political support. Relatively little was achieved in the Uruguay round in this connection.

Long before it was known whether the Uruguay Round would be concluded successfully, commentators were calling for the multilateral trading system to be extended to cover competition (antitrust) policies. This reflected concerns that policies -- or the lack of policies -- in this area could effectively restrict access to markets, even if overt trade barriers were low, thus granting exporters located in these markets an 'unfair' advantage. The use of antidumping is to a large extent justified on the basis of such considerations. This paper explores how a negotiated multilateral agreement to introduce competition policy considerations into the unfair trade realm might help to defuse both market access-related disputes and limit the use of antidumping actions, the instrument of choice for industries seeking to reduce competition from imports. It is suggested that efforts be made to obtain agreement that a lack of contestability of an exporter's home market -- as determined by a competition agency -- becomes a *precondition* for an antidumping investigation. The objective here is to focus on determining whether a perceived necessary condition for 'unfair trade' -- i.e., market access restrictions -- has been satisfied.[1]

The plan of the paper is as follows. Section II discusses the objectives and criteria used in antidumping and competition cases. Section III provides an overview of regional integration agreements where the relationship between antitrust and antidumping has been addressed, i.e., the European

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1/ Of course, in practice many economists would argue that antidumping policies have nothing to do with 'unfairness', however defined, instead constituting straightforward protectionism. While sympathetic to this viewpoint, it is not very helpful in moving things further. This paper therefore takes at face value the claims of defenders of antidumping that it is intended to address an 'unfair trade practice'. The focus of the paper on a possible international agreement to link antitrust and antidumping distinguishes it from the literature emphasizing the opportunities for individual countries to apply antitrust-based criteria in the application of their national antidumping laws. See, e.g., Wood (1989), Temple-Lang (1990), Boltuck and Kaplan (1993), or Kelly (1993).

Economic Community (EEC), where no antidumping duties can be imposed by member states on products originating in other member states; the European Economic Area (EEA), the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), where the same applies, and the North American Free Trade Area (NAFTA) and the recently concluded agreements between the European Union (EU) and the Central and Eastern European countries (CEECs), where antidumping continues to exist. The objective of Section III is to explore what the regional experience suggests regarding the necessary and sufficient conditions for replacing antidumping with antitrust. The conclusion that is suggested is that any attempt to achieve this goal in a multilateral agreement is doomed to fail for the foreseeable future.

In Section IV a proposal is developed to enhance the role of competition policy disciplines in the unfair trade context. The proposal does not imply any harmonization of competition laws or the elimination of antidumping action as a possible remedy. It does, however, go beyond the requirements of the current GATT Antidumping Agreement and the one that was negotiated in the Uruguay round. Under the proposal antidumping would become just one of three possible remedies, with its initiation made conditional upon a finding by the competition authorities that the exporter concerned benefits from substantial barriers to entry on its home market. Section V concludes by noting that the suggested approach can also be implemented in the regional context. There is increasingly a perception that many countries are interested in joining regional agreements so as to 'safeguard' their access to the regional market. However, recent agreements (e.g., the Europe Agreements, but also NAFTA) maintain antidumping. While accepting that 'political realities' may prevent the abolition of antidumping in such agreements, the far-reaching liberalization that is achieved under them should at least allow something along the lines of the proposal to be implemented.

II. Antidumping and Antitrust

National competition policy can be defined as the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position (including attempts to create a dominant position through merger). The underlying objective of competition policy in most jurisdictions tends to be efficient resource allocation, and thereby the maximization of national welfare. Most competition laws attempt to attain this objective by prohibiting the abuse of dominant positions (either through prohibition or through regulation), and forbidding various kinds of competition-restricting agreements between competitors. The focus of competition laws is on competition, reflecting the belief - which is extensively supported by empirical evidence - that vigorous competition is an effective way to foster economic efficiency. Many jurisdictions recognize that specific agreements between firms that may reduce competition could be efficiency enhancing, and make allowance for such agreements. However, the burden of proof in such instances is usually upon the participants in such arrangements.

The objectives underlying trade policy contrast starkly with those of competition la Governments pursue trade policies for a variety of reasons, including as a means to raise revenue protect specific industries (whether 'infant', 'senile' or other), to shift the terms of trade, to attain cer foreign policy or security goals, or simply to restrict the consumption of specific goods. Whatever underlying objective, an active trade policy redistributes income between segments of the population protecting specific industries and the factors of production employed there, and usually does so in inefficient manner. Trade policy is consequently often inconsistent with the objectives underly competition policy. The way this inconsistency is frequently put is that competition law aims protecting *competition* (and thus economic efficiency), while trade policy aims at protecting *competi* (or factors of production).

This is also the case for antidumping, although many of its defenders regard it as *the* exam of a trade policy that is consistent with the objectives of competition law. While this may have been case at the time antidumping laws were first written (late 19th and early 20th century), it is certainly the case anymore. The original theoretical rationale for antidumping law was developed by Viner (19 He argued that antidumping may be needed to protect domestic consumers from predat (anti-competitive) dumping.[2] The fear was that a foreign firm (or cartel) could deliberately pr products low enough to drive existing domestic firms out of business, then establish a monopoly. O established, the monopolist could more than recoup its losses by exploiting the resulting market pow For this scenario to be plausible, however, the monopolist (cartel) must not only eliminate dome competition, it must be able to prohibit entry by new (foreign) competitors. For this to be possibl must either establish a global dominance or it must convince the 'host' government to pursue a pol stance that tolerates or supports entry restrictions (e.g., high tariffs).[3] Both options are difficult realize, and in practice cases of successful predatory dumping remain undocumented. Proponents antidumping often have a different definition of predation than the economic one described above. Th concern, implicitly if not explicitly, relates to the continued existence of national firms that produc good. The fact that competition from other outside sources will in most realistic circumstances prev the formation of a monopoly is considered irrelevant. What matters is the maintenance of a domes industry.

In addition to 'predation', advocates of antidumping policies also argue that antidumping i justifiable attempt by importing country governments to offset the market access restrictions existing an exporting firm's home country that underlie the ability of such firms to dump. Such restrictions m consist of import barriers preventing arbitrage, but may also reflect the non-existence or non-enforcem

of competition law by the exporting country. These constitute reasons why dumping is held to be an unfair practice. Thus, the U.S. has claimed that lax Japanese antitrust enforcement permits Japanese firms to collude, raise prices, and use part of the resulting rents to cross-subsidize (dump) products sold on foreign markets. Garten (1994, pp. 11-13) offers a representative and thoughtful defense of antidumping that emphasizes entry barriers in the exporter's home market. Four major conditions are argued most likely to give rise to dumping: closed home markets of exporters, anti-competitive practices in the exporting country market which permit export sales below cost, government subsidization, and non-market conditions (mainly referring to the People's Republic of China and the economies in transition). Garten goes on to defend active application of antidumping laws to address these conditions. Arguing against those who suggest that if lack of competition is the problem, competition laws should be applied, "The Administration supports increased global standards in the area of competition law and believes that, with success in this effort, the need to invoke the antidumping law will be reduced. Competition laws can and do work effectively alongside the antidumping law, *but are not a substitute for it*. Th[illegible] need for vigorous enforcement of the US antidumping law will continue for the foreseeable future" (Garten, 1994, p. 20, emphasis added). Sole reliance on antitrust measures is rejected: "If the low prices are the result of dumping and the exporter succeeds in driving its US competition out of business, prices could still rise, likely to higher levels than if there had never been dumping" (Ibid.) Garten goes on to argue that another disadvantage of the "sole reliance" on antitrust laws is the questionable effectiveness of the US antitrust laws in "addressing and resolving problems that arise outside the United States and the time-limits that are not appropriate for cases where urgent need of protection from unfairly traded imports is sought" (Ibid.).

Antidumping is an inferior instrument to address foreign market closure as it does not deal directly with the source of the problem, i.e., the *government* policies which *artificially* segment markets, or allow this to occur. An antidumping duty may put pressure on affected firms to lobby their government to eliminate such policies -- or to abolish private business practices that restrict entry -- but does so in a very indirect manner. Once investigations are initiated, any changes in policies or practices cannot have an impact on the finding. Thus, the *threat* of antidumping apparently must induce market opening. But, in many cases there will not be significant barriers to entry, so there is not much to be done by exporters on this dimension. A problem with current antidumping enforcement is that no account is taken of whether price discrimination or selling below cost is the result of market access restrictions. Instead, this is simply assumed.[4] At the same time, antidumping creates a large number of distortions.[5] The existence of antidumping induces rent-seeking behavior on the part of import-competing firms, and

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4/ Of course, there need be no uniform relationship between market closure and dumping, as this will depend on a lot of other variables. What matters is that market closure is held to be a justification for antidumping, i.e., is a source of 'unfairness', without being shown to exist.

5/ This is generally recognized. For example, "But unlike domestic antitrust laws, which generally increase competition and lower prices, national antidumping laws sometimes reduce competition and raise prices." Economic Report of the President, United States Government Printing Office, Washington D.C., 1994.

the threat of actions lead exporting firms to alter production, allocation, and production-location decisions in ways that reduce welfare.[6]

Many economists that have studied the problem of antidumping have concluded that the welfare costs associated with the use of this instrument could be reduced if account was taken of its economy-wide impact. The policy implication that is often drawn is that a 'public interest' test be introduced, and that the costs of protection be publicized. In practice it appears that such suggestions have little effect because of the widely held perception that dumping is 'unfair'. The costs of protection are consequently heavily discounted by policymakers, even if they are formally required to establish that action is in the national interest. Suggestions that international efforts center on the adoption of public interest clauses or more specific 'economy-wide impact' tests run into the problem that such actions are *in theory* in each country's interest. Reciprocal negotiations cannot strengthen the incentives to go down this path. What is required is to deal with the rhetoric of 'unfairness' first. One possibility in this connection, discussed further below, is to engage competition policy authorities in determining whether the exporter's home market is contestable, and whether dumping threatens competition in the importing country's market.

Procedural Aspects of Antidumping Investigations

Detailed rules have been developed in the GATT regarding antidumping. A brief summary is perhaps useful for those that are not familiar with the multilateral "rules of the game," as amended by the recently concluded Uruguay round negotiations. Dumping is defined as offering a product for sale in export markets at a price below "normal value". "Normal value" is defined as the price charged by a firm in its home market, in the "ordinary course of trade". Trade is considered not to be ordinary if prices are less than average total costs (i.e., the sum of fixed and variable costs of production plus selling, general and administrative costs).[7] In the absence of sufficient sales on its domestic market, the highest comparable price charged in third markets or the exporting firm's estimated costs of production plus a 'reasonable' amount for profits, administrative, selling and any other expenses is to be used to determine normal value.[8] In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of a relationship or agreement between the parties involved in a transaction, the export price may be constructed on the basis of the price at which the

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6/ See, e.g., Finger (1993), Hoekman and Leidy (1993), and Messerlin (1989 and 1990).

7/ Such sales may be disregarded in determining normal value if the authorities determine that they are made over a period of at least 6 months, in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

8/ Costs are to be calculated on the basis of records kept by the exporter or producer under investigation, as long as these follow generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

imported products are first resold to an independent buyer, or if they are not resold to an independent buyer, "on such reasonable basis as the authorities may determine."

The comparison of the export price and the normal value must be made at the same level of trade (normally ex-factory level), and for the same time period. Allowance must be made for differences in the conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and in costs, including duties and taxes, incurred between importation and resale.[9] When price comparisons require a conversion of currencies, the rate of exchange on the date of sale must be used. In an investigation, the exporters must be allowed at least 60 days to adjust their export prices to reflect sustained movements in exchange rates during the period of investigation. The existence of margins of dumping during the period under investigation must be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, *or* by a comparison of normal value and export prices on a transaction to transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods.[10]

Actions against dumping may only be taken if it can be shown that the dumping has caused or threatens material injury to the domestic import-competing industry producing a 'like' product. Injury determinations must be based on positive evidence and involve an objective examination of the volume of the dumped imports, the effect of the dumped imports on prices in the domestic market for like products, and the impact of dumped imports on domestic producers of such products. A significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country, is a required for finding injury. Significant price undercutting of domestic producers, or a significant depressing effect on prices are other indicators that may be used.

De minimis dumping margins are set at 2 percent or a volume of imports/level of injury that is negligible. Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess effects of such imports if the margin of dumping established in relation to the imports from each country is more than *de minimis*, the volume of imports from each country is not negligible, and a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like domestic product. An illustrative list of indicators is given in the antidumping agreement to determine the impact of dumped imports on

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9/ If price comparability has been affected, the normal value is to be established at a level of trade equivalent to the level of trade of the constructed export price, or due allowance is to be made for such factors.

10/ An explanation must be provided why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

the domestic industry. These include actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; and actual and potential negative effects on cash flow, inventories, employment, wages, growth, or the ability to raise capital.

Dumped imports must be found to cause injury because of dumping. The necessary causality must be established on the basis of "all relevant evidence before the authorities." Any other factors that are known and that at the same time are injuring the domestic industry must be taken into account, and must not be attributed to the dumped imports. A number of factors that may be relevant in this respect are noted in the Agreement, including the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of - and competition between - the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry.

The term "domestic industry" is defined as the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. If producers are related to the exporters or importers[11] or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the remaining producers of like products.

The GATT agreement on antidumping contains rather detailed procedural requirements, relating to initiation of investigations; the evidence that can be used; transparency of procedure; the need for an appeals option; the duration of antidumping actions; and the remedies that may be used. It is too far-reaching to discuss all these aspects of the Uruguay round antidumping agreement. Although the new rules constitute an improvement over prior GATT requirements in this regard, they do little to compensate for the fact that antidumping authorities retain substantial discretion in applying regulations and defining criteria. No requirements were introduced that the market access conditions prevailing in the exporter's home market be investigated, or the threat to the competitive conditions existing on the importer's market be ascertained. While the discretion with respect to methodologies used to determine dumping and injury margins has been somewhat circumscribed, this is an area where 'abuse' cannot be regulated away. Many of the practices that have been identified as leading to significant protectionist biases remain untouched.[12]

11/ This requires that one directly or indirectly controls the other; both are directly or indirectly controlled by a third person; or together they directly or indirectly control a third person. There must be grounds for believing that the relationship causes the producer concerned to behave differently from non-related producers.

12/ For example, an apparent improvement from an economic welfare point of view is the new requirement that antidumping duties be terminated within five years of imposition. In practice this may not be a binding constraint, as this is conditional upon the findings of a review investigation whether both dumping and injury caused by dumped imports continues (or threatens) to persist. Another example pertains to the definition of an

There are substantial differences between antidumping and antitrust enforcement in this connection. Abstracting from the differences in objectives, antidumping authorities have much greater discretion than do antitrust authorities in implementing the respective laws. With respect to key issues such as the methodology used to calculate dumping margins, the determination of the 'relevant' market (i.e, how to define the 'like' products with which dumped imports are competing and thus injuring), and how to ascertain whether dumped imports have caused material injury current procedures are biased in favor of domestic industry. This contrasts with antitrust enforcement, where it is much clearer what the objective of the law is and where methodological guidelines have been developed that are applied. An example is the US Department of Justice's Merger Guidelines defining how the relevant market is to be determined.[13]

While the GATT Agreement does not require any consideration of the economy-wide impact of antidumping duties, their impact on existing users of imports, or the involvement of competition authorities, nothing in the GATT requires Members to implement antidumping laws. There is also nothing that prevents them from adopting antidumping laws that give competition authorities a role in the investigation process and makes the imposition of a duty conditional upon a finding that this is not too detrimental to competition and welfare. Some jurisdictions have included public interest clauses in their antidumping legislation (see below), others have given their competition offices a role in either implementing antidumping investigations (e.g., Poland), or addressing their effects *ex post* (e.g., the EU). This goes beyond what is required by the GATT, and reflects a recognition that antidumping actions are potentially very costly instruments of trade policy.

III. Lessons from Regional Integration Agreements

Attempts by countries to negotiate the abolition of antidumping have been made in the context of a number of regional integration agreements. The experience obtained in this connection provides valuable information regarding the conditions that are necessary for antidumping to be replaced by antitrust enforcement.

'interested party' in the GATT Agreement. This provides users and final consumers of the import a voice during the investigations, but restricts them to providing evidence that is relevant to the determination of dumping, or injury to domestic firms that compete with the imported product. The fact that a duty may injure their proper business is not a factor that GATT members are required to consider. See Hindley (1994) for a more comprehensive discussion.

13/ See Morris and Mosteller (1991), Morris (1993).

European Economic Community

The EEC (now the European Union) is unique in that it involves the complete liberalization of trade in goods, services, labor and capital (the four freedoms). In addition, it imposes common disciplines on Member states with respect to state aids (subsidies), government procurement practices, and competition policy. Articles 85 and 86 of the Treaty of Rome prohibit practices that restrict or distort competition and abuses of dominant positions insofar as they affect intra-European trade flows Art.85 EEC prohibits agreements and concerted practices - both tacit and explicit, whether enforceable or not - that restrict or distort competition in the common market and may affect trade between EU member states. A *de minimis* rule has been established by the EC Commission under which firms with relevant market shares below 5 percent and aggregate annual turnover of less than ECU 200 million are exempted from the reach of competition disciplines. Article 86 EEC prohibits abuse of a dominant position. Dominance is determined on the basis of the relevant product and geographic markets. Art.86 contains an illustrative list of abuses, including unfair trading, price discrimination, tie-ins or bundling, and restricting output or access to markets. Effects on trade may be potential, indirect as well as direct, and involve stimulating as well as restricting trade (e.g., through the use of cross-subsidization).

Public undertakings and undertakings to which special or exclusive rights have been granted (e.g., monopolies), are the subject of Article 90 EEC, which requires nondiscrimination on the basis of nationality and behavior consistent with the other competition principles and rules of the EU, insofar as the application of these rules do not impede the realization of the tasks assigned to the public undertaking. State monopolies of a commercial character must also ensure nondiscrimination regarding the conditions under which goods are procured and marketed between EU country nationals (Article 37 EEC). State-aids are considered to be incompatible with the common market if they affect trade flows. However, generally available subsidies are permitted in principle, as is aid targeted at disadvantaged regions (Article 92.3(a)) (e.g., regions with per capita incomes that are substantially below average, or areas where there is significant unemployment).

One consequence of the far-reaching liberalization/integration of markets and adoption of common competition policies was the explicit recognition that antidumping actions did not have a place in the common market. Article 112 of the Treaty of Rome provides for the imposition of antidumping measures on internal trade only during the twelve-year transition period leading up to full implementation of the Treaty.

The European Economic Area Agreement

The EEA is a far-reaching agreement between the EFTA states (minus Switzerland) and the EU that involves the former adopting much of the EU's *acquis communautaire* (the main exception being the Community's Common Policies – agriculture, external trade), and the EU extending the four freedoms

to the EFTA countries. Art. 26 of the EEA Agreement stipulates that: "Anti-dumping measures, countervailing duties and measures against illicit commercial practices attributable to third countries shall not be applied in relations between the Contracting Parties, unless otherwise specified in this agreement." Protocol 113 EEA limits the application of Art. 26 in two ways: (i) the Article is only applicable to the areas covered by the provisions of the EEA Agreement and in which the Community *acquis* is fully integrated into the Agreement (an ad hoc solution was, for example, found with respect to fisheries, where the Community *acquis* was not integrated); and (ii) unless EEA Contracting Parties agree on other solutions, its application is without prejudice to any measures which may be introduced by them to avoid circumvention of anti-dumping measures, countervailing duties or measures against illicit commercial parties, aimed at third countries. This restriction was judged necessary because the EEA is a free trade area. It does not establish a customs union with the EU.[14]

The FTAs negotiated between the EC and the EFTA states in the early 1970s contained disciplines on the application of competition policy . Despite the fact that EFTA countries adopted competition policies similar to those of the EC, and despite the free trade status that was achieved, "[t]he Community, however, continued its practice of imposing anti-dumping measures whenever it considered that an EFTA company dumped its products on the Community market arguing, *inter alia*, that so long as the EFTA states and the Community did not have the *same* competition rules, this was necessary in order to maintain fair competition between Community and EFTA companies."[15] Products of the former EFTA countries were the subject of about 5 percent of all antidumping actions initiated by the EC in the 1980s. Despite this relatively low incidence, the abolition of antidumping duties in the EEA was one of the negotiating goals of the former EFTA countries, as their exporters sought to eliminate the threat of such actions completely (Hindley and Messerlin, 1993).

In the EEA context, as in the EU, the elimination of antidumping was accompanied by the adoption of common competition rules (i.e., EU rules). Moreover, the rules apply to both firms *and* governments in an explicit recognition that actions on the part of both actors may restrain competition, and thus circumvent the objective of free trade. That far-reaching market integration increases the interest of governments to adopt common competition policies is one of the unambiguous conclusions that emerge from the EU/EEA context. A common trade policy vis-a-vis non-members was not required.

The Australia-New Zealand Closer Economic Relations Trade Agreement

On January 1, 1983 the Australian - New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) came into force. The Agreement aimed at integrating progressively the economies of the

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14/ See Norberg et al. (1993).

15/ Op.cit., p. 390, emphasis added.

two countries by establishing a free-trade area between them. Article 12(1)(a) of the ANZCERTA contains a legally binding obligation imposed on the two participants to: "examine the scope for taking action to harmonize requirements relating to ...restrictive trade practices."

Australian antitrust laws follow the US model, whereas New Zealand initially followed the UK experience. In 1986, New Zealand's Parliament enacted new competition legislation largely adapting its legislation to the Australian system.[16] In large part these changes were driven by the desire of the new government to enhance competition in the economy. However, they also allowed discussions between the two countries to eliminate antidumping on bilateral trade flows. In the review of the ANZCERTA that was completed in 1988 and resulted in the Protocol in Acceleration of Free Trade on Goods signed August 18, 1988, this evolution was reflected in the Preamble: "...the maintenance of anti-dumping provisions in respect of goods originating in other Member States ceases to be appropriate as the Member States move towards the achievement of full trade in goods between them" (Adhar, 1991, p. 320). As noted by Adhar, "The rather doctrinaire view that removal of trade barriers would eliminate the incentive or scope for dumping was rejected. Accordingly, policy makers seized upon existing domestic competition laws. With minor amendments, domestic antitrust could address problems of trans-Tasman predation" (Ibid, p. 322).

In the ANZCERTA context a two-step procedure was therefore followed. Full trade liberalization was judged necessary but not sufficient to eliminate incentives for dumping. Such elimination required active enforcement of *agreed* competition laws. The corresponding modified Article 4 of the ANZCERTA now reads:

> "1. The member States agree that anti-dumping measures in respect of goods originating in the territory of the other Member States are not appropriate from time of achievement of both free trade in goods between the Member States on 1 July 1990, and the application of their competition laws to relevant anti-competitive conduct affecting trans-Tasman trade in good"... and
>
> 4. Each Member State shall take such actions as are appropriate to achieve the application of its competition law by 1 July 1990 to conduct referred to in paragraph 1 of this Article in a manner consistent with the principles and objectives of the Agreement."

16/ Adhar (1991, p. 332).

The North American Free Trade Agreement

Both the Canada-US Free Trade Agreement (CUSFTA) and the North American Free Trade Agreement (NAFTA) liberalize trade in industrial products and foreign direct investment flows. They do not liberalize trade in agricultural products, or discipline the use of subsidies. Indeed, both agreements simply restate the existing multilateral (GATT) disciplines and remedies concerning subsidies. Both agreements continue to maintain antidumping for internal trade flows. Despite lengthy discussions on the topic, and despite the Canadian government's great interest in disciplining the use of antidumping (with a stated preference for abolition) negotiators in both instances were unable to agree to replace antidumping with antitrust enforcement. In part this reflected differences in the competition rules and their enforcement in the member countries. More important appears to have been the strength of the lobbies in the countries involved that supported the continued existence of antidumping.

EU Agreements with Central and Eastern European Countries

The recently negotiated Europe Agreements between the EU and six Central and Eastern European countries (CEECs) illustrate that free trade, a common competition policy, and disciplines on subsidy and related policies is not enough. The Europe Agreements will lead to complete free trade and freedom of capital flows over a ten year period. The Agreements also foresee in the application of the basic competition rules of the EU by the associated countries to practices that affect trade between them. The rules relate to agreements between firms restricting competition, abuse of dominant position, the behavior of public undertakings (state-owned firms) and competition-distorting state aids (Articles 85, 86, 90 and 92 of the EEC Treaty respectively). Thus, competition policy is defined widely to include the behavior of governments as well as of firms.

Despite their agreement to adopt EU-compatible competition disciplines, and despite the fact that free trade and freedom of investment will be achieved within ten years, there is no provision in the Europe Agreements specifying that antidumping will be phased out. Continued threats of contingent protection on the part of the EU implies that CEEC firms will face different standards than their EU competitors. EU firms will be permitted to engage in price discrimination or sell below cost on the EU market, whereas CEE firms will be constrained in pursuing such a strategy by the existence of EU antidumping procedures. On EU markets, price discrimination by CEEC firms in the sense of selling products at prices below those charged at home may lead to antidumping petitions if this injures EU firms. Such dumping is unlikely to be the result of concerted practices or abuse of dominant positions, as these will be difficult to attain by CEEC firms. Nor can it be argued that CEEC firms are unfairly benefitting from a protected home market.

Experience demonstrates that international agreement on the abolition of antidumping is difficult to achieve. Where it has proven possible, it occurred in a bilateral or regional setting. The two instances where elimination of antidumping proved possible -- the EEC/EEA and the ANZCERTA -- entail far-reaching liberalization of trade in goods, services and factors of production, coordination and substantial harmonization of competition policies, as well as disciplines on government procurement and state aids (subsidies). In the EU context, there are supranational rules and enforcement of competition disciplines that apply to both firms and governments. This is not the case for ANZCERTA, which does not have an equivalent of the European Commission and the ECJ, although it does have disciplines on subsidies that are stronger than those contained in the GATT. The NAFTA, in contrast, does not contain disciplines on subsidies that go beyond those of the GATT, does not imply common antitrust rules or enforcement, and continues to allow for antidumping. This suggests that abolition of antidumping not only requires concurrent, if not prior, agreement to eliminate trade and investment restrictions ('free market access'), harmonize -- or at least coordinate the application of -- competition laws and policies, and adopt common disciplines on the use of state aids. However, the experience of the CEECs illustrates that all of this may be necessary, but it is not sufficient.

Whatever the case may be regarding the sufficient conditions for international agreement to abolish antidumping, clearly a liberal trade and direct investment policy stance and active competition law enforcement are necessary conditions. Unilateral efforts to liberalize foreign access to domestic markets for goods and services is likely to be a precondition for any multilateral agreements in this area. Free trade is an effective means of fostering competition. It should help both to reduce the probability and the magnitude of dumping by exporters, and provide governments with arguments to oppose the application of antidumping actions against their exporters. Perhaps somewhat less obviously, but again supported by the regional experience, liberalization should extend to the service sector. In practice, this implies a liberal foreign direct investment policy, and the application of the national treatment principle. Perceived restrictions on access to distribution channels and related services are often held to be a justification for the imposition of antidumping measures.

IV. A Three-stage Approach for Addressing Unfair Trade Allegations

Unilateral liberalization of access to markets cannot guarantee a significant fall in the incidence of antidumping harassment. Even economies such as Singapore and Hong Kong are subjected to antidumping by OECD countries. More is needed. Freer trade and a liberal FDI stance will at best increase lobbying against antidumping in export markets, and hopefully facilitate the negotiation of agreements to discipline antidumping. That is, it is a necessary, not a sufficient condition. Vigorous enforcement of domestic antitrust laws could, in principle, help, but again is unlikely to be sufficient. Even if it were desirable and politically feasible, harmonization of competition laws in the multilateral

context, may also be insufficient, as demonstrated by the Europe Agreements. An attempt can be made, however, to enhance the role of competition policy disciplines in the trade policy context by seeking multilateral agreement on a very limited number of common standards. Political realities will require that the antidumping option be maintained in the immediate future. But, it might be possible to make antidumping just one of a number of available remedies. In what follows a three stage process is proposed, of which only the first stage is new.

Stage 1: Applying Antitrust Legislation

If an import-competing industry believes that a foreign firm or firms is engaging in injurious dumping, under current rules it may request its government to launch an antidumping investigation. The focus of this investigation is to determine whether dumping occurs, and if so, if it materially injures the domestic import-competing industry producing like products. As noted earlier, a major weakness of antidumping enforcement is that no attempt is made to determine whether there is any injury to competition, i.e., to national welfare. Moreover, although ostensibly justified because of market access restrictions in the exporters home market (see, e.g., Garten, 1994), this is also not a criterion. Instead of automatically initiating an antidumping investigation upon receipt of a complaint, it is proposed that governments agree that an allegation of injurious dumping lead to consultations between – and investigations of – the relevant *competition authorities*. If a necessary condition for 'unfair' dumping by a firm is market segmentation and/or market dominance, as argued by defenders of antidumping, then an attempt should be made to determine whether this is the case. Vigorous enforcement of the antitrust laws of both the exporting and importing country should, in principle, do much to ensure that the perceived precondition for dumping to be 'unfair' (market power/closure at home or abroad) is satisfied.[17]

The first question to be addressed in this context is whether the interested parties have an incentive to have recourse to an approach based on antitrust enforcement rather than pursuing/facing trade remedy protection. From the exporting country's point of view, the alternative of being subjected to antidumping investigation/duties is clearly much less attractive than the enforcement of its own competition laws. The latter will raise its welfare, the former will lower it. From the importing country's point of view, investigation and imposition of antidumping duties is clearly an inferior remedy. As mentioned earlier, an antidumping duty does nothing to offset the barriers to contesting the foreign market. Indeed, an antidumping investigation does not even establish whether such access restrictions exist. Important in this connection is the likelihood that interests of exporting firms and the economy as a whole will diverge. If the domestic market of the exporting industry is not contestable, the industry's rents associated with market segmentation may be lower than the costs to consumers of the goods

17/ It should be emphasized again that the arguments of proponents of antidumping are taken as given. Clearly unfairness is a subjective notion, and is often used as a fig leaf. In principle, market power in the home market may or may not give rise to dumping. The issue at hand is to deal with the perception of 'unfairness'.

produced. That is, welfare will be reduced. The exporter's government should therefore support the enforcement of its competition laws in these circumstances. Similarly, the importing country government has an interest in ensuring that an antidumping complaint is not simply being used by the domestic industry as a mechanism to create or enforce a cartel or similar non-competitive market structures.[18]

Given that it is in the interest of both the parties to seek enforcement of antitrust laws, the main issue is which antitrust laws are to be enforced. In antitrust case-law, initially in the US and then in the EU, the "effects" doctrine has led to an expansion of the reach of domestic jurisdictions when addressing antitrust issues. Summarizing, under the "effects" doctrine, domestic courts have jurisdiction to judge actions of foreign parties to the extent that the latter have a direct, immediate (or reasonably foreseeable) and substantial effect on the market of the importing country. These three conditions can be (and in practice have been) stretched to encompass actions that could be, at best, described as borderline cases.[19] This approach was exemplified by the Bush Administration: "Applying the antitrust laws to anticompetitive conduct that harms U.S. exports is consistent with [previously followed] enforcement policy ... Congress did not intend the antitrust laws to be limited to cases based on direct harm to consumers. Today, when both imports and exports are of importance to [the US] economy, we would not limit our concern to competition in only half of our trade."[20] The Clinton Administration appears to follow the same approach. Assistant Attorney General Anne Bingaman recently "reaffirmed the Department of Justice's policy to take enforcement action against foreign conduct that falls within the jurisdictional reach of the Sherman Act, even where the restraints do not have a direct impact on US consumers."[21]

Recently, a proposed bill was introduced for discussion in the US Congress which would give the President new powers to take action to open foreign markets.[22] The proposed Bill would add a new Section 311 to the existing Section 301 of the 1974 Trade Act (as modified in 1988). Under Section 311 "(a) The President shall have the authority to impose civil penalties on foreign or domestic persons that engage in restrictive business practices, including price-fixing, bid rigging, joint restraint on output,

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18/ As has been noted by Messerlin (1990), in practice firms have used antidumping as a cartel enforcement mechanism in the EU context. Wood (1989) and Boltuck and Kaplan (1993) argue that many US antidumping cases are attempts by US firms to protect rents, i.e., to maintain supra-competitive prices that result from imperfectly contestable markets.

19/ In 1983, the Antitrust Division of the US Justice Department recommended criminal prosecution against Japanese trading companies that had allegedly reached agreements concerning how much US seafood they would buy and at what prices. See Davidow (1993) for a discussion of the United States v. C. Itoh & Co. case and its influence on the current US administration.

20/ Statement by James Rill, Assistant Attorney-General, Antitrust Division, as cited by Ohara (1994, p. 50).

21/ *International Trade Reporter*, 11, 1994, p. 374.

22/ See H.R. 4206, 103d Congress, 2nd Session.

market allocation, boycotts, tying arrangements or similar activities, when such practices foreclose United States exports or otherwise burden or restrict United States foreign commerce....[and] (e) Civil penalties imposed by the President pursuant to this section shall be levied against the United States business operations of foreign or domestic persons found to have engaged in restrictive business practices under this section and shall be commensurate with the degree of financial injury arising out of the foreclosure of exports or other burden or restriction on United States commerce."[23] This proposal opts for government-to-private business remedies, arguably to avoid potential inconsistency with GATT rules. Irrespective of the GATT, the proposed legislation clearly applies US standards extraterritorially, although it is unclear whether the assessment of the President is to be based on the domestic (US) antitrust laws.[24] Whatever the case may be in this regard, if enacted, the proposed Bill will allow the President to impose sanctions on US subsidiaries of foreign companies when it has been determined *under US law* that private actions of the parent company on foreign soil foreclose US exports. Such assertion of jurisdiction arguably goes against the rulings of public international law (see below).

In the United States, some courts have based their jurisdiction completely on the "effects" doctrine. Other courts have used it only as a first step to assert jurisdiction, considerations of traditional (negative) comity coming into play as a second step before jurisdiction is definitely asserted.[25] In the EU the situation is slightly different. In the *Dyestuffs* case,[26] the Advocate General stated in his opinion that it is compatible with international law to assert jurisdiction if an act committed abroad has direct, immediate and substantial effects within the Community's territory. Although his opinion was not followed by the European Court of Justice (ECJ), it was later largely espoused in the *Wood Pulp* case.[27] Sir Leon Brittan masterfully draws the parallelism between this case and the judgment of the Permanent Court of International Justice in the *Lotus* case with respect to assertion of jurisdiction.[28]

Ensuring that the three necessary conditions of the effects doctrine are met guarantees a sensible approach towards asserting jurisdiction. In the case of applying competition laws in the unfair trade context, the subject of investigation will be the contestability of the relevant market in both the importing

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23/ Ibid.

24/ This could be important, as the US antitrust laws tend to be lenient with respect to vertical arrangements, and many of the examples cited are vertical in nature.

25/ See Meessen (1989) and Atwood (1993).

26/ Court of Justice, Case 48/69, ICI v. Commission, 1972, ECR, 619; Case 52/69, Geigy v. Commission, 1972, ECR, 787; Case 53/69, Sandoz v. Commission, 1972, ECR, 845.

27/ The version of the effects doctrine that was espoused was somewhat more restrictive in that the implementation within the territory of the Community of a foreign conduct was required. See van Gerven (1990).

28/ See Brittan (1991, pp. 11-12).

and exporting country. Whether or not exporting firms will dump depends not only on the existence of market access restrictions in their home market and the structure of the market, but also on the situation in the market of the importing country. Whether dumping is injurious to competition depends importantly on the market structure prevailing in the importing country. Accordingly, in the dumping context, at least one criterion (direct effect) and most likely another one (immediate or reasonably foreseeable effect) of the "effects" doctrine are not met. It therefore seems unreasonable to argue that the authorities of the importing country can assert jurisdiction over barriers to entry in the market of the exporting country, and consequently apply their own antitrust laws based on the "effects" doctrine. In the absence of a world competition law, the only law that is applicable under an interpretation of the effects doctrine that is compatible with international public law and able to address the issue of foreign market structure and conduct is the competition law of the exporting country. Domestic market structure and conduct in the importing country should be the focus of its own competition authorities. Interpreting the "effects doctrine" as allowing the importing country's antitrust authority to apply its legislation to practices prevalent in the exporting country that *might* give rise to dumping (and thus produces its effect on the market of the importing country) is to stretch the concept to an unreasonable extent. Such an approach sanctions the existence of situations *potentially* giving rise to dumping, rather than the conduct itself.

Attention should therefore focus on obtaining agreement that each country applies its competition policies to the actions of firms located in their respective territories. The principle of positive comity can prove useful in implementing competition policy-based investigations in the unfair trade context. The notion of 'positive comity' appears alongside 'traditional' comity in the September 1991 cooperation agreement in antitrust between the EU and the US.[29] According to the traditional comity principle, sovereign states will consider important interests of other states when exercising their own jurisdiction (Art.II of the agreement). 'Positive comity' shifts the initiative to the state whose interests are affected, which is given the legal option of requesting another state to initiate appropriate enforcement proceedings if this could address the complaining country's concerns.[30] While it clearly goes beyond the traditional principle that is embodied in the OECD Recommendations,[31] the ultimate decision remains at the

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29/ "Agreement Between the Government of the USA and the Commission of the EC Regarding the Application of Their Competition Laws," *International Legal Materials*, XXX, 1991, pp. 1491-1502. See, e.g., Ham (1993) for a discussion.

30/ Art.V:2 of the agreement states: "If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities."

31/ The 1986 OECD Recommendation, which replaced the 1979 Recommendation and purports to strengthen international cooperation in this field, encourages OECD members to give effect to the principle of traditional comity.

discretion of the state asked to act. This principle has begun to find wider application in the international sphere (Hoekman and Mavroidis, 1994b).[32]

How might the process work? Upon receipt of a request to start an antidumping investigation, the relevant authorities (e.g., DG-1 in the EU context, the Department of Commerce in the US) would inform the competition authorities of the exporter's home market that a petition has been received and request them to undertake an investigation into the contestability of the relevant market. The aim of the investigation would be twofold: (1) to collect data on the prevailing market structure, extent of competition, and regulatory environment; and (2) to determine whether the exporting firm has engaged in anticompetitive behavior or has a dominant position which it has abused by restricting entry. Both aspects are important. The investigation will document all relevant government measures that affect the structure of the market: tariffs, non-tariff measures, subsidies, monopolies, preferential tax or procurement treatment, barriers to foreign direct investment, and so forth. The investigation will also seek to determine whether private agreements have been concluded to restrict competition, or whether the firms have and abuse a dominant position. Throughout the investigation, the competition authorities of the importing country must be kept fully informed and be given all the information that is collected. Agreement might be sought that a representative from the importing country's antitrust office participate in the proceedings. Strict time-limits must be agreed and adhered to, so as to facilitate the acceptance of the new procedures by the lobbies that support antidumping.

Concurrently with the investigation by the competition authorities of the exporter's home country, symmetry suggests that the importing country's competition authorities also determine whether its domestic market is competitive, and whether the imposition of trade barriers would endanger competition. As noted earlier, often import-competing industries that file antidumping petitions may not be competitive, the underlying objective being to maintain rents. Application of competition tests is clearly in the power of each importing country to implement unilaterally. No multilateral agreements are required. The fact that few countries involve their competition offices in antidumping enforcement illustrates the power of the rhetoric of allegations that dumping is "unfair." The application of competition-based remedies in the home markets of exporters -- if deemed appropriate -- may help to reduce the extent to which dumping is deemed to be 'unfair', and induce governments to more actively involve their competition offices in the application of contingent protection.

The competition authorities generally have substantial powers to act on an *ex post* basis against the effect of government regulations that restrict competition. If the conclusion of the investigation is that competition has been artificially restricted in a manner that violates the law, standard remedies will be

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32/ Some have expressed concern over the efficiency of this instrument. Atwood (1993) points out that the efficiency of the whole mechanism largely depends on the self-interest of the parties. Clearly bargaining power will also be important. As far as the subject at hand is concerned, however, it can be argued that there is a coincidence of interests between exporting and importing countries to initiate such proceedings (see above).

employed. What these are will depend on the wording of the law and on practice. In many instances the competition office may find that the law has not been violated and that there are no significant barriers to entry for foreign products. In such cases the transparency/information generating aspect of the investigation is crucial. The main point to emphasize is that *if* the importing country's competition authorities agree that is no significant closure of the market, the antidumping petition will be closed. The same occurs if a violation of the law is found to have occurred, standard remedies are applied to counteract this, *and* these are judged satisfactory by the importing country's competition authorities. If no disagreement arises, then clearly the process has been substantially more useful than the classical recourse to antidumping duties: the grounds for dumping have either been eliminated,[33] or it has been concluded that a necessary condition for dumping to be injurious to competition has not been satisfied.

It should be noted that the proposed approach towards introducing competition policy disciplines consists of a series of procedural obligations. There is no call for any harmonization of competition laws and policies. Although agreement on 'minimum standards' and applicable remedies could make the whole process more efficient, this is not necessary. However, non-harmonization will certainly imply that parties can be expected to disagree. For example, the outcome of the investigation by the exporting firm's competition authorities may be contested by the importing country because certain practices that restrict entry are legal under the exporter's competition law. Alternatively, even if a practice is judged illegal and action is taken, the applicable remedy may be judged to be unsatisfactory. It is important that not all findings by the exporting firm's competition office be contestable, as otherwise the implementation of the proposal will be of little value. Thus, it is important that the importing country's *competition* authorities disagree with their foreign counterparts, and do so on the basis of facts and arguments that concern the impact of the exporter's market structure/conduct on competition in the importing country's market. It is this that should arguably be the 'important interests' that the principle of positive comity revolves around (see above).

Three possible types of disagreements can be identified: (1) a number of policies or practices are identified that restrict the contestability of the market and enhance the market power of the exporting firm, but no action can be taken by the authorities under the existing law (e.g., the practices have been exempted on the basis of an efficiency defense); (2) there is no disagreement regarding the existence of an anticompetitive practice, but the importing country's government perceives that the remedy is ineffective in terms of dealing with the problem; and (3) there is disagreement, based upon the common facts that have been collected, as to whether the contestability of the market is significantly impeded by private/government actions. In these cases the importing country must be able to pursue the matter further.

33/ If the exporter's law provides for compensation or pecuniary remedies these will go to the importing government. The latter may or may not pass on the funds to the petitioning firm.

Two options will be available to the government of the importing country: a non-violation complaint to GATT, and the initiation of antidumping proceedings. What is important in this connection is that the investigation by the competition authorities will have largely determined the facts of the case, generating information regarding market structure and market conduct in both the exporting and the importing market. A non-violation complaint under GATT rules is always open to GATT members. All that is required is that the necessary conditions have been met (see below). However, the initiation of antidumping will be conditional upon the prior investigations by the respective competition authorities. Ideally, a finding that the contestability of the exporter's home market is limited by either government policies (trade or other) or private business practices that are tolerated by the government should be a necessary condition for initiating antidumping proceedings. That is, the first of the three possible reasons for disagreement noted above should apply. Non-violation is the appropriate path for the other two possibilities.[34]

Stage 2: Non-violation complaints

The main forum for disputes where no specific GATT Articles are violated is a so-called *non-violation* complaint under GATT Article XXII:1(b).[35] Non-violation complaints were designed to address the concern of contracting parties relating to modification of negotiated competitive conditions (based on tariff concessions) through subsequent government action in areas that were either not addressed by the GATT or did not violate a GATT obligation. For anticompetitive practices to be the subject matter of a non-violation complaint three conditions must be met: (i) the measure must be applied by a government; (ii) it must alter previously negotiated competitive conditions; and (iii) the measure could not have been reasonably anticipated at the time the market access conditions were negotiated. Article XXIII:1(b) speaks of the 'application of any measure' that nullifies or impairs benefits. The term 'measure' suggests that not only formal laws and regulations are included but also other forms of government action that are necessary to make the government choice operative. The mere tolerance by a government of a private business practice is unlikely to be sufficient grounds for a non-violation complaint. However, if such tolerance is reflected in a positive (specific) action, the first criterion will be satisfied. An example could be an exemption by the competent antitrust authorities granted to private enterprises that effectively reduces market access opportunities for products of third countries by establishing difficult to penetrate distribution channels. In such cases, if the action (exemption) could not have been reasonably anticipated at the time market access conditions were negotiated, a contracting party might bring a non-violation complaint. Passive tolerance of a private business practice, to the extent that

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34/ In practice, of course, this may be impossible to negotiate. If antidumping remains an option under all three scenarios, the antidumping authorities should be required to publish the results of the investigation by the competition authorities.

35/ For a comprehensive discussion of non-violation in the competition context, see Hoekman and Mavroidis (1994a). This section largely draws on that paper.

it nullifies or impairs established competitive conditions, can also give rise to a non-violation complaint, and this independently of the legal action that might be taken on the domestic plane.

The content of the term 'reasonable expectations' has not been interpreted in GATT case-law. Panels tend to follow a case-by-case approach. Indeed, one can question whether it is appropriate at all to define specific criteria determining the reasonableness of expectations. The answer could be provided through a procedural rule: if 'failing evidence to the contrary' is always to be interpreted as a shift of the burden of proof on the contracting party trying to reject the argument that something was reasonably expected, then 'reasonable expectations' will be perceived to be always present and therefore protected when a concession is negotiated, unless the contracting party that allegedly modified the value of the concession provides evidence to the contrary. If the term 'evidence' is given its ordinary meaning, then the imposed standard of proof on the contracting party invoking the unreasonableness of expectations is high. The substantive content of the term 'reasonable expectations' can therefore be argued to be of secondary importance, since these exist until proven unreasonable. If this interpretation is accepted, the onus will be on the contracting party that alters the value of the concession to show that at the time it was negotiated serious reasons should have led the other contracting party to believe that the agreed level of competitive conditions would eventually be reduced (modified negatively in the future).

Special provisions on remedies in cases of non-violation complaints have been included in the Understanding on Rules and Procedures governing the Settlement of Disputes as a result of the Uruguay Round Agreements signed at Marrakesh the 15 April 1994.[36] Article 26.1(b) of the Understanding stipulates: "where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the member concerned make a mutually satisfactory adjustment". Article 26.1(d) of the Understanding further stipulates: "notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute".[37] Since there is no obligation to withdraw the non-violating measure, any satisfactory adjustment will concern a different subject-matter; this is a case of cross-compensation.

Stage 3: Antidumping

According to the current GATT Antidumping Agreement (see Section II above), three conditions have to be met for contracting parties to be allowed to impose antidumping duties: (i) existence of

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36/ See GATT (1994).

37/ Paragraph 1 of Article 22 states that compensation is a temporary measure available in the event that recommendations and rulings are not implemented within a reasonable period of time and that they should not be preferred to full implementation of rulings or recommendations of the adjudicating bodies.

dumping; and (ii) dumping causes material injury to the domestic industry. Two options exist as far as the introduction of competition concerns in antidumping enforcement is concerned. The first is to do nothing and simply to apply what has been negotiated during the Uruguay round. The second is to attempt to agree on the introduction of criteria that make the application of antidumping more sensitive to competition considerations. Common sense suggests that efforts should concentrate on agreeing to Stage 1, and that this is likely to be difficult enough without seeking to change the criteria that are employed by antidumping authorities. Moreover, as mentioned earlier, making antidumping more sensitive to competition concerns is something that is in the interest of any administering country. The problem is a political economy one, in that the power of the lobbies supporting a narrow injury-to-industry focus outweighs that of those who bear the burden of this. It is not clear how introduction of this issue on the multilateral agenda will help overcome this constraint.

On the understanding that changing the criteria used in the antidumping context to be more competition-sensitive is a domestic issue, it is nonetheless useful to identify a number of options that are available to governments that seek to lessen the protectionist bias of GATT-consistent antidumping mechanisms. The basic idea is to shift the focus from injury to competitors (i.e to the domestic industry producing the like product) to injury to competition (i.e to the economy of the importing country as a whole).[38] In principle, antidumping duties should be imposed only if a cost/benefit analysis determines that the advantages created by the imposition of duties for the economy as a whole outweigh the disadvantages. Three avenues can be explored in this context.

(i) Public interest clause. Some countries have adopted so-called public interest clauses in their antidumping legislation. Although they differ across jurisdictions, public interest clauses generally require

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38/ This may require changes in domestic legislation. A relevant judgement in this connection was given by the US Court of International Trade in the case of USX Corporation against the US International Trade Commission, March 15, 1988, 682 Federal Supplement pp. 60-76. In the USX case US domestic steel producers challenged a final negative injury determination by the USITC. The Court of International Trade examined the so-called 'five factors approach' that had been introduced by Commissioner Susan Liebeler in 1985 (Red Raspberries from Canada, USITC Report 1701), and was the basis for the negative finding. This approach, which was akin to a predation standard, focused on the existence of: (1) large and increasing market shares; (2) high dumping margins; (3) homogenous products; (4) declining prices; and (5) barriers to entry to other foreign producers. The appraoch was very controversial. The Court concluded that US legislation required that an 'injury to industry' test be used, not an 'injury to competition' test. As CIT Court Judge Restani stated in her opinion: "...Congress has made a judgement that causally related injury to the domestic industry may be severe enough to justify relief from less thanfair value imports even if from another viewpoint the economy could be said to be better served by providing no relief" (correspondence with Morris Morkre). Consequently, the Court ordered the ITC to remand the case. Reference can also be made to an attempt by the Federal Trade Commission (FTC) 'assist' the USITC in making its final determination on material injury in the 1986 case of imports of 64K dynamic random access memory components. The FTC argued in a pre-hearing brief before the ITC that although the petitioner (Micron Technology) had alleged predation, it was unlikely that a predatory pricing strategy had been implemented in the DRAM market. Instead, pricing was competitive. In 1988, Section 1328 of the Omnibus Trade and Competitiveness Act 'clarified' that the ITC is *not* required to determine that prices of imported products is predatory (Horlick and Oliver, 1989, p. 31).

that before duties are imposed, investigating authorities examine the impact this would have on the users of the alleged dumped import and the final consumers of goods that embody the imports concerned. Economic theory suggests that in the majority of cases disadvantages outweigh the advantages.

The practice of jurisdictions that have public interest clauses reveals that vaguely defined clauses have little impact. Thus, in the case of the EU, which has a 'Community interest' clause, it appears that this provision almost never has led to a decision not to impose duties in instances where dumping and injury to Community producers was found to exist. One reason for this is that no guidance is given to investigators how to weigh the injury to producers against the injury to users and consumers. For a public interest clause to be effective, it is important that it allows potentially negatively affected parties to defend their interests by giving them the opportunity to present their arguments to investigators, and have the legal standing to do so.[39] They should have access to the information presented by the import-competing industry seeking protection in making their case. Public interest clauses should come into play at the same time that injury to producers and the causal link between dumping and such injury is established. Currently, public interest clauses are invoked at the final stage of an investigation. This limits their impact since users are required to counteract by then well established evidence, and may have insufficient time to present their arguments. If introduced at a late stage, i.e., after the dumping and injury to producer investigations are completed, it is important that enough time be given to an analysis of the economy-wide impact of imposition of duties.

The experience with public interest clauses in Australia and the EU is informative. The Australian Antidumping Authority (ADA) has never made a recommendation on public interest grounds. However, there have been some cases where antidumping duties could have been imposed, but exporters were given only a "warning". In these cases the ADA appears to have concluded that taking action was not in the public interest. If it is brought to the ADA's attention that exports from a source which have been given a warning have increased and appear to be dumped, the ADA will undertake a fast-track inquiry. This process, called the "Sorbitol-approach", was first used in a case involving a chemical product, sorbitol, from a number of sources. It has also been applied by the ADA with respect to canned ham (2 companies), automotive lead acid storage batteries (3 companies), polyvinyl chloride (14 companies) and triethanolamine (2 companies). Whether this "surveillance" approach will have a less trade restrictive effect than the imposition of a duty clearly depends on the reaction of the exporters concerned. Evidence drawn from the EU context suggests that surveillance of imports can have trade restrictive effects (Winters, 1991).

39/ In the EU-context, the 'Community interest' clause was strengthened in March 1994. An amendment to the antidumping legislation gives legal standing to consumers. It remains to be seen how this strengthening will operate in practice especially taken into account the heterogeneity/diversity of the consumers as opposed to the homogeneity of the producers. The recent Peugeot cases brought before the ECJ, where the BEUC (the EU consumers' group) played a very active role, suggests that there is reason to believe that consumers will try to exploit the new possibilities offered to them by the new legislation.

The European Union's antidumping legislation also contains a public interest clause.[40] Art for example, calls for imposition of antidumping duties in cases "...where the facts as finally establ show that there is dumping or subsidization during the period under investigation and injury c thereby, *and* the interests of the Community call for Community intervention..." This was perceiv be a dead letter for a long time.[41] Recently however, in a case concerning imports of gum rosi Commission concluded that "...the negative effects of antidumping measures on the users of gum would be overwhelmingly disproportionate to the benefits arising from antidumping measures in of the Community industry."[42] This finding was motivated by the fact that the Community indus capacity of production was limited and that the imposition of antidumping duties would result substantial increase in the costs of production for the Community industry that uses gum rosin input. Accordingly, "the Commission concludes that protective measures would not be appropriat that it would not be in the Community interest to continue the proceeding."[43] Recent modificatio the EU's antidumping legislation have strengthened the position of consumers in antidum investigations.[44] These new developments reveal a tendency to seek to balance the interes beneficiaries and injured parties as a result of an eventual introduction of antidumping duties.

The foregoing simply gives users and consumers of the imported products a voice. A step fu would be to redefine the concept of injury used in investigations. Dumping should then be found to a negative impact on competition, not just on competitors. In practice, the best way to ensure tha is done is to use the same tests that the competition authorities would use to determine whether discrimination or selling below cost is anticompetitive and violates the competition law. Indeed competition authorities could be given the mandate to undertake such an investigation. An example is the Polish antidumping law, which gives the Antimonopoly Office the responsibility of investig allegations of dumping. Alternatively, competition authorities could be given a veto right, havi approve an antidumping duty before it is put into effect. At a minimum, competition offices should the mandate to determine whether antidumping duties -- and, indeed, trade policies in general -- hav to an excessive reduction in competition on the domestic market.

An interesting case decided by the ECJ in 1992 explicitly establishes a link between antidum and antitrust. Pechiney and Extramet are the only processors of calcium metal in the EU. Pechin also the sole EU producer of the metal. At a given stage, Pechiney refused to supply calcium met

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40/ See Council Regulation 2423/88, 11 July 1988, Official Journal, L 209/1ff.

Extramet, leading the latter to bring charges against the former for abuse of dominant position. At the same time, Extramet shifted to greater imports of calcium metal from China and the former Soviet Union. This in turn gave rise to an antidumping petition by Pechiney. The Commission investigated, and imposed antidumping duties. Extramet responded with a request to the ECJ to annul the antidumping order because the Commission had not investigated the possibility that other factors were damaging the EU industry. Specifically, Extramet argued that if Pechiney had supplied Extramet, imports would have been much lower, perhaps even below *de minimis*. The ECJ found in Extramet's favor, annulling the antidumping order on the grounds that anticompetitive practices relevant to this context were not addressed before recourse was made to antidumping duties.[45]

(ii) Defining de minimis requirements. According to the current GATT Antidumping Agreement, investigating authorities are not supposed to take any action against insignificant increases in dumped imports or insignificant underselling. However, allowance is made for the imposition of duties if the cumulation of a number of such insignificant exporters causes injury. Governments interested in reducing the anticompetitive effects of antidumping can introduce much higher *de minimis* standards than those required in the GATT Agreement. A necessary condition for the imposition of duties should be that an exporter accused of dumping have a significant market share. Concepts developed and employed in the antitrust area can again be useful. Thus, a dominant position by a foreign firm or group of firms (e.g., a cartel) could be made a necessary condition for taking action.

Dominance has been defined in various ways in national laws: some states opt for a 30% threshold, others for 40%, etc. Some also employ three- or five-firm concentration criteria/indices. Whatever the criteria, clearly the thresholds used by competition authorities are much higher than the market shares required under the GATT Antidumping Agreement. The concept of national treatment is relevant in this connection. Foreign firms should in principle be treated identically to their domestic competitors. If the latter are subject to competition disciplines that define dominance in a specific way, this should also be the criterion applied to foreign competition.

(iii) Determination of the relevant market. Under the current GATT Agreement "the term 'domestic industry' shall be interpreted as referring to the domestic producers...of the like product". The key therefore, to defining 'domestic industry' is the definition of the like product. If 'like product' is defined in too strict a way, it might lead at lest to overestimation of the effects of dumping and consequently to impositions of duties in cases where it should not. In general, there is a need to apply economic analysis and concepts, including basic factors such as cross price demand elasticities. If on the contrary, the relevant market is defined in too broad a way, duties will not be applied when they should

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45/ Extramet Industry S.A. versus Council of the European Communities, (No. C-358/89), Decision of 11 June 1992, pp. I-3813-3850.

be. A proper definition of the relevant market in accordance with economic considerations should be the starting point of antidumping investigations.[46]

V. Concluding Remarks

Proponents of antidumping are concerned with the possibility that dumping is predatory, is unfair because it is supported by a government (e.g., through subsidization), or is unfair because the exporters involved benefit from noncontestable home markets. Subsidization should not be addressed through antidumping. This is what countervailing duties are designed to do. Indeed, the mechanism of countervailing duties has the great advantage over antidumping in that it at least requires a finding that subsidies exist, and cause injury. Predation and anticompetitive market conduct are issues that antidumping actions cannot address. Perhaps even more important, current antidumping enforcement procedures make no attempt to determine whether the necessary conditions for "unfairness" have been satisfied.

The obvious solution to the problem of antidumping, one that has been suggested at regular intervals by economists and trade lawyers for over 20 years, is to make antidumping enforcement more consistent with competition law enforcement. That is, the focus of attention should become the effect of dumping on *competition* in the importing country's market, rather than its impact on the *competitors* that happen to be located in that market. So far, it has proved to be impossible to sell this idea to policymakers. A major reason for this is that many of the proponents of replacing antidumping with competition enforcement have argued that what is required is agreement to adopt common competition policies. The regional integration experience illustrates that this is unlikely to be sufficient to allow agreement to abolish antidumping. Free trade, freedom to invest, and disciplines on government subsidies are also likely to be required. Even then, this may not be sufficient, witness the experience of the Central and Eastern European countries in the EU-context. Achievement of the various necessary conditions that are suggested by the regional experience in the multilateral context cannot be expected any time soon. But it might prove possible to seek agreement that greater effort be put into determining whether the conditions that are alleged to potentially give rise to "unfair trade" actually exist, *before* having recourse to antidumping. One way this avenue might be pursued has been explored in this paper.

The foregoing has assumed that governments seek to agree to implement the proposal in the multilateral context, e.g., as part of a future GATT negotiation. While this would be preferable, and should in principle be feasible, in practice the suggested approach may be much easier to implement in a 'small numbers' context. Thus, it could be pursued through bilateral agreement or in the context of plurilateral arrangements. There is increasingly a perception that many countries are interested in joining

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46/ See, e.g., Wood (1989), Morris (1993), and Kelly (1993).

regional integration agreements such as the EU or NAFTA so as to 'safeguard' their access to the regional market (Hindley and Messerlin, 1993). The review in Section III of the experience that has been obtained with attempts to abolish antidumping in the context of regional integration agreements suggests that there are at least three necessary conditions for the abolition of contingent protection: (1) free trade and freedom of investment; (2) disciplines on the ability of governments to assist firms and industries located on their territory; and (3) the existence and enforcement of competition (antitrust) legislation. While necessary, the Europe Agreements negotiated between the EU and the CEECs illustrates that these conditions are not sufficient. Although the three conditions will to a very great extent be satisfied for intra EU-CEE flows once the Europe Agreements are implemented, the antidumping option was retained indefinitely. Similarly, antidumping continues to be available in the intra-NAFTA context. Clearly, the first best strategy for the CEECs is to seek the elimination of antidumping once the Europe Agreements have been fully implemented. However, if this proves to be impossible, an agreement along the lines sketched out earlier would be a second-best policy. More generally, attempts could be made to include an explicit competition-antidumping link in Cooperation and Association Agreements that are currently either under negotiation or in force. Even if 'political realities' prevent the abolition of antidumping in regional integration agreements, the far-reaching liberalization that tends to be achieved under them should facilitate the implementation of the proposal in such contexts.

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