Antidumping and antitrust issues in free-trade areas: under what legal conditions should an extended application of the provisions against abuse of a dominant position replace antidumping measures within the North American Free Trade area?

(Or Towards an International Code on Competition?)

by Gabrielle Zoe Marceau

Supervisor: Professor Valentine Korah, UCL
External Supervisor: Dr Brian Hindley, LSE

International Competition Law

Faculty of Laws
University College London
University of London
England
June 1993
ABSTRACT

In this thesis the legitimacy of anti-dumping measures in free-trade areas is contested. Economists argue that, generally, antidumping actions restrict and distort competition. In political terms, antidumping measures are biased in favour of a privileged interest-group: the producers. Legally, they infringe the obligation of National Treatment contained in the GATT and NAFTA. Within regional groupings they contradict the guidelines of Article XXIV(8)(b) of the GATT.

Anti-dumping laws should be phased out in favour of an extraterritorial application of national competition laws dealing with similar issues domestically. The traditional alternative for antidumping actions has always been the application of domestic legislation against predation and price discrimination. It is argued that this solution is inappropriate or at least incomplete. Many abuses, other than predation, can be exercised in transnational markets: transnational vertical restraints, tying, refusal to deal, restrictions on patents, trade marks and copyright which all may facilitate dumping (i.e. difference in price between two national markets). It is argued that anti-dumping actions could be phased out within NAFTA if a comprehensive legislation on competition were to be enforceable against any transnational restrictive business practice.

NAFTA can also constitute a laboratory for needed discussion on an international code of conduct of firms and governments. In an international forum, what constitute market power and abusive conduct differ from what would otherwise be acceptable in the domestic market. Security and other national policies ought to be weighted against efficiency considerations. In that context, the European framework of analysis, where variables additional to efficiency are balanced in competition assessment, provides a good model for such an international code of competition. Enforcement of the National Treatment obligation of the GATT and Public Interest clauses in antidumping laws are the best way to reconcile trade and competition considerations.
ACKNOWLEDGEMENTS

Many friends have helped make this thesis possible.

Thank you to my friend Bernard Colas who introduced me to International Economic Law. In London, I would like to thank Alice Hemming for her generosity over the past four years. Thank you also to Michael and Mary who gave me extensive computer facilities, and to Deborah, Murray, Margorie and Tony who let me use their wonderful flat where I was able to work peacefully for hours. Diane, Christiane, Patricia and Neal were always supportive, especially during my hospitalisation. In Brussels, I had an unforgettable stage in the Competition Directorate of the EEC Commission, thanks to Paul Malric-Smith. I was also lucky enough to have my friend Richard supporting me. In New York, I am grateful to Paul and Violaine who were a continuous source of strength.

I am indebted to Professors Leigh and Hartley of the LSE for having facilitated my transfer to UCL when my first supervisor left to work for the GATT. I have greatly benefited from the availability of Dr. Brian Hindley, my second supervisor, who ensured that I consider the counter-arguments to my propositions.

I owe my thesis to my main supervisor, Professor Valentine Korah, who always forced me to improve my arguments and to respect deadlines. It is also because of her that my stay in New York as well as Brussels, experiences which greatly enriched my work, were made possible.

I have benefited from the financial generosity of the Overseas Research Award, the Maple Leaf Fund, the Government of Quebec and the Centre for EEC Law and International Antitrust of Fordham Law School.

I am obliged to Maureen, Wayne, Gill, Lyne, Johane, Bernard and Patricia who patiently commented on my English. I am also deeply indebted to Mark Sherwood-Edwards who made very helpful comments on various drafts and has helped me print and produce the final version of my thesis. Finally, I thank my parents, brothers and sisters and friends who never stopped encouraging me. I will always be grateful to all of these people for helping me complete my Ph.D. thesis.
TABLE OF CONTENTS

INTRODUCTION ................................................................................................................ 1

PART I INTERNATIONAL REGULATION OF DUMPING AND OTHER
RESTRICTIVE BUSINESS PRACTICES ................................................................. 3

Chapter 1 Economic, legal and strategic considerations on dumping practices and
antidumping laws .................................................................................................. 4

1.1 Introduction .................................................................................................... 4

1.2 Economics of dumping ............................................................................... 9

1.2.1 Classic definition dumping: transnational price discrimination
practice............................................................................................................... 9

1.2.1.1 Business rationales for price discrimination ..................... 10

1.2.2 Pragmatic definition of dumping: transnational sale below costs . 11

1.2.2.1 Reasons for selling below full costs ................................. 12

1.3. Welfare impacts of dumping for the importing and exporting country 14

1.3.1 Impact of dumping for the importing country ............................... 16

1.3.1.1 Level of output..................................................................... 16

1.3.1.2 Income distribution ............................................................. 16

1.3.1.3 Effects on the competitive process......................... 17

1.3.2 Welfare impact of dumping for the exporting country .................. 18

1.3.3 Conclusion on the welfare impact of dumping ............................... 19

1.4 Existing tests proposed to domestic courts to identify predatory
behaviour .......................................................................................................... 19

1.4.1 Short-run cost-based rules ..................................................................... 20

1.4.2 Long-term cost-based rules .................................................................. 20

1.4.3 Output expansion rules ...................................................................... 21

1.4.4 Rules governing price rises ................................................................ 21

1.4.5 Rule-of-reason test ............................................................................. 22

1.4.6 Tests suggested by Europeans ................................................................ 23

1.4.7 "Two-tier" rules ..................................................................................... 24

1.4.8 No rule ................................................................................................. 25

1.4.9 Conclusion on tests on predation ...................................................... 25

1.5 International Predation ............................................................................... 25

1.6 The Law on Dumping .................................................................................. 28

1.6.1 The GATT and national antidumping laws ..................................... 29

1.6.2 What the GATT authorises .................................................................. 29
PART II DICHOTOMIES OF TREATMENTS BETWEEN DOMESTIC AND FOREIGN RESTRICTIVE BUSINESS PRACTICES AND NATIONAL ATTEMPTS TO RECONCILE AND CO-ORDINATE THESE DIFFERENT CONSIDERATIONS

Chapter 3 Antidumping regulation contravenes the obligation of national treatment of the GATT and NAFTA.

3.1 Introduction

3.2 The obligations of Most-Favoured-Nation and National Treatment of the GATT the right to impose discriminatory antidumping measures

3.2.1. "treatment no less favourable than that accorded to like products of national origin..."


3.3 Evidence of the different treatments in substantive standards between antidumping laws and anti-discrimination and anti-predation laws

3.3.1 Comparison of substantive standards of antidumping regulation with those of domestic laws on predation and price discrimination

3.3.1.1 Nature of the infraction
3.3.1.1 Laws on predation vs laws on dumping 118
3.3.1.2 Laws on price discrimination vs antidumping laws 122
3.3.1.2 Causation and injury 123
3.3.1.3 Definition of markets 124
3.3.2 Comparison of the procedural elements between antidumping and competition laws 125
3.3.2.1 Fora and standing 125
3.3.2.2 Procedure and time-limits 126
3.3.2.3 Defense and counterclaims including treble damage 127
3.3.2.4 Remedies 127
3.3.2.5 Unilateral and rapid enforcement 128
3.3.2.6 Conclusion 129
3.4 Differences between national systems 129
3.4.1 Legal cultures and legal traditions 129
3.4.2 Common Law vs Civil Law 131
3.4.3 Different schools of thoughts in the USA 136
3.4.4 The European conception of the role of competition 138
3.5 The different policy objectives of antidumping and antitrust laws 139
3.5.1 Interest-group politics 141
3.6 Conclusion 143

Chapter 4 Co-ordination of antidumping and competition considerations at the domestic level: considerations of competitive elements in antidumping cases and the use of trade measures in competition cases 145
4.1 Introduction 145
4.2 Context for the consideration of competition variables in antidumping determinations 146
4.3 Pressures to reduce antidumping duties 151
4.3.1 The EEC system 151
4.3.1.1 Legal standing 151
4.3.1.2 The Lesser Duty Principle 153
4.3.1.3 The Community Interest 153
4.3.1.3.1 Allegation of the state of competition in the EEC 156
4.3.1.3.2 Commercial users 157
4.3.1.3.3 No Injury finding 158
4.3.1.3.4 Foreign policies 160
4.3.1.3.5 Industrial policy 160
4.3.1.3.6 Conclusion on Community Interest 161
4.3.2 The Canadian system 162
4.3.2.1 Legal standing 162
4.3.2.2 Public Interest 163
4.3.2.2.1 Procedure 166
4.3.2.2.2 Criteria for Public Interest 167
| 4.3.2.3 Proposals | 168 |
| 4.3.2.4 Conclusion | 170 |
| 4.3.3 The US system | 171 |
| 4.3.4 The Mexican system | 174 |
| 4.4 Antitrust liability in antidumping actions | 174 |
| 4.5 Trade measures for competition purposes | 178 |
| 4.6 Conclusion | 178 |

PART III  EFFORTS OF COORDINATION OF ANTITRUST AND ANTIDUMPING ACTIONS WITHIN FREE-TRADE AREAS. 182

Chapter 5  Political, economic and legal aspects of free trade areas 183
| 5.1 Introduction | 183 |
| 5.2 Definitions | 183 |
| 5.3 Political reasons for regional arrangements | 185 |
| 5.4 Political impact of regional arrangements on international relations | 189 |
| 5.5 Economics of regional integration | 191 |
| 5.5.1 Free-trade area vs customs union vs common market vs economic union vs political union | 195 |
| 5.6 International law on free-trade areas | 197 |
| 5.6.1 International customary law on free-trade areas | 198 |
| 5.6.2 Preparatory works of the Havana Charter and the GATT | 199 |
| 5.6.2.1 The collapse of the Havana Charter | 201 |
| 5.7 GATT Law on free-trade areas | 203 |
| 5.7.1 The place of article XXIV in the GATT | 203 |
| 5.7.2 Article XXIV (4) | 205 |
| 5.7.3 Article XXIV (5) | 207 |
| 5.7.4 Article XXIV (7) | 207 |
| 5.7.5 Article XXIV (8)(b) | 208 |
| 5.7.5.1 "... duties and other restrictive regulations of commerce be eliminated..." | 208 |
| 5.7.5.2 "... on substantially all trade within a FTA" | 210 |
| 5.7.6. Article XXIV (10) | 211 |
| 5.8 Interpretation of the GATT practice | 211 |
| 5.9 Conclusion | 213 |

Chapter 6  Experiences of other free-trade areas in dealing with internal measures. 215
| 6.1 Introduction | 215 |
| 6.2 Provisions on restrictive business practices (competition) contained in agreements of free-trade areas | 215 |
| 6.2.1 The European Free Trade Agreement, EFTA | 216 |
| 6.2.2 The free-trade agreements between the European Economic Community and the countries member of the European Free Trade Association, the EEC-EFTA FTAs | 219 |
6.2.3 The European Economic Association (EEA) .......................... 223
   6.2.3.1 The content and the organisation of the EEA ............. 225
   6.2.3.2 Provisions dealing with dumping and competition .... 226
6.2.4 The so-called Europe Agreements ..................................... 229
   6.2.4.1 The Content of the EEC-Poland FTA ....................... 231
6.2.5 The Australia-New Zealand Agreement for Closer Economic Relations ......................................................... 235
   6.2.5.2 The 1988 Review and the phasing out of antidumping duties inside the Trans-Tasman territory ............. 238
6.3.1 The functioning of the EEC Competition system supplementing antidumping actions ........................................... 245
6.4 Conclusion .................................................................................... 249

PART IV PHASING OUT ANTIDUMPING LAWS WITHIN NAFTA ........ 252

Chapter 7 The regulation of restrictive business practices within NAFTA .... 253
7.1 Introduction .................................................................................. 253
7.2 Existing national antidumping laws and their similar impact ........ 253
   7.2.1 Differences in the determination of injury ....................... 254
   7.2.2 Differences in the agencies enforcing the law .................... 255
   7.2.3 Legal standing and quasi-judicial process ......................... 256
   7.2.4 Imposition of Duties ............................................................ 257
   7.2.5 Public Interest clause .......................................................... 258
   7.2.6 The Lesser Duty principle ..................................................... 258
7.3 The Bi-National Tribunal of NAFTA .......................................... 258
   7.3.1 Criteria for judicial review .................................................... 260
      7.3.1.1 The US system .............................................................. 260
      7.3.1.2 The Canadian system .................................................... 260
      7.3.1.3 The Mexican System ...................................................... 262
7.4 New provisions on competition and monopolies in the NAFTA .... 265
7.5 Proposals for phasing out antidumping enforcement ................ 269
7.6 Proposals for a system of conflicts of laws ................................. 271
   7.6.1 First Model: "The law of the territory where the restrictive business takes place" ................................................. 272
   7.6.2 The Second Model: Allocation of jurisdiction based on the 33% more of the turnover of the firms concerned. ............. 273
7.7 Conclusion .................................................................................... 273
Chapter 8 Implementation of the chosen model of regulation of restrictive business practices for NAFTA

8.1 Introduction ...................................................................................................................... 275
8.2 US, Canadian and Mexican domestic legislation on competition ........................................ 276
  8.2.1 Background and policies of the three competition laws ................................................ 276
  8.2.2 Standing, procedure, enforcement, costs and delay .................................................. 282
  8.2.3 The treatment of price discrimination ........................................................................ 283
  8.2.4 Treatment of predatory pricing .................................................................................. 286
  8.2.5 Other abusive conducts of firms with market power .................................................. 288
  8.2.6 Vertical Restraints ...................................................................................................... 290
  8.2.7 Horizontal agreements .............................................................................................. 291
  8.2.8 Joint ventures and Mergers ...................................................................................... 292
  8.2.9 Intellectual property rights ....................................................................................... 292
  8.2.10 Conclusion on the comparison of domestic laws .......................................................... 293

8.3 Application of the models proposed in chapter 7 .................................................................. 294
  8.3.1 "The law of the territory where the restrictive practice takes place" .................................. 294
    8.3.1.1 Examples of the proposed model .............................................................................. 295

8.4 Amendments to existing competition and antitrust laws .................................................... 298
8.5 Abolishing Export cartels .................................................................................................. 301
8.6 Parallel amendments to antidumping laws ........................................................................... 302
8.7 Proposals for a transitional period ...................................................................................... 303
8.8 Conclusion .......................................................................................................................... 306

PART V TOWARDS AN INTERNATIONAL CODE OF CONDUCT .............................................. 307

Chapter 9 Parameters, Issues and Comments on an International Code on Competition

9.1 Introduction ....................................................................................................................... 308
9.2 Attempts towards international code on competition ....................................................... 309
9.3 New proposals .................................................................................................................. 311
  9.3.1 The GATT Trade Report Mechanism .......................................................................... 311
  9.3.2 American Bar Association ......................................................................................... 311
  9.3.3 European Positive Comity ......................................................................................... 313
  9.3.4 The continuous work of UNCTAD, World Bank, OECD etc. ...................................... 314
  9.3.5 The NAFTA laboratory .............................................................................................. 315
  9.3.6 US-Japan Structural Impediment Initiative, SII .......................................................... 316
9.4 Fundamental social differences .......................................................................................... 322
  9.4.1 Antitrust vs competition .............................................................................................. 322
  9.4.2 Industrial policies ....................................................................................................... 325
9.5 An international code on competition: general issues and proposals .............................. 328
  9.5.1 A binding agreement? ................................................................................................ 329
  9.5.2 Rule of reason or per se ............................................................................................. 330
  9.5.3 Dominance versus market power .............................................................................. 331
9.5.4 Practices which would be "abusive" behaviour ................. 331
9.5.4 A single infraction of abuse of a dominant position .......... 332
9.5.6 The best institution: GATT, MTO, UNCTAD, OECD or a new forum? .......................................................... 334
9.6 Proposed alternatives ............................................................. 335
  9.6.1 Private positive comity ....................................................... 335
  9.6.2 The non-violation procedure of the GATT ...................... 336
  9.6.3 The ICSID type of tribunal .............................................. 337
9.7 Domaine Réservé ................................................................. 338
9.8 Conclusion ........................................................................... 338

CONCLUSION .................................................................................. 340
  1. How do antidumping and antitrust provisions interact within a free-trade area? .................................................. 340
  2. Does the law require antidumping measures within free-trade areas to be phased out? ............................................. 341
  3. How should antidumping measures be phased out within NAFTA? ............................................................... 343
  4. Should (could) antidumping measures be phased out multilaterally in favour of an international code on competition? 346
  5. Concluding comments ............................................................. 348

BIBLIOGRAPHY ................................................................................... i
INTRODUCTION

This thesis is concerned with the regulation of business practices within free-trade areas, with a special focus on NAFTA. At this time, there are no internationally enforceable rules regulating general standards of conduct for commercial enterprises. A body of international competition rules allowing for direct actions against perpetrators of distortions to trade is needed. NAFTA is an excellent laboratory for this discussion. In free-trade areas, as in any integration agreements, the incentive to regulate business practices regionally increases in an effort to rationalise and integrate production and distribution amongst member states. Moreover, NAFTA brings together countries with different legal traditions and economic power. Importantly, NAFTA is the only agreement where the USA has relinquished sovereignty over imports through the Bi-National Tribunal.

Two sets of legislation regulate unfair business practices. Antidumping laws aim at regulating unfair practices of foreign firms while competition laws are concerned with unfair practices in domestic markets.

The traditional economic rationale for antidumping measures has been the threat of international predation. With the great increase of transnational commerce, domestic economic policies, laws and business practices have gained important extraterritorial impact. In the absence of any international agreements as to which domestic policies and business practices constitute restrictions of trade, antidumping laws have evolved as strategic tools to countervail the effects of domestic structural differences and other non-tariff barriers between commercial partners. In practice, therefore, antidumping laws effectively stop the entry of many otherwise reasonably priced imports from exporters incapable of predation.

The allegation that antidumping actions are necessary to countervail the closure of the home market of exporters should not justify an increase in price of imports at the detriment of other businesses and consumers in both the importing and the exporting country. Indeed, the boomerang effect of unreasonable antidumping
measures is now leading exporters of all countries to complain about the lack of transparency and consistency of the various price regulation with which they have to comply.

In fact, antidumping laws impose on foreign firms substantive and procedural standards of prices and business practices totally different from those imposed on national producers by domestic competition laws. It is argued, therefore, that the dichotomies of treatments between domestic and foreign producers infringe the obligation of National Treatment contained in article III of the GATT and article 301 of the NAFTA. Moreover, between member states of a free-trade area, antidumping measures seem to lose their political and social rationales. This is specially evident in NAFTA where the economies of Canada and Mexico can be viewed as "branch plant" economies because of the high level of US ownership and because many Mexican and Canadian firms are part of a continental organisation of production.

The only effective solution is to address business practices and their governmental regulation directly. Regulation of behaviour of firms is, however, a very sensitive issue. They carry social, moral and philosophical choices on the role and the obligations of individuals, firms and the governments. As part of an overall social organisation, national competition laws follow different patterns. Policies and laws on competition constitute one of the four cornerstone national policies. This thesis attempts to draw attention on the important impact of the two main legal traditions of commercial partners, common law and civil law, on their social organisation and related legislation on business practices.

Two models for the regulation of business practices are suggested for NAFTA based on adaptations of experiences in other free-trade areas and customs unions. In addition, the systematic administration of a Public Interest clause in antidumping laws should greatly improve the competitiveness of antidumping enforcement and favour the transition towards the phasing out antidumping laws.

These discussions should, finally, draw parameters for an eventual international code on competition.
PART I INTERNATIONAL REGULATION OF DUMPING AND OTHER RESTRICTIVE BUSINESS PRACTICES

Part I is concerned with the control of restrictive business practices in multilateral and world-wide arrangements. At present there is no world-wide binding agreement generally regulating commercial behaviour and agreements of enterprises. Only two transnational business practices are subject to some regulation. International price discrimination and international sales below full cost are indirectly controlled through the provisions against dumping contained in the General Agreement on Trade and Tariff (the GATT) and the GATT Antidumping Code directed to states. Dumping law is discussed in chapter 1.

Restrictive business practices other than dumping and their impact on international trade have been addressed by states from three different angles: 1) The need to regulate international restrictive business practices; 2) The possibility of domestic business practices having transnational effects; and 3) The relation between foreign business practices and dumping and between domestic business practices and antidumping actions. These three issues have been dealt with in multilateral, bilateral, regional agreements and in domestic legislation. Attempts to regulate these aspects of restrictive practices at the international and bilateral levels are discussed in chapter 2.
Chapter 1  Economic, legal and strategic considerations on dumping practices and antidumping laws

1.1 Introduction

Currently there is no world-wide binding agreement regulating commercial behaviour or agreements of firms. Only two business practices are subject to some binding regulation: transnational price discrimination and sales below full cost are indirectly controlled through the provisions against dumping contained in the General Agreement on Tariffs and Trade (the GATT) and the GATT Antidumping Code.\(^1\)

The word dumping always seems to have had a pejorative connotation.\(^2\) Professor Jackson relates\(^3\) that Adam Smith was the first to use the word dumping,

\(^1\) In this thesis world-wide agreement refers to international agreement open to the participation of any and potentially all states, multilateral agreement is also often used in that sense; a regional agreement is a multilateral one where countries come from the same geographical region or share common grounds, i.e. the EEC and the OECD are regional agreements; a bilateral agreement binds two countries only. An international agreement is an agreement between States.

\(^2\) The exact name of the GATT Anti-dumping Code is the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade concluded in 1979 during the Tokyo Round of negotiation.

\(^3\) It is said that the term originates from the Old Icelandic word "thumpa" which means to thump or hit somebody. Then "dump" came to be a temporary depot for munitions. Myersin T., "A Review of Current Antidumping Procedures: United States Law and the Case of Japan" Columbia J.Int'l L., Vol. 15 No.2, p. 168.

but in reference to situations approximating today's subsidies. Viner\(^5\) refers to discussions by Alexander Hamilton in 1791 about foreign country dumping\(^6\). Jackson reports that during the US Congress debates of 1884, the word dumping was used in reference to undesirable foreign goods sold in the American market.

Antidumping laws appeared at the turn of the century and can be viewed as a consequence of the industrial expansion and improved transportation. Trade became more international, and the balance of power amongst states was shifting. Low imports from Germany\(^7\) (and from the US as far as the Canadian law is concerned) led to the adoption of the two first antidumping laws in Canada and the USA.

National antidumping laws were enacted first in Canada (1904), then New Zealand (1905), Australia (1906), Japan (1910), South Africa (1914), the USA (1916/21) and Britain (1921).\(^8\) The Canadian Antidumping act of 1904\(^9\) provided for an automatic imposition of antidumping duty equal to the difference between the Canadian price and the price of similar goods in the exporting country.\(^10\) There was no investigation into the exporter's intent or of the injury caused to the importing country. Until 1969\(^11\), Canada's antidumping provisions contained no injury test.

The first specific US antidumping law, the Revenue Act of 1916, was of criminal nature, required proof of the predatory intent of the exporter-importer, treble

---


\(^6\) He also reports that the 1816 US Tariffs Act was said to have been enacted againsts the threat to American industries from so-called "English dumping".


\(^8\) Viner J., *Dumping: A Problem in International Trade*, 1923.

\(^9\) An Act to Amend the Customs Tariff, 1897, S.C. 1904, c.11, s.19.

\(^10\) i.e. the margin of dumping.

\(^11\) The introduction of a causal injury was one of the main issue of the negotiations of the Kennedey Round. The adoption of article 3 of the then antidumping code required that dumping be the "principal" cause of injury. For further discussions on the negotiations see Grey R., *The Development of the Canadian Antidumping System*, 1973, p.29ss; also Bierwagen R., *GATT Article VI and the Protectionist Bias in Antidumping Laws*, 1990, p.87.
damages were possible, and it was enforced in ordinary courts.\textsuperscript{12} It was in fact an extraterritorial application of the Sherman Act's principles at the time when the Sherman Act was considered not to apply outside the US territory.\textsuperscript{13}

It is interesting to note that there are proposals to amend the 1916 US Antidumping Act to force exporters to the USA to price their exports at a level exceeding their fully allocated costs, i.e. the standards retained in today's administrative antidumping legislation. Treble damages against condemned exporters would also be possible. Additionally, the US firms would have to prove foreclosure or absence of price competition in the home market of the exporter. Difficulties in proving accurately these two latter elements may lead authorities to be very lax regarding evidence of causation. In any case, this new Act would catch much more than international predation in the economic sense of the term.\textsuperscript{14}

The difficulties of establishing the intent required by the 1916 Act led to the adoption of the 1921 US Antidumping Act. The 1921 US Antidumping Act provided an administrative procedure for the imposition of antidumping duties equal to the margin of dumping. Unlike the Canadian statute, it incorporated a condition that dumped imports be shown to actually or potentially injure the domestic industry. The Americans used their Antidumping Act of 1921 as a model when drafting the section on dumping in the Havana Charter and the GATT.

In the sixties, antidumping actions increased\textsuperscript{15}. At the end of the Kennedy


\textsuperscript{15} See figures in Bierwagen R., GATT Article VI and the Protectionist Bias in Anti-dumping Law, 1990, note 10 p. 3, in Van Bael I. and Bellis J.-F., Antidumping and Unfair Trade Laws of the (continued...)
Round of the GATT negotiations on reduction of tariffs in 1967, a first Antidumping Code was negotiated. This Antidumping Code was intended to 1) clarify the broad definitions of article VI, 2) provide for procedural requirements in antidumping investigations and 3) authorise an additional remedy in regard to sporadic dumping, i.e. dumping of a relatively large quantity of goods in a relatively short period. This code never proved satisfactory since the US Congress refused to ratify it. Finally, during the Tokyo Round of negotiation of 1980, the 1967 GATT Antidumping Code was amended to conform to the newly negotiated Subsidies Code. The main changes were 1) the elimination of the requirement that dumping be the "principal" cause of injury, 2) a procedure for accepting exporters' undertakings and 3) new arrangements for the resolution of disputes. It was also intended that all signatories, especially the US, be brought into conformity with the GATT antidumping law.

In this thesis, Article VI of the GATT dealing with dumping together with the 1980 Antidumping Code will be referred to as "GATT antidumping law". The fact that some members of the GATT have signed the GATT Antidumping Code while

15 (...continued)

EEC, 1990, Tables I to VI, p.411 to 681 and in Trebilcock M.and Boddez T., Unfinished Business, 1993, p. 16-17. This trend is continuing if not increasing. Between 1980 and 1988, 13 countries initiated a total of 1665 antidumping investigations. Between 1980 and 1992 694 antidumping petitions were initiated in the USA, and the Department of Commerce issued 192 antidumping duties. Between 1980 and 1990, the USA brought 24 antidumping actions against Canadian goods and Canada brought 52 cases against USA goods. EEC, Australia, Canada, the USA and now Mexico are the big users of antidumping actions. Japan initiated its first antidumping investigation against Chinese exports on the 30/1/93 ("Japan penalise Chinese exports FT 30/1/93). On the 30/6/67 the Agreement on the Interpretation of article VI (often called the 1967 antidumping code or the Kennedy Antidumping Code) was signed by 16 countries.

16 On the 30/6/67 the Agreement on the Interpretation of article VI (often called the 1967 antidumping code or the Kennedy Antidumping Code) was signed by 16 countries.

17 The President was considered not to have had the authority to negotiate any agreement altering existing antidumping laws. See Marks M. and Malmgren H., "Negotiating Non-tariff Distortions to Trade", L & Policy Int'l Bus., vol.7 (1975), p.237.

18 Article 16 of the GATT antidumping Code of 1979. The language of the 1979 Trade Act which has implemented the Tokyo Antidumping code has led many authors to argue that the US antidumping law has not been amended nor supplanted by the new provisions of the Tokyo Code as such. The position of the US has been that the injury test applied before the 1979 Trade Act did respect the new standard of the Tokyo Code. For further discussion see Jackson J. and Davey X. Legal Aspects of International Economic Relations, 1986, p.674ss.
some have not, may be problematic.\textsuperscript{19} In 1968\textsuperscript{20} the Director-General of the GATT issued a ruling to the effect that it would be contrary to the non-discrimination principle for a member of the GATT to treat two member states differently although only one of them has signed the GATT antidumping code. Some countries still consider the antidumping code binding on its signatories only.\textsuperscript{21}

In this chapter, the economics of dumping and antidumping actions will be discussed. There is an important literature on whether the existing rules are in conformity with economic rationale for an optimal allocation of resources within and between trading partners.\textsuperscript{22}

Secondly, the analysis of the GATT antidumping law and national antidumping laws will lead to the conclusion that the pattern sponsored by the GATT is outdated for today's highly sophisticated industries and globalized production. National regulation used for the evaluation of prices fixed by foreign firms, which may be organised along different corporate management models, laws and practices, are ill-adapted to deal with legitimate social differences. More particularly the reference to and use of the concept of "cost of production" should be avoided in any international setting until standards are agreed upon. It will be concluded that these national biased applications seem, however, to be licensed by the GATT.

Finally, the argument favouring a strategic use of antidumping actions will be discarded because it avoids the root cause of the problem: the issue of restrictive business practices. Threats to national security and economic stability of the

\textsuperscript{19} Canada, United States and Mexico have signed and ratified the 1980 Antidumping Code. One of the purpose of the proposed Dunkel document of the Uruguay Round would be to bring together under one single agreement all existing Codes in an attempt to put an end to the segmentation of the GATT law between members.

\textsuperscript{20} GATT Documents (L-3149), 1968.

\textsuperscript{21} Canada treats dumping from any country the same way. The USA, however, treats imports from members non-members of the GATT Antidumping Code and non members of the GATT differently. Discussion Martin St-Amant Politique Commerciale du Québec, Gouvernement du Québec 28 May 1993.

importing country as well as the needs for industrial policies should be handled through safeguard measures focusing on the reorganization of industry in the importing country.

1.2 Economics of dumping

Economists have always defined dumping as transnational price discrimination where the prices vary between national markets. Although they still object in principle, they now accept that dumping may also be defined as a transnational sale below costs. Even Allan Deardoff admits this new "definition".

The definition has broadened over the years. (...) Some now consider dumping to include "sales below cost", at least presumptively (...) This alternative criteria for dumping has gradually acquired the elevated status of an alternative definition.23

There is, however, no correlation between price discrimination and sales below cost. Sales below cost may occur with or without discrimination and discrimination may take place without selling below costs. This section addresses the basic economics of both types of dumping practices, the reasons why firms may use such pricing practices and their alleged related welfare impact.

1.2.1 Classic definition dumping: transnational price discrimination practice.

Price discrimination occurs when different units of the same commodity are sold at different prices for reasons not associated with differences in costs or when different units of the same commodity are sold at the same price where costs are different.24 Dumping refers to a situation where prices are lower in the importing market than in the domestic market of the exporter.

---


24 More precisely Clemens first defined it as "sales of different units at prices which are not proportional to their marginal costs". Clemens, E., "Price Discrimination and the multi-product firm", Rev. of Econ. Studies, Edinburgh, vol XIX, 1951 referred to by Dale, R. in Antidumping Law in Liberal Trade Order, 1980, p. 2.
Different\(^2^5\) prices between different markets presuppose that:

1. There are two separate markets. The separation can be social, geographical, cultural or legal.

2. One market is less competitive than the other. The elasticity of demand and supply must differ between the two markets.\(^2^6\)

1.2.1.1 Business rationales for price discrimination

There are various business reasons why an enterprise may want to maintain, for a certain period of time, two different prices in two different markets.

1. When a firm with market power in the country of export enters a new market divided by tariffs, transport costs, technical standards or otherwise, it may maintain lower prices in the new and more competitive market, (still at a profitable level) without any desire nor any capacity to eliminate competition in this new market.

2. In order to achieve economies of scale, for promotional reasons or to test a new product, a producer may need to expand into a new geographic market. If prices are controlled (by cartel or government) in the first market, the reduction of price occasioned by the increased output may take place only in the second market.

3. In a period of depression or of excess capacity, a producer active in two markets may be able to lower its prices in one market only if prices are regulated (by cartel or government) in one of the markets.

4. There is also the possibility of international predation. A firm with market power may use price discrimination and cross-subsidize a low-price market with profits from a high price market in order to eliminate competition in the low-price market and eventually reap monopolist profits there.

\(^2^5\) Price discrimination can take place between an infinity of markets - in theory each consumer can be a market. But for the sake of simplicity price discrimination is used here with reference to two prices in two different markets.

\(^2^6\) It is reasonable to suppose that elasticities of demand for the same product are more likely to differ between national markets than domestically if for no reason other than national preferences and differences in domestic competition systems.
In the first three hypotheses above the producer may have the intention of raising its price rapidly when regular production starts. The producer may not have the capacity to predate, i.e., eliminate competition from all sources in order to collect monopolist profits, assuming firms are conducted only by profit-maximization interests. As discussed in section 1.3 of the present chapter, the identification and the control of predatory practices is however an unresolved issue in courts.

In these first three patterns, the problem is not the market with low prices, nor the fact that there is a difference in prices between two markets. It is the market where prices are high which should be the focus of our concern.\textsuperscript{27}

Dr. Hindley's discussion of the reasons for enterprises to discriminate in price is based on the concentration of markets involved\textsuperscript{28}. In an industry with a low level of concentration predatory pricing is a totally "implausible" explanation for dumping. The only explanation for persistent differential price dumping is that foreign firms have an agreement with respect to prices in their own market which they are unwilling to break. All excess supply at that agreed price is therefore sold abroad.\textsuperscript{29} It is submitted that a governmental control of prices in one of the markets may also explain the price discrimination.

\textbf{1.2.2 Pragmatic definition of dumping: transnational sale below costs}

The other way to define dumping is the pricing of exports below some definition of costs. The argument in favour of this definition is that exports below costs must be subsidised with sales at much higher price somewhere (usually in the home

\textsuperscript{27} Consumers and firms in the low-price market should also wonder if restrictive business practices and barriers to entry in the high-price market are not in fact impediments to market access.

\textsuperscript{28} Joskow and Kleverick's test of domestic predation was similarly based on the structure of the market. Further discussion in section 1.4 of the present chapter.

market), thus are evidence of price discrimination. Sales below costs may also be evidence that the exporter will raise its price in the future after predating.\footnote{As mentioned before selling below various levels of costs - even if the level is predatory - has however nothing to do with discrimination. The exporter may in fact be selling below costs both at home and abroad.}

In the discussion of sales below some level of costs, three main types of costs are usually referred to: average total costs, average variable costs and marginal costs. Marginal cost is a concept very difficult to identify in practice because it refers to the extra costs needed to produce an extra good. Marginal costs are usually not used by courts. Variable costs are said to be those which vary with output and fixed costs those which do not. Experts and tribunals have expressed great difficulties in administering these economic concepts.

Structure and allocation of costs vary also with different countries, management models, accounting methods, social institutions, culture and legislation. In a multi-product enterprise the identification of such cost is arbitrary. In any international setting, a reference to a particular type of costs should take into consideration legitimate national differences.

Moreover the proper level of costs which is rational to cover when setting a price is also very problematic. While some economists would object only to sales below marginal costs other people would require that fully allocated costs be covered.\footnote{Tests to identify predation are discussed in section 1.4 of the present chapter.}

1.2.2.1 Reasons for selling below full costs

In Western economics the first objective of firms is to maximize profits in the long term. In accounting terms, producing an extra good should yield at least the extra costs of producing that extra good: the so-called marginal costs of production. As long as marginal costs are covered, producing at a price where at least some of the fixed costs are recouped is therefore rational and business-wise. For a firm to continue producing without recouping its full costs is reasonable when, for instance,
1. The testing of new products and promotion may justify sales below total average costs and even below marginal costs, for a certain period of time.

2. The market is depressed or there is excess capacity (due to an erroneous decision); then an enterprise with high fixed costs (and low variable costs) may keep on selling below average total cost of production in order to minimise the losses.

3. An enterprise is competing to enter a new market; it will be willing to forgo profits (selling therefore below total variable costs) for a while in order to make itself known to consumers with the assumption that it will soon sell at a price covering full costs.

4. An enterprise wants to maximise sales instead of profits without any intention of eliminating competitors. This is objectionable from the point of view of competitors because excess output will depress prices but consumers will gain, provided the situation does not turn into predation. However Williamson's test of predation and cases like Alcoa have condemned overproduction as evidence of strategic predation and monopolization.

5. The uncertainty about new markets leads producers to make decisions on price and contracts before export costs are known. Prices may end up not covering marginal costs or even variable costs. This situation represents however a wrongful evaluation of the costs more than a decision not to cover marginal costs.

6. The possibility of predation exist but as argued in section 1.3, it is usually accepted that there are other less risky and less expensive ways of gaining monopoly power.

There seem to be very rational reasons why a firm may choose to discriminate in prices between two markets or sale below full cost. As discussed in the next section, this is in line with the conclusions reached by most economists that short

---

32 Beaumol's theory against profit-maximization of big enterprise when officers and shareholders do not have the same interests. Many people affirm that Japanese firms tend to favour growth and market shares over profitability.


34 United States v. Aluminium Co. of America 148 F2d 416 (1945).
Chapter 1 page 14

of predation, dumping increases the general welfare of the importing country; more concern should be raised for the potential lack of competition in the importing and exporting market.

1.3. Welfare impacts of dumping for the importing and exporting country

After Viner's work, dumping was traditionally classified according to its duration because of its allegedly different welfare impacts. Dumping was considered to be sporadic, short-run and intermittent or, long-run and continuous. Viner condemned only short-run dumping because "it could induce a maladjustment in the use of productive resource of the importing country." For him, sporadic dumping was of insufficient duration to affect investment and employment decisions. Long-run dumping was causing a shift in the use of resources justified, however, by the continuity of low-price imports.

Time is relevant in evaluating strategic dumping but Viner's classification of dumping practices and their related impact is contested as being too simplistic and "misjudging the true costs of resource mis-allocation in the importing country".

It is however interesting that recently Robert Willig, ex-Chief economist for the Antitrust Division of the US Department of Justice, has established a categorisation based on the intent of the exporter, its market power and the structure of the importing market. Willig would reintroduce a concept of strategic dumping. For him predatory dumping and strategic dumping are detrimental to the global economy. He identified five types of dumping practices with different impact:

---

35 A problem remains as to when a firm is predating and more importantly how to identify such predation practices ex-ante.

36 Viner J., Dumping. 1923, p.140.


39 Dale, R. Antidumping law in a liberal trade order, 1980, p. 3.
1. **Market-Expansion Dumping:** the exporting firm can profitably charge a lower markup in the importing market because it faces a higher elasticity of demand there with respect to price.

2. **Cyclical Dumping:** the motivation arises from the unusually low marginal costs or opportunity costs of production that accompany a condition of substantial excess production capacity with little or no use apart from the manufacture of the good in question.

3. **State-Trading Dumping:** the motivations may be found in the other categories but the acquisition of hard currency is particular.

4. **Strategic dumping:** this term is adopted to describe exports which injure rival firms in the importing country through an overall strategy of the exporting nation that encompasses both the pricing of the exports as well as restraints foreclosing the exporters' home market. If each independent exporter's share of their home market is of significant size relative to the scale economies, then they benefit from a significant cost advantage over any foreign rivals.

5. **Predatory dumping:** this term is applied to low-priced exports with the intention of driving rivals out of business in order to obtain monopoly power in the importing market. The standard of costs would be "true economic costs", opportunity costs, or the costs that a firm would need to recover from contemporaneous prices in order to be motivated to make sales in the absence of any predatory effects.

   The concept of "strategic dumping" brings together the problems of the source of the inelasticity of the exporting market in relation to lower prices of the same goods in the importing market. Willig writes that because of 1) the closure of the exporting market, 2) the consequent constraints on the sales of domestic suppliers which retrain their ability to invest in R&D, learning-by, and human and physical capital, 3) the possibility of monopoly power of the exporters if domestic suppliers in the importing country are not able to compete effectively, and 4) the possible oligopoly between foreign and domestic producers, and ... from the perspective of the global economy, the
negative effects of strategic dumping on the importing nation are likely to outweigh the net benefits to the exporting country.\footnote{Willig, R., "The economic effects of antidumping policy", 1992, OECD Restricted Document p.12.}

This categorisation does not seem to suggest better solutions for correcting the source of dumping. The source of dumping remains the existence of different national economic policies between two national markets. National differences are however normal and reasonable unless standards exist.

\textbf{1.3.1 Impact of dumping for the importing country}

\textbf{1.3.1.1 Level of output}

It was first argued in 1933 that total output under discrimination may be larger than under single-price monopoly.\footnote{Robinson J., Economics of Imperfect Competition, 1933, London, p.201.} In fact, in a perfectly discriminatory market, if every buyer was paying what he is willing to pay according to a classic demand curve, the total output would tend to be the same as the output of a perfectly competitive industry. On the other hand it is possible for the monopolist using price discrimination strategy to reduce output in one of the markets.

In the importing country, international price discrimination tends to reduce the output of directly competing local manufacturers but it may, however, increase the output of downstream producers. Each situation deserves a specific assessment and for that matter dumping is not different from any other low-price imports.\footnote{"(...) any imports, dumped or not dumped, may reduce the output or profitability of local manufacturers. This is, however, no more an argument against dumping than it is against free trade." Dale, R. Dumping in a liberal Order, 1980, p.28. Also "All import-competing firms prefer a higher price of imports, however. It is not a wish that is peculiar to industries in which there is dumping." in Hindley B., "Economics of Dumping", Policy Implications of Antidumping Measures Tharakan P. (Ed.), 1990, p.7.}

\textbf{1.3.1.2 Income distribution}

As for the other aspects, domestic direct competitors may lose profits because of dumping. Shareholders will therefore give away dividends and some workers may
become unemployed for a while. On the other hand low price goods will directly improve the conditions and the savings of some commercial users and consumers.

13.1.3 Effects on the competitive process

Price discrimination may be pro-competitive if it is the results from a transition from complete monopoly to more competitive behaviour. It may also serve to disrupt or preclude collusive or interdependent pricing practice. Therefore if price discrimination helps disrupting an international cartel it becomes pro-competitive for both the importing and the exporting country. Price discrimination may be anti-competitive when it is evidence of predatory practices or when it hides detrimental economic differences between the two national markets concerned. The effects vary as well depending on whether discrimination takes place horizontally or vertically.

a) discrimination against rivals at the same level of industry (horizontal)

Price discrimination like any low prices will lead to the elimination of some competitors in the importing country. Viner has argued that intermittent dumping was damaging to direct competitors and to the importing country as a whole because it may lead to the mis-allocation of resources in adapting to a situation incorrectly considered permanent. Richard Dale has however responded that price discrimination, even intermittent, will only eliminate inefficient competitors:

If we assume that the foreign exporter is a profit-maximiser/loss-minimiser then his export price must be at or above his own short-run marginal cost. Accordingly, the domestic producer's short-run operating costs are above those of his foreign competitor and, so long as there is excess capacity in the industry, the foreign exporter must be regarded as more efficient of the two. 44

The elimination of less efficient competitors is desirable for society. The difficult issue, however, is to assess when a competitor is "as efficient as the dumper" and

---

43 "In highly concentrated markets, prices may be rigid... where such price reductions (talking about price discrimination) are sporadic and not part of a systematic pattern favouring large purchasers, they may be the first step towards more general price reductions." Report of the Attorney-General's National Committee to study the Antitrust Laws, Washington, US Government Printing Office, for the United States Congressional Record, 27 May 1969, p.13.

how long a competitor is supposed to cope with reduced prices. Are concepts of "short-run operating costs" the appropriate criterion to identify similarly efficient competitors, or should "long-run costs" be relevant?

Various tests, analyzed in the following section, have been proposed as means to identify ex-ante predatory practices in domestic markets. These tests claim to distinguish non-efficient from efficient competitors. There is, however, no consensus on how to identify domestic predatory practices ex ante, so it is difficult to expect further consensus for international predation.

b) Downstream (vertical) price discrimination

In an international setting, dumping seems to be beneficial to the secondary line of competition located in the importing country. The presence of low-price imports will promote the domestic industry using them. Such historical cases exist. In today's antidumping investigations, industrial users are strong opponents of protectionist actions against imports of components and material although they often do not have legal standing. Individual consumers will also benefit from more choice and lower prices as long as there is no predation.

13.2 Welfare impact of dumping for the exporting country

In an international pattern of price discrimination, the less elastic market or the one where restrictive business practices exist would tend to support higher prices at the detriment of individual and commercial home consumers. On the other hand, by expanding export market opportunities, price discrimination dumping may benefit home consumers by making possible lower costs of production, greater investments in new products and increased capacity that injures their welfare.

---

45 This beneficial aspect of dumping is clearly illustrated by: (i) the rapid expansion of British sugar-using industries in the second half of the nineteenth century based largely on dumped European beet sugar; (ii) the prosperity of the Dutch shipbuilding, machinery and nail industries prior to the first World War was attributable partly to dumping of German steel and wire; and (iii) the competitive advantages conferred on the Welsh tin-plate industry at the turn of the century by the dumping of steel by the United States Steel Corporation in Britain... Dale R., Antidumping Laws in a Liberal Trade Order, 1980, p.30.

46 The rights of commercial users are further discussed in chapter 4.
1.3.3 Conclusion on the welfare impact of dumping

For economists sales below costs and price discrimination are objectionable if there is predation and cross-subsidisation. No one would deny that international price discrimination may hide important differences of economic policy. Schools of thought disagree on whether these differences are relevant to other markets.

Although fears of predation always seem to have always existed, its plausibility has been very hotly debated. Opinions on predation vary according to one's basic concept of the role of governmental economic actions in society. In section 1.4 existing tests on predation and their limited application for international settings are discussed.

1.4 Existing tests proposed to domestic courts to identify predatory behaviour

As mentioned, the difficulty is to identify predation "ex-ante" because the line between a very competitive price and a predatory price is very fine. All competition presupposes a hope of increasing sales which makes life harder for competitors. There is no single accepted definition of what constitutes predation. Predation is therefore usually defined with reference to its consequence: the elimination of a competitor which would otherwise be beneficial the society: the so-called efficient competitor.

Various aspects of this simple affirmation remain unresolved. What is an efficient competitor? What is efficiency? What time period of reference should be used? Should predation be concerned only with efficiency? Are there any circumstances where a less efficient supplier should be protected? Should attempts to predate be punished? How to distinguish competition on the merits from predation remains a very difficult issue.47

This difficulty has brought economists and lawyers to provide possible "tests" or rules of thumb to recognise price predation. In the following section, the main tests

are briefly discussed\textsuperscript{48}. In an international setting, however, most of these tests prove inadequate.

\subsection*{1.4.1 Short-run cost-based rules}

The most famous test, maybe because of its apparent facility, is the one put forward by Professors Areeda and Turner of Harvard. The Areeda-Tumer test states that pricing below short-run marginal cost should be unlawful, and that short-run marginal cost can be approximated by short-run variable cost. Professors Areeda and Turner admitted that strategic long-run considerations may be important and effective, but they should not be considered since, like the intent of the predator, they are too difficult to assess. This test also presupposes that a firm has monopoly power in the target market.

Areeda & Turner's definition of variable costs was so wide that it tended to bring the cost measure closer to full costs\textsuperscript{49}. In its 1990 Supplement, Areeda admitted the limits of their test based on a relative distinction between variable and fixed costs which reflects policy's choices and depends on the time scale used.\textsuperscript{50}

\subsection*{1.4.2 Long-term cost-based rules}

\textsuperscript{48} The categorisation is based on the study of the OECD on predation, 1989.

\textsuperscript{49} "The capital costs attributable to investment in land, plant, equipment, property and other taxes unaffected by output, depreciation on plant, advertising, R&D, management and clerical expenses would be considered variable costs." OECD, Predatory Pricing, 1989, p. 31.

\textsuperscript{50} The difficulties of measuring costs are notorious. 'Allocating costs among a firm's several product lines is inevitably arbitrary. ... estimating the reasonable costs of obtaining capital or the opportunity cost of using it is often intractable, although perhaps arbitrary estimates can serve our immediate purpose fairly well. Marginal costs suffer from the uncertainty of computing not only what is marginal (which does not appear in the customary accounting statements) but also which costs are variable and which are fixed'. The main text did not adequately emphasize that the proposed definition should be presumptive rather than conclusive, for it will not be inclusive enough in some cases and will be overinclusive in others. Of all the ways one might solve the classification problem, leaving it to the jury seems unwise.... Variability may be a fact, but its determination is too heavily driven by policy to be left to jury....obscurities remain that can be resolved, often arbitrarily, only by reference to policies....' Areeda P. and Hovenkam H., Antitrust Law, (1990 supplement) p.635-639.
After the Areeda-Turner test, Posner\textsuperscript{51} argued that long-run marginal costs was a better measure because some equally or more efficient competitors (more efficient in having lower long-run marginal costs) will lack the ability, or the will, to sustain losses in the short run. For practical reasons, he also substituted marginal by variable costs. He would consider the intent of the predator and would request the plaintiff to make an initial showing that the market was predisposed to effective predatory pricing.

1.4.3 Output expansion rules

Williamson's test\textsuperscript{52} would require legislation for enforcement. Williamson condemns any marginal-cost-based rules because they ignore the possibility that 1) a firm may build an infrastructure in view of further needs to reduce the variable costs of expanding production or 2) it may produce at high output in consideration of a potential entry in the market of a competitor.\textsuperscript{53} It would restrict output and maintain limit pricing. When a new competitor enters the market, the established firm could release its accumulated stock or use its plant at full capacity and still respect the marginal-cost-based test.

Williamson argues that these effects can be avoided by a rule which prohibits the dominant firm from expanding output in response to entry for a period of 12 to 18 months. For Williamson prices should cover expected long run average costs. He recommended an average costs test, but would admit exceptions for promotional prices of nondurable consumer goods for a brief period of time. Williamson's standards, fully allocated costs, are close to those of antidumping laws, but most would argue that the threat of expanding output on entry is not credible.

1.4.4 Rules governing price rises


\textsuperscript{53} This may have been is the type of situation that was condemned as monopolization by the American court in the 	extit{Alcoa} case.
Another test based on long-term strategy has been suggested by Beaumol\textsuperscript{54}. Beaumol also refuses to rely only on the relationship between prices and costs. While Williamson would control increases of output in response to entry, Beaumol concentrates on price increase after the successful predation, i.e. after the new entrant has been driven out of the market. He advocates legislation requiring any price to last five years after the predation. He would not prohibit price cutting in response to new entry but would force enterprises to select viable prices.

Beaumol's test is also unrealistic in that legal intervention takes place after the competitor has been driven out of the market, by which time it may be unable to undertake legal action (it may, however, have a deterrent effect). Secondly, the maintenance of a price for five years is impossible to control in any other manner than retrospectively, i.e. once a competitor which may have been efficient has been eliminated.

1.4.5 Rule-of-reason test

In response to the Areeda-Turner test, Scherer\textsuperscript{55} proposed a wide inquiry into many factors surrounding the predator's conduct including its intent and consequences. In his opinion, long-run welfare can sometimes be maximized with a dominant firm's prices either above or below marginal costs. He would look at the relative efficiency of the enterprises in the market, the minimum efficient scale, the monopolist's effect on other enterprises and the subsequent prices.

More and more experts are calling for a broad inquiry. This is the position favoured by the EEC.\textsuperscript{56} Schwarz's method would also favour an enquiry into price, capacity, investment, R & D, product innovation, advertising and marketing.\textsuperscript{57} In the


recent AZKO case the European Court of Justice has chosen a test which includes a research of the intent and an analysis of the relationship between costs and prices.

1.4.6 Tests suggested by Europeans

Professor Yamey seems to have reinvigorated the debates on the best test to identify predation. He argued that certain price cutting episodes should be classified as predatory even though price never went below the defendant's costs.

Thomas Sharpe suggested a test which assess whether a given rate, price or fare owe its profitability solely to the exit or exclusion of competitors? If so, the price is predatory. If the given rate, price or fare is profitable to the firm, in the absence of any future gain from reduced competition, then the price is presumed not to be predatory.

What does profitability imply? What can be considered a reasonable level of profits? A similar test was applied by the Australian High Court in Queensland Wire where the question asked was: Given the market and the barriers to entry, would the refusal to sell be maintained if there were a competitor who would offer

---

58 In the AKZO, (Case C-62/86, 3 July 1991) case the Court seems to have been greatly influenced by some correspondence where the intention of AKZO to eliminate its competitor ECS was made clear. The test used by the Court was: "71. Price below average variable costs ... must be considered abusive ... 72. Moreover, prices below the average total costs ... but in excess of the average of variable costs must be considered to be abusive when they are fixed in the context of a plan which has for its purpose to eliminate a competitor ... 74. As soon as the criterion of admissibility to be upheld is a criterion based on costs and the strategy of the dominant undertaking... ".


60 This position was also sustained by the Transamerica Computer Co. v. IBM Corp. 698 F.2d 1377; in International Air Industries v. American Excelsior 517 F.2d 723; and in William Inglis E sons Baking Co. vs ITT Continental Baking 668 F2d 1014, cert. denied 459 US 825.


the product? If the answer is negative, the refusal would be abusive under section 46 of the Australian Trade Practice Act.

1.4.7 "Two-tier" rules

Joskow and Klevorick's approach is that market structure determines whether predation is a possible strategy. When predation is alleged the market structure should firstly be analyzed according to three components: short-run monopoly power, conditions of entry and "dynamic effects of competitors and entrants".

Short-run monopoly would be measured by the predator's market share and the elasticity of the demand for its product. Conditions of entry refer to the speed with which potential competition becomes real competition. They would look at capital requirements, consumers' loyalties, the enterprise's learning curves, sequences of entry and quality of information. The dynamic of the market is determined by rapid growth or decline. Where predation would not cause a competitor to quit or deter entry any cut in price would be tolerated.

The second phase of his enquiry would be a "pricing rule of reason" test in which the intent would be a relevant though not a necessary factor. Prices below the average variable would be deemed predatory (one exception being where the alleged predator can show that closure of the firm was more costly which in fact changes the opportunity costs); prices between average variable and average total

---

63 Kerrin Vautier suggests that the questions should be: "- Are there alternative explanations for the alleged predatory conduct? - Is there a valid business reason for the observed conduct? Are there credible reasons, in terms of potential gains in efficiency and consumer welfare, which lend weight to the legitimacy of the conduct? - Fundamentally, is the firm's conduct consistent with a competitive response - even if harm to a competitor was the intent/effect of that conduct?", "Trade and Competition* CER and Business Competition, Vautier K., Farmer J. and Baxt R. (Ed), 1990, p.107.

64 Areeda approved that test: "Market structure and the defendant's market share bear not only on the likelihood that predation exists but also on the existence of an antitrust violation. The main text assumed that monopoly power had already been established and sought to define when a monopolist's pricing practices should be considered improper -that is, predation. In fact, most defendants charged with predatory pricing are not monopolists at all; rather, the claimed offense is attempted monopolization*. Areeda P. and Hovenkam H, Antitrust Law (1990 supplement), p. 711.2.
would be presumed predatory (except depressed prices); prices above total costs would be presumed nonpredatory unless they change within two years.

1.4.8 No rule

Finally some have argued that predation should not be a concern of authorities. Bork\textsuperscript{65} and Easterbrook\textsuperscript{66} are thinkers of the Chicago School and like McGee\textsuperscript{67}, argue that predation must be rare because recoupment is usually impossible and because there are less risky and less expensive ways to gain monopoly power. Moreover, they argue that competition authorities and courts are incompetent to distinguish pro from anti-competitive pricing practice. Their intervention therefore risks the creation of more damage than would have been caused by the alleged predator.

1.4.9 Conclusion on tests on predation

There is no consensus on how to identify ex-ante practices of predation. Most of the suggested tests have referred to domestic competitors subject to similar laws and social organisation. In international settings, how can efficiency be measured between firms subject to very different legal, social and structural variables domestically.

1.5 International Predation

In an international setting - with a nationalistic perspective - the objection to foreign predation is even greater because the abuse, if it works, will benefit an enterprise of another country. As put it by Nicholaides\textsuperscript{68}, concepts such as "power",

\textsuperscript{68} Nicholaides P., "Predatory Behaviour" 1992, OECD, Restricted Document p.27; Nicholaides argues that there is no clear relationship between a country's strategic or interventionist policies and welfare, especially if they are implemented in response to other countries' policies.
"hegemony", "rivalry" and "exploitation" have a long history in international trade theory and trade diplomacy. The idea that nations compete for dominance is older than economics.

Competition for world power should, however, be distinguished from traditional predation. Protectionist trade laws do not always target specific foreign industries or firms. They lack prey. It can, however, be argued that in certain circumstances antidumping measures are economic sanctions against specific countries and particular competitors.69

Strategic policies that aim to exploit or dominate do not normally involve an element or sacrifice as predation does. Sacrifices come indirectly from consumers, but not the industries benefiting from the strategies.

It is reasonable to argue that predatory pricing can be sustained more easily in transactions between markets than in transaction within markets simply because the global economy is less integrated than domestic economy.70

It should, however, be stressed that the Chicago School argues that there is no direct relation between sales below costs in one market and higher prices in another market and that a producer will only predate in a market if it expects that the same market will eventually brings in all lost profits and investments caused by the predatory operation.

What the predatory seller may be doing in another market is irrelevant,...the possession of funds does not dictate the use to which they will be put.71

This was the position taken by the US Supreme Court in the Matsushita72 case. Although there was a 25% price difference between the Japanese and the US market and it was admitted that there were cartels in Japan which would otherwise be illegal in the USA, the Court concluded that there was not sufficient evidence

---

69 See discussions at section 1.8 of the present chapter.


to sustain a request for summary judgment.\textsuperscript{73} After twenty years of Japanese presence in the USA market, US competitors were still very much alive. From the evidence available, recoupment was impossible. Predation therefore became an implausible motive.\textsuperscript{74}

In international settings existing tests on predation cannot be used without adaptations.

Firstly, different social organisations may lead to different relationships between consumers, firms and governments. Discussions on subsidies and industrial targeting, for instance, involve issues inherent and fundamental to the statehood of the countries involved. Concepts of public interest and national security are not addressed by domestic courts, if only through the rare acceptance of defences to the extraterritorial application of antitrust laws.\textsuperscript{75}

Secondly, many economists' assumptions become even more objectionable when their discussions involve actors from different cultures. Corporate models, which are themselves reflections of a particular social economy, have a direct impact on competition. Profit maximization, financial recoupment, corporate and banking links vary with national traditions.

Thirdly, as suggested by Willig\textsuperscript{76}, since cross-subsidization may be facilitated between international markets\textsuperscript{77}, market power in other countries should be

\textsuperscript{73} It could have been argued that the restrictive business practice in Japan lessened competition in the USA, and distorted the structure of the US market contrary to Article 1 of the Sherman Act. However, private firms in the US did not suffer any injury from these practices so the DOJ should have been prosecuting.

\textsuperscript{74} This position contrasts with the recent announcement of the US Department of Justice to the effect that US antitrust laws will now on reach restrictive business practices in other countries if they affect US consumers and exporters. The extraterritorial application of US law is discussed in chapter 2, section 2.3.

\textsuperscript{75} Defences in antitrust cases are discussed in chapter 2, section 2.3.5.


\textsuperscript{77} The risks of cross-subsidization between product and geographic markets is much higher: Report of the OECD on restrictive business practices of multinationals, 1977, p.14, discussed in chapter 2, section 2.4.3; Nicholaides P. "Predatory Behaviour" OECD, 1992, Restricted Document.
considers when assessing whether a firm is in a dominant position. US standards on monopoly power are therefore inadequate.

Fourthly, it is suggested that in cases of alleged international predation, the concept of recoupment should be interpreted more widely to include recoupment through monopoly profits in any other geographic or product markets.

Finally, the reference to cost of production, variable and full costs, used in domestic predation tests as well as in antidumping laws, and the frequent construction of prices and costs of production, are deficient. They ignore legitimate national differences in accounting practices, business traditions and legal organisation.\(^78\)

Antidumping laws have, however, nothing to do with predation. Tests used to identify foreign dumping do not follow economists' argument that the main purpose of antidumping laws should be to deter international price discrimination and predation. Antidumping laws have only kept from the economics analysis the reference to threats of predation and, unfortunately, the use of the term "dumping" for business practices which have usually nothing to do with economic dumping.

1.6 The Law on Dumping

Free trade would further expand without any national borders and national discriminations. Antidumping laws are about national borders. They maintain national frontiers and isolate domestic firms from foreign competition.

GATT antidumping law was adopted to restrain national antidumping actions. Most authors would say that it has failed to do so.\(^79\) In the last twenty years the

\(^78\) This argument on the inadequacy of using the concept of costs of production in international setting is developed in section 1.6.2.2. of chapter 1.

drastic increase in antidumping actions has invited a lot of research and studies on
the administration of antidumping laws. The structure and the language of the
GATT appears to license various biased procedures and tolerate unilateral
condemnation of reasonable pricing policies by foreign firms. The present section
exposes some of these biases of national legislation. It should also emphasise the
gap between the actual national enforcement and the economic rationale for
antidumping measures.

1.6.1 The GATT and national antidumping laws

GATT law does not have the comprehensive approach of the Havana Charter
and does not address clearly the issue of detrimental practices by enterprises. The
only restrictive business practice ("RBP") that the GATT controls indirectly is
dumping. Moreover the GATT does not condemn the RBP of dumping per se. It
authorises the importing state, the "victim" state, to react against dumping by raising
unilaterally, at its border, prices of dumped imports. The exporting state is however
not held responsible for tolerating within its territory the pricing practice of
dumping nor any other restrictive business practices.® States are free to regulate,
or not regulate at all, dumping acts, other pricing practices or any other restrictive
business practices taking place on their territory. The GATT, unlike what was
foreseen in the Havana Charter, does not oblige each state to police business
practices on its territory. The act of dumping may even be encouraged by the
national authorities of the exporters.®

1.6.2 What the GATT authorises

---

80 By comparison, when dealing with subsidies which are acts of States, the GATT is much more
assertive and condemns certain subsidies (GATT article XVI).

81 The provisions of the Havana Charter on restrictive business practices are discussed in
chapter 2, section 2.2.3, when attempts to regulate RBPs multilaterally are analyzed.

82 This point is very relevant when discussing Dr. Hindley's proposal to give to the importing
state a right under GATT to request antitrust action against the dumping firm by the government
of the exporting country. Hindley B., "The Economics of dumping", Policy Implications of
The GATT does not prohibit international dumping, it provides for a permitted discriminatory response to foreign dumping in certain circumstances. This regulating pattern has three main features: a dumping practice, an injury caused into the importing country and an antidumping duty.

1.6.2.1 GATT definition of dumping and national applications

The GATT gives a two-track definition of dumping. Dumping is defined either by reference to a comparison between the export price (i.e., the price in the importing country) and the "normal value" of similar goods. Normal value is the price of similar goods in the exporting country or in a third country. In practice dumping is also defined by reference to the full "costs of production" of the exported goods. One of the main problems is that the home price, the export price and the costs of production often end up being constructed unilaterally by national antidumping authorities\(^8^3\) in the light of Western business assumptions.

National authorities exercise immense discretion when evaluating the dumping margin. For instance, the practice of the USA, Canada (and the EEC) is to average foreign prices over the last six months and to compare the average price with the prices of individual sales in the importing market; however only export prices below the average foreign price are used. The dumping margin is therefore always inflated.\(^8^4\)

Prices in the exporting country used for comparison must refer to "like products"\(^8^5\). Article 2.2 of the Antidumping Code defines "like product" as an

---

\(^8^3\) Messerlin relates that more than 1/2 of the cases initiated by the EEC during 1980-1985 prices were constructed.Messelin P., Experiences of Developing Countries with Antidumping Law, World Bank Paper, 1988.

\(^8^4\) For example owing to the fluctuation in the dollar value of the currency of the exporter, prices of the same load vary each day. The same goods can be sold at $9.00 one day, $10.00 the second day and $11.00 the third day, both in the domestic and export markets. In the home market, prices will be averaged at $10.00, but not in the export country. The first day there will be a dumping margin of $1.00 and the other transactions will not be used to offset the margin of the first day.

\(^8^5\) GATT article VI(1).
identical or similar product based on physical identification. When domestic production has no separate identity, the narrowest group or range of products which includes the like products should be examined. The difficulty in complying with this physical similarity requirement shifts the comparison to a third country or a constructed price. Although various adjustments exist in order to compensate for the differences between the goods in the exporting country and in the "like goods" in the importing country, this identity test invites authorities to make irrelevant distinctions between products in order to use the preferred constructed price.

Like product also means that the comparison be effected "at the same level of trade, normally ex-factory and with sales made at as nearly as possible the same time." Provisions stipulating that due allowance shall be made for the "differences in conditions and terms of sale, taxation and other differences affecting price comparability" allow for disturbing adjustments and manipulations of costs. Variations in exchange rates between the date the export price is fixed and the day the product crosses the frontier, will also be assessed against exporters. Decisions are taken by lower level officials on a case by case basis as to whether certain sale expenses are directly or indirectly related and therefore ought to be deducted.

---

86 "... a product... which... has the characteristics closely resembling these of the product under consideration." Article 2.2 of the Antidumping Code.

87 Article 2.6 of the Antidumping Code.

88 Article VI.1, VI.4 of the GATT and paragraph 6 of article 2 of the GATT Antidumping code.


91 In the USA for instance : major sales expenses which many business men would consider directly related to sales, such as salesmen's salaries, are considered to be indirect expenses and are not subtracted from ordinary price-to-price comparison of arms-length prices. Similarly, in cases involving export sales through related parties, Commerce deducts the full amount of indirect expenses from the US price, but "CAPS" the amount of indirect expenses deducted from the normal value." Horlick G., "The United States Antidumping System" in Antidumping Law and Practice, Jackson J. and Vermulst E. (Ed.), 1990, p.145.
Prices of like products in the home market of the exporter also ought to be "in the ordinary course of trade". In a desire to define "the ordinary course of trade" article 2.4 of the GATT Antidumping Code was adopted:

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to the third... or with the cost of production in the country of origin plus a reasonable amount for administrative selling and any other costs and for profits....

This new article of the 1980 Antidumping Code was in fact sanctioning the American practice since 1974 of considering sales below full costs in the home market as outside the ordinary course of trade. This extension of the concept "in the ordinary course of trade" has legitimised the second-track definition: it is now tolerated that national antidumping laws require that the price of imports cover their full cost of production. Cost of production is, however, a difficult concept.

1.6.2.2 The costs of production

Already in 1923 Maurice Clark had identified what would become the "Achilles heel" of price investigations.

The backbone of the science of economics is the balancing of value against cost...

In Western business practices, costs are identified mainly in management, accounting, financial or fiscal reports. Accounting is a way to record costs in a

---

92 Article VI(1)(a) of the GATT.
94 Some have even argued that this introduced a "Basic Price System" which was rejected by the Kennedy Code. See Rodney C. de Grey, United States Trade Policy Legislation, 1982, p.60.
specific period of time. Cost accounting differs from financial accounting in that the latter undertakes to show the total profits and losses of the business as a whole, where the purpose of cost accounting is to give detailed information of the cost of a given product, job, department, process and to analyze components of these costs.

Cost accounting varies enormously from one firm to another and financial accounting practices vary a lot from country to country. The latest issues of the Harvard Business Revue relate ten different methods for firms to allocate and present costs. How to evaluate them all?

Methods of allocating joint costs are, by definition, arbitrary. The value given to immobilisation, the obligation to disclose research and development expenditures or discoveries, the various modes of depreciation, can all mislead outsiders examining costs of an enterprise for different purposes.\(^6\) Newspapers are full of discussions on attempts by accounting corporations to standardise their practices so that buyers and other analysts can rely on any national accounting report and understand its meanings and implications.\(^7\)

These various presentations of costs can also mislead Courts or the national authorities when trying to assess what are the costs of producing one good and what is the relationship between a cost and the price of a product.

Marginal, variable, and full costs are economic concepts used to study markets. Financial statements and accounts, on the other hand, are prepared by accountants to aid management in operating the business... For that reason, the court cannot simply turn to the defendant's financial statements to find the marginal, variable, or full costs.\(^8\)

\(^6\) In order to favour more harmonization and understanding of the various national accounting practices, the OECD has created a working group which has come to the following conclusion: "The solution of the problems raised by harmonization of accounting methods practised in OECD countries depends largely on the degree of freedom of accounting principles from tax rules..." *Accounting standards Harmonization* No. 3 "The relationship between taxation and financial reporting", Paris, 1987, OECD, p.41. Taxation systems are, however, far from being harmonised, they are the shield protecting domestic policies. Even inside the EEC states have maintained jurisdiction over taxation and VAT, as the remaining tool of economic policies.

\(^7\) The *International Accounting Standards Committee* has suggested some 30 standards for financial statements. Costs of production, however, are depend directly on management decision for which there are no uniform standard. Washman R., "Coming Clean on the Balance Sheet", *FT* 7/11/92, p.38; Griffiths L., "Watchdog fails the Extraordinary Test", *Evening Standard* 18/12/91.

\(^8\) Areeda P. and Hovenkham H., *Antitrust Law* (supplement 1990), section 712.1 p.664.
In Western standards fixed costs refer to certain accounting items which do not vary with variations in business and variable costs to accounting items which vary in proportion to business. Antidumping legislation usually refers to direct and indirect costs, and in provisions for adjustments, to direct and indirect expenses. Direct costs are those traceable to a given job or order or class of business along the process. Like variable costs, they usually vary in proportion to business. Indirect costs are those expenses that serve the business as a whole; they usually include fixed and overhead costs.

Overhead costs refer to costs which cannot be attributed to particular units of business, to an increase or decrease in output and which do not involve a proportionate increase or decrease in costs but which are related to production as opposed to fixed costs for capital interest, etc. As mentioned overhead costs are also indirect costs. Selling, advertising, research and development expenses are obvious overhead costs or indirect costs. The problem is that some costs vary somewhat with the level of production but not directly with the output.99

Sunk costs are the real risks of an enterprise, the costs encountered in the past and which are irretrievable. Their importance may justify an enterprise resisting the lowering of prices for some length of time.

Overhead costs, like fixed or indirect costs, are said to be those which do not vary in the chosen time period. But which time period? As mentioned in the following section, antidumping regulation uses a framework of analysis of six months to one year. When assessing whether foreign prices cover the full costs of production, all costs must be recouped within six months otherwise sales are...

---

99 Electricity, heating and some salaries to salesmen do increase with output but lack a mathematical relationship. Generally in accounting all costs except direct labour and material are overheads. When the first antidumping rules were enacted at the beginning of the century, overhead costs were minimal in comparison with labour costs (direct) and traditional fixed costs. In some of today's industries 80% to 90% of costs are overheads for which deductions and adjustments are undertaken.
considered to be under costs. Six months is a period much shorter than the cycle of the product during which it is reasonable to be recouping investments.\textsuperscript{100}

An enterprise may also reasonably decide that its turnover is two years. Decisions based on a different time scale will reach drastically different results. Time alters the characteristics of costs. All costs are variable in the long run. Differences in time perspectives explain most of the disagreements between the exporters and the antidumping authorities of the importing country. Unfortunately there is no internationally agreed period of reference for antidumping cases.

The distinction between variable and fixed costs is also considered to be difficult and subjective in domestic competition litigation. While this thesis was being written Professor Areeda published his latest supplement on US Antitrust Law, in which he admitted:

The main text adopted a relatively arbitrary definition ... middle-run variability in which most costs, including overheads... are considered variable. We characterized that as "short-run"... perhaps we should have coined a new term of "relevant-run" costs.\textsuperscript{101}

The identification of the "relevant-run costs" to be included in the calculation is also problematic. There is no single relationship between short, medium and long-term costs to produce a good and its price. Another problem is the identification of the costs of a multi-product seller which becomes aleatory. Roger Phillips reports that in 1967 at the GATT negotiations, the US delegate stated that, because of its complexity, a clause on costs of production could not possibly be administered.\textsuperscript{102}

Experience in predatory pricing cases has demonstrated the need for additional discussion of which costs are variable... The main text originally proposed a

\textsuperscript{100} "Key features of modern, high-technology production are large start-up costs in the form of research and development outlays as well as the traditional initial outlays of capital equipment and strong learning-by-doing effects... One consequence of these characteristics is that in setting prices, firms... try to maximise their profits over the product cycle.* Baldwin R., "Assessing Fair Trade Laws* in \textit{World Economy}, vol.15 no.2 (1992), p.192.


somewhat arbitrary and broadly inclusive definition of variable costs...Allocating costs among a firm’s several product line is inevitably arbitrary.\textsuperscript{103}

The enterprise’s structure of fixed, variable and overhead costs is crucial when assessing whether to keep producing and at what level of price. Short of mutually agreed standards, evaluating the costs and assessing a price is one of the main features of business.

A firm maximizing profits, defined as the difference between revenue and opportunity cost, is making the best allocation of resources under its control, according to the firm’s evaluation of its alternatives.\textsuperscript{104}

In an international setting differences in legislation, institutions, cultural choices and business tradition may provoke further clashes in deciding whether the production should be based on variable or fixed costs. In North America, for instance, salaries are variable costs but in Europe where laying off costs two to three years of salary, these expenses are semi-variable or overhead costs. In Japan where employees are often hired for life, wages are fixed costs.

Corporate models also have a direct impact on the allocation of costs. The Structural Impediment Initiative agreement between Japan and the USA, the SII, discussed in Chapter Nine, has led to a better understanding of some of these differences in social organisation, corporate models and cultural expectations.

One of the most prominent and enduring characteristics of the Japanese industrial corporations... is their tendency to engage in tight, long-term commercial relationships with other Japanese companies... obligations (are) created as long as two or three decades through favours performed by other companies or to future business they hope to transact with the same parties. This particularly characterized their banking relationships, but also their dealing with suppliers, subcontractors, and large corporate consumers.\textsuperscript{105}

The impact of their long-term engagements and cross-share-holdings means that most costs of production in Japanese firms are "fixed". Are these Japanese decisions irrational? According to traditional domestic predation tests, like the Areeda &

\textsuperscript{103} Areeda P. and Hovenkam H., Antitrust Law (1990 Supplement), p.567.

\textsuperscript{104} This corresponds to an "opportunity costs". Lipsey R., Sparks G. and Steiner P., Economics, 1973 p. 173.

\textsuperscript{105} Kesner K., Japanese Takeovers, 1990, p.104
Turner, these firms never predate. They are never selling under their variable costs, they almost only have fixed costs.

There are no agreed criteria and parameters for "cost of production" to enable us to determine whether a price really covers its costs of production or which part of it. Costs of production are maybe a most valuable business secret, but they are certainly a very versatile concept used alternatively in accounting, finances, taxation, legal suits and trade conflicts. What is more important, however, is that there does not seem to be an economic theory which shows that competition is skewed if firms do not have the same proportion of fixed and variable costs. To the contrary in a Schumpetarian world it is precisely these differences that sustain rivalry between firms.  

1.6.2.3 Other factors influencing prices and dumping

National antidumping laws usually require that the exporting firm sells above all its costs of production plus 8% profits and 10% of overhead costs. The percentage of profit is also a social phenomenon. The goals of the firm will directly affect the margin of profit. To take the example of Japanese firms:

The goals of a company will be growth and longevity, with profitability a distant third priority. In fact independent shareholders will rank fairly low on the list of constituencies...Dividends will be small....

Inter-corporate links and tolerance of competition laws may also have an important impact on the allocation of overhead costs. For instance, traditionally in Japan, firms work in conglomeration and follow a pattern of cross-shareholding. Advertising as well as other selling operations are done by enterprises within the group. National antidumping laws will often consider these enterprises as being linked and will add up all their costs for producing an export when assessing the normal value. Since similar costs will not be accounted for in the importing country.
where business is done differently, a price discrimination situation will rapidly be constructed.

Laws on competition, on intellectual property, labour relations affect managers' decisions over supply and prices. Business traditions are also very relevant. Taxation will greatly influence a decision to retain surplus, to invest it in research and development or to release them in dividends or otherwise. The capacity to maintain a high level of capital (provided no better opportunities are available) that generates a surplus to be used in lean times will determine whether to continue producing even if fully allocated costs cannot be recouped for some time.

More immaterial differences such as cultural taste or distaste are also elements which have a direct influence on pricing decisions and which, at the same time, may constitute barriers to entry to foreign firms ignorant of these so-called "structural differences".

Altogether pricing decisions and costs of production are influenced by many external and internal variables and are simply evidence of management choices and skills in a particular social environment. Differences in accounting rules, social institutions and legal obligations have a tremendous impact on the allocation of costs and on the decision to sell at a certain level of price. These differences are legitimate; to compare prices and costs of production, in an international setting, without any internationally agreed standards, is ludicrous.

Moreover, prices and costs of production are often constructed.\(^{108}\) Many procedural impediments,\(^{109}\) such as time constraints, shift the assessment of dumping

\(^{108}\) National regulations will usually require the recoupment of costs of production inside a period of six months from the production of the goods; a much shorter period than the product cycle! If all costs are not recouped within that period the exporter is considered not to be in the ordinary course of trade and these sales will be excluded from the comparison. If there are not enough sales considered to be above costs, foreign prices are constructed. If the importing country considers that the information given by the exporter is inexact, it is put aside and prices are constructed.

\(^{109}\) The short period of time given to exporters and importers to react to antidumping investigations and collect costs data against allegations of illegal prices, (in USA the application has to be filled in English and typed, forcing small foreign exporters to hire American lawyers), the general non-disclosure of information held by officials and the fact that most of these costs are often confidential data that exporters are hesitant to release, will often lead relevant national authorities to presume and construct these costs of production according to the best information available.
to a third country price or a constructed price.\textsuperscript{110} When prices are constructed they are usually with the so-called "best available information" which often means information given by domestic competitors.

It is not surprising that the highest average dumping margin is produced when the best information available is used to represent home market value since this information is frequently taken from the original petition.\textsuperscript{111}

It becomes evident that dumping margins are often inflated. In Canada and the USA the importance of the margins can be considered by the tribunal in charge of determining the injury.\textsuperscript{112}

\textbf{1.6.3 Circumstances where a response to dumping is permitted: injury caused to domestic industry}

Antidumping duties are permitted if dumping causes (or threatens to cause) injury to an established domestic industry (or retards its establishment).

\textbf{1.6.3.1 Injury caused}

The level of injury has to be material. Experts at the time of the adoption of Article VI seemed to have different opinions of the meaning of "material".\textsuperscript{113} Material injury appeared to be of a lesser degree than serious injury which is the standard for the Escape Clause authorised by article XIX.


\textsuperscript{112} In the recent Steel case, the Canadian Authorities based their decision to exclude US exports from the determination of antidumping duties on the fact that the very low margin of dumping of US steel could not have caused the injury. No NQ-92-007, 21 May 1993.

\textsuperscript{113} Dale R., Antidumping in a Liberal Trade Order, 1980, p.22.
GATT antidumping law requires that determination of injury be based on "positive evidence" evaluated after consideration of the increase, even in relative terms, in the volume of imports, their effect on prices, and their impact on domestic producers. This means that even if the quantity of goods imported has not increased, once domestic production has decreased, the proportion between foreign and domestic goods will increase and therefore qualify as a potential injury.

The main focus of the antidumping injury test relates only to the interests of competitor-producers in the importing country, not that of consumers of such goods nor on the domestic competition system itself.

The "threat" of material injury is said by experts also to be misused:

The "threat" label can become a means whereby injury is found even though evidence is lacking or insufficient to rise to the level of "material" (...) the "threat" issue may represent a frustrating but insoluble problem within the confines of the GATT and the Code.

In the recent US antidumping cases against steel exporters, the US domestic production had in fact increased, but the US industry managed to prove injury.

The GATT can be interpreted as requiring that before antidumping duties be imposed, complainants demonstrate that injury is not caused by other factors such as: contraction in demand, changes in the patterns of consumption, development in technology, export performance and productivity of domestic industry and/or interestingly, the restrictive business practices and competition between foreign and domestic producers. It is interesting to note that in the proposed Antidumping Code under the Uruguay Round, the content of that footnote has been introduced

---

114 Paragraph 1 of article 3 of the GATT Antidumping Code.
115 Paragraph 2 of article 3 of the GATT Antidumping Code.
118 "US Steel's dumping complaints sound familiar" FT 22/7/92.
119 During the Tokyo Round Article 3.4 footnote 5 of the GATT antidumping code added restrictive business practices as variables which may be assess in the determination of injury. See further discussions in chapter 4, section 4.2.
into the text of paragraph 4, article 3 "Determination of injury". If restrictive business practices of the exporting and importing country were addressed, antidumping determinations should improve. Unfortunately most national antidumping laws do not refer to RBPs.

Productivity, prices, output and profits, market share and efficiency of the affected industry as well as price undercutting of dumped goods and price depression of domestic goods, are also criteria which can be used to identify whether foreign goods are the cause of injury suffered by domestic industry. In practice, the exporting firm bears the burden of proof.

The main problem with the "injury caused" criteria, are the very loose tests used by national authorities. The injury caused is the biggest flaw in national antidumping laws. These requirements have been applied very loosely. In the USA for instance commissioners have announced a new interpretation of the injury test.

In their view, sometimes called the bifurcated approach, the commission must first ask whether trends in financial conditions and other indicators suggest that the US industry which makes the like product is in poor or worsening health. If the poor-health test is not passed, the enquiry (should) end (...) But if the

---


121 Dale writes that the reference to restrictive business practices seems to have been a concession to those who believed that antidumping actions should not be taken where the effect may be to reinforce oligopolistic (or monopolistic) pricing practices. Dale R., Antidumping Laws in a Liberal Order, 1980, p.77.

122 RBPs of domestic producers are variables that OECD countries are urged to take into consideration by the 1986 OECD Recommendation on Co-operation between Members in areas of Potential Conflicts between Trade and Competition Policies, when they administer their national trade laws. Further discussions in chapter 2, section 2.4.1.

123 This reference to price depression of dumped goods is not strong enough however to receive the "meeting competition" of the Robinson-Patman Act.

124 For instance the USA antidumping law requires that injury be "through the effects of dumping". In British Steel Corp. v. U.S. [593 F.Supp. 405] the C.I.T. stated that the causation requirement is satisfied "if the (subsidized) imports contribute even minimally, to the conditions of the domestic industry." This was however a countervailing duty case but the USA Countervailing law has the same injury test than the antidumping law.


126 For a detailed analysis of the application of the concept of injury and causation see Bierwagen R., GATT Article VI and the Protectionist Bias in Anti-dumping Laws, 1991, p.87ss.
domestic industry is deemed by some standard to be in poor health, the bifurcated approach asks whether increases in imports have contributed even minimally to the industry’s poor or worsening condition; if they have, the commissioners find in the affirmative.\textsuperscript{127}

Cass wrote that

The Commission [ITC] want to produce opinions that are not fully transparent and do not rigorously implement an analytically determined model of causation.\textsuperscript{128}

It would be difficult to be more assertive on the issue of the lack of requirement of causation by the ITC, a pattern which seems to have been followed by most countries.

Three issues deserve to be expanded: the like product (good), the cumulation and the industry affected.

### 1.6.3.2 Injury on like products (goods)

An important issue is whether the ITC has the authority to alter the class or kind of foreign merchandise representing the imports to be investigated in its determination of injury caused to the US production. A parallel issue exists between the determination of Revenue Canada and by the Canadian International Trade Tribunal. Some experts have argued that the ITC cannot alter the scope of the domestic industry concerned by the antidumping investigation and the injury imports cause.\textsuperscript{129} It is also the position taken by the Courts in Canada under the old antidumping act.

With SIMA, the situation is different. In the recent Carpet case\textsuperscript{130} the CITT was asked to brake down into five subcategories the product class of machine tufted carpeting. The tribunal ruled that it would hear evidence on the five subcategories


\textsuperscript{130} Inquiry No: NQ-91-006, Decision of 6 May 1992.
and reserved the right to regroup some or all the subcategories. The tribunal requested that the Deputy Minister provide separate margins of dumping for each of these subcategories of goods which it did. The tribunal then found that there were three subcategories of like goods in this inquiry and injury existed for each subcategory. Although this decision has been appealed to the Bi-national Tribunal, the judgment of the CITT was confirmed on this aspect.\textsuperscript{131}

In \textit{Women's Shoes}\textsuperscript{132}, the tribunal concluded that there were two classes of the "like goods" although the Minister of Revenues had established dumping for four "class or kind of product".

In US law, Paul Victor has argued in class\textsuperscript{133} that the ITC can subdivide into smaller groups the determination of class or kind of foreign merchandise and that if injury was proven for one of the subgroup only, duties would still be imposed on the entire class or kind. Horlick on the other hand would reduce the scope of the injury determination to cover only the volume of imports involved in the specific sales transactions examined by the Commerce.\textsuperscript{134} The discordant scope of inquiries may lead to many more imports being penalised than should be necessary. This argument is parallel to the one on causation.

\textbf{1.6.3.3 Cumulation}

The problem of cumulation is often cited as an important flaw of the dumping system. The GATT antidumping code in article 3.2 to 3.4 talks about the "effects of such imports". The issue is whether it is legal to look at the aggregate effects of dumped goods from all countries when assessing whether or not injury is caused to domestic industry. In Canada the practice is to exclude a country from the

\textsuperscript{131} See p. 38 of the Opinion of the Bi-national Panel: Affirms the Tribunal's determination of like goods under s.42(1) of SIMA, even though its determination of like goods categories differed from the categories of goods for which the Deputy Minister found dumping.

\textsuperscript{132} Inquiry No: NQ-89-003, Decision of the 18 May 1990.

\textsuperscript{133} Tuesday 30 April 1993, \textit{International US Antitrust and Trade Law}, Fordham Law School, Center for International Antitrust.

cumulation if judged necessary. In the USA the ITC has to cumulate and there is no possibility to be excluded from an injury determination other than the provision for de minimis.  

Cumulation is severely condemned by experts and in the recent Carpet case the Bi-National Panel has required CITT to assess the accurate cause of dumping in order to determine whether dumping in itself caused material injury with detailed price calculations.  

1.6.3.4 The industry affected: the standing issue

The main purpose of antidumping laws is said to be the protection of the domestic industry from unfair practices of a foreign industry. An industry has two dimensions: a product market and a geographic market. Both elements can easily be distorted.

In the USA, for instance, foreign owned companies, which manufacture in the US, often cannot obtain legal standing as US producers in order to contest a dumping investigation initiated by US producers. In US law, there is also an exception for the "related parties" which authorise their exclusion in the determination of injury. If downstream producers and other commercial interested groups could obtain legal standing in antidumping cases, determination of injury would become more competitive.

The possibility of regional industries when the market is isolated may also be

---


136 "Last conclusion of the Panel: "Remands the Tribunal's determination that dumping has "caused" past and present material injury, and direct the Tribunal... to demonstrate the rational basis for such determination by detailed analysis including but not limited to each of the following..." Decision CDA-92-1904-02 7 April 1993, p.38.

137 "Detroit car Makers avoid collision" FT 10/2/93.


problematic because it increases the chances of injury. This has led authors to single out the selectivity of the protection offered by antidumping actions: case by case depending on the need. As if the Antidumping Authorities were reasoning the cases after having decided which industry they need to protect.\textsuperscript{140}

More important is the fact that there are fewer and fewer authentic domestic industries due to the globalization and the specialization of production. Bierwagen relates:

A Spanish manufacturer, owned by Spanish business men and Westinghouse of Switzerland, triggers an investigation into the dumping of refrigerating systems for carriers manufactured in France by the subsidiary of an American company.\textsuperscript{141}

In practice the standing issue does not raise big enquiries. In USA, for instance, the Commerce Department assumes that the petitioner has standing unless proven otherwise.

Thus, when Commerce finds standing, it actually has no idea what proportion of the domestic industry supports the petition.\textsuperscript{142}

The concept of industry used to initiate an antidumping investigation and to assess injury has been biased in favour of complainants. The practice in the USA is to consider that when one firm is complaining about dumping, the other firms in the "industry" approve that producer, unless they expressly oppose it. Even some opposition from other members of the industry is not sufficient ground for reversing the decision of the Commerce Department to ignore this opposition.\textsuperscript{143}

\begin{itemize}
\item \textsuperscript{139} (...continued)
\item \textsuperscript{140} Stegemann K. "The International Regulation of dumping: protection made too easy" paper prepared for the department of Economics Queen's University Canada Nov 1990.
\item \textsuperscript{141} Bierwagen R., GATT Article VI and the Protectionist Bias of GATT (1990) p.12.
\item \textsuperscript{143} Surumerica De Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660 (C.A.F.C. 1992)\
\end{itemize}
This practice was contested in the 1990 Panel Report on US Antidumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden. The Panel concluded that the initiation of an antidumping investigation by the US authorities was inconsistent with Article 5:1 and, as a consequence, the imposition of antidumping duties was not in conformity with Article 1 and had resulted in a prima facie nullification or impairment of the benefits. The Panel recommended that antidumping duties be reimbursed to Sweden.\textsuperscript{144} The practice of the Commerce Department has not changed since.\textsuperscript{145}

1.6.4 Antidumping duties

When all the previous conditions prevail - dumping, injury caused to domestic industry -, antidumping duties are permitted (\textit{but not obligatory}), to cover the margin of dumping. It is desirable that such duties be less than the margin of dumping where a lesser duty is sufficient to remove injury.\textsuperscript{146}

The Canadian antidumping law contains a "public interest" clause\textsuperscript{147} which allows the authorities to reduce the amount of antidumping duties. The Europeans have a similar "community interest" criterion to be addressed when assessing antidumping duties. The US law does not have such a provision: antidumping duties are automatic and must cover the full margin of dumping once an injury has been assessed. The interests of consumers are not addressed directly.\textsuperscript{148}

\textsuperscript{144} Another GATT case Ciment Clinker from Mexico ADP-82, 7 Sept. 1992 reiterated the same principle against the US practice, but in vain.

\textsuperscript{145} Victor P. Class on US Antidumping Law, Center for International Antitrust, Fordham University Law School 13/4/93.

\textsuperscript{146} Paragraph 1 of Article 8 of the GATT Antidumping Code.

\textsuperscript{147} The Canadian International Trade Tribunal has however concluded that the public interest was not a basis for rejecting a petition but only for limiting the level of protection. See Finger M. and Dhar S., \textit{Do Rules Control Power?}, 1991, World Bank, p.40.

Antidumping duties are said to be a remedy for financial injury caused by goods found to be have been dumped. For the same reason countries are required to terminate antidumping duties as soon as they are no longer needed and to review the situation when an interested party requests and proves such a need. Unlike the USA, Canada has a "sunset clause" whereby antidumping duties are phased out automatically after three years unless their need is demonstrated.

Imposing antidumping duties is a unilateral act of a State done without prior consultation and directed against foreign enterprises. Moreover, once determined, antidumping duties are imposed on all similar goods of any enterprise coming from the relevant country. Once a finding of dumping is established, the only recourse of exporters is to raise their export prices, to agree on an undertaking with the importing authorities, to cease to export or to have their own state initiate a conciliation and dispute settlement procedure.

1.6.5 Conclusions on antidumping laws

National antidumping laws are often argued to be necessary to counteract foreign predation, export of unemployment and other social dumping. They block at national borders much more than predatory imports. In fact, antidumping laws end up spreading to the importing country foreign goods' high prices.

149 Antidumping duties are not supposed to be penal. Assessment of duties by some national authorities can, however, take many years. During this period importers concerned must provide bonds as security for the maximum assessable duty which is usually much greater than the amount finally assessed. It is difficult to ignore the highly punitive impact of antidumping duties.

150 The GATT also prohibits retroactive assessments but authorises provisional measures pending a final determination. In exceptional circumstances of a surge of imports during the investigation, duties can be imposed retroactively. Provisional measures should represent the maximal level of any final duty that the exporter will have to pay. This is not respected in all countries. In Canada exporters always knows how much he or she will have to pay. In the USA the liability for payment is determined on a retroactive basis in the course of the annual review. For further discussion see Vermulst E., "Australia, Canada, the EEC and the USA antidumping laws" in Antidumping Law and Practice Jackson J. and Vermulst E. (Ed.), 1990, p.437.

151 The Antidumping Code provides for consultation, conciliation through the Committee for conciliation and dispute settlement before a panel established to examine the matter. This panel is then governed by the GATT understanding regarding Notification, Consultation, Dispute Settlement and Surveillance. The EEC-EFTA FTAs, the EFTA, the Europe Agreements and, the Trans-Tasman CER before 1/7/90, have express provisions forcing parties to co-operate and consult before imposing antidumping duties.
The initial purpose of the GATT was to restrain national antidumping actions and to establish parameters that states must not overstep when applying their national antidumping laws. The GATT language seems, however, too loose to achieve this. An important problem is that the GATT does not define good or restrictive business practices, nor does it establish what is a fair or unfair price other than through a reference to the "ordinary course of trade" in article 2.1 of the GATT antidumping Code. This expression has been stretched a long way.

GATT's rules do not provide limits to national practice, they provide sanction for it. Such rules are not part of the solution, they are part of the problem.\textsuperscript{152}

GATT antidumping law does not refer to the degree of market power of the exporter which could reveal restrictive business practices of the exporter and its capacity to affect the importing market.\textsuperscript{153} Antidumping laws do not address the source of the damage, the behaviour of firms; they only "patch up" the problem for the exclusive benefit of industries in the importing country. An authentic antidumping analysis would focus on the structure of the importing and exporting markets in order to find out what is causing dumping and whether the firms opposing dumping are dominant and therefore asking for pure protection.

The period of reference for recoupment of costs should be variable and justifiable. Importantly, the interests of other commercial groups should also be addressed when determining the injury. The situation could be better handled by introducing a presumption against the exporter, allowing the exporter the opportunity to establish fair practice and or special circumstances. Then predation, exclusionary practices and other restrictive business practices could be better identified and dumping could be corrected.


\textsuperscript{153} For instance it is reported that more than half of the antidumping actions brought by the EEC have been against countries whose exporters have less than 5% of the EEC market. In the eighties, 90% of cases, the foreign country's share of the market was less than 25% - still much too small for predatory pricing to make any sense. "Repeal the Protectionist's Charter" Economist 15 June 1992 p.20. Messerlin relates than between 1980 and 1985, 94% of the cases were against developing countries. Experiences of Developing Countries with Antidumping Laws world Bank Paper 1988.
1.7 Impact of antidumping actions

The analysis of the application of antidumping measures by national authorities has emphasised the gap with economic rationale for antidumping actions. Before strategic, political, and social considerations for antidumping measures are addressed, it is worth looking at the actual economic impact of antidumping actions. This way one can better weigh the trade-off effects of the antidumping measures with other alleged social or moral benefits discussed in section 1.8 below. According to most economists antidumping actions are unnecessary and actually damaging to society's welfare.\textsuperscript{154} National antidumping laws prevent the entry of much more than predatory sales, in fact the US State Treasury once stated:

As one who has had considerable practical experience in administering the American Antidumping Act of 1921, I can say there has never been a case with which I have come into contact, which I am prepared to categorise as predatory dumping.\textsuperscript{155}

Some experts in international relations have demonstrated that antidumping duties are imposed for the exclusive benefit of protected political groups. Micheal Moore has concluded, after an examination of the decisions of the ITC over 6 years (1980-86), that petitions involving the constituencies of the Senate Trade Committee are systematically favoured.

Instead, the success of a particular interest group in obtaining relief from foreign competition may be tied to the influence of their elected representatives.\textsuperscript{156} Professor Baldwin and Steagall also reached parallel findings:

The Commission does appear to have been influenced by the pressures in the 1980s from Congress and various sources for greater protectionism... Decisions


\textsuperscript{156} Moore M., "Rules or politics?: An empirical analysis of ITC antidumping decisions" Paper for the department of economics at the George Washington University, July 1990.
tend to be affirmative if there is a downward trend in the industry profits and employment in the sector.\(^{157}\)

The impact of antidumping duties is again a debatable assessment: while economists talk about outrageous restrictions to trade, politicians argue the "unfairness" of foreign acts. Without agreed standards on fairness such discussion lack rigour. The following quotation of Dr Hindley is very clear:

The aim of an anti-dumping duty is to transfer income from the rest of the community to domestic producers of the dumped goods... Since consumption must exceed output for an imported good, consumers must lose more than producers gain.\(^{158}\)

Since determinations of dumping and injury in the USA and Canada - and quite probably in all nations - do not follow criteria of efficiency, Richard Dale's conclusion seems accurate:

Antidumping laws have been applied.... for a purpose which is overtly anti-competitive...[they] represent a charge on public expenditure, while also imposing direct costs on these engaged in international trade.\(^{159}\)

Recently, the World Bank has produced a detailed economic analysis of the impact of widespread antidumping duties. The report concluded that the actual imposition of antidumping duties

act more as protective policies to insulate the import-competing sector from competition (...). They do not end the dumping because they do not remedy the root cause.\(^{160}\)

Another important impact of antidumping measures is their boomerang effect. A good example is the recent US Dumping Study demanded by Carla Hills before her departure. Mr Katz, her deputy, said:


\(^{158}\) Law Reform Commission, The Anti-dumping Tribunal, 1979, Ottawa, p.65

\(^{159}\) Dale R., Antidumping Law in a Liberal Economy, 1980, p. 191. Hyun Ja Shin has also demonstrated in a discussion paper for the OECD that antidumping measures have been routinely taken against imports which would have otherwise improve US welfare. Mark Dutz has done the same with the Canadian law.

... the rules adopted by both the US and the EEC had become increasingly "arbitrary and restrictive. The number of countries adopting similar regimes had proliferated, so that American exporters now [have] to worry that they [are] denied market share under similar rules.\footnote{Dunne N. "Hills ordered dumping laws study" FT 10/3/93; see also Dunne N., "Republicans demand US dumping study" FT 12/3/93 and following articles. This study seems to have been postponed by the new Administration.}


If most antidumping actions do not make any economic sense and restrict trade, what other social, political or strategic values do they protect?

\section*{1.8 Strategic, political and social considerations on dumping}

The GATT does not restrain national biased enforcement of antidumping laws. For some political scientists this is evidence that the GATT is a mere "diplomatic arrangement"\footnote{Hudec R., The GATT Legal System and World trade Diplomacy, 1990.} and that national trade laws are nothing but an exercise of economic strategy to force other countries (and foreign exporters) to behave according to the importing country's short term interest: an expression of power behind the mask of unfair trade laws.\footnote{Baldwin R., Economic statecraft, 1986; Other authors more aggressive: "such principles such as "national treatment" and "most-favoured-nation" - principles that underpin the GATT structure - are inherently disadvantageous to the most liberal and open societies." Prestowitz P. Tonelson A. and Jerome R., "The Last Gasp of GATTism", Harvard Bus.Rev., 1991 (March-April), p.130.}
...in the 1980's, the elaboration and application of GATT rules has been an exercise in the application of economic and political power, not in its control. (...) national practice determines what the GATT rules mean.\textsuperscript{167}

Others have argued that antidumping actions are, in fact, nothing but international sanctions or acts of economic statecraft.\textsuperscript{168} Sanctions against variant corporate models and social differences which lead firms to employ different pricing practices, sanctions against different domestic economic policies and domestic competition laws.

Another answer for explaining the gap between the economics and the law on price discrimination is that "it is naive to believe that governments attempt to maximise national welfare" which is the standard by which economists compare policies.\textsuperscript{169} According to this approach policies are the result of pressures exercised by various interest groups. For instance, Moore has concluded that petitions involving the constituencies of Senate Trade Subcommittee members are systematically favoured.\textsuperscript{170}

More importantly for the purpose of this thesis, some have argued that antidumping laws ought to be maintained in response to trade barriers or market closure of the exporting country. According to this approach, antidumping policy is viewed as a tool, not only to raise the exporter's prices, but also to put pressure on the exporters so they open their market to foreign competitors. But raising prices in the importing market will meanwhile extend the exporter's monopoly prices to


\textsuperscript{169} Professor Shugart has argued that domestic antitrust enforcement also follow the same pattern of interest-group politics. In that sense it is argued in chapter 3 that antidumping and antitrust laws are not so different. See discussion in chapter 3, section 3.6.1.

\textsuperscript{170} Moore M., Rules or Politics?: an Empirical Analysis of ITC Antidumping decisions, 1990, Washington, Department of Economics of the George Washington University, p.17. Economists have started demonstrating how antidumping actions have led to collusion among domestic firms and with foreign firms to their mutual advantage but at the cost of reducing the national income of the importing country. In Chapter 4 the liability for misuse of antidumping measures is discussed. See Messerlin P., "Antidumping or Pro-Cartel Law" in World Economy, vol.13 (1990), p.465.
the second market. Another strategic explanation for the need for antidumping laws is the Interface theory analyzed hereafter.

### 1.8.1 The Interface theory

The "Interface" theory of Professor Jackson favours the application of antidumping laws as buffers between social, economical and structural differences present in international trade.\(^\text{171}\)

For Professor Jackson, structural differences are largely responsible for most trade problems facing the international system and "may consciously or unconsciously foster the private firms' ability to dump".\(^\text{172}\) National antidumping laws would work as a "mediative or interface mechanism" between the different commercial, accounting, social and legal rules of the concerned trade partners.

This function would not attempt to cleanse the international system of distortions, but only to subdue protectionist pressures by reducing the "unfairness"of foreign commercial structures. In this light, the international sanctioning of national rules is a "buffer" which ameliorates the effects of structural differences...The interface argument also suggests that maybe national antidumping laws operate a de facto safeguard measure....\(^\text{173}\)

Three comments on this theory can be made. First the Interface theory favours actions to balance and nullify the impact of the competitive advantage of exporters. It therefore assumes that structural differences should be compensated for and that foreign firms should be run in conformity with the business practices of the importing country. Are antidumping actions in fact punishments for legitimate business decisions by jealous authorities?

Secondly, if the nature, rationale and, therefore, application of antidumping laws have been "transformed" into de facto safeguard measures, their application should

---

\(^{171}\) This theory was first argued by the economist Ethier in economic and mathematical variables that nobody understood. Ethier, "Dumping", *Journal of Political Economy* 90 (1982) p.487. Professor Jackson and his team made it simple. See p. 20 ss in *Antidumping Law and Practice*, 1990, the section written by Jackson which refers to his chapter 10 of *World Trade and the Law of GATT*, 1969.


\(^{173}\) *Idem*, p.250.
respect the parameters of article XIX of the GATT: 30 day notice, readjustment measure, non-discrimination application and compensation. Maybe the problem should be resolved in the direction advocated by Lowenfield\textsuperscript{174}: only one system of rules for the control of all imports without reference to the reason for protection.

The third objection is applicable to any strategic use of antidumping laws. These approaches recognise a problem but refuse to address its roots. The GATT does not consider the issue of the investment, competition, taxation, labour laws and other social policies of the domestic markets concerned. Focus should be put on the importing market's capacity to maintain market disorder and on the exporting market's tolerance of restrictive business practices instead of expanding, with antidumping duties, the monopolistic prices of the exporter to the detriment of consumers in both markets.

1.8.2 Security threat and proposals

There is a populist allegation that imports at prices below fully allocated costs are a threat to the security of the importing country. This argument is often heard for agricultural products: "in the eventuality of a war soldiers cannot fight without food". Japan has been very strong on this point to maintain its domestic market for rice closed to foreign producers. It is a very emotional argument. As put clearly by Thomas Leary, former General Counselor for General Motor, antitrust and antidumping are very much emotional, business people are terribly nationalistic not to say racist.\textsuperscript{175}

It is not the purpose of this thesis to analyze the substance of the arguments and whether it makes sense to protect domestic industries that are less efficient than foreign industries, for security or strategic reasons. Economists and political scientists argue about it. The argument is sufficiently heard in public forum to deserve some attention as to how in legal terms it should be best treated.


\textsuperscript{175} Class on Comparative Competition Laws of Professor Fox, New York University 14/2/93.
Firstly, it is doubtful whether all goods ought to be protected for strategic reasons. There is a need for states to identify such products as well as criteria for new products. It is difficult to see that civil cars would be included in such a category. Article XX could be extended to include strategic industries. Alternatively, Article XXI on security could be amended to cover goods other than military goods.

States could draw up a list of strategic goods "partly tradable" and a list of goods presumed to be "fully tradable". The goods on the list of "partly tradable goods" could be subject to quotas of imports. States would be authorised to notify other states of the exclusion of a product from the list of "fully tradable goods". They would, however, bear the obligation to justify their exclusion and would have to compensate trade partners for the restriction in market access for that excluded good presumed to be fully tradable. This compensation pattern may follow the system envisaged by article XIX of the GATT.

Secondly, "safeguard measures" (Article XIX of the GATT), rather than antidumping duties, are therefore a better means to deal with the arguments against disturbing and dangerous flows of imports in strategic industries or security. Basically article XIX of the GATT authorises member states to raise tariffs and use quotas during a definite period of time to adjust to such an event. The important difference between antidumping and safeguard actions is that while antidumping measures target a country and are imposed on an discriminatory manner without any obligation to compensate, safeguard measures must be imposed without national discretion and with compensation. Safeguard measures must be notified to the GATT secretariat and to member states who are then authorised to obtain compensation for the increase of tariffs or the imposition of quotas. For safeguard measures, the emphasise is shifted to the readjustment of the industry in the importing country during the period of safeguard. In case of a surge of cheaper imports of better quality, it would be more reasonable to focus on the disturbance caused to the importing country and allow for reorganisation of the domestic production and re-localisation of workers.

\[176\] Which have led some to argue that they can be considered international economic sanctions.
Thirdly, quotas of penetration may be more suitable and more transparent than sporadic antidumping actions. Within these quotas full competition should be tolerated if not encouraged. Quotas would, however, tend to lead to price fixing and export cartels. Logically, some "collaboration" and partitioning of production in these sensitive areas will take place. Maybe this is the price to pay for a secure environment. It would be better to recognise the existence of some sensitive areas of trade and to exclude them from general rules and to deal with the issue in a transparent manner than to allege the application of free-trade rules and then pretend than some exports are unfairly dumped.

Fourthly, if trade follows the parameters of national security, as argued in chapter 5 of this thesis, then special treatment for allies should be possible, i.e. within regional grouping. This argument has, however, risky consequences. The main purpose of the institutionalization of the MFN clause in the GATT was to avoid repeating damages caused by the economic isolation of the USA, a superpower and a super market for producers world-wide. To tolerate discrimination in favour of a group system may bring back inequalities of opportunities and frustration leading to aggression. It is submitted that the best way to avoid wars is to encourage respect for the obligation of the GATT for National Treatment and to address directly domestic policies, and specially domestic competition policies.

1.8.3 Industrial policy and social considerations

An argument parallel to the one correlating trade and security, relates trade measures to considerations of social justice and industrial policies. Hutton and Trebilcook have attempted to identify social values in the Canadian antidumping actions and had to conclude that

the majority of the cases ended up helping workers and communities which are already better off than most in Canada. 13 of the 30 cases studied were supported by the rationales of distributive justice, communitaris, or both.\textsuperscript{177}

\textsuperscript{177} We accept as widely-supported three types of normative justifications for state action to mitigate the impacts of foreign imports: economic efficiency or utilitarianism, social contractarian (continued...)
The answer to this argument is the same as for the allegation of a security threat. If the importing country needs a form of targeted regional protection, it should use safeguard measures rather than hiding behind the flag of foreign unfairness.

Some have argued that the antidumping policy in the EEC was and should be used covertly as an industrial policy. In the USA a similar argument can be developed with auto makers and the car industry. Dumping would constitute an unfair export of unemployment, of lower employment and environment standards, the so-called "social dumping". The allegation is that some protection must be offered to infant industries or to protect big pockets of jobs in regions where there is no other employer and while the labour force is not movable for various reasons.

Again safeguard measures seem more appropriate tools to deal with the root cause of the problem.

1.9 Alternatives to the use of antidumping actions

---


178 Dodwell D."Protectionist Wolf in Sheep's clothing" FT 15/12/92; also Davenport M. "The Charybdis of Antidumping: A New form of EEC Industrial policy?" Paper 22, Royal Institute of International Affairs, London..

179 Done K. "US auto makers seek urgent talks with Japanese" FT 14/1/92; "Clinton under car company pressure" FT 11/3/93; "Big Three may act over car imports" FT 27/1/93.

180 "Foreign Steelmakers Twist the market" Wall Street Market 4/3/93 A15.

181 Social dumping is also used in the area of environment where product not environment friendly are said to have been dumped into a country. Environmentalist argue that antidumping duties should be imposed on them as a punishment and to collect money to pay for the environment programmes that these firms do not pay for. "Environmentalists Against GATT" Wall Street Journal 19/3/93.
Dr Hindley has suggested that the importing country should have a right, under the GATT, to force the exporting country to investigate the exporting market.¹⁸²

This solution is sensible to the extent that the exporter's behaviour in its domestic market - or any other market where it makes abnormal profits to support foreign losses - is condemnable and illegal. Since there are no such standards, discussions can only take place voluntary or in the context of the OECD¹⁸³. As argued in chapter 9, it is doubtful that such a process would replace antidumping duties; it may improve the competitiveness of antidumping enforcement however.

A second possibility would be to extend legal standing in domestic courts and to give firms of other countries a private right to trigger the domestic competition system of the exporter. There could be also some type of bi-national panel under the GATT secretariat, along the pattern of the NAFTA Bi-national tribunal, whose function would be to ensure that domestic tribunals apply competition laws fairly. Controlling domestic competition cases would, however, be very tedious.

The negotiation of multilateral rules on international competition are also possible. Multilateral and regional attempts to do so are analyzed in the following chapter 2 and in chapter 6. Proposals for an international code on competition are made in chapter 9.

Another proposal is that Bi-national panels under the GATT, along the pattern of the NAFTA Bi-national tribunal, could be accessible to exporters alleging unfair application of national antidumping laws.

1.10 Conclusions

¹⁸² "The alternative means of dealing with the problem...is to provide importing countries with a the GATT right to request antitrust action against the dumping industry by the government of the exporting country. It would also be possible to provide for some form of sanction when an exporting-country government takes no action in a case that the importing-country government can demonstrate to the satisfaction of other the GATT contracting parties." Hindley B., "Economics of Dumping", in Policy Implications of Antidumping, Tharakan P. (Ed) 1990 p.39.

¹⁸³ See discussions of this forum in chapter 2, section 2.4.1.
Traditionally, economists have concluded that only predatory dumping is injurious to the importing and exporting country: cross-subsidization and threats of dependence of foreign imports should not be the concern of any Administration. If the importing country is competitive, recoupment of lost sales will become impossible and predation is therefore implausible. In the international context, recoupment should be viewed in taking into consideration the various cultures and conceptions on profits and time scale.

Predation may not be the only concern of nations. The weakening of an efficient competitor (short of its elimination) or the prevention of the establishment of a strategic industry or injurious disturbance of the structure of a market may also be important matters. Domestic competition systems recognise that restrictive business practices and various abuses of market power (structural and behavioral restrictions), other than predation, are objectionable. This reasoning can be extended to an international settings.

It is reasonable for states to worry about practices, other than predation. Dumping as such may not be detrimental but it may be evidence of all sorts of anticompetitive activities. It is what is behind international price discrimination and transnational sales below their full costs of production which should be a concern: evidence of a market (the exporting country) where abuses of market power, and other restrictive agreements, may take place.

Provisions in national antidumping laws referring to restrictive business practices in the determination of the injury, as provided for in article 3.4 of the GATT antidumping code, should be implemented. The law would therefore provide for some examination of the market which supports dumping and the market around which antidumping duties are raised. Any discussion on dumping short of addressing the issue of restrictive business practices in both the importing and the exporting markets, is a waste of time.

The international regulation of domestic and transnational restrictive business practices is addressed in the following chapter 2.
Chapter 2 The International Control of Business Practices Other Than Dumping

2.1 Introduction

Chapter 2 centres on international legal instruments which aim at regulating restrictive practices of enterprises other than dumping. States have addressed the problem of restrictive business practices from three different angles and there are two types of international instruments. Some instruments are directly applicable to firms while others are exclusively addressed to states. The three approaches to restrictive business practices are the following:

Firstly, states have attempted a few times to coordinate actions against international cartels and detrimental business practices. Proposals have varied from an international jurisdiction, where central actions would be institutionalised, to modest promises of exchange of non-confidential information, and co-operative consultations. These arrangements exist in bilateral, regional and world-wide instruments. Multilateral instruments and their application in bilateral agreements will be discussed in this chapter. Specific arrangements contained in free-trade areas and other regional integration agreements will be studied in chapter 6.

Secondly, domestic cartels and other domestic restrictive business practices and their potential impact on international trade and foreign markets are addressed in various world-wide accords and are analyzed in this chapter; those specific to regional arrangements will be discussed in chapter 6. Thirdly, states have also attempted to interrelate domestic restrictive business practices to dumping measures
and antidumping actions. These efforts can be found in Recommendations of the Organisation for Economic Cooperation and Development (OECD), in national antidumping laws, analyzed in chapter 5, and in economic regional integration agreements addressed in chapter 6.

In the absence of a comprehensive agreement dealing with international restrictive business practices, states relied on trade measures and on the extraterritorial application of their domestic laws. A discussion of states’ position on extraterritoriality following a historical analysis of the comprehensive approach initially recommended in the Havana Charter\(^{184}\) helps to explain the GATT’s limited scope of application and the purpose of various codes of conduct developed in other fora.

A conclusion will be reached stating that the European "positive comity" is an excellent solution to reduce delays surrounding preliminary jurisdictional debates. Positive Comity can also be developed into a substantive norm for trade and competition conflicts. In fact, the USA seems to have favoured this solution in the two Side-Agreements of NAFTA on labour and environment standards.

2.2 Attempts by various organisations to co-ordinate actions against restrictive business practices

2.2.1 League of Nations

The first attempts to control restrictive business practices on the international level\(^{185}\), were made at the League of Nations during the Economic Conference of the 4th May 1927. One of the purposes of this conference was to deal with

---

\(^{184}\) The Havana Charter, also called the Charter of the ITO, refers to the "Final Act of the United Nations Conference on Trade and Employment" which took place in Havana, Cuba, on 24 March 1948. The Havana Conference produced a single document which included six agreements on trade policy, cartels, commodity agreements, employment, economic development and international investment, and the constitution of a new United Nations Agency in the field of international trade, the International Trade Organisation (ITO). The ITO was to support and strengthen the Bretton Woods institutions, i.e., the International Bank for Reconstruction and Development (the World Bank) and the International Monetary Fund (the IMF).

\(^{185}\) Domestic legislation controlling certain behaviour of firms was first introduced in Canada and USA in the late 19th century. After World War II, Japan, Germany, UK, Australia, New Zealand and some European countries enacted similar laws on competition.
"industrial agreements". It was argued that these industrial agreements may be beneficial because they can insure more systematic production, more rational development and better organisation among enterprises. They could also discipline anticompetitive behaviour and maintain employment and prices. On the other hand, they were said to lead to monopolies, by raising prices to the detriment of certain social groups and some countries. Boycotts against specific countries and limitations of output were at risk.

The formation of an international jurisdiction seemed impossible due to the important divergence of opinions between Americans, who severely condemned cartels, and the Europeans, who were more moderate. Europe was very much cartelized before the second world war. This project perished when the USA abstained from voting on the final report in which states had agreed to continue work and surveillance in the area.

2.2.2 International Labour Organisation

From 20/4 to 12/5/44, during the 26th session of the International Labour Bureau in Philadelphia, proposals were made to address the issue of industrial agreements. The same conflict of opinions on the effects of cartels re-emerged. Some countries considered that cartels should be tolerated because they ensure stability in standards and employment. Others argued that cartels limit technical progress, equate to monopolies and function to the detriment of the majority. Some suggested a system of registration for these international agreements among producers.

The Americans refused these proposals because of the important divergence of opinion between countries. They were convinced that it would be impossible to control international private agreements. The final resolutions are evidence of these opposed positions and efforts of concessions. Paragraph II,13,b of Resolution VI of the conference invited members to take all necessary measures to

---

186 The ILO is composed of 56 members, 28 governments, 14 associations of employers and 14 unions.
maintain a high and stable level of employment and to maintain an increasing level of production through

mesures tendant à décourager les pratiques de monopoles et à encourager le progrès technique, à maintenir un système de prix et de salaire d'une souplesse raisonable ....

Paragraph II, 13, c, states that the Conference favours

la suppression des barrières artificielles qui limitent l'accès aux ressources et aux marchés, l'assouplissement des restrictions excessives imposées soit par des organismes gouvernementaux soit par des entreprises ou des syndicats.\textsuperscript{187}

It is interesting to note that, initially, the concern over restrictive business practices took place in fora dealing with employment. Employment issues, during and after the Great Depression and World War II, were an important concern for all countries. This may also explain the relationship made between domestic employment and trade during the Havana negotiations.\textsuperscript{188}

\textbf{2.2.3 International Trade Organisation}

During World War II, the link between trade and war (or security) forced states to address the practices of enterprises.\textsuperscript{189} The slogan of the US administration for the adoption of an international trade organisation was: "If goods can't cross the borders, soldiers will".\textsuperscript{190}

International trade was going to be crucial for all nations to avoid war; practices of enterprises would not be allowed to spoil this project. The Havana Charter was negotiated in this context. It recognised that distortions to trade resulted, not only


\textsuperscript{188} Its very title declares it: "Final Act of the United Nations Conference on Trade and Employment". Article one of the Havana Charter constitutes an official recognition of the potential link between domestic (industrial and competition) policies and external trade policies.

\textsuperscript{189} The Americans had not yet joined the Allied Forces, but recognised that a major reason for the breakdown of the last peace settlement laid in the inadequate handling of economic problems and in their own economic isolation. They were also conscious of the harm they did in refusing to join the League of Nations.

from acts of states, but also from actions of enterprises and/or from their tolerance by states. It included articles 46 to 54, a whole chapter on the control of restrictive business practices. Article 46(1) would have obliged members to

take appropriate individual measures and (shall) co-operate with the Organisation to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in article 1. (Emphasise added)

Importantly, the offence required that the firm or the group of firms possess market power. It seems that cartels between firms without market power would not have been caught.

46(2) : complaints ... shall be subject to investigation ...

whenever...
(a) such a complaint is presented to the Organisation, and
(b) the practice is engaged, or made effective by one or more private or public commercial enterprises or by any combination..., and
(c) such commercial enterprises, individually or collectively, possess effective control of trade among a number of countries in one or more products.

However, cartels are referred to in article 46(3) which sets out a list of RBPs including, price fixing, exclusionary practices, export cartels, discrimination, voluntary export restraints and abuse of patent in the commerce of goods. Article 46(3)c) allowed the condemnation of any other similar restrictive practice if voted by 2/3 of the states. Market power would still be a necessary criteria of the infraction.

Co-operation among member-states to make remedial action more effective was also envisaged in article 51 but, more importantly, mandatory consultation, production of reports, notification when requested by the Organisation\textsuperscript{191}, as well as extensive investigation procedures by the International Trade Organisation

\textsuperscript{191} Article 50 of the Havana Charter, talking here about the International Trade Organisation which would have had the responsibility of the enforcement of the Havana Charter. The ITO was though to be the third pillar of the Bretton Woods system.
(ITO)\textsuperscript{192}, were foreseen. Article 50 would have obliged Members to ensure, within their jurisdiction, that private and public commercial enterprises did not engage in practices specified in paragraphs 2\textsuperscript{193} and 3\textsuperscript{194} of Article 46:

50.1 Each Member shall take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices which are specified in paragraphs 2 and 3 of Article 46 and have the effect indicated in paragraph 1 of that Article, and it shall assist the Organization in preventing these practices.

The outstanding feature is that the contravention to any provisions of chapter V on Restrictive Business Practices could trigger the procedure for the settlement of disputes. References to the International Court of Justice for an advisory opinion, to the Conference of member states, or to the executive board of the ITO, were possible to deal with complaints of states.\textsuperscript{195}

\textsuperscript{192} Article 48 of the Havana Charter.

\textsuperscript{193} ...complaints regarding any of the practices listed in paragraph 3 shall be subject to investigation in accordance with the procedure regrading complaints provided for in Articles 48 and 50 whenever,

a) such a complaint is presented to the Organisation, and

b) the practice is engaged in, or made effective, by one or more private or public commercial enterprises or by any combination, agreement or other arrangement between any such enterprises, and

c) such commercial enterprises, individually or collectively, possess effective control of trade among a number of countries in one or more products.

\textsuperscript{194} The practices referred to in paragraph 2 are the following:

a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;

b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;

c) discriminating against particular enterprises;

d) limiting production or fixing production quotas;

e) preventing by agreement the development or application of technology or invention whether patented or unpatented;

f) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not subjects of such grants;

g) any similar practices which the Organisation may declare, by a majority of two-thirds of the members present and voting, to be restrictive business practices.

\textsuperscript{195} Chapter VIII of the Charter dealt with Dispute Resolution.
The Havana Charter had also one article on dumping\textsuperscript{196}, under the Section E on "General Commercial Provisions" in Chapter IV entitled "Commercial Policy".\textsuperscript{197} Regulation of transnational restrictive practices was not viewed as an alternative to anti-dumping and anti-subsidy laws.

The Havana Charter was never ratified. Since then, the world has never managed to conclude another agreement coordinating actions of states and enterprises in international trade as comprehensive as the Havana Charter. Importantly, the attempted provisions of the Charter are historical evidence of some recognition that domestic policies on business practices, labour standards, development, have all a direct impact on trade and peace.

\textbf{2.2.4 Attempts by the OEEC}

The Organisation for European Economic Co-operation, the predecessor of the OECD, through its European Agency for Productivity (the AEP), also addressed the issue of restrictive business practices in 1953\textsuperscript{198}. In its Eighth annual report we read:

Elles (les pratiques commerciales restrictives) abritent artificiellement des entreprises et des industries inéfficaces et découragent les tentatives qui auraient pour but d'abaisser les prix ou d'améliorer les méthodes de production.\textsuperscript{199}

The AEP produced an important glossary updated every year until 1981. One of the purposes of this exercise was to "promote the standardisation of terminology concerning restrictive business practices".\textsuperscript{200} All the work of the OEEC was continued by the OECD.

\textsuperscript{196} Article 34 of the Havana Charter: "The Members recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value is to be condemned if it causes or threatens material injury....". This article is similar to the equivalent article in today's GATT.

\textsuperscript{197} Section C of the same chapter dealt with Subsidies.

\textsuperscript{198} The European Productivity Agency was formed on 23 March 1953.


\textsuperscript{200} Glossary of Terms relating to restrictive business practices, 1964, OECD, Paris, 95 pages.
2.2.5 Attempts by the ECOSOC

When it became evident that the Havana Charter would not be adopted, the Economic and Social Council of the United Nations took it upon itself to examine the problem of restrictive business practices. In September 1951, the Council adopted a resolution forming an Ad Hoc Committee to prepare and submit proposals "with a view to achieving the objectives laid down in article 46 of the Havana Charter"\textsuperscript{201}.

Substantive provisions of the draft agreement submitted by the Ad Hoc Committee were very similar to those of the Havana Charter.\textsuperscript{202} The list of restrictive business practices was extended. The paramount authority and the final power of decision was to be vested in an organ consisting of the representatives of all governments adhering to the agreement. Decisions of the representative body would be taken by majority vote. Most investigation, consultation, verification and preparation of reports would be delegated to a secretariat. The same secretariat would have had to conduct investigation and advise the representative body whether a reported restrictive business practice had harmful effects.

This project was first submitted to the Economic and Social Council at its 16th session (30 June-5 August 1953) and again at its 19th session (16-27 May 1955). Since the Americans again refused to sponsor such a project until all member states followed similar economic doctrine and adopted identical legislation, the resolution was adjourned sine die.

2.2.6 New-Zealand's proposal to amend GATT Article VI

The absence of control of restrictive practices was also condemned at the GATT in the context of dumping practices and antidumping laws. In 1954, New Zealand proposed that article VI on dumping be amended to include the phrase "accordingly Contracting Parties shall refrain from action which would cause or encourage

\footnotesize{\textsuperscript{201} GATT Secretariat, Restrictive Business Practices, 1959, Geneva, p.76.}

\footnotesize{\textsuperscript{202} The new organisation was going to be dealing only for RBPs while the ITO had a full range of responsibilities.
dumping of this kind. Even this very moderate proposal was refused. States did not agree on the cause of dumping.

2.2.7 Attempt by the GATT Contracting Parties, 1958-60

Recognizing once again that international cartels, trusts and other restrictive business practices (RBPs) could hamper the expansion of world trade, the Contracting Parties of the GATT decided, on 5 November 1958, to appoint a group of experts

to study and make recommendations with regard to, whether, to what extent if at all, and how, the Contracting Parties should undertake to deal with restrictive business practices.

On the 2 February 1960, the report of the group of experts was adopted. This report concluded that RBPs may hamper the expansion of world trade or frustrate the benefits of tariff reduction and removal of quotas. In the present circumstances, it would not be practicable for the Contracting Parties to undertake any form of control of such business practices. The report favoured bilateral and multilateral consultations at the request of any Contracting Party, with the help of the secretariat of the GATT.

Two suggestions of this report deserve mention. The first one is the possibility that the tolerance of RBPs by states may constitute an "impediment" to trade condemned by the second paragraph of article XXIII of the GATT:

1. If any contracting party should consider that ... any benefit accruing...is being nullified or impaired or the attainment of any objective of the Agreement is being impeded as the result of...
   b) the application by another contracting party of any measure, whether or not in conflicts with the provisions of this agreement, or
   c) the existence of any other situation, ...
2. ... the matter may be referred to the CONTRACTING PARTIES....

---


204 Resolution 5 November 1958 on Appointment of Group of Experts, GATT Documents BISD, p.29.
The group of experts recommended, however, that this provision should not be used because of the difficulties in determining what would constitute "impediments to the objectives of the GATT".

The second interesting element is that a minority group (France, Sweden, Denmark, Norway) proposed a pattern very similar to what Sir Leon Brittan labelled the new "positive comity", where the country which has territorial jurisdiction over RBPs should, at the request of a contracting party affected by a RBP, enter into consultation. In the case of unfruitful bilateral consultations, a secretariat and a group of experts would scrutinise the complaint along the pattern of the ITO.

On the 18 November 1960, the Contracting Parties adopted the majority's view. A decision favouring consultation was taken without any further obligation being imposed on state which have territorial jurisdiction over RBPs. If consultations are initiated, members have, however, the obligation to inform the GATT secretariat of the results.

2.3 The extraterritorial application of national laws on restrictive business practices

It is reasonable to expect a State to control what takes place on its territory (territorial jurisdiction) and to some extent, what is done by its nationals elsewhere (personal jurisdiction). It is also understandable that a state would want to protect its territory and its nationals from the detrimental impact of foreign conducts or agreements. Problems arise when firms operate in many countries resulting in many nations having an interest in what they are doing. As Rahl put it, "the relevant markets of antitrust concern are not neatly arranged according to national boundaries".

---

205 See in the present chapter sections 2.4.2.5 and 2.6, and in chapter 9, section 9.3.3.
206 The problem of extraterritoriality is not limited to national competition or antitrust laws although restrictive business practices have been the main source of jurisdictional debates.
Obvious problems may arise when the interests and policies of the home state of the firm(s) and those of the state where the effects take place, do not converge. It is always relevant to repeat Lord Wilberforce's comment in Westinghouse where the jurisdictions of Britain and the USA clashed:

"...it is axiomatic that in antitrust matters the policy of one State may be to defend what it is the policy of another state to attack."

The principle of territorial jurisdiction is a corollary of the principle of sovereignty and equality of states, i.e., the characteristics of statehood and two pillars of the international system. However, there are no internationally agreed standards or definite international customary law on the extraterritorial application of national competition laws. This debate has led to an important body of literature. As Roth argued it:

Both proponents of and objectors to the effects test claim that their position is based on international law.

Strong and powerful States seem to favour the "effects doctrine" or some adaptation thereof, which extends the reach of domestic laws to activities taking place outside their territory when the domestic territory is itself affected. Smaller and less expansive countries have countered with blocking statutes and other tactics.

---

208 Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] 1 All ER 434, 448
209 The discussion on jurisdiction is addressed from different angles by different authors in using many different terms. The same terms sometimes cover different notions: prescriptive and coercive jurisdiction or legislative and enforcement jurisdiction. Some distinguish between executive, judicial and legislative jurisdiction, others between prescription of the law and the application of the law and the primary and the secondary claim to proscribe and apply. Another distinction is between the jurisdiction to prescribe, to adjudicate and to enforce. Whether the basis for jurisdiction is personal or subject-matter does not matter since the main problems will be the possibility of enforcing the judgment and the likelihood of being able to conduct a trial and collect evidence, the real determinants of jurisdiction.
210 The famous Lotus case (1927) PCIJ Ser.A, no.10, p.23, is usually quoted as a source of guidance for problems of extraterritoriality. But as Jacques Bourgeois very well puts it: "...it is absurd, at least far fetched to discuss the 'effects' of the economic activities of undertakings whose turnover exceeds the GNP of most States in terms of bullets shot across frontiers or the negligence of the officer-of-the-watch of 'The Lotus'." In Bourgeois J., "EEC Control Over International Mergers", Yearbook of European Law 1990, p.103.
212 Like the EEC's "implementation doctrine".
to limit penetration of their sovereignty by the extraterritorial application of foreign law, either during discovery or when enforcing judgements.

Two general comments must be made. Firstly, not all laws make express reference to foreign trade: US laws do, while the Canadian Competition Act and articles 85 and 86 of the EEC treaty and the proposed Mexican Act do not. This would not prevent the extraterritorial application of national legislation under the "effects doctrine".

The second comment is that there seem to be two main schools of thought as to whether or not, and when, a state may extend its jurisdiction abroad. Bourgeois describes them clearly:

According to one school, States may only claim jurisdiction where the international law permits them to do so; according to the other, since international law does not establish jurisdiction but only limits it, States may do anything that is not prohibited by international law.  

In this thesis, proposals for the extraterritorial application of domestic competition laws within NAFTA are suggested alternatives to the enforcement of antidumping laws. It is, therefore, important to look at the position generally taken by the USA, Canada and Mexico on the extraterritoriality of their domestic laws. It will be concluded that since they follow divergent policies, a negotiated solution becomes necessary. The EEC's position on the issue is also relevant in order to understand the proposal for "positive comity", a new concept for solving international conflicts of extraterritoriality. Finally, defences usually accepted by domestic courts, will also be addressed since they may become important exceptions to the proposed extraterritorial application of competition laws in NAFTA.

2.3.1 Position taken by the US authorities

---

213 Bourgeois J., "EEC Control Over International Mergers", Yearbook of European Law, 1990, p.103. In fact this distinction follows the argument made in this chapter that the legal approaches of civil law and common law countries differ generally. This is true of their conception of competition laws and their extraterritorial application.

214 The Mexican competition legislation will be put into force in June 1993; there is not much experience to relate to.
Articles 1 and 2 of the Sherman Act prohibit collusive restraints or monopolization of "trade or commerce among the several States, or with foreign nations". Section 5 of the Federal Trade Commission Act declares unlawful "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce". Commerce includes "commerce among the several states or with foreign nations".

Section 1 of the Clayton Act also applies to "commerce among the several States and with foreign nations" as does the Robinson-Patman Act whose definition of commerce includes commerce with foreign countries. Therefore, US antitrust legislation clearly aims to reach activities outside the US territory.

US courts have had very different positions on extraterritoriality. With Banana\textsuperscript{215} in 1909, courts initially refused to apply US laws abroad.\textsuperscript{216} In 1945, with Alcoa\textsuperscript{217}, US laws were considered to reach foreign practices if they affect US markets. Concerns over the absence of foreign consideration led, in 1976, to Timberlane Lumber Co. v. Bank of America\textsuperscript{218}. A Federal Court suggested a three step test to determine whether US courts have jurisdiction over foreign practices:

1. whether there was "some effect - actual or intended - on American foreign commerce".
2. whether the restraint was "of such a type and magnitude so as to be recognisable as a violation of the Sherman Act".
3. whether "as a matter of international comity and fairness should this extraterritorial jurisdiction be asserted".

The core of Timberlane is essentially its balancing test for which the Court gave 7 elements to be considered:

1. the degree of conflict with foreign law and policy,
2. the nationality or allegiance of the parties and the locations or principal places of business of corporations,

\textsuperscript{215} Banana Co. v. United Fruit Co. 213 U.S. 347, (1909).

\textsuperscript{216} As discussed in chapter 1, the 1916 Antidumping Act was enacted to countervail the effects of predation and price discrimination of foreign business practices, at the time when the Sherman Act was considered not to apply abroad.

\textsuperscript{217} United States v. Aluminium Co of America 148 F.2d 416, (1945).

\textsuperscript{218} 549 F 2d 597 (1976).
3. the extent to which enforcement by either state can be expected to achieve compliance,
4. the relative significance of effects on the United States as compared with those elsewhere,
5. the extent to which there is explicit purpose to harm or affect American commerce,
6. the foreseeability of such effect, and
7. the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

The Antitrust Enforcement Guidelines for International Operations of 1977 endorsed Timberlane and confirmed that the Department of Justice was not going to take action unless the conduct abroad was having "direct substantial and reasonably foreseeable effects on US Trade". In 1981, Interbank\textsuperscript{219} added a further requirement of "anticompetitive effects".\textsuperscript{220}

In 1984, Laker\textsuperscript{221} rejected the judicial balancing between US and foreign interests because of the substantial limitations of any court to conduct such a neutral balancing test. The Court also considered that it was not its function to protect international comity. Laker suggested a "reasonable test" where jurisdiction exists if a practice has a direct, substantial and reasonably foreseeable anticompetitive effects.

In 1982, in the Foreign Trade Antitrust Improvement Act, Congress amended antitrust laws to apply only if the conduct has "a direct, substantial, and reasonably foreseeable effect on US domestic or import trade, or on the export trade of a person engaged in such trade or commerce in the United States". The Congress was then clearly of the view that US antitrust laws had two separate purposes: to

\textsuperscript{219} National Bank of Canada vs Interbank Canada Assessment 666 F.2d 6 (1981).

\textsuperscript{220} Courts have not been consistent with the requirement as to the substantial effects. Hawk writes that all courts have required a showing of substantial or at least more than de minimis effect on US foreign or domestic commerce. See Hawk B., United States and Common Market Antitrust, 1989, p.122.

prevent injury to consumers in the United States; and to preserve US export opportunities.  

The Reagan Administration, however, rejected this interpretation and the Antitrust Division declared in 1988, in the now famous footnote 159:

Although the 1982 Law extends jurisdiction under the Sherman Act to conduct that has a direct, substantial and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Justice Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.

The Department also limited the judiciary's practice of balancing other states' interests under the rule of international comity, when the actions are initiated by the US Government.

On the 3 April 1992, the US Department issued a statement of its renewed enforcement policy amending footnote 159 as follows:

The Department of Justice will in appropriate cases, take antitrust enforcement action against conduct occurring overseas that restrains United States exports, whether or not there is direct harm to US consumers, where it is clear that 1) the conduct has a direct, substantial, and reasonably foreseeable effect on export of goods or services from the United States; 2) the conduct involves anti-competitive activities which violate the US antitrust laws - in most cases, group boycotts, collusive pricing, and other exclusionary activities; and 3) US courts have jurisdiction over foreign persons or corporations engaged in such conduct.

(...) The Department of Justice will continue its longstanding policy of considering principles of international comity when making antitrust enforcement decisions that may significantly affect another government's legitimate interests.(...) 

This statement of enforcement policy supersedes a footnote in the Department of Justice's 1988 Antitrust Guidelines for International Operations

---


223 Footnote 167 of the 1988 Guidelines clearly states: "In the Department's view, antitrust suits prosecuted by the US Government should not be subject to dismissal by the US Courts on the basis of comity."
that generally had been interpreted as foreclosing Department of Justice enforcement actions against anti-competitive conduct in foreign markets unless the conduct results in direct harm to US consumers. The new policy represents a return to the Department's pre-1988 position on such matters.(...)\textsuperscript{224}

The US Supreme Court, In re Insurance Antitrust Litigation\textsuperscript{225}, is expected to render an important judgment where the balancing test, suggested by Timberlane\textsuperscript{226}, and disapproved by the Department of justice, may be altered. The law is therefore not definite. As a general rule, one can say that the US courts are willing to use their domestic law against foreigners and foreign practices. These continuing US attempts to reach business practices taking place abroad, are evidence of the need to inter-relate all markets in which firms operate.

2.3.2 Position taken by the Canadian authorities

The fact that Canadians have been much less aggressive than Americans in expanding their competition law against foreigners is not surprising. Canadian laws have almost never been applied to activities abroad.\textsuperscript{227}

...possibly because we do not have the same strength ( as the Americans) to enforce our laws abroad, we confine ourselves to proceedings and remedies which can be applied in our own territory.\textsuperscript{228}

The other important factor is that, until 1986, the Canadian competition legislation was a criminal statute. Under article 6(2) of the Canadian criminal code :"no person shall be convicted ... of an offence committed outside Canada". In the Libman\textsuperscript{229} case, the Supreme Court of Canada summarised the relevant principles as follows:

\textsuperscript{224} Business Law Brief, April 1992. \\
\textsuperscript{225} Judgment of the United States District Court for the Northern District of California. MD 767, 20 September 1989; Revised Order 10 October 1989. \\
\textsuperscript{226} 549 F.2d 597, (1976). \\
\textsuperscript{227} In R. v. Campbell [1964] 2 O.R. 487, although the unlawful conduct was that of a US manufacturer, proceedings were instituted only against the manufacturer's representative in Canada. \\
\textsuperscript{228} Davidson R., "The Canadian Response to the Overseas Reach of United States Antitrust Law", Can.-US.L.J. vol.5 (1979), p.166. \\
...It is sufficient that there be a "real and substantial" link between the offense and this country, a test well known in public and private international law... The outer limits of the tests of [a real and substantial link] may... well be co-terminous with the requirements of international comity.

It is always a more sensitive issue to apply criminal laws\(^{230}\) to foreign firms than to apply economic statutes. It could, however, be argued that RBPs abroad have a real and substantial link with Canada when they affect prices of goods exported into Canada.\(^{231}\)

The purpose of the Competition Act is to maintain healthy competition in Canada.\(^{232}\) Exclusionary practices in the USA against Canadian exports, would reduce possibilities of economies of scale for Canadian firms, and consequently, lead to an increase in prices for consumers. Such practices may be considered to restrict competition in Canada.

The problem, however, is that the semantics of the provisions against abusive conduct require a dominant position in Canada. Article 79 of the Canadian Competition Act on abuse of a dominant position, requires that "one or more persons substantially or completely control, throughout Canada... a class or species of business". This means that one could not use this provision against a dominant firm in the USA, using its dominance there to disrupt Canadian markets.\(^{233}\) If the market was defined as being NAFTA or the world, it would still be difficult to use the infraction of abuse of a dominant position unless the situs of the dominance

\(^{230}\) It should also be mentioned that some sections of the Canadian criminal code envisage some extraterritorial applications when dealing with conspiracy, aircraft, and international air navigation.

\(^{231}\) Canadian always considered, however, that their domestic laws could apply abroad if to protect public interest and public order: "The Commission considers that where any overt act takes place in Canada flows from an agreement which is contrary to the public policy, public interest or public order, such agreement comes within the Canadian jurisdiction even if it was not made in Canada. In such circumstances, even if the agreement does not violate the laws of the country where it was made, it is still in the purview of the Canadian courts." Royal Commission of Restrictive Business Practice, 1965, Canada.

\(^{232}\) Section 1.1 of the Canadian Competition Act states: "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while...".

\(^{233}\) As discussed in chapter 7, section 7.4, article 1503(d) of NAFTA envisages a situation where a monopoly in one country is used to deter markets in another country where the same firm is not in a dominant position.
was in Canada. As the law is written these exclusionary practices could be a criminal infraction of section 45 of the Act.\textsuperscript{234}

Sections 82, 83 and 84 of the Act deal with foreign refusal to supply, foreign laws and directives, and foreign judgments, which adversely affect trade or commerce in Canada. These could find direct application within the NAFTA.

In order to reach firms in a dominant position and cartels abroad, in public or private civil procedures, the Canadian Competition Act would have to be amended.

\subsection*{2.3.3 Position taken by the Mexican authorities}

Since the Mexican competition law has not yet been applied, it is difficult to make any assertions. In Mexican law, there is no mention of foreign markets except when exempting export cartels in article 6. Negotiators of NAFTA have come to the conclusion that Mexicans would follow Canadian policies in favouring restrained extraterritoriality.\textsuperscript{235} As is the case for Canada, one can expect that Mexico worries more about the penetration of foreign laws into its territory than about the extraterritorial application of its own laws.

\subsection*{2.3.4 The position taken by the European authorities}

Articles 85 and 86 of the EEC Treaty do not contain any express reference to foreign commerce. Article 85 prohibits agreements whose object or effect is to restrict competition "within the common market" and which may affect "trade between Member States".\textsuperscript{236} Article 86 focuses on abuse of a dominant position within the Common Market or within a substantial part thereof.

\textsuperscript{234} It should be remembered that there is no civil offense similar that of article 85 EEC in the Canadian legislation. Only criminal conspiracy against horizontal agreements could be used in an extraterritorial way but as discussed it is always difficult to use criminal laws abroad.

\textsuperscript{235} Discussion with Jonathan Fried, Chief Legal Adviser for the negotiations of NAFTA. 18 April 1993.

\textsuperscript{236} Whatstein L. has argued that "article 85 incorporates the economic effects of the infringing act as a constituent element and blurs the distinction between the effects doctrine and objective territoriality." in "Extraterritorial Application of EEC Competition Law - Comments and Reflections" Israel L. Rev, vol.26 no.2 (1992), p.205.
In the EEC, the Commission always favoured the "effects doctrine", but the Court has systematically refused to refer to it. In 1969, in Dyestuffs\textsuperscript{237}, the effects of concerted practices among Community and non-Community companies were assessed. When challenged in the European Court, the Commission argued for a jurisdiction based primarily on the "economic unity theory", according to which, the parent companies, through the subsidiaries they control, are considered to be acting themselves in the Community. Although the Advocate General favoured the "effects doctrine" the Court based its decision solely on the theory of economic unity.

Subsequently, whether in the Franco-Japanese Ballbearings\textsuperscript{238} or Franco-Taiwanese Mushroom Packers\textsuperscript{239}, Continental Can\textsuperscript{240}, Commercial Solvents\textsuperscript{241}, or Beguelin\textsuperscript{242}, the Commission always used the "economic unity" theory together with the "effects doctrine", but the Court has always limited itself to the first approach. In all of these latter cases, however, the foreign enterprises had a "link with the Community" through a subsidiary. The reference to the "effects doctrine" was, therefore, unnecessary.

In the recent Wood Pulp\textsuperscript{243}, it was alleged that 41 producers of wood-pulp from outside the EEC had a price-fixing agreement with regard to sales in and to the Community. Some of the producers were only exporting and did not have a representative in the Community.\textsuperscript{244} The Commission, therefore, relied on the effects doctrine. The ECJ refused, again, to refer to the effects doctrine. Asserting

\begin{footnotes}
\textsuperscript{237} Commission decision 24/7/69, O.J. 1969, L 195/11.
\textsuperscript{238} Commission's decision 29/11/74, O.J. 1974, L 343/19.
\textsuperscript{239} Commission's decision 8/1/75, O.J. 1974, L 343/19.
\textsuperscript{240} 1973 ECR 215.
\textsuperscript{241} 1974 ECR 223.
\textsuperscript{242} 1971 ECR 949.
\textsuperscript{243} 1988 ECR 5193.
\textsuperscript{244} In Aluminium Imports from Eastern Europe decision of the 19/12/84, O.J. 1985, L 92/1, at par 14.6, some Western producers and Eastern enterprises had concluded exclusive dealing (selling and buying) agreements. Some participants had headquarters in the EEC but some did not. The Commission also concluded that the agreement infringed article 85 of the EEC Treaty.
\end{footnotes}
that the "reprehensible conduct was alleged to have taken place inside the community", the Court concluded:

The decisive factor is, therefore, the place where it (the agreement) is implemented.  

Some argue that there is no difference between the implementation doctrine and the effects doctrine. This is contestable. Could one say that an international cartel, between non-EEC firms fixing prices of a sub-product necessary to a final product, exported and bought eventually by some European firms, be implemented into the Community? What about a cartel of non-EEC firms lowering prices all over the world and therefore reducing the export possibilities of EEC firms (possibly to eliminate them)? Would it be implemented into the EEC? Unfortunately, these interesting questions are outside the scope of the present thesis.

It is submitted that the "implementation doctrine" should be understood along the lines of the European "positive comity", i.e. in giving jurisdiction to the States where the RBP takes place. Implementation means to put into action. It requires a physical commercial presence and must take place in the territory exercising jurisdiction. Jurisdiction is given to states where the restrictive practice takes place.

In fact, the implementation doctrine is much closer to the objective territorial jurisdiction than the effects doctrine. It is, however, possible that a restrictive practice takes place in more than one jurisdiction; collaboration and agreement of allocation of jurisdiction will remain necessary. This first stage of collaboration can be greatly improved by the process of "positive comity" discussed below in sections 2.4.2.5 and 2.6.

2.3.5 Jurisdictional defences and exceptions to the extraterritorial reach of antitrust and competition laws

245 "The producers in this case implemented their pricing agreement within the Common Market. It is immaterial whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community." Wood Pulp, par. 16 and 17.
There are circumstances where governmental involvement in foreign restrictive business practices has been interpreted as exempting firms from the application of national laws. In the context of NAFTA, where the extraterritorial application of domestic laws would be institutionalised, these defences, and the situations and policies they protect, will have to be addressed.

23.5.1 Foreign Sovereign Immunity defense

According to this defence, foreign sovereigns and their organs are not, in general, subject to antitrust liability. This defense has been narrowed down both in the USA and the EEC to exclude commercial activities which are not necessary for the exercise of sovereignty.

23.5.2 Act-of-State doctrine

There is some overlapping with the Foreign Sovereign Immunity Defense; if a practice is covered by the US Foreign Sovereign Immunity Defence Act, there is usually an "Act of State". This doctrine was defined as "a policy of judicial abstention from inquiry into the validity of an act by a foreign State within its own territory and within the scope of its sovereignty". In the USA, Kirkpatrick has limited this exception to cases questioning the validity of foreign government act.

23.5.3 Foreign sovereign compulsion defense

---

26 When discussing the parameters of an international code on competition, these various governmental policies will have to be reconciled.

247 In the USA the Foreign Sovereign Immunities Act of 1976 has reduced this immunity to non commercial activities. In the EEC, the Commission rejected this defense in the Aluminium Imports from Eastern Europe 19/12/84, O.J. 1985, L92/1: "It follows that the applicability of Article 85, since it relates to trading activities, is not defeated by claims of sovereign immunity. Such claims are properly confined to acts which are those of government and not of trade.... Even if the foreign trade organisations were indistinguishable under Socialist Law from the State...".


This defence aims at immunising private conduct required, and not merely authorised, by foreign government. This could be invoked in most Voluntary Export Restraints where the foreign government compels its enterprises to export at a prefixed price. This defense was invoked in Wood-Pulp, but was rejected by the Commission and the Court because "the US Webb-Pommere Act merely exempts the conclusion of export cartels from the application of US antitrust laws but does not require such cartels to be concluded"\textsuperscript{250}.

This seems to be the most relevant defence in the context of NAFTA, and for the discussions on an international code on competition, because it addresses acts of firms, as opposed to the other defences which are concerned with acts of governments.

\textbf{2.3.5.4 Noerr-Pennington doctrine}

According to this doctrine, efforts made in the US to influence or persuade the legislature, the executive or administrative bodies and courts, are exempt from liability of antitrust laws, even if these efforts may be anticompetitive. This exception should, however, not exempt "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor"\textsuperscript{251}. For instance, it could be argued that the threat of antidumping actions from the three big US car producers against Japanese exporters in February 1993\textsuperscript{252} (although they knew there was no any possibility of dumping), would not be protected by the Noerr-Pennington.

Marcos Mendes\textsuperscript{253} cites John Temple Lang and argues that the right to petition and lobby is also a fundamental right in the EEC legal order. It is interesting to

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{250} 1988 ECR 5193, paragraph 19-20.
\item\textsuperscript{252} See discussion in chapter 4, section 4.4.
\item\textsuperscript{253} Mendes M., Antitrust in Interrelated Economies, 1991, p.101.
\end{itemize}
\end{footnotesize}
note that the European Parliament is considering the introduction of a code for EEC lobbying.\textsuperscript{254}

\textbf{2.3.5.5 Defences available to export and import cartels}

The problem with export and import cartels is that their detrimental effects may only take place abroad.

In the USA, the 1918 Webb-Pomere Act grants export immunity certificates to export associations of "goods, wares or merchandises".\textsuperscript{255} The 1982 Export Trading Company Act extended the coverage of the act to include services and technology licensing.\textsuperscript{256} Since the 1982 Improvement Trade Act, export commerce that does not affect other exporters or US domestic commerce will not be prosecuted by the FT or the DOJ. In practice, therefore, exporting cartels do not need Webb-Pomere certificates.\textsuperscript{257} Import cartels would be illegal since they would necessarily tend to restrict competition within the USA.

\begin{itemize}
\item \textsuperscript{254} "A New Code for Lobbying", \textit{FT} 21/7/92 .
\item \textsuperscript{255} Barry Hawk has however argued that there are situations not exempted by the Webb-Pomere Act which should be interpreted narrowly. These are:
\begin{enumerate}
\item participation in a foreign cartel or agreement with competitors concerning price or output;
\item use of the association to remove surplus US production in order to fix or stabilize prices within the United States;
\item acquisition of foreign competitors in order to protect the member's position in the United States;
\item restrictive agreement with non-member US firms and restrictions on use of members' patents;
\item sales on behalf of non-members;
\item establishment and operation of jointly-owned manufacturing facilities in foreign countries.
\end{enumerate}

\item \textsuperscript{256} The conditions for exemption are those where:
\begin{enumerate}
\item the association must be formed for the sole purpose of engaging in export trade and be engaged solely in such trade;
\item the association must not act in restraint of domestic trade or export trade of a domestic competitor;
\item the association must not be involved in any agreement or act which either:
\begin{enumerate}
\item artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by the association;
\item substantially lessens competition within the United States or
\item otherwise restrains trade within the United States.
\end{enumerate}
\end{enumerate}

\item \textsuperscript{257} "The Congress did not buy that the only people to protect were consumers" Professor Kesseler, Class of International Antitrust 2/2/93, Fordham Law school, Center for International Antitrust.
In Canada, export cartels are exempted under article 45(5) of the Canadian Competition Act. Import cartels which lessen competition are illegal. Under the new Mexican Competition Act, "Cooperative societies and associations that engage in direct sales of their products abroad shall not constitute monopolies"\(^{258}\) provided they respect certain conditions, one of which is that "their products are not also offered for sale or distributed within Mexico"\(^{259}\). It is very doubtful that import cartels would be exempted under the application of a rule of reason.

In the EEC, export cartels usually constitute "restraint on competition relating to countries outside the Community (non-EEC countries) which is not in itself likely to restrict or distort competition within the common market"\(^{260}\). However, an agreement involving some EEC and non-EEC members preventing the non-EEC members from supplying the Community could be caught by the provision of article 85. If the effect of an EEC export cartel is to limit the supply into the Community, thus raising prices inside the community, this agreement could also be caught by article 85.

With regard to import cartels, the Commission, in a notice on Japanese imports, has indicated that "measures which directly restrain imports to the Community or which regulate quantities, prices, quality, or other terms of trade and thereby indirectly prevent or restrict imports from third countries, are subject to the rules of competition"\(^{261}\).

Not much analysis is necessary to conclude that these actions, if they were taking place domestically, would be per se illegal.

### 2.3.6 Conclusions on the issue of extraterritoriality

This section had two purposes: the first was to emphasise the discrimination in favour of domestic export cartels. Since export cartels tend to lead to import cartels

---

\(^{258}\) Article 6 of the Proposed Mexican Act on Economic Competition.  
\(^{259}\) Paragraph II of Article 6 of the Mexican Economic Competition Act.  
\(^{260}\) Bulk Oil v. Sun, 1986 ECR 559.  
the national tolerance of cartels has a serious spill-over effect. In the context of NAFTA export cartels should be rapidly abolished.\textsuperscript{262}

The second purpose was to underline that, in the absence of standards on what constitute a restrictive business practice, states have used, in addition to trade laws, their own national law against RBPs taking place abroad when these RBPs have an effect in their territory. The fact that two or more states may allege jurisdiction over a conduct or an agreement has created important diplomatic conflicts to which states have responded in accepting some defences. Whether the test is one of "reasonably foreseeable effects" or a "balancing test", the situation remains highly unsatisfactory.

In the next section, attempts to increase collaboration and co-ordination of state actions against these restrictive business practices are analyzed. The European proposal for a process of "positive comity" seems successful in reducing the need for an extraterritorial application of domestic laws.

\subsection*{2.4 Increased collaboration and co-operation}

Faced with clashes of jurisdiction and boomerang effects, countries have tried to co-ordinate some of their enforcement procedure in the area of antitrust and reconcile discriminatory treatments. The OECD has been the most efficient forum and has favoured extended bilateral agreements.

\subsubsection*{2.4.1 Recommendations of the Council of the OECD}

On 5 October 1967, a first Recommendation was adopted by the Council concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade. It called for:

(1) notification of investigation if another country's important interests are at risk,

\textsuperscript{262} This discrimination, where some cartels are tolerated and others are not, constitutes also an infringement of the obligation of National Treatment of the GATT and NAFTA as argued in chapter 3.
(2) co-operation when two or more countries proceed against a same RBP in international trade
(3) transmission of information and
(4) use of mutually beneficial methods of dealing with RBP.

On 3 July 1973, the OECD Council went further and introduced a procedure for consultation. The Recommendation concerning a Consultation and Conciliation Procedure on Restrictive Business Practices affecting International Trade invites its Members to request consultation when enterprises, situated in another Member Country, are engaging in RBPs which substantially and adversely affect their interest.

More importantly, the Recommendation stipulates that the Member country addressed, if it agrees that enterprises situated on its territory are engaged in RBPs, "should attempt to ensure that these enterprises take remedial actions or should themselves take whatever remedial action is necessary". It also states that "Members should endeavour to find a mutually acceptable solution". In the event of unsatisfactory bilateral consultations, Members are invited to use the good offices of the Committee on Restrictive Business Practices.

On 21 May 1986 the Council adopted a Revised Recommendation concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade, replacing the previous ones. The 1986 OECD Recommendation deals at greater length with notification, consultation and conciliation procedure, and reiterates that each Member country "should attempt to ensure that enterprises take remedial action, or should itself take whatever remedial action it considers appropriate".

---

263 This text closely follows the language of article 50 of the Havana Charter without imposing any obligation on Members. See the text of article 50 in section 2.2.3 of the present chapter.

264 On the 25 September 1979, the Council of the OECD had slightly expanded the scope of the two previous Recommendations for consultation procedure and furthered the exchange of information. In a more specific area, on 22 January 1974, a Council Recommendation Concerning Action Against Restrictive Business Practices Relating to the Use of Patents and Licences, reminds Members that they should be particularly alert to harmful effects of abusive practices by patentees and their licensees, in particular, with regard to restrictions on territory, quantity, price restrictions, tying, grant-back etc.

265 The Havana Charter stated: "shall take appropriate means to ensure that..."
The 1986 OECD Recommendation on RBPs impose, therefore, on its members, four obligations:

1. notification, consultation and request for restraint: when a Member initiates a proceeding which may affect important interests of another Member (This is what Europeans have labelled "negative comity");

2. co-ordination: when two Members proceed against the same restrictive business practices;

3. notification, consultation and request for action: when a Member considers that a restrictive business practice exercised in the territory of another Member affects the first Member. The second Member, however, does not have to justify its unilateral decision as to whether to intervene or not. Moreover, no criteria have been established for making that decision. (This is what Europeans have labelled "positive comity");

4. possibility of conciliation through the good offices of the Committee of Experts on Restrictive Business Practices.

This Recommendation is still in force today. Since its inception, it has triggered 5 bilateral arrangements furthering collaboration between states in the enforcement of laws against restrictive business practices. They are analyzed hereafter.

2.4.2 Bilateral arrangements of co-operation in competition matters

The USA is party to four of these five arrangements which implement the "1986 OECD Recommendation on RBPs" and its predecessors.

The most collaborative one is the administrative agreement between the Government of the USA and the Commission of EEC which has introduced a process of "positive comity with justifications". This process involves relinquishing more sovereignty than was envisaged in the 1986 OECD Recommendation of RBPs.

---

266 The determination whether acts of enterprises constitute RBPs, is left to the unilateral decision of states. States do not have any obligation to justify their decision, regarding RBPs on their territory, to the affected country.
2.4.2.1 Memorandum of Understanding between the United States of America and Canada of January 1959, 3 November 1969 and 9 March 1984

As mentioned in section 2.3, the aggressive extraterritorial reach of US antitrust laws has led many countries to enact "blocking" statutes. The first blocking legislation was the Business Records Protection Act enacted in 1949 by the Legislature of Ontario, Canada\(^\text{267}\). Its purpose was to circumvent possible attempts by the American Department of Justice to obtain documents as had occurred in Quebec, in the *In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Co*\(^\text{268}\).

Another series of cases, the **Canadian Radio Patent cases**\(^\text{269}\), led to the adoption of the first agreement between the USA and Canada.\(^\text{270}\) Cambell writes that the initiation of these cases and the subsequent consent decrees were both "the straw that broke the camel's back"\(^\text{271}\). Canadians feared further attacks on their sovereignty and initiated negotiations for an agreement on the extraterritorial application of American antitrust laws.

In 1959, Canadian Minister of Justice, David Fulton, and the US Attorney General Rodgers, signed an administrative agreement called "Antitrust Notification and Consultation Procedure".\(^\text{272}\) In 1969, an expanded version of this first

---


\(^{268}\) 72 F.Supp. 1013 (S.D.N.Y. 1947) The fact that a corporation's records and documents are physically located beyond the confines of the United States does not excuse it from producing them if they are in its possession and the Court has jurisdiction of the corporation. The test is control - not location of the records. p.1020.


\(^{270}\) The **Canadian Radio Patent** cases consisted of civil antitrust actions filed in the United States alleging that through the initiation of patent infringement suits and the denial of licences, the Canadian Radio Patents Ltd had effectively closed the Canadian market to American producers of "home entertainment apparatus". Canada saw these judgments as direct interference with its social, economic and cultural policies.


\(^{272}\) The two ministers agreed that: "... in the future, when it becomes apparent that the interests of one of our countries are likely to be affected by the enforcement of the antitrust laws of the other, notification prior to the institution of any procedure and consultations will take place".

(continued...)
arrangement was signed between the Minister of Canadian Consumer and Corporate Affairs, Ron Basford, and US Attorney General, John Mitchell. The Basford-Mitchell agreement was in line with the first Recommendation of the Council of the OECD on "Co-operation between Member States on Restrictive Business Practices Affecting International Trade" adopted on 5/10/67.

Both the 1959 and the 1969 Canada-USA arrangements were very weak: they failed to address both Canadian blocking legislation and US extraterritoriality. Furthermore, they did not provide for adequate confidentiality of disclosures, nor did they establish any mechanism by which Canada could be informed of the position of the USA in implementing specific export policy.273

The Antitrust Notification and Consultation Procedure is an attempt to treat a compound fracture with an aspirin.274

During the years 1975-76, the USA commenced important proceedings against an alleged cartel of producers of uranium outside the USA. Three Canadian firms were sued by Westinghouse, other US purchasers, and by the United States Department of Justice in treble damage cases. The situation was complex275 and the Basford-Mitchell agreement was shown to be highly inadequate. Tension between the two countries was growing. In 1976, the Canadian government enacted the Uranium Information Security Regulation.276 This regulation prohibited the release

---

272 (...continued)

273 Most authors agree that the Fulton-Rodgers and the Basford-Mitchell agreements avoided the real issues of the conflict. The two countries had indeed different expectations. Canada hoped to eliminate the extraterritorial reach of the American antitrust laws while the Americans saw the agreement as merely offering an occasion for the American government to explain its case to the Canadian government.


275 The Canadian government did not deny the existence of an export cartel, but argued that the cartel was necessary since the United States had closed its market to foreign producers while at the same time dumping large stockpiles of uranium in the world markets which depressed prices.

of any written information on uranium unless required by Canadian Law or the Minister of Energy.

Their geographical proximity, however, forced a collaboration between the two countries. On 9 March 1984, the USA and Canada signed a detailed Memorandum of Understanding (MOU) which refers to the 1979 OECD Recommendation on RBPs.

The 1979 OECD Recommendation\textsuperscript{277}, the MOU requires a sufficiently detailed\textsuperscript{278} notice ten days prior to the initiation of antitrust investigations affecting the other party. Article 5 stipulates that when one Party seeks to obtain information located within the territory of the other, the other Party will not normally discourage a response. Article 8 also recognises that, after a reasonable opportunity has been given for consultation, Parties can use whatever means they consider necessary to obtain relevant information from private parties, including compulsory process.\textsuperscript{279} Consultations are encouraged.\textsuperscript{280} Of particular interest is the express recognition that the other Party's "significant interest" may exist even in the absence of any governmental connection with the activity in question.\textsuperscript{281}

\textquote[277]{It will be recalled that this Revised Recommendation of 1979 merged the two previous recommendations of 1973 and 1979. See section 2.4.1 of the present chapter.}
\textquote[278]{Article 2(6) of the MOU.}
\textquote[279]{The MOU emphasises the importance of the issue of confidentiality and "Parties recognise that there may be limitations imposed by their laws on disclosure by one Party to the other of certain classes of information each possesses"Article 10(1) of the MOU. Moreover, notifications and consultations pursuant to this Understanding are deemed to be exchanges of confidential information. Article 10(2).}
\textquote[280]{Article 4 of the MOU.}
\textquote[281]{Article 6 of the MOU.}
\textquote[282]{Article 6 of the MOU.}
Article 7 refers to the traditional principle of comity, where one party agrees to consider restraining its antitrust actions when they affect another party. There is no allocation of jurisdiction in the event of concurrent jurisdiction.\textsuperscript{283}

The co-operation between the two countries was further expanded by a Treaty of Mutual Assistance on Criminal Matters signed on 18/3/85. The treaty provides for inter-jurisdictional assistance by the respective Departments of Justice in gathering information, locating people and obtaining testimony and record under subpoenas and search warrants for the purposes of both investigation and prosecution. Both countries may refuse to execute a request if it is contrary to its public interest, a concept not defined.

Since the Treaty covers criminal offences, it could be used in the cases of criminal proceedings under the Canadian Competition Act. It is suggested that this Treaty on Mutual Legal Assistance, or a similar one constructed along the same model, could be used to implement further collaboration in civil antitrust matters. Article III, paragraph one of the Treaty seems to open the door to such expansion.

The Parties, including their component authorities, may provide assistance pursuant to other agreements, arrangements or practices.

\textbf{2.4.2.2 Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany, 23 June 1976}

This is the least detailed of the bilateral arrangements. It appears to have been signed merely because of the historical ties between Germany and the USA\textsuperscript{284}. There are provisions for requesting information from the other party, whose confidentiality has to be respected. There are also provisions encouraging consultation in case of concurrent jurisdiction.

\textsuperscript{283} Canadians, nevertheless, continued to fear US invasion of their sovereignty. On 3 December 1984, the Canadian Parliament passed the Foreign Extraterritorial Measures Act. The Act provides that the Canadian Attorney General can prohibit or restrict actions of discovery, as well as reduce the amount of a foreign judgment to an amount he finds equitable. This provision would authorise a reduction of the amount of treble damages.

\textsuperscript{284} Glynn E. in "International agreement to allocate jurisdiction over mergers" in 1990 Annual Proceedings Fordham Corporate Law Institute, 1991, p.35.
Acceptable reasons for refusing to collaborate are spelled out but with wide exceptions. There is a peculiar provision for comity: States have agreed "not to interfere with any antitrust investigation or proceeding of the other party."

It will be interesting to see how the present agreement and the new agreement between the US government and the EEC Commission on competition issues, discussed in sub-section 2.4.2.5 below, will interact. One can imagine the tricky problems which could arise if, for example, the USA were to notify the German authorities directly, but not the EEC Commission, alleging the latter's lack of interest!

2.4.2.3 The US-Australia Antitrust Cooperation Agreement of 17 May 1982

The USA-Australia agreement is unusual in that it focuses specifically on US antitrust proceedings against Australian export cartels. The enforcement of the Australian competition law is only indirectly addressed. It provides that the US government will notify Australia of any antitrust investigation which might have implications for Australia and that Australia will notify the USA of a policy which may have antitrust implications for the USA.

After notification, consultations may be held with a view of avoiding conflicts between the laws, policies and national interests of both parties. The USA should give consideration to Australian exports (negative comity) and Australia, through its export policies, should endeavour not to harm US interests. The USA is to

---

285 Article 3: Either Party may decline, in whole or in part, to render assistance..., if such Party determined that: (a) compliance would be prohibited by legal protection of confidentiality or by the domestic law ...; (b) ...inconsistent with security, public policy or other important national interest; (c) the requesting party is unable or unwilling to comply with the terms and conditions of the complying party...; (d) the requesting Party would not have been obliged under a, b and c, if the demand had been made to the requested Party.

286 Article 4(1): Each Party agrees that it will act,... so as not to inhibit or interfere with any antitrust investigation or proceeding of the other Party.

287 In virtue of the subsidiarity principle of the Single Act, it is possible for the EEC Commission to let a member state handle a case alone.

288 Article I of the USA-Australia Agreement.

289 Article 2 of the USA-Australia Agreement. There is also express reference to each country's sovereignty and consideration of comity.
inform a US court seized with a private antitrust proceeding of any consultations with Australia.\textsuperscript{200} There are also provisions for confidentiality of the information exchanged and co-operation between antitrust agencies.\textsuperscript{201}

\textbf{2.4.2.4 Agreement between the Federal Republic of Germany and the Government of the French Republic Concerning Co-operation on Restrictive Business Practices, 28 May 1984}

The Franco-German agreement is an expression of the concurrent jurisdictions over competition matters between national competition laws and the EEC competition system.

The main emphasis of the agreement is on the exchange of information. It also envisages notifications, efforts to restrain antitrust actions which would be detrimental to the other party\textsuperscript{202}, and consultations when jurisdictions seem to overlap\textsuperscript{203}.

It is difficult to imagine situations which would involve the interests of both France and Germany and yet not "affect trade between member States" under articles 85 or 86 of the EEC Treaty.\textsuperscript{204} Under the principle of subsidiarity, it is, however, possible for the Commission to decide not to intervene, leaving member states to solve the issue directly.

\textbf{2.4.2.5 Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, 23 September 1991}

The Agreement between the Government of the United States and the Commission of the European Communities (the GUS-CEC) is, in the Commission’s view, an administrative agreement which did not need the ratification of Member

\textsuperscript{200} Article 6 of the USA-Australia Agreement.
\textsuperscript{201} Article 5 of the USA-Australia Agreement.
\textsuperscript{202} Article 6 and 7 of the USA-Germany Agreement.
\textsuperscript{203} Article 7(2) of the USA-German Agreement.
\textsuperscript{204} The relevant services of DGIV have informed me of the continued use of this treaty by France and Germany.
States nor the European Parliament. France challenged the agreement in the European Court\(^{295}\) alleging that, because of its international character, the agreement should have been approved by Member States. This has not stopped notifications and exchanges taking place under this agreement.

The GUS-CEC is the most detailed agreement applying the 1986 OECD Recommendation on RBPs. It contains extensive provisions on notification of enforcement activities which may affect "important interests" of the other Party.\(^{296}\) Article IV provides for co-operation and co-ordination in enforcement activities. No allocation of jurisdiction as such exists, since it would transform the administrative agreement into a treaty\(^ {297}\). It is, however, the most detailed process of co-ordination of jurisdiction envisaged in any of these bilateral arrangements.

Article V of the GUS-CEC is often considered to be the innovative aspect of this agreement: Sir Leon Brittan has labelled this provision "positive comity". It is, however, argued here, that this process was already contemplated in the OECD Recommendation on RBPs of 1973\(^ {298}\). The group of dissenting countries of the GATT working group\(^ {299}\) on Restrictive Business Practices also reached similar conclusions in 1960. The GUS-CEC is, nonetheless, the first bilateral agreement which implements this particular aspect of the Recommendations of the Council of the OECD (which was expanded in the sister recommendations of 1979 and 1986).

The main innovation of the GUS-CEC, it is submitted, is the obligation for the

---

\(^{295}\) Case no C-237/91.

\(^{296}\) Article II of the GUS-CEC Agreement.

\(^{297}\) Sir Leon Brittan has labelled this provision, which for him constitutes one of the three elements of the GUS-CEC, the "who goes first" principle. "Negative and Positive comity" are the two other main provisions.

\(^{298}\) Article I. The COUNCIL RECOMMENDS to the Governments of Member Countries:
1. that a Member country which considers that one or more enterprises situated in one or more other Member countries are engaging in restrictive business practices which substantially and adversely affects its interests, should request consultation with such other Member country or countries...
2. that any Member country so addressed should give full consideration to the case submitted...
3. that the Member country addressed which agrees that enterprises situated in its territory engaged in restrictive business practices... should attempt to ensure that these enterprises take remedial action... (emphasis added).

\(^{299}\) Discussed in section 2.2.7 above.
requested party to justify any decision during the process of conciliation (article VII-2).

Each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is subject to consultation.

This further obligation to justify their decision is highly significant. Gradually, the EEC and the USA will be able to build up a body of practices. The trend of this provision is reinforced by the stipulation that it is in the common interest of the Parties to share information which will

promote better understanding... of economic conditions and theories relevant to their competition authorities' enforcement activities and intervention... 300

Since there is no internationally agreed "perfect theory", nor any definition of what constitutes a restrictive business practice, this is a first step towards the establishment of criteria for what amounts to anticompetitive conduct and when governments should intervene. For the moment, the GUS-CEC has avoided this issue and has defined "anticompetitive activities", the term used instead of restrictive business practices, with reference to both national laws: "any conduct or transaction that is impermissible under the competition laws of a party" 301.

Article VI deals with a process of "negative comity". It provides many elements which ought to be considered, before a Party decides to enforce its competition laws where the interest of the other Party may be affected. Concepts such as: "balancing test", "reasonable expectations", the "degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies", the "relative significance to the anticompetitive activities", the "presence or absence of a purpose... to affect consumers, suppliers, or competitors" are formally introduced. 302

300 Article III-1(b) of the GUS-CEC Agreement.
301 Article I d) of the GUS-CEC Agreement.
302 Article VI-1: The concept of "important interest of a Party" is defined along the lines of the definition contained in the MOU between Canada and the USA.
In Article VIII, as in all of these types of agreements, the confidentiality of the information is addressed. It has been argued that this provision is fatal to the validity of the agreement. Riley has asserted\(^{303}\) that the agreement is ultra vires because it exceeds the framework of Regulation 17 within which the competence of the Commission to conclude administrative agreement is limited.\(^{304}\) He concludes cynically by saying that, even if such an agreement were signed by the Council, it would still be ultra vires because it gives to a non-member State a direct and formal influence on the application of articles 85 and 86 of the EEC Treaty. This, for Riley, is contrary to the fundamental objectives of the Communities.\(^{305}\)

In response to the argument attacking the capacity of the Commission to sign the GUS-CEC, it can be argued that, in article 3(f) of the EEC Treaty, the Commission has been given the authority to ensure the establishment of a system of undistorted competition in the EEC. If the only, or the best way, to do so is to collaborate with another administration, such an administrative agreement is ancillary to the functions and powers of the Commission in the area of competition.

Another argument in favour of the Commission's power to sign the GUS-CEC is that it is essentially non-binding. Parties have only agreed to collaborate and help each other, when feasible, in the realisation of their respective antitrust tasks. The


\(^{304}\) Riley argues that the complainants, under article 3(2) of Regulation 17, can only be a Member State or a natural or legal person, not the United States which moreover cannot have a "significant and reasonably direct interest" (Article 3(2)(b)). He also condemns the provision of the Treaty which states that the important interests of the United States will be considered. For him it implies that rights which Member States obtain only via the Treaty and the legislation (Article 10 of Regulation 17) would be granted to non-Member States. The agreement is said to transfer confidential information which, under article 20(1), may be used only for the purpose of the relevant request or investigation. It is true that since the Spanish Bank, Case C-67/91, this restriction has been interpreted very severely. It is unlikely that the ECJ would tolerate more rights being given to authorities of the United States than to the Member states. Finally, he argues that since the views of the United States are said to be factors to be taken into account, when appraising a concentration (a conclusion he draws from the reading of articles 3 b iii) and 4 of the USA-CEC), the agreement is ultra vires because such a criteria was not envisaged in article II.1 and II.2 of the Regulation 17.

\(^{305}\) This argument resembles the conclusions of the EEC Court in the opinion concerning the EEA agreement, that no external element may affect the integrity of the EEC. See discussion in chapter 6, section 6.3.2.
internal process of decision-making of each Party is not affected and the final decision is left to the entire discretion of each Party. No change of national laws is required. The only possible encroachment of sovereignty (or loss of final discretion) which could be attacked is the obligation to justify. Nothing, however, obliges the Parties to behave rationally and the grounds for any decision could be entirely political. In other words, it can be argued that the discretion has been maintained, but states must communicate the discretionary decision.

Another response to Riley's argument that even the Council could not enter into such an agreement, is that one of the objectives of the EEC is to expand commercially and to enter into foreign commercial relations. The EEC states have relinquished part of their sovereignty for these purposes. It is therefore doubtful that the EEC, as a whole, would not have the capacity to sign a treaty which aims at realizing the goals of its founding treaty. In that sense, the exchange of confidential information is only subsidiary to the full realisation of more fundamental goals.

It must be added, however, that the Spanish Bank case may be interpreted as having very much limited the powers of the Commission to transfer the information acquired under articles 11, 12, 13, 14 for any purpose other than the relevant request or investigation.

The main impact of the OECD Recommendations is to have led states into signing more detailed bilateral agreements. For instance, the GUS-CEC has introduced alternatives to the contested extraterritorial applications of domestic competition laws which are now put forwards in international agreements as discussed in section 2.6 of the present chapter.

2.4.3 OECD Declaration on Multinationals

Towards the end of the 1960's, the increasing power of multinational corporations (MNCs) and their transnational behaviour became a major source of

---

306 Article V-4 of the GUS-CEC Agreement.
307 Article IX of the GUS-CEC Agreement.
concern\textsuperscript{308}. In 1974\textsuperscript{309} the OECD Committee of Experts on RBPs was instructed to concentrate upon the problems of competition raised by the activities of multinationals and their related firms. The Committee was also invited to draft guidelines for multinational enterprises relating to competition.\textsuperscript{310} The Report concluded that:

Because of the economic power wielded by multinationals and the special structure of the markets on which they operate, multinational enterprises may have more opportunities to engage in predatory practices for various reasons. Thus, multinationals not only enjoy economies of scale and the possibility of international cross-subsidisation - which is also true of large diversified national groups - but also have a number of competitive advantages resulting from their transnational structure(...).\textsuperscript{311}

Following this report, the OECD Guidelines for Multinationals, including a chapter on competition, were promulgated on 21 April 1976. These guidelines are directed at multinationals:

Enterprises should (...) refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example, (...)

b) predatory behaviour toward competitors ;(...)
e) discriminatory (i.e. unreasonable differentiated) pricing and using such pricing transactions between affiliated enterprises as a means of affective adversely competition outside these enterprises.\textsuperscript{312}


\textsuperscript{309} In 1969, a recommendation was made at the Cambridge International Conference on Monopolies Mergers and Restrictive Practices, sponsored by the OECD, that the OECD Committee of Experts on Restrictive Business Practices should undertake a study of the RBP of multinational enterprises.

\textsuperscript{310} This Report focus on 4 main RBPs: international pricing abuses, anti-competitive mergers, international allocation of production and markets, and unduly restrictive international patent licensing.

\textsuperscript{311} OECD Report on Restrictive Business Practices of multinational firms, July 1977, p.15-16

\textsuperscript{312} Note the use of the "dominant position" notion. These guidelines were revised in 1979 but the Chapter on Competition remained unchanged.
The chapter on competition of the OECD Guidelines is very short. Moreover the terms "adversely affect competition", "abuse", "dominant", "predatory" and "discriminatory", are not well defined.\textsuperscript{313}

An important element which lends authority to these guidelines is the participation and the explicit approval of the business community. In fact, annex IV of the Guidelines gives a list of business federations having expressed support for the OECD guidelines.

On 13 June 1979, a Revised decision of the council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises was adopted. A procedure was arranged for a periodical exchange of views between, on one side the OECD members, and on the other side, the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee to OECD (TUAC). These exchanges of views take place annually.

\subsection*{2.4.4 UNCTAD Code on Restrictive Business Practices}

During the same period, a group of "eminent persons" prepared a report for the United Nations, on the effects of Multinational Enterprises on world trade and development for the United Nations.\textsuperscript{314} They divided the code in seven sections, one of which is addressed to enterprises: A- Objectives, B- Definition, C-Multilaterally agreed equitable principles for the control of restrictive business practices, D- Principles for enterprises, E- Principles for States, and F- International measures, international institutional machinery.

For the UN code, RBPs\textsuperscript{315} can take two forms: 1) abuse of a dominant position

\footnotesize{\textsuperscript{313} These Guidelines were preceded by a joint declaration by Members of the OECD recommending the observance of the guidelines by multinationals operating in their territories, where they state that they are prepared to consult and review the above matters within three years. On 21 and 22 June 1976, the Council took note of the Declaration of Member States and recognised that the support and publicity given to the guidelines was an important factor by their authority.

\textsuperscript{314} UN Department of Economic & Social Affairs, The impact of Multinational Corporations on Development and International Relations, UN Doc. ST/ESA/6 (1974).

\textsuperscript{315} Section B, 1: Restrictive business practices* means acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to (continued...)}
of market power and 2) restrictive agreements among enterprises. This definition roughly follows antitrust concepts found in the Sherman Act and in the EEC. Article 4 is organised along the lines of article 86 of the EEC treaty and seems to be an exclusive list of methods of abusing a dominant position in a market. It is a combination of practices proscribed by the Sherman Act and the Clayton Act. The EEC term, "abuse of dominant position", rather than the US notion of "monopolisation" is used. Paragraph 4 and its footnote 5, require conduct to be analyzed in terms of both its "purpose and effects."

In the section addressed to states, it is recommended that states "adapt, improve and effectively enforce" antitrust legislation, as well as "base" their laws regulating RBP s along with the parameters and definitions of the UN Code of Conduct. There has been "Model Laws" improved yearly for the benefit of developing countries and East European countries. In this sense the UNCTAD has been a good educational forum.

---

315 (...) continued


317 Paragraph 4(a) deals with predatory prices, 4(b) discrimination, 4(c) mergers, takeovers, joint ventures, 4(d) price fixing, 4(e) import restrictions, 4(f) refusal to deal, exclusivity, export restriction, tying.

318 As with the Sherman Act and the EEC treaty, the Code does not establish a fixed market share to define "dominant position" and two or more enterprises can share a dominant position. Stuart writes that this result was not intended to embrace the untested theory of "shared monopoly" or the possibility of mere conscious parallelism. Stuart B., "The UN Code on Restrictive Business Practices: An International Antitrust Code is born", Am. Univ. L. Rev., Vol.30, p.1031.

319 A footnote to article 4, section D reads: Whether acts or behaviour are abusive or not should be examined in terms of their purpose and effects in the actual situation, in particular with reference to the definition of restrictive business practices and to whether they are: (a) appropriate in the light of the organizational, managerial and legal relationship among enterprises concerned; (b) appropriate in light of special conditions or economic circumstances in the relevant market; (c) of types which are usually treated as acceptable under pertinent national or regional laws and regulations for the control of restrictive business practices; (d) consistent with the purposes and objectives of these principles and rules.
It is quite surprising to note the dominance of Western market rules in the UNCTAD Code. Joel Davidau offers two explanations: 1) nations are more liberal in the context of international economy than at home and 2) there is really no plausible rationale for an antitrust code except endorsement of competition.\textsuperscript{320}

However, in an article with Debra Miller, he suggest a more pragmatic reasoning:

In the negotiation, Western nations were aided by a split among developing countries. Among the group of 77 countries which distrusted MNC governments involved in commodity cartels like OPEC worried that an antitrust code might restrain their activities and therefore favoured a weak code with many exceptions. The Westerners agreed to a complete exception for inter-governmental cartels in exchange for agreement that the code would not be legally binding and would provide other factors to be considered, particularly if practices had been approved by nationals governments and if restraints were between affiliated firms.\textsuperscript{321}

An important lacuna is that the UN code does not address the problem of extraterritoriality. This code, more so than that of the OECD, is the result of a compromise between countries with widely differing views and needs. It is nonetheless evidence of a minimum standard.

\subsection{2.4.5 The ICC Code on Investment\textsuperscript{322}}

It is worth looking at the Guidelines for International Investment of the International Chamber of Commerce because they were used by the members of the OECD and UNCTAD when they drafted their Codes. In fact the ICC Guidelines were the first to suggest that rights and obligations of states and firms should form the agreement.

Restrictive business practices are addressed in section II, VII and VIII. Section II, "Ownership and Management", sub-section 1., states that an investor:


\textsuperscript{322} It is interesting to note that enterprises are members of the International Chamber of Commerce. So these guidelines are really a code of conduct for firms written by firms.
d) Should, if he finds himself in a dominant market position, refrain from abuse of that position by actions that are to the detriment of the economy of the host country.

The corollary for the Host Country is as follows:

3. The Government of the Host Country ...f) If there is abuse of a dominant market position, should, in preference to immediate application of restrictive regulations, seek to remedy the situation either by stimulating competition, especially through the encouragement of new investment and the lowering of import tariffs, or by recommending a change in investor's practices.

The ICC Guidelines were adopted by the Council of the ICC in 1972. The resolution expressly stated that they hoped to serve as a model for future international agreements\textsuperscript{323}. The OECD and UNCTAD codes have effectively followed this pattern where states and firms have rights and obligations.

2.4.6 Other codes of conduct

There are a few other codes of conduct or international agreements which refer to restrictive or detrimental business practices. They show the continuing efforts of states to tackle the countervailing effects of business-detrimental agreements and conduct:

- The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy\textsuperscript{324} of the International Labour Organisation contains a provision condemning abuse of concentration of economic power.
- The Convention forming the Intergovernmental Maritime Navigation Organisation, in its first article on the goals of the organisation, is said to examine restrictive business practices among members, in order eventually to eliminate them.

\textsuperscript{323} "It is hoped also that these Guidelines will be helpful to the United Nations and other governmental organisations in their efforts to promote constructive discussions on the relationships between international investors, the governments of host countries and the investors' governments." Introduction of the official ICC Guidelines, 1972, p.6.

\textsuperscript{324} ILM 1977 p.422.
The draft Code of Conduct on Transfer of Technology and the Code on Transnational Corporations, will never be put into force since intellectual property (TRIPs) (and soon competition matters) are now under the aegis of the GATT.

Altogether, today, there are three codes of conduct (OECD, UN and ICC) and two sets of OECD Recommendations in force today which deal with different aspects of restrictive business practices. Since none of these instruments are legally binding, what are their value?

2.5 Legal value of these UNCTAD, OECD and ICC instruments

Some commentators have a very pessimistic view of the impact of these agreements. Stanley writes:

Codes of conduct for MNCs really amount to international politics regarding economic issues masquerading in false legal garb.

The American Bar Association Special Committee on International Antitrust also had a rather negative view of the UNCTAD code:

... the UNCTAD RBP code has not had noticeable effects on the conduct of the signatory nations or on their national firms.

The UNCTAD Code was unanimously endorsed by the General Assembly of the United Nations on 5 December 1980. The fact that it was unanimously approved, without reservation, gives, however, some authority to its limited content.

International arbitrators have already recognised that a Resolution of the General Assembly may be evidence of, and even a source of, international law. In

---

326 ILM 1984 p.626.
329 ABA Special Committee on International Antitrust, chapter 12 on an International Code p.525.
the oil arbitration of Texaco, the arbitrator, Professor Dupuis, recognised the legal force of the UN Resolution of 1864 on Permanent Sovereignty over Natural Resources.

To qualify as a "Source of Law", an instrument must experience general acceptance in order to be considered a "general principle accepted by all civilised nations" or an "international customary law". Their unanimous adoption, without reservation, suggests that all governments share the same minimal concepts. They can, therefore, be considered source of obligations.

In the Nicaragua case, the International Court stated that some resolutions of the UN can be evidence of rules of customary law. In view of its unanimous adoption by the UN General Assembly, the UN Code of Conduct can also be considered as customary international law on the minimum standards in the area of restrictive business practices. By doing this, the OECD governments have initiated a classic process of law-making.

The theory of the "legitimizing" or the "legitimation" function of codes of conduct for MNEs has the same tendency. This proposition is stated most succinctly in the "Modalities" paper of the UN Commission on Transnational Corporations:

---


331 "In appraising the legal validity of the above-mentioned Resolutions, this Tribunal will take account of the criteria usually taken into consideration, i.e. the examination of voting conditions and analysis of the provisions concerned. (...) while it is now possible to recognize that resolutions of the United Nations have a certain legal value, this legal value differs considerably, depending on the type of resolution and the conditions attached to its adoption and its provisions." Idem p. 31.


335 This has, however, been criticised by many authors. Among them, see Mendelson M.,"The legal character of General Assembly Resolutions: Some considerations of principle" in Legal Problem of the New International Economic Order Hossaim (Ed), 1980, p.95 and from the same author "The Nicaragua case and customary international law" in Co-existence, (1989), p.85.

336 "Bien que les Principes directeurs s'adressent aux entreprises qui ont une activité dans les pays membres - ou sont établies la plupart des sociétés-mères des firmes multinationales - leur influence déborde en fait le cadre de la zone de l'OCDE". OCDE Réexamen de 1979 sur les PRCs, p.66.
States which have adopted the Code would not be able to attack as inherently unlawful or improper any action by other states taken in accordance with provisions of the Code. Even a nonbinding legal instrument, assuming it is properly adopted may suffice to override a previously uncertain norm.\footnote{UN Documents E./C/10/AC.2/9 22 December 1978.}

The OECD Guidelines for MNEs had to be adopted in the form of a "declaration" since multinationals had an active role.\footnote{Decisions and Recommendations of the Organisation can be addressed only to Member States and not to private bodies such as MNEs.} The Declaration of the 21 June 1976 and the Revised Declaration of 1979 are "acts of governments acting together" in the framework of the OECD: Ministers who issued the Declaration acted as representatives of their governments and not as members of the Council.\footnote{The governments of OECD Member Countries ... ... declare that they jointly recommend to multinationals... Introduction to the OECD code on multinationals, 1976, OECD.}

The adoption of principles by 23 governments of the Western World, where most MNEs have business and head offices, does lend legal value to the Guidelines. These countries expressed:

their firm political determination that in carrying out their policies they will observe the spirit of the declaration as well as the particular elements it contains.... Much of the importance of declarations is that they are issued on a very rare basis and at a very rare level.\footnote{OECD Secretariat Manual for the Guidance of Chairmen of Subsidiary Bodies of the Organisation, 1988, restricted document, p.161.}

Similar comments can be made for the other OEEC Recommendations. They are not binding according to the OECD constitution\footnote{Article 6 of the OECD Constitution: "Unless the Organisation otherwise agrees unanimously for special cases, decisions shall be taken and recommendations shall be made by mutual agreement of all the Members". (i.e. by consensus).}. Nevertheless, since recommendations are adopted by ministers representing their governments, they certainly have a strong political impact coming from countries where most international enterprises have their head-offices.

Another purpose of the OECD and UN codes of conduct is to encourage countries to negotiate more specific arrangements dealing with the same issues. Successful bilateral agreements have resulted from these codes. The educational aspects of these codes for developing countries is also very important. Competition
policies are now systematically implemented as a conditions of the loans of the World Bank. In fact competition can be viewed as one of the cornerstone of governmental policies.

As for the ICC Guidelines, they are acts of a chamber of commerce; they cannot bind states. They have, however, greatly inspired the OECD and UN works and have set a new type of mixed international agreement where states and multinationals are parties to the same legal instrument.

It is, therefore, true to say that, besides the GATT which indirectly regulates reactions of states against some restrictive business practices of exporters (dumping), there is no world-wide agreement regulating restrictive business practices. This explains why states have relied on the problematic extraterritorial application of their national laws. Except for the 1986 Recommendation of the OECD, none of these instruments deal with the problem of the extraterritorial application of competition laws or with the defences usually opposed to these laws. The problem remains vivid. In this sense, the European proposal for positive comity brings winds of change.

2.6 European proposal for Positive Comity

The principle of positive comity was negotiated for the first time in the bilateral agreement between the Government of the USA and the EEC Commission on competition/antitrust matters.443

---

442 The word comity comes from the latin word, comitas, and is defined in the Black's Law Dictionary as:
comitas: Courtesy; civility; comity. An indulgence or favour granted another nation, as a matter of indulgence, without any claim of right made.
comity: courtesy; a willingness to grant a privilege, not as a matter of right, but out of deference and good will. Recognition that one Sovereignty allows within its territory to the legislative, executive or judicial act of another sovereignty, having due regard to rights of its own citizens.

443 Sir Leon Brittan gave a speech to the World Economic Forum, on 3 February 1992, where he described more generally the concept of "positive comity".
Positive comity attempts to curb the unilateral application of domestic competition law against RBPs abroad by relying instead, on the collaboration with the state which has territorial jurisdiction.

National tribunals, especially in the USA, have recognised the principle of international comity, exercised mainly as a "restraint" in the possible application of American antitrust law to foreign conduct or agreement.

In the area of comity, we have built upon the principle that each jurisdiction should have regard to the important interests of the other in exercising competition jurisdiction. I would call this principle "negative comity", not in any pejorative sense, but as an expression of the idea that it calls for restraint on the part of competition authorities. (...)344

"Positive comity", on the other hand, calls upon another country to positively do something about a RBP on its territory. By leading a state to oppose actively a restraint, positive comity entails a commitment to act for another state, but, it may be argued, for the benefit of both states.345

Rules of positive comity have been negotiated in the draft article of the GATs (General Agreement of Services)346 and in article 4.3 of the draft Multilateral Agreement on Steel Trade Liberalization347. The addressed state is however not obliged to reply to the requesting state.348

344 Part of the speech of Sir Leon Brittan said at the Center for European Studies on 17 March 1992.

345 Sir Leon said on 24 April 1992 at the University of Chicago Law School: "Under the positive comity principle, countries whose interests are affected by restrictive practices in the territory of another may call upon that other country to deal with the situation by applying its own laws".

346 Article IX 2: Each Party Member shall, at the request of another Party Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Party Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question...."

347 Article 8: "The Notifies party shall consult with the other and shall accord full and sympathetic consideration to its request in deciding whether or not to initiate enforcement activities with respect to anticompetitive conduct identified in the notice. The notified party shall inform the other of the grounds for its decision...."

348 As argued in section 2.4.2.5 the language of these clauses is very similar to that of the 1986 OECD Recommendation on RBPs.
In the negotiation for an Energy Charter under the umbrella of the Nuclear Agency sponsored by the OECD, the EEC Commission is proposing to go one step further in the implementation of a positive comity clause alongside the obligation of justification contained in the GUS-CEC agreement.\textsuperscript{349} The EEC Commission would add the following obligation: "The notified Contracting Party shall inform the other of the grounds for its decision." This apparently inoffensive sentence involves a major surrender of sovereignty. It is far from certain that the USA or Japan would accept having to justify their decision. Justification by states is the first step towards effective enforcement against restrictive business practices.

Positive comity, if understood as including an obligation to justify imposed on the states with territorial jurisdiction,\textsuperscript{350} could become a very effective preliminary step to the enforcement of trade laws or domestic antitrust laws against foreign restrictive practices.

2.7 Conclusion and proposals

Faced with the absence of an international agreement assessing standards for what constitutes a restrictive business practice, and without any international jurisdiction to refer to, states have so far relied on the extraterritorial application of their own domestic antitrust laws to force their trading partners to behave according to the so-called "level playing field". The recent American decision to use the Sherman Act against Japanese cartels and Kereitsu\textsuperscript{351} is striking example. This type of unilateral extraterritorial aggression, although understandable, can only lead to further clashes of jurisdiction.

The European proposal for "positive comity" must be understood as an alternative to the extraterritorial application of one country's domestic competition

\textsuperscript{349} See discussion in sections 2.4.2.5 and 2.6 of the present chapter.

\textsuperscript{350} In many ways, Barry Hawk's prediction of 1990 is becoming reality: the EEC is leading the way for international competition! "The International Application of the Sherman Act", Antitrust L.J. vol.59 (1990), p.170.

\textsuperscript{351} Decision of the DOJ of 3/4/92; see discussion in section 2.3.1.
laws in favour of the enforcement of the competition laws of the country where the restrictive business practice originated. In addition, the obligation, for the country having territorial jurisdiction over the RBPs, to justify its intervention, or absence of intervention, would help to build up a body of practices, should favour transparency and allow states to understand the rationales and policies of their trading partners. One could also argue that, because of the principle of "estoppel", recognised as a general principle of international law and customary international law, states would have to maintain a coherent practice with regard to RBPs. This would only facilitate the identification of difficulties and disagreements amongst states as a preliminary step to international negotiations of standards.

In any case, this "positive comity" process should be used as a first step in the assessment of jurisdiction before applying antitrust laws to foreign conduct. The foreign state would have to take a position on the alleged restrictive practices, which would greatly help judges in balancing various interests or in determining the reasonableness of proceedings. With time-limits for answering, the length of debates would be greatly reduced.

It is also suggested that some international authority could ensure that national enforcement of domestic competition laws be applied fairly and consistently. This could be organised along the lines of the Bi-National Tribunal of the Canada-USA FTA\textsuperscript{352}. A further step towards the harmonisation of national competition standards could involve a recourse to such Bi-National Tribunal, following the pattern of reference envisaged by article 177 of the EEC treaty; this reference could be for advisory opinions similar to those given by the International Court of Justice. These proposals would, however, not constitute efficient alternatives to antidumping actions, as will be discussed further in chapter 9.

\textsuperscript{352} See discussions in chapter 7, section 7.3.
PART II Dichotomies of treatments between domestic and foreign restrictive business practices and national attempts to reconcile and co-ordinate these different considerations

Part II focuses on the actual interaction between antidumping and antitrust rules in NAFTA member states. Understanding these conflicting considerations should facilitate the establishment of a regional system of competition within NAFTA.

In chapter 3, it is argued that substantive and procedural norms of antidumping laws contravene the obligation of National Treatment of the GATT and NAFTA. Procedural and substantive differences between legal treatment of foreign and domestic business practices are numerous.

Chapter 4 is centered on the pressures to reconcile these conflicting policies and for a more competitive enforcement of antidumping laws. The GATT seems to have provided rights to commercial users and consumers in the administration of antidumping laws. States, however, do not appear to have transmitted these rights to their nationals.
Chapter 3 Antidumping regulation contravenes the obligation of national
treatment of the GATT and NAFTA.

3.1 Introduction

One of the basic pillars of the GATT system is the principle of non-
discrimination introduced during the negotiations of the Havana Charter. The
obligation of "National Treatment", contained in article III of the GATT, and the
principle of "Most-Favoured-Nation", contained in article I of the GATT, constitute
respectively the domestic and transnational applications of this principle.\textsuperscript{353} It is
argued in this chapter that dichotomies between antidumping and competition laws
infringe the obligation of national treatment of the GATT, reiterated in article 301
of NAFTA.

Firstly, the interaction between article III on National Treatment and article VI,
authorising antidumping actions, is analyzed. The Panel of the GATT on Section
337 of the US Trade Act of 1930\textsuperscript{354} suggests that the obligation of national
treatment of the GATT covers substantive and procedural aspects of any regulation.
The framework of analysis used in the conclusions of the Panel Report is applied
to antidumping laws in sections 3.3 and 3.4 of this chapter. In these sections the
treatment of domestic pricing practices (substantive and procedural standards) is,
therefore, compared to the treatment imposed on imports in order to demonstrate
infractions of article III of the GATT and article 301 of the NAFTA.

In section 3.5, the argument commonly raised that antidumping and antitrust (or
competition) laws follow different policy objectives is dismissed as inconclusive and

\textsuperscript{353} In other words, the most-favoured-nation principle means that any trade privilege offered
to any state ought to be offered to any other member state of the GATT; the national treatment
obligation means that foreign goods ought not to be given a treatment inferior to the treatment
offered to similar domestic goods.

inapplicable within a free-trade area. Moreover, an analysis of antitrust enforcement along the lines of the "interest-group theory" narrows the gap with antidumping laws.

In section 3.6, it is submitted that national differences in social, political, institutional and legal institutions can only lead to different national treatments by different states. Examples from the EEC and the US will be offered in the context of their respective legal traditions. These will affirm that compliance with the obligation of National Treatment cannot replace the need for further harmonization of domestic standards. In the context of an international code on competition, discussed in chapter 9, these national differences will have to be coordinated and reconciled.

It is finally concluded, in section 3.7 that to reconcile standards of antidumping laws with those of domestic laws against predation and price discrimination, as it is usually argued, would not be sufficient to comply with the obligation of National Treatment. To the extend that antidumping laws are used to countervail national structural differences, it is submitted that antidumping laws should provide exporters with as much substantive and procedural rights as those given to domestic producers in all aspects of domestic competition legislation.

3.2 The obligations of Most-Favoured-Nation and National Treatment of the GATT

the right to impose discriminatory antidumping measures

Article III of the GATT reads as follow:
National Treatment on Internal Taxation and Regulation

1. (Internal taxes and other internal charges, laws, regulations and requirements affecting the internal sale ... should not be applied to imported or domestic products so as to afford protection to domestic production.)\(^{355}\)

2. (Internal taxes and internal charges.)

\(^{355}\) Information between brackets is a summary of the content of the paragraph.
3. (Grandfather rights for internal taxes.)

4. The products of the territory of any contracting party imported into the territory of any contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. (Regulation relating to the processing of products and quantities)

6. (Grandfather's rights of paragraph 5)

7. (Regulation on mixture)

8. (Non application of this article to Government procurement...express authorization of subsidies exclusively to domestic producers)

9. (Internal maximum price control measures)

Paragraph 4 is supplemented by an interpretative note, the relevant part of which reads:

... any law, regulation or requirement ... which applies to an imported product and to the like domestic product and is ... enforced in the case of the imported product at the time or point of importation, is ... subject to the provisions of Article III.

The obligation of National Treatment has been repeated in the NAFTA agreement:

**Article 301: National Treatment**

1. Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the *General Agreement on Tariffs and Trade* (GATT), including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.

2. (Application by State or Province)

Article VI(2) of the GATT authorises discriminatory antidumping duty:
In order to offset or prevent dumping, a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of such product...

Since antidumping laws are permitted by the GATT, the question remains whether antidumping enforcement has been exempted from the obligation of National Treatment, and, if not, whether they actually or potentially infringe article III(4) of the GATT and article 301 of NAFTA.\(^{356}\)

Antidumping laws are expressly legitimized in article VI of the GATT if the following two conditions are met: the occurrence of dumping, and an injury to the competing domestic industry. These then entitle the importing country to impose, at the border, an antidumping duty to compensate for the injury (for an amount not superior to the margin of dumping). The provision nowhere exempt national authorities imposing antidumping measures from the fundamental obligation of national treatment. Article VI permits a special remedy, antidumping duties at the border, in specific circumstances. Otherwise, according to article III of the GATT, foreign goods must be treated equally with domestic goods. Indeed, the right to impose antidumping measures is exceptional, in the context of free trade principles sponsored by the GATT; accordingly, it should be interpreted restrictively.

The argument that article VI:1(a) contains an exception to the obligation of National Treatment does not fully account for economic reality. Such an argument turns on the requirement in Article VI:1(a) that prices of sales "in the ordinary course of trade" (in the home market of the exporter) be used for the comparison with export price (price in the importing country). This reasoning is premised on the view that only sales covering their fully allocated costs are "in the ordinary

\(^{356}\) The potential impact of dumping rather than its actual consequences for specific imported products was considered to be the scope of analysis under article III:4 by the GATT Panel on the legality of Section 337 of the US Trade Act of 1930: "... in order to establish whether the "no less favourable" treatment standard of article III:4 is met, it [the Panel] had to assess whether or not Section 337 in itself may lead to the application to imported products of treatment less favourable than that accorded to products of United States origin. ... the previous practice ... has been to base ... decisions on the distinctions made by the laws, regulations or requirements themselves and on their potential impact, rather than on the actual consequences for specific imported products." (emphasis added). Panel of the GATT on Section 337 of the Trade Act of 1930, paragraph 5.13.
The conclusion to this argument is that states are expressly authorised by article VI of the GATT to require that imports be priced above their fully allocated costs.

However, any business man or economists would agree that selling below full cost is behaviour that is frequent and rational. It is submitted that such a simple reference to the ordinary course of trade, does not constitute a sufficient derogation from the substantive and procedural rights that National Treatment guarantees to imports. The obligation of National Treatment is so fundamental to the GATT that only clear exemptions should be accepted.

Furthermore article III of the GATT does not contain any exception in favour of antidumping laws, although it mentions other exceptions, namely subsidies. To read in an exemption for antidumping measures, where such an exemption could easily have been included, does not seem appropriate.

It can be reasonably concluded that the administration of antidumping laws ought to respect the obligation of National Treatment. Regulation controlling prices and pricing practices of foreign goods cannot, therefore, be "less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements...", except for the few expressed derogations contained in article VI of the GATT.

3.2.1. "treatment no less favourable than that accorded to like products of national origin..."
Article III on National Treatment has been the subject of few GATT Panels. They dealt with definitions and parameters of internal taxes, internal quantitative restrictions, products, like domestic products. The expression "not less favourable" has been interpreted to encompass marketing, financial services and administrative regulation.

The GATT Panel on section 337 of the US Tariff Act, discussed below, examined the impact of this US trade statute which imposed more stringent procedural obligations on foreign exporters than to those imposed on domestic producers. The analogy to the conflict between standards of antidumping and those of competition laws is evident.


On 28 November 1988, the GATT Council adopted a Panel Report which found Section 337 of the US Tariff Act of 1930, authorising the US President to use trade measures against imports from countries which do not respect US standards of intellectual property laws, to be inconsistent with article III, paragraph 4 of the GATT (i.e. the National treatment). This Panel decision has crucial consequences for the regulation of pricing practices of foreign firms especially since Section 337, as duly emphasised by the Panel, is not limited to patent disputes. Section 337

365 For instance, the Supreme Court of Hawaii, in Hawaii v. Ho, 41 Hawaii 565, interpreted "not less favourable" as prohibiting a law requiring that those who sell foreign eggs, to place a placard bearing the words "we sell foreign eggs" in a conspicuous place of their shop. The Italian law giving special credit terms to farmers who purchase Italian agricultural machinery was also struck down - Imported Agricultural Machinery, GATT Panel 15/7/58 - GATT 7th Suppl. BISD60 (1959). The Canadian Foreign Investment Act requiring that foreign investors "purchase goods of Canadian origin" was declared to be inconsistent with article III:4.
speaks of "unfair methods of competition and unfair acts in the importation of articles into the United States". These criteria resemble those on which antidumping measures are based.

There is, however, an important caveat in using the decision of the GATT Panel on Section 337 as authority for the allegation that antidumping legislation infringes the obligation of National Treatment. The GATT does not contain any provision on intellectual property rights and the Panel did not address the substantive aspects of Section 337, only the procedural ones. The report concluded that the procedure under Section 337 was inconsistent with the obligation of National Treatment. The Panel ruled that "Laws, regulations and requirements" encompass both procedural and substantive law.\footnote{According to the Panel, "Laws, regulations and requirements" cover procedural and substantive law: "The Panel noted that the text of Article III:4 makes no distinction between substantive and procedural laws, regulations or requirements ... If the procedural provisions of internal law were not covered by Article III:4, contracting parties could escape the national treatment standard by enforcing substantive law, itself meeting the national treatment standard, through procedures less favourable to imported products than to like products of national origin". Panel Report paragraph 5.10.}

This implies two things: firstly, the obligation of National Treatment covers any legislation, rights and obligations whether or not they are mentioned in the GATT; and secondly, although antidumping laws may authorise a special remedy against imports, the substantive and procedural rights given to foreigners in the antidumping process must comply the obligation of National Treatment.

The GATT does not require the treatment of domestic and foreign producers to be the same; what matters is that domestic and foreign goods benefit from equal opportunities on the domestic market. Article III:4

... call[s] for effective equality of opportunities for imported products ... the mere fact that the imported products are subject... to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4.... The underlying objective is to guarantee equality of treatment...\footnote{Paragraph 5.11 of the Panel decision.}

It is significant that the argument that article III:4 of the GATT deals with goods while most procedures of US Section 337 are addressed to persons, was
rejected "since the factor determining whether persons might be susceptible to section 337... is the source of the challenge products".368

The Panel based its decision that Section 337 was inconsistent with article III.4 of the GATT on the following six factors:

1. the availability to complainants of a choice of forum in which to challenge imported products, whereas no corresponding choice is available to challenge products of the United States.

2. the potential disadvantage to producers or importers of challenged products of foreign origin resulting from the tight and fixed time-limits in proceedings under section 337, when no comparable time-limits apply to producers of challenged products of US origin;

3. the lack of opportunities in Section 337 proceedings to raise counterclaims, as is possible in federal district court proceedings;

4. the possibility that general exclusion orders may result from proceedings brought before the US International Trade Commission under 337, given that no comparable remedy is available against infringing products of US origin;

5. the automatic enforcement of exclusion orders by the US Customs Service, when injunctive relief obtainable in the federal court in respect of infringing products of US origin requires for its enforcement individual proceedings brought by the successful plaintiff;

6. the possibility that producers or importers of challenged products of foreign origin may have to defend their products both before the USITC and in federal district courts, whereas no corresponding exposure exists with respect to products of US origin.369

As argued hereafter, similar conclusions can be reached if one tests national antidumping laws, as they are actually enforced, against the parameters established by this Panel report.

3.3 Evidence of the different treatments in substantive standards between antidumping laws and anti-discrimination and anti-predation laws

368 Paragraph 5.10 (a).
369 Conclusion of the Panel Report on Section 337 US Trade Act. The argument to the effect that Commissioners of the antidumping authorities were less qualified than judges of the domestic courts of law was rejected for lack of evidence.
Traditionally, experts have drawn parallels between antidumping laws and domestic laws against price discrimination and predation. However, as argued in chapter 1, dumping and antidumping laws are not just about price discrimination and threat of predation. In today's international trade, antidumping laws are "buffers" between national systems of competition. Since antidumping laws are used to countervail the effects of various business practices made possible because difference in competition laws, a comprehensive analysis whether or not they respect the obligation of National treatment, would compare standards of antidumping laws with those of the domestic regulation of various business practices. Such a fascinating study is, however, beyond the scope of this thesis.

The demonstration of the dichotomies between the treatment of domestic goods (and producers) and foreign goods (and foreign producers) will, hereafter, be limited to comparisons between domestic laws against predation and price discrimination, and dumping. The substantive norms are first compared. Then procedural standards of competition laws will be compared with procedural obligations imposed on foreign producers by antidumping laws. It will become evident that foreign goods (and foreign producers) are treated much less favourably than domestic goods and producers.

3.3.1 Comparison of substantive standards of antidumping regulation with those of domestic laws on predation and price discrimination

3.3.1.1 Nature of the infraction

3.3.1.1.1 Laws on predation vs laws on dumping

Tests on predation differ a great deal from those on dumping. None of the tests on predation discussed in chapter 1\(^{370}\) has gained full approval from courts in any country.

\(^{370}\) See discussion in section 1.4.
The Canadian Guidelines, for instance, favour the two-tier test of Joskow and Klevorick\(^{371}\) where, in the second stage of analysis, prices below full costs and above variable costs are presumed to be unreasonably low. Moreover they refer to the conclusions reached by the Court in Hoffman-La Roche\(^{372}\). In Hoffman-La Roche the Ontario Court of Appeal of Ontario held that, even in the case of below-cost pricing, there could be numerous other factors which affect pricing decisions such as the duration of prices, and the competitive circumstances. The Canadian guidelines therefore state:

"In fact, Hoffman-La Roche stands for the proposition that a certain amount of flexibility is necessary ... while price/cost comparisons are an important ingredient, they are not necessary determinative"\(^{373}\).

In the proposed Mexican Economic Competition Act, predation is not even mentioned as a possible monopolistic practices. This legislation seems to follow Bork and Easterbrook's theory that predation should not be regulated. It remains to be seen how Mexican courts will apply these criteria and whether further guidelines will be adopted by the Mexican government. As the proposed law is currently drafted, it would seem to tolerate very aggressive pricing practices on the Mexican territory.

In the USA, most of the attempts to provide analytical benchmarks for the US courts on predation test, conclude that very different standards are enforced in the USA.

... no single legal standards prevails in the lower federal courts - a situation apparently accepted by the Supreme Court, which has repeatedly denied certiorari in pricing cases.\(^{374}\)

---

\(^{371}\) See discussions in chapter 1, section 1.4.7.


\(^{373}\) Predatory Pricing Enforcement Guidelines, Consumer and Corporate Affairs, 1990, Ottawa, p.3.

Indeed, on three occasions the US Supreme court had the opportunity to assess which cost standards should be followed by lower courts, and refused to do so.

Lloyd Constantine of the New York City Bar, has reported, in front of the Committee on "US in a Global Economy", the following: only the 2nd Circuit follows the Areeda-Turner standard; the 7th Circuit follows Bork's approach on recoupment; in the 9th, 10th and 11th Circuit courts require a supplier to cover its full costs of production; in these three Circuits judges also look at the intent. In all the other Circuits, he maintains that courts have based their decisions on a mix of circumstances, presumptions and to the intent of suppliers. Constantine then concluded that while there is no uniform standard used by lower courts, most Circuit courts do look at the intent of the supplier.

Although standards vary greatly from one Circuit court to another, Richard Rapp argued that in all cases on predation, the following questions are usually asked:

- Is the alleged predator a dominant firm (or does it have some other advantage that would enable it to become one)?
- Do market structure and entry conditions make recoupment of a predatory investment possible?
- Has the alleged predator invested in the destruction of rivals?.

374 (...) continued


375 Barry Wright Corp. v. ITT Grinnell Corp 724 F.2d 227; Cargills Inc vs Monfort of Colorado 479 US 104 (1984); and Matsushita Electronic Industries vs. Zenith Radio Corp. 475 US 574 (1986).

376 In Matsushita, 475 US 1986 p.574, the Supreme Court refused to sponsor any cost-based test and rejected the case on summary judgment because recoupment was considered impossible. Predation was therefore considered to be an implausible motive: "Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight... Whether or not petitioners have the means to sustain substantial losses in this country over a long period of time, they have no motive to sustain such losses without some likelihood that the alleged conspiracy in this country will eventually pay off."

377 Wednesday 14 April 1993, Association of the Bar, New York 6:45pm.

By contrast, in antidumping investigations, there is no enquiry into the market power of the exporter or its intentions. Nowhere in the antidumping process is there any analysis of the structure of either the importing or the exporting market. The antidumping machinery is triggered simply by a domestic competitor alleges that prices of exports do not cover their full costs or that there is a differential in prices.

In national antidumping laws, costs of production must usually be recouped within a period of six months from the production of the goods; a much shorter period than the product cycle! If all costs are not recouped within that period, sales are considered not to be in the ordinary course of trade and will be excluded from the comparison.

Moreover, in antidumping cases, prices are often constructed. They are constructed if, not enough foreign sales can be used, if details of the costs are not submitted within a period varying from 30 to 45 days, or if the information provided by the exporters is judged inadequate or inaccurate. When prices and cost of production are constructed, they are usually set according to the "best available information", which often means information provided by domestic competitors.

Prices used for the comparison, when assessing dumping, must always cover full cost of production. Further manipulation of prices is authorised by adjustments. When "constructing" these prices, "a reasonable amount for administration, sales and profits" which, in the USA is 10% and 8%, is to be added to the constructed cost of production.

By contrast, in predation cases, domestic courts the respondent will provide its own costs and explanation as to their level; prices are not constructed by tribunals.

---

379 See discussion in chapter 1 section 1.6.2.1.
380 It is not surprising that the highest average dumping margin is produced when the best information available is used to represent home market value since this information is frequently taken from the original petition. Devault J., "The Administration of US Antidumping Duties: Some Empirical Observations" in World Economy vol.13 (March 90) p.85.
381 Article 2.4 of the Antidumping Code and article VI(1)(b)(ii) of the GATT.
382 In Canadian law, the percentage for profits is also 8% but two further steps of enquiry into the exact amount of profits made by the exporter are required. There is no minimum percentage for administration cost although the resulting decisions usually reach such 10%.
Antidumping laws do not contain any analysis of intent (to predate or otherwise) or indeed of the capacity of the exporter to do so. Some argue that in antidumping regulation the monopoly power of the exporter is correctly presumed from low prices in the importing country.\textsuperscript{383} This is an unacceptable assumption not supported by the evidence.\textsuperscript{384} Moreover, many antidumping cases involved firms from Third World and Eastern European countries which do not have market power, therefore, are not able to predate.

The levels of costs required to be covered in antidumping cases differ significantly from the levels required in domestic laws on competition in NAFTA member states. In fact, the substantive analysis undertaken by antidumping authorities is totally different from that of domestic predation cases.

\subsection{3.3.1.1.2 Laws on price discrimination vs antidumping laws}

Domestic price discrimination laws focus on differences between sale prices charged to private consumers or retailers. On the other hand, in antidumping laws, the comparison is made on an ex-factory basis without consideration of the final price. Freight, advertising, insurance and other direct and indirect costs are deducted from the ex-factory price to identify what the ex-factory prices are in both countries. Moreover, when prices are constructed, overhead costs of 10\% and 8\% profits are added to those ex-factory costs of production in the home country which inflates the margin of price discrimination.

In antidumping laws, provisions stipulating that due allowance be made for the "differences in conditions and terms of sale, taxation and other differences affecting price comparability"\textsuperscript{385} can further inflate foreign prices. In the USA, for instance,

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{384} In the eighties, 50\% of the EC antidumping actions were against firms with less than 5\% of market share: 90\% were against firms with less than 25\% of market share. "Repeal this Protectionist Charter" \textit{The Economist} 15 June 15 1991, p.20.
\end{flushright}

\begin{flushright}
\textsuperscript{385} article VI.1, VI.4 of the GATT and paragraph 6 of article 2 of the GATT Antidumping code.
\end{flushright}
in cases involving export sales through related parties\textsuperscript{386}, the Department of Commerce deducts the full amount of indirect expenses from the US price, but limits the deduction of indirect expenses from the home price, to the amount deducted from the US price.\textsuperscript{387} If exporters run their business differently and tend to have many indirect expenses, they are rapidly penalized.\textsuperscript{388}

By contrast, in domestic price discrimination cases, prices are not constructed. The defendant has the burden of proving his costs, but actual costs are used. Substantive norms differ a great deal between those of domestic laws against price discrimination practices and those of antidumping laws.

3.3.1.2 Causation and injury

When one looks at the injury tests of antidumping and antitrust laws, differences are also readily apparent. There is almost no requirement of causation in antidumping cases; the US bifurcation test is a good evidence of this:

If the domestic industry is deemed by some standards to be in poor health, the bifurcated approach asks whether increases in imports have contributed even minimally to the industry's poor or worsening condition; if they have, the commissioners find in the affirmative.\textsuperscript{389}

The requirement under the GATT antidumping law that the determination of injury be based on "positive evidence"\textsuperscript{390} has been interpreted as including a relative increase. Therefore, even if the quantity of goods imported has not augmented, decreases in domestic production increase the proportion between foreign and domestic goods, thereby qualifying as a potential injury.

\textsuperscript{386} The so-called Export Purchase Price.


\textsuperscript{388} Similarly, major sale expenses which many business men would consider directly related to sales, such as salesmen's salaries, are deemed indirect expenses and are not subtracted from ordinary price-to-price comparison under the Purchase Price method.


\textsuperscript{390} Paragraph 1 of article 3 of the GATT Antidumping Code.
By contrast, causation is a crucial fact in domestic competition cases; lost sales, for instance, are not sufficient to prove injury caused by the practices of the other firm. In competition cases, injury to "competition" is the standard. In addition, in private litigation, there plaintiffs must have personally suffered injury. Since healthy competition always involve pressures to lower prices, a reduction in price does not necessarily indicate an injury to competition.

In antidumping cases a reduction in prices of domestic goods is usually considered evidence of an injury. Moreover, injury to consumers of direct competitors (the second-line injury) is not even addressed in antidumping investigations. In antidumping investigations, there is almost no consideration of the state of competition in the importing country. It will be argued in chapter 4 that some national antidumping laws have introduced, albeit timidly, concepts of Lesser Duty and Public Interest leading to more competitive assessment of the overall injury caused by low priced imports.

It can therefore be concluded that tests of injury and causation requirements differ drastically between domestic competition enquiries and antidumping investigations.

3.3.1.3 Definition of markets

The methods of defining markets are also very different in antidumping and in competition analysis.

Traditional antitrust and competition assessments of markets rely on the following in their determination of the boundaries of markets: supply and demand elasticity, price comparison over time, barriers to entry, potential competitors, consumers' preferences, the structure of the industry and freight costs. Moreover definitions of markets are used as tools for assessing market power in order to determine dominance and monopoly one aspect only of the infraction of abuses of a dominant position or monopolization.

397 In Matsushita although there were cartels which were contrary to the Sherman Act, these tended to increase prices. Therefore the US domestic industry was not suffering any damage.
By comparison, antidumping laws do not consider the market power of the exporter, commercial users' needs of the imported goods, or the availability of substitutes, when assessing whether antidumping duties should be imposed. In antidumping determinations, markets are equated with the directly competing industry within the importing state. Moreover, no account is taken of the fact that industries in the exporting and importing markets may differ and the elasticity of their respective goods is not assessed.

It becomes evident that substantive norms of domestic regulation on price discrimination and predation diverge from those of antidumping laws. National authorities seem to be much less tolerant of foreign business practices than of parallel domestic business practices.

### 3.3.2 Comparison of the procedural elements between antidumping and competition laws

If one tries to apply the conclusions of the Panel Report on US Section 337 to antidumping laws, it becomes indisputable that the procedural limitations imposed on foreign producers in antidumping cases tend to infringe the obligation of national treatment of the GATT and of the NAFTA.

#### 3.3.2.1 Fora and standing

In Canada and the USA, and probably soon in Mexico, the competition cases are dealt with by a court of law, where parties are entitled to full discovery rights and due process.

By contrast, antidumping actions are exclusively prosecuted by government agencies along a quasi-judicial process of administrative law. During an administrative antidumping investigation, there is no independent arbiter of reasonableness, burdens, or the relevance of the requirements. Hearsay evidence is also accepted. The fact that, in Canada and the USA, the determinations of injury and dumping are made by two separate branches of the government, each competing with the other and responsible to different Departments, together with
the fact that civil servants act both as inquisitor and judge in their functions, have led a Japanese scholar to describe the system as "no less hideous to the modern mind than the similar method employed during the Tokugawa regime".\textsuperscript{392}

In domestic courts, there is no lobbying, transparency is the rule and judges are independent from parties and their representatives.

Another important difference is that domestic producers infringing competition laws can be challenged only in domestic courts whereas foreign producers can be challenged both in domestic courts and by antidumping authorities.\textsuperscript{393} The burden is therefore doubled against foreigners. Exporter do not have any choice of forum nor any possibility to refer the antidumping investigation to a domestic court.

Finally, in antidumping cases, industrial users and consumers do not have legal standing.\textsuperscript{394} The absence of consideration of other interest groups has a direct impact on the anticompetitive conclusions of antidumping cases. In competition cases, commercial actors can either intervene or have their interests assessed through the determination of the market, causation or injury.

3.3.2.2 Procedure and time-limits

Antidumping investigations are characterised by a massive amount of data that must be obtained and presented within an extremely short period of time. Time limits from 30 to 45 days to answer back to questionnaires which, in the USA for instance, are required to be answered on IBM compatible computer tape\textsuperscript{395}.

\textsuperscript{392} Extract from "Torquemada and the Tariff Act: The Inquisitor Rides Again", \textit{Int'l Lawyer} vol.20 no.2, p.641 where David Palmeter, condemning the US procedural system of their antidumping laws, continues at page 657: "It does not behove a nation whose notions of procedural fairness are rooted in the Bill of Rights, and in the opinions of a Holmes or a Brandeis, to utilize a system in which Thomas de Torquemada and Ieyasu Tokugawa would be more than comfortable."

\textsuperscript{393} In the \textit{Matsushita} case, firms were sued under the 1916 antidumping Act, the Sherman Act, and the administrative Antidumping act.

\textsuperscript{394} In chapter 4 of the present thesis, efforts to assess the interests of commercial users and consumers in application of Lesser Duty rules or through Public Interest clauses is discussed. It can be said that, generally, the economic interests other than those of directly competing producers are not considered in the antidumping process.

\textsuperscript{395} Exporters who have acquired Sperry-Univac, Hewlett-Packard, Control Data or other US brands are, to use words of David Palmeter "out of luck". "Torquemada" \textit{Int'l Lawyer} vol.20 no.2, p.641.
Moreover, the non-compliance with these time limits by an exporter brings about terrible consequences: costs and prices will be constructed with "the best available information".

By contrast, in domestic competition cases, no comparable time-limits are imposed on domestic producers and the information is collected through cross-examination. In domestic courts, extension of time limits and filing amendments are normally be permitted so that the best evidence is retained.

3.3.2.3 Defense and counterclaims including treble damage

It is no defence to an allegation of dumping that the export price produced a significant profit or is reasonable. In NAFTA member states, exporters' arguments that the competing industry is source of its own injury (along the Extramer argument) is inadmissible. In addition, the exporter is not entitled to argue that the domestic producers' higher prices are due to restrictive practices of firms in the importing country. Finally, the interests of other industries in the importing country cannot be argued.

Importantly, in antidumping investigations, the exporter is not entitled to bring a counterclaim. It is not permitted to claim damages because members of the complainant industry are cartelized and have foreclosed the importing market.

On the other hand, domestic laws against price discrimination and predation usually accept the defense of good faith (absence of predatory intent), meeting competition, excess capacity, changing conditions affecting the market and the marketability of the goods concerned. Counterclaims can also be introduced when based on the same facts object to the competition litigation.

3.3.2.4 Remedies

396 Case C 358/89, Judgment of the ECJ 11/6/92.
397 In the following chapter 4, the very timid introduction of such considerations in the antidumping process will be discussed for the three NAFTA member states and in the EEC.
In the USA, antidumping duties must cover the entire margin of dumping once injury has been proven irrespective of whether the amount of the duty would be sufficient to repair the injury. Antidumping authorities are not afforded any latitude as to the most appropriate remedy: only antidumping duties can be imposed.

Domestic courts, by contrast, are entitled to great latitude as to the best form of compensation, as long as the remedy is limited to what is necessary to repair the damage. In addition, a monopolist or a dominant firm may be forced to give up rights, divide, wine off, sell, license, alter clauses of contracts.

At the same time, a domestic producer sued in domestic courts also has many more alternatives than the defendant in antidumping cases. It may seek to have various cases joined, allege new facts, and amend its pleadings, in order to provide the court a better perspective. A producer can also try to settle its case out of court on business terms.

The only possibility for an exporter caught in an antidumping investigation is to accept an undertaking suggested by the importing country, increase its prices or stop exporting. Any private settlement out-of-court between exporters and competitors is totally prohibited.

Antidumping duties are, by definition, a rapid remedy and the essence of the antidumping process as discussed in the following subsection.

3.3.2.5 Unilateral and rapid enforcement

The automatic and unilateral imposition of antidumping duties differ from the adversarial process by which competition cases are litigated. However, the unilateral and rapid imposition of duties at the border can be viewed as an express exception to the obligation of national treatment contained in article III. This is why antidumping actions make sense in the context of the GATT: it allows a special remedy which is different from what domestic courts can provide in competition cases. This exceptional way of opposing transnational price discrimination is,

\[398\] In competition cases, fines may also be imposed by the governmental authorities. In the USA, the winning party will obtain treble damages.
however, arguably, subject to the obligation of National Treatment in respect of the other elements of the administrative process in which duties are levied.

3.3.2.6 Conclusion

In can, therefore, be concluded that antidumping laws, as they are actually enforced, infringe on the obligation of National Treatment of the GATT and of NAFTA since their substantive and procedural standards do not provide "equality of opportunities in the importing market". The best way to reconcile the right to impose antidumping duties and the obligation of National Treatment is to require that the importing country offers as many opportunities to exporters in the antidumping process as it does for domestic producers in similar situations. Once dumping and injury have been proven, a special remedy of antidumping duties, not normally available against domestic producers but explicitly authorised by the GATT, may be imposed.

It will be argued in chapter 5 that within a free-trade area, these divergent treatments, between domestic firms and firms from another member state, are even more inappropriate in their opposition to efforts to create a free-trade market.

3.4 Differences between national systems

To require that imports be treated without discrimination as against domestic products is different from requiring similar treatments in both the importing and the exporting market. Differences in national domestic competition systems will inevitably lead to different treatments as between one country and another. When one looks at the various applications of the obligation of national treatment, the legal tradition of the countries concerned becomes very relevant.

3.4.1 Legal cultures and legal traditions
A legal tradition or legal culture is the philosophy and culture underlying legal systems; it is not a set of rules on contract, corporations and crimes although, like the language; it is often an expression and reflection of its particular tradition. It is a set of deeply rooted attitudes conditioned historically about the nature of law, the role of law in society and polity, the proper organisation and operation of a legal system, and the way the law is or should be applied, perfected, studied and taught.

There are two legal traditions in the world: common law and civil law. In fact, the world dominance of both common law and civil law traditions is the direct result of Western European imperialism. Most countries have received one or both influences.

Common law and civil law countries have two very different ways of dealing with regulation. It is usually accepted that the Anglo-Saxon countries (the Commonwealth and the USA) are broadly based on curative systems of common law whereas the other countries follow a system of civil law. Countries of civil law background are said to be concerned with the need for certainty and, therefore, tend to focus more energy on prevention and pre-established solutions.

The difference between countries of common law tradition and civil law tradition is fundamental, which impacts on the administration of the system of justice and, more importantly, on the role of the law and the courts. Since a competition system can be considered a corner stone of any social organisation, competition laws of common law and civil law countries will necessarily differ importantly. The "National Treatments" will therefore vary. Understanding these differences will help to understand the limits of the obligation of National Treatment. It is even more relevant in NAFTA since Canada may look as if she relinquished her common law "anti-trust" legislation in 1986, for a more civilian "competition"

---

399 A legal system can be defined as an operating set of legal institutions, procedures, and rules. One may say that there are as many legal systems as there are governments.

400 Students of international law may be more aware of the existence of these legal traditions because a pre condition for the allegation of a principle of international law is that it is recognised by the two legal traditions. See Article 38(1)c of the statute of the International Court of Justice.
Now that Mexico, a country of civil law tradition, has joined the NAFTA, the impact of divergences of legal cultures will have to be better scrutinised, understood and reconciled.

This distinction will also become very relevant when addressing the parameters of an international code of competition. Indeed, the differences between the EEC competition and the US antitrust systems can be best understood by reference to their different legal traditions which explain their different attitudes, social policies and legal reasoning. Although some people talk about the existence of three economic blocks in international economic relations, one may also argue that there are two fundamental social and legal organisations. While there are distinctions and degrees, it is worth drawing parameters of these variances in order to appreciate more accurately different conceptions and modes of implementing competition systems between countries.

3.4.2 Common Law vs Civil Law

The civil law tradition is both the oldest and the most widely distributed. When the "Corpus Juris Civilis" books of Justinian were published in Constantinople in A.D. 533, the civil law tradition was already 1000 years old. It is usually accepted that the inception of the Common Law started in 1066 when the Norman king William The Conqueror tried to impose on England the continental legal system.

---

401 See discussion in chapter 8, section 8.2.1.
402 Understanding civil law principles is fundamental to a discussion on EEC law since its basic charters and its continuing legal development and operation are the work of people most of whom have been trained in civil law tradition.
403 North-America, Europe and Asia.
405 Civil law tradition is the dominant legal system in Central and South America, Western Europe (except the U.K. and Ireland), many parts of Africa, Asia, including Japan, all of Eastern Europe and Quebec.
The Common law has formed as the result of the reaction to this intrusion after King William agreed to let the people keep their own village's legal traditions: the law of the common people developed. With the remarkable expansion of the British Empire during the age of colonialism, common law principles have become widespread.406

The legislator is a prominent actor in civil law systems but professors and jurisconsult are even more important.407 In civil law countries the judge has never had an important role and he is not a "cultural hero".408 The judge is a highly placed civil servant who applies the law, which is meant to be clear and not in need of any interpretation. The tendency, even for civil law high courts, is for judges to work collegially. Separate or dissenting opinions are neither written nor published, and votes are not counted.409

The net image is of the judge as an operator of a machine designed and built by legislators.410

Both this profound desire not to allow judges the power to alter the democratic choices made through legislation and the duty of judges to apply the law as pre-established have led to detailed legislation and greater intervention of civilian governments than common law ones.

In common law jurisdictions, the legislator is supreme but statutes are traditionally exceptions to the laissez-faire, and often supplements to existing law. The law is created by pragmatic solutions to problems in various contexts. Judges have been one of the main creators of the rules of law and are thus famous and

---


407 All famous legal names are those of professors. The intellectuals, the professors are the main stream : the "doctrine".

408 One can decide to become a judge at 25 of age. The law graduate goes to a school-for-judges, sits exams, starts at the bottom of the hierarchy of tribunals and is slowly promoted according to his or her capabilities and contacts. The tradition of the scholars as an important force in the development of the common law is very recent and still, comparatively, very weak. The common law is still a law of judges.


Because of the principle of stare decisis, judges have built a body of law and principles that one draw from individual decisions. The US antitrust system is has evolved along this case by case approach. Also, the US "rule of reason" is an example of this pragmatic approach to competition problems.

The major difficulty facing civilian judges is to match the facts with codes, legislation and regulation that are often incomplete. The impossibility of calling on the legislature every time an interpretation was necessary, led to the creation of Revision Courts whose function is generally to provide interpretation to lower courts. This procedure has been adopted, for example, in article 177 of the EEC treaty.

In civilian countries, great importance is put on the "certainty" which is based mainly on distrust for individual decisions and the reliance on pre-established and detailed rules and solutions. In civil law philosophy, every act is governed by at least one principle, if not a specific article or regulation in a code. As such, there is a litany of presumed agreements and contracts. More than an assembly of rules, civil law codes usually refer to, and include, some political declaration of principles similar to "codes of conduct". Civil law systems are organised along codes.

For civil lawyers, definitions, classifications, methodology and systematisation are fundamental and a hierarchy of sources of law has been established according to traditional formal logic. It is not the existence of codes, but their role in the socio-legal organisation which characterise civil law systems. A code, for a civilian lawyer,

---


412 The common law of England an unsystematic accretion of statutes, judicial decisions, and customary practices, is thought of as the major source of law. It has deep historic dimensions and is not the product of a conscious revolutionary attempt to make or restate the applicable law at a moment in history..., Merryman J., The Civil Law Tradition, 1985, p.150.

413 In a civil law system one normally finds five main codes: civil law, civil procedure, commercial law, criminal law and criminal procedure. A civil law code is divided into contracts, persons and obligations. Contracts are divided according to their purpose(property, leasing, marriage and many presumed contracts), and sets of rules are established for each category. Today these divisions remain the core of all codes of civil law countries.
is a set of principles organising human and social relationships.\textsuperscript{414} The Germans have had an important influence of the systematisation of legal rules.

The attitudes that led France to adopt the metric system, decimal currency, legal codes, and rigid theories of sources of law, all in the space of a few years, are still basically alien to common law tradition.\textsuperscript{415}

In that sense, the civil law system is said to be preventive where rules and solutions are pre-organised in one of the codes. For example, there is no such concept as a "constructive trust" in civil law. Indeed, there is no need to create legal relationships retroactively since the system has in principle envisaged all possible situations.

This influence is very evident in the EEC competition system where block exemptions and detailed regulation containing authentic policy declarations are frequent. No such regulation exist in the US system. In common law systems, flexibility is a fundamental value which allows judges to find an adequate solution to specific problems. For civilian lawyers, such discretion would threaten the certainty of the law.

The Common law, on the other hand, is said to be a curative system. Common law judges produce curative solutions induced from the direction given by previous decisions. The very nature and source of common law is a combination of practical and individualised solutions to problems encountered by people. The judge is a problem-solving actor. There is no legal redress without injury even if there is a breach of obligation. This basic principle of US antitrust is drastically opposed to the European conception of infringement to competition rules which renders the contract nil, sometimes even ab initio. In civil law countries, the existence of a right and its exercise are two independent concepts. Infringement of a rule and the actual damage caused, are also two different ideas in civil law.\textsuperscript{416}

\textsuperscript{414} Usually in common law tradition a code refers to a main statute with regulations in a very specific area.


\textsuperscript{416} This difference is very well depicted by some authors criticising Matshushita where the Court suggested that firms may be punished only after they have succeeded in predating notwithstanding their intention to do so and their conduct. See this criticism in "Predatory Pricing Conspiracies After (continued...)
Merryman writes that from a philosophical point of view the Common Law culture seems to reflect stronger trust and confidence in human nature, whereas the civilian approach reveals a greater effort for a better social organisation.\(^{417}\)

In the efforts to create an international code on competition the two different views of the EEC and the USA will clash. Indeed they have already clashed, as discussed in chapter 2. Negotiators and writers have already emphasised the totally different attitude and perception of the role of the law between the EEC and the USA.\(^{418}\)

It may be that the differences between US and Community perceptions of GATT dispute resolutions reflect differences in legal systems generally, with the United States traditionally placing greater faith in resolving disputes through litigation.\(^{419}\)

Matei wrote that for authors such as Polinsky, Cooter, Posner and many others, the legal framework in which economic tools are introduced is typically the common law. Torts, property and contract, for example, are not autonomous branches of law in Europe. The idea of a common law process of decision making, as opposed to a centralized regulatory model, is simply unknown on the European continent.\(^{420}\)

\(^{416}\) (...continued)

\begin{itemize}
  \item Matsushita Industrial Co. v. Zenith Radio Corp.: Can an Antitrust Plaintiff Survive the Supreme Court's Scepticism? \textit{Int'l Lawyer} vol.22 no.2 p.529.
  
  \item Merryman J., \textit{The Civil Law Tradition}. 1985, p.149.
  
  
  \item Brand R. "Private Parties and the GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930", \textit{J.W.T,}, vol. 24, (1990) p.5, 12; See also Ehrenhaft D. "A US View of the GATT" \textit{Int'l Bus. Lawyer}, May 1986, p.147: "... somewhat differing approaches towards international agreements taken by the US and the EEC on both a philosophical and a political level... Americans accuse Europeans of distorting the plain meaning of the text, and the Europeans accuse Americans of trying to rewrite history... Differing approaches in the interpretation of the text are not the only philosophical difference between the United States and the Community. Differences in the purposes of the GATT also exist... It is the view of the US that the purpose of international Trade Agreement is to establish clear rules that will promote free trade... The EEC and Japan, on the other hand, seem to believe in a narrower purpose..." and the rebuttal by Phan van Phi R. "A European View of the GATT" \textit{Int'l Bus. Lawyer} May 1986, p.150.
  
\end{itemize}
This important source of difference\(^{421}\) has a direct impact on the application of the
obligation of National Treatment because exporters must be treated the way
domestic producers of the importing country are treated, which may be different
from the way the exporters are treated in their home market. It is wrong, however,
to isolate these differences. There are a lot of mutual influence between the
common law and civil law systems.\(^{422}\) Opposite schools of thought exist, however,
within each country. To some extent, the presence of these various schools of
thought within many countries is consequence of the mutual influence of national
systems discussed in chapter 9.

### 3.4.3 Different schools of thoughts in the USA

Hovenkamp writes that there are six main schools of thought in the USA: the
common law school, the rule of reason school, the monopolistic competition (New
Deal) school, the workable competition school, the liberal school and the Chicago
School.\(^{423}\) Professor Fox, in her *Lexicon*\(^{424}\), establishes two main groups: the
Chicago School and what she labels, the realist/traditionalist approach. Arthur\(^{425}\)
would divide them into three: the Chicago School, the Harvard school and the

\(^{421}\) The economic success of the USA has only reinforced the Anglo-Saxon principles of non
intervention in markets. The growing presence on the international scene of Japan and other more
"organised" economy, such as those of most EEC countries, is forcing the USA to look at
alternatives to its legal administration, especially in the area of industrial policies, as further
discussed in chapter 9. For an example of this influence, see Nelsonya Causby's comments on the
positive aspects of *AKZO* over *Matshushita* as far as strategic anti-competitive effects of pricing:
The United States has much to learn from the EEC's treatment of predatory pricing.... They [US
courts] should recognize that predatory pricing involves more than inefficiency." Hastings Int'l &

\(^{422}\) Axim S., Greene P. and Denis P., "Importing Foreign Competition: Is this the New


\(^{424}\) Class notes given by Professor Korah 1991-92 for the class on US-EEC Comparative
Antitrust.

Liberals. For both the Chicago and the Harvard theorists economic efficiency is the only concern that antitrust policy should have.

The Liberals are usually considered to see goals other than economic efficiency in antitrust laws "even at the expenses of economic ones if need be". These goals may be equity, redistribution of income, promotion of small business enterprise, promotion of entrepreneurs' liberty, neutral treatment of minorities, the fear of concentrated economic power, the avoidance of political interference, industrial policies, and private power.

In the USA, the battle concerning the goals of antitrust laws usually follows the discussion on the initial goals of the Sherman Act, a question for which there seems to be no exclusive answer. Page argues that this conflict of ideologies is "inherent in antitrust" and that the Sherman Act "represents an uneasy compromise between the viewpoints". One thing remains true: "competition", and monopolization were not defined in the Sherman Act. Moreover at the end of the 18th century, there were already two schools of thought amongst economists in the USA: the classic and the "German thinking" which had made its place among American economists. The best answer to the argument on the initial purpose of the Sherman Act, may be that, given the absence of economic knowledge when the Sherman act was adopted, policy makers of the time did not see any contradiction between promoting consumer welfare, economic efficiency, and distrusting any economic concentration of power.

426 Idem p.1167.
429 Machlup F., History of Thought on Economic Integration, 1977, p.29.
Indeed the way the USA has treated its nationals, in terms of antitrust rules has varied through US history and may have followed politics.\(^{430}\)

### 3.4.4 The European conception of the role of competition

The Europeans have a different conception of the role and purpose of their competition system that the USA. The achievement of a common single integrated market within the Community is the main purpose of the EEC treaties. As mentioned in the previous section, for civilian countries, the law is the expression of policies and social goals and, article 3 of the EEC Treaty is a good example of this effort of coordination. Competition policy is one of the means available for achieving economic integration in the Common Market. The EEC Commission is the centralised agent of all this coordination.

Mr Van Miert, recently appointed Member of the Commission responsible for Competition policy, indicated he would model the EEC competition policy more on the German and Japanese approaches and less on the British free-trade approach of Sir Leon Brittan.\(^{431}\) He declared that would take into account other elements, including environmental, regional and social pressures of competition as well as industrial and internal market objectives.\(^{432}\)

This centralised approach is very different from the highly decentralised approach of the US system\(^{433}\). Under the flag of democracy, opposite interest-

---

\(^{430}\) For example, the Reagan administration can be viewed as associated with the Chicago philosophy although Professor Areeda was advisor to President Reagan; the Bush administration subsequently softened this approach. The Structural Impediment Initiative pact with Japan, initiated in 1989 and later on, the policy declaration that antitrust laws would be applied extraterritorially in order to protect US exports are evidence of this change of trend. The new Clinton administration is expected to follow an even more liberal approach with Pitofsky and Fox as its leading advocates.


\(^{432}\) Financial Times 13/1/93, 15/1/93, 19/1/93.

\(^{433}\) "This highly centralized system contrast vividly with the Byzantine proliferation of statutes, enforcement bodies and fora in the United States, all charged, to overlapping and inconsistent degrees, with "antitrust" policy". Hawk B. "EEC and U.S. Competition Policies - Contrast and (continued...)"
groups win different protection in the USA. This lack of co-ordination is evident in antitrust enforcement where lower courts often follow opposite directions. Easterbrook condemns it as follows:

**Antitrust is today a body of common law, always in evolution, subject to different interpretation in thirteen federal circuits and the courts of fifty states. A single practice may be challenged in a dozen forums ... No matter how well-intentioned the plaintiffs, no matter how astute the judges, the process of common law litigation is one of uncertainty... Common law antitrust litigation is a high-risk, high-delay litigation.... Some other nation, with a legal system able to give quick and binding answers to tough questions, will take the baton.**

National treatments are, therefore, far from similar treatments. The discipline of the obligation of National Treatment would not be sufficient to replace the growing need for an international standards on competition discussed in chapter 9.

**Indirectly, however, the obligation of National Treatment should lead to some harmonisation** of standards because of the boomerang effect of any economic policy.

### 3.5 The different policy objectives of antidumping and antitrust laws

Competition (or antitrust) laws share the same philosophical roots as "free trade" systems in that the mechanisms of free markets are considered the best way

---

**433 (...continued)**

Convergence in *European and American Perspectives on Competition and Industrial Organization*, p.39. There is, however, much mutual influence learning amongst trade partners. The recent bilateral negotiations with Japan, the Structural Impediment Initiative, and the Interface Theory of the Michigan School, are evidence that the Americans now accept that many different economic policies are in fact interrelated which, to achieve a comprehensive solution, must be addressed together (as they were in the Havana Charter).


**435** Messen argued that competition laws and the global competitive process improve more through the competitive interaction of different national competition laws than through harmonisation: "...competition laws are just like cars in that they improve through competition". "Competition of Competition Laws" *NW.J.Int'l L.& Bus.*, vol.10 no.1 (1989), p.17.

**436** The boomerang effect means that exporters will end up being treated by foreign governments the way their national government treats foreign exporters. At such end domestic exporters will be pressuring their own government to treat foreign exporters in a better way in order to be treated better by foreign governments.
to increase welfare. Both competition and trade systems contain provisions to protect the good functioning of the markets and to deal with unfair commercial practices.

Some economists would argue, however, that intervention to control unfair practices will often cause more damage than the practices themselves and, therefore, that a free market economy should be interfered with as little as possible. This contention ignores, however, a basic principle of public international law: sovereignty of states. As long as states maintain the right to administer their domestic policies autonomously, differences and distortions will remain. Therefore, in theory, measures dealing with unfair trade practices, such as antidumping laws, share common goals with competition policy and antitrust laws in that both sets of legislation are designed to prevent unfair business practices which distort the operation of a free market.\(^\text{437}\)

In practice, however, the enforcement of these laws follow very different patterns. Actors in competition and trade law are often said to be different: trade laws are supposed to govern commercial relations between States, whereas competition laws govern acts of private firms. This distinction is, however, inaccurate. In some competition systems, as is the case in Europe, competition rules cover both acts of states (subsidies) and conduct of firms (structural and behavioral). On the other hand, some trade laws, laws on antidumping for instance, are concerned primarily with acts of firms, although the attitude of governments involved is also relevant. The problem, therefore, is that often the actors concerned are mis-identified.

It is commonly admitted that antidumping laws protect domestic producers and sellers competing with imports, while antitrust laws protect competition defined in

\(^{437}\) It is worth noting the correlation between the strong enforcement of antitrust laws and the reduction of tariffs and other trade laws as observed by Robert Feinberg. For him, historically in the USA and the EEC, antitrust enforcement and trade liberalization have tended to move in the same direction. "...in today's interdependent economies, protection in any one sector distorts the incentives in related sectors, leading to attempts at further barriers to trade.... In the absence of strong antitrust policy, domestic interest may be able to frustrate the goal of a more open international trade system." Feinberg R., in "Antitrust Policy and International Trade Liberalization" World Competition, vol.14 (1990-91), p.13.
terms of welfare for consumers.\textsuperscript{438} This distinction is not completely borne out in fact. The competition system of Canada, for example, expressly states in article 1, that its purpose is to protect the opportunities of small and medium business; so does the Mexican law and the EEC Treaty.\textsuperscript{439} Rights of small and medium business cannot always be equated with "competition", i.e. economic efficiency.

Moreover, like antidumping actions, antitrust enforcement and policy are greatly influenced, and some would say manipulated, by interest-groups concerned only with their own privileges as discussed below.

3.5.1 Interest-group politics

It is often said that antitrust laws aim at promoting consumer welfare in that they are designed to preserve the unrestrained interaction of competitive forces that will yield the best allocation of resources, the lowest prices, and the highest quality products and services for consumers.\textsuperscript{440} Without entering into a critique of the enforcement agencies in the USA, it is worth summarizing the views of William Shughart, special assistant to the director of the Federal Trade Commission's Bureau of Economics because they put light on the weaknesses of the antitrust system, since they have their parallels in the antidumping system.\textsuperscript{441}

Shughart argues that narrow interest-groups determine the formulation and the enforcement of antitrust policy. He addresses five interest-groups in the USA, other than consumers, who, he argues, manipulate antitrust laws to their exclusive interest: the Federal Trade Commission, the Department of Justice, the Judges, the Lawyers and the private litigants.

\textsuperscript{438} This was very well described in the report of the OECD, \textit{Competition and Trade Policies}, 1984, Paris.

\textsuperscript{439} See discussions in chapter 8, section 8.2.1.


For him, most private litigation appears to be essentially contract disputes "recast as antitrust cases and embellished with a variety of antitrust charges". Investing in an antitrust lawsuit, as any other investment decision can be used to subvert the competitive process.

The administrative structure of the Federal Trade Commission (FTC) and the Department of Justice's Antitrust Division (DOJ) are biased in favour of bringing to court large numbers of easily prosecuted antitrust cases that generate few, if any, benefits for consumers.

The structure and functioning of the US Congress also facilitate the biased uses of the antitrust process by firms in order to obtain protection from competitive market forces given that private firms are contributors to political parties. Shughart is no less severe in his assessment of the role of the judiciary and of lawyers:

Judges tend to decide a greater percentage of antitrust complaints in the government's favour when vacancies exist on higher courts and increased opportunities for promotion are perceived. Antitrust penalties tend to be stiffer the larger the backlog of cases on the court calendar,...perhaps...to induce...parties...to settle.

As for lawyers, they clearly gain from the system of private litigation. Firms can often win advantages in the court room that they could not win in the market. Shughart is supported by Professor Areeda:

In fact the lure of treble damages and lawyer's fees, particularly in the context of class actions leads to a tendency to take legal action in every possible situation..... I am sorry to say that the consequence of this is that a good deal of antitrust litigation in the United States is really lawyer-dominated and lawyer-initiated and the true parties in interest are the lawyers.

---


443 Michael Moore has since clearly established that antitrust enforcement is directly related to the relationship between representatives of the Congress or Senate and the complaining firm without any welfare consideration."Rules or Politics" Paper for the Department of Economics at George Washington University July 1990 p.55.


Shughart concludes that the selection of cases by the FTC, the DOJ and private litigants is usually done for the best interests of very limited groups rather than the majority of the community.

For the purpose of this thesis, reference to Shughart's arguments is made to support the proposition that any legislation can be misused or abused by interest-groups. Antitrust is not different from antidumping in that respect. Antitrust procedures, however, allow and require consideration of more interest-groups than antidumping ones do. No other interest-group has legal standing in antidumping cases and, therefore, their interests tend to be neglected as further discussed in the following chapter 4.

3.6 Conclusion

In this chapter the regulation of prices and pricing practices of domestic sales have been compared to parallel regulation of transnational sales in order to demonstrate that the actual enforcement of antidumping laws infringe the obligation of National Treatment contained in the GATT and NAFTA.

Antidumping laws appear to impose much greater restriction on the practices of foreign firms than those imposed on domestic producers selling in their home market. This is true for both substantive and, importantly, procedural rights, which tend to be denied to exporters in antidumping cases.

Antidumping laws need not be identical in all points to domestic competition laws to comply with requirements of National Treatment. Article III of GATT guarantees an "equality of treatment". The purpose of III:4 is to "protect expectations on the competitive relationship between imported and domestic products."

---

447 Paragraph 5.11 Panel decision on US Section 337.
The provisions of the GATT authorising antidumping measures can be reconciled with the obligation of National Treatment. Indeed, it would be unreasonable to expect Contracting Parties to have agreed on an article VI and adopted an Antidumping Code if they did not have effective application. Antidumping laws have a role different from antitrust laws; they offer rapid remedies: the duties. The enforcement of antidumping laws must, nevertheless provide exporters with rights parallel to those given to domestic producers in similar circumstances.

This is not to say, however, that the compliance with the obligation of National Treatment would solve distortions in international trade. Domestically, states are organised along different models. Different social organisations will lead to different competition systems.

Altogether both competition and antidumping laws have evolved into different but not contradictory directions. However they need not be opposed. Antidumping laws could offer further rights to exporters (and commercial users). If a "Public or National Interest" clause was introduced in antidumping laws, their enforcement would become much more competitive and the divergences from standards of domestic competition laws would greatly be reduced. This discussion is further developed in the following chapter.

448 Or "Community Interest" in the EEC discussed in chapter 4, section 4.3.1.3 of this thesis.
Chapter 4 Co-ordination of antidumping and competition considerations at the domestic level: considerations of competitive elements in antidumping cases and the use of trade measures in competition cases.

4.1 Introduction

Before proposing a fusion of antidumping and competition laws in NAFTA (which is done in Part IV), the present chapter focuses on the state of the law, i.e., on the actual interaction and co-ordination of competition considerations in national antidumping laws.

Competitive considerations can be introduced, by various means and at various levels, into the antidumping process in order to reduce the level of antidumping duties. For instance, antidumping duties could be reduced if 1) the margins of dumping are reduced\textsuperscript{449}, 2) antidumping duties do not cover the full margin of dumping or 3) the interests of various interest-groups are considered when assessing causal injury. If commercial users and consumers had more procedural and substantive rights in the antidumping process, antidumping determinations would likely be more competitive. Private enforcement has always been more aggressive and efficient than public enforcement.

\textsuperscript{449} Inadequacies in the determination of dumping margin are discussed in chapter 1.
The initial difficulty is that the expressed goal of antidumping laws is generally to protect domestic production from injury caused by dumped (unfairly traded) imports, without any other considerations. Other interest-groups are also urging that enforcement rules be altered. These efforts have taken three main routes: an expansion of legal standing rights, the Lesser Duty principle, and the use of public interest clauses. These possibilities for increasing competitive changes are the subject of this chapter. Reference is made to the EEC competition system because of its "community interest clause", which has been in force since 1984. It was, at the time, a new legal technique which allowed for the introduction of competitive variables into decisions to apply trade measures.

4.2 Context for the consideration of competition variables in antidumping determinations

The purpose of most antidumping laws is straightforward: the protection of domestic production from dumped imports. For instance, the definition of "material injury" in SIMA clearly speaks of "... in respect of the dumping ... material injury to the production in Canada of like goods." The USA, Mexican and EEC laws provide similar protection. The primary purpose of the provisions of the GATT on dumping is different. GATT antidumping law attempts to limit antidumping

---

450 Competitive considerations in trade measures other than antidumping actions, such as voluntary export restraint, are not discussed in this chapter. The determination of the margin of dumping may also be biased against the exporter mainly because prices and costs are constructed, as seen in chapter one of the present thesis. But chapter four is more concerned with the injury phase of the antidumping process.

451 EEC No. 2176-84.

452 Article 2 of the Special Measures Import Act.

453 SEC. 731. of Subtitle B of the Title VII of the Tariff Act of 1930, as amended (2) the Commission determines that an industry in the United States - (i) is materially injured (...) by reason of imports ...".

454 Article 12 of the Regulation Against Unfair International Trade Practices of 25 November 1986 states: "... duties shall be fixed ... only if ... the Secretariat becomes convinced of the occurrence of injury to the domestic production apparatus".

455 Article 4.1 of the EEC Council Regulation NO. 2423/88 states: "... if the dumped... imports...are... causing injury i.e. causing ... material injury to an established Community industry..."
actions by exhorting member states to use minimal duties whenever possible and by reiterating that antidumping actions are not mandatory.

In fact, Article VI of the GATT was adopted in 1948, in order to restrain national antidumping actions even if it also legitimised antidumping laws by allowing member states to impose antidumping duties in certain circumstances. In 1980, two provisions of the Tokyo antidumping code further favoured the reduction of antidumping duties: 1) the "Lesser Duty" principle in Article 8, and 2) the reference to restrictive business practices, in article 3.4, in the application of an injury finding.

The practice of most states is to impose duties for the full margin of dumping. Article 8 of the GATT Antidumping code\textsuperscript{456} encourages states to provide their antidumping authorities with a discretion to impose duties less than the margin of dumping already determined, if such lesser duty would be sufficient to remove the injury suffered. This principle is called "Lesser Duty" principle. In the application of, and in addition to, this Lesser Duty principle, the EEC introduced consideration of what is called the "Community Interest" in their legislation.

Another important innovation of the Tokyo antidumping negotiations is the reference in footnote 5, Article 3.4 of the GATT antidumping code\textsuperscript{457}, to restrictive business practices as variables which may be assessed when determining the

\textsuperscript{456} Article 8(1) of the GATT antidumping Code: "The decision whether or not to impose antidumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether or not the amount of the antidumping duty to be imposed shall be the full margin or less, are decisions to be taken by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories Parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry."

\textsuperscript{457} Article 3.4: "It must be demonstrated that the dumped imports are, through the effects(4) of dumping, causing injury within the meaning of this Code. There may be other factors(5) which at the same time are injury the industry, and the injuries caused but other factors must not be attributed to the dumped imports'. Footnote (5): "Such factors include inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the pattern of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and export performance and productivity of the domestic industry."
injury. Unfortunately neither US, EEC, Mexican or Canadian antidumping law expressly refers to restrictive business practices.

Therefore anticompetitive agreements between exporters, between domestic producers or between the two groups, are not effectively addressed in the antidumping process. The US Federal Trade Commission (FTC) and the Canadian Bureau of Competition may intervene and make representations in such proceedings but their role is very limited. Bourgeois argues that in the EEC such practices would be one of the factors to be taken into account for assessing injury. If antidumping measures were based on more systematic assessments of restrictive business practices in both countries, then antidumping decisions would be more competitive.

Besides these two provisions resulting from the Tokyo Negotiations, GATT antidumping law does not require antidumping laws to consider the impact on competition.

The OECD has, however, encouraged member states to take into consideration the anticompetitive effects of trade measures. In 1984 the OECD produced a report on the interaction between trade and competition policies. The report recognised that trade and competition policies closely interact. On 30 April 1985, the OECD Council adopted a first Recommendation calling upon Members to undertake on

---

458 It is interesting to note that in the proposed Antidumping Code, negotiated under the Uruguay Round, the content of that footnote has been introduced into the text of paragraph 4, article 3 "Determination of injury". See Dunkel Report, Dec 1991, MTN.TNC/W/FA page F.5


460 Referring to Certain sodium carbonate originating in the Soviet Union O.J. L48/1 (1980).

461 "Competition and Trade policies share the common objective of seeking to remove artificial distortions in the market place. While competition policy is designed to preserve competitive domestic market structure and the efficient allocation of resources, laws dealing with unfair trade practices aim to protect domestic industry from unfair import pressures causing injury to domestic competitors. Accordingly, in the enforcement of anti-dumping and countervail laws, different standards are applied to import pricing practices than if such practices were examined under competition statutes." OECD, Trade and Competition their Interaction, 1984, p.8.

462 As early as 14 December 1971, the Council of the adopted a Recommendation on Action against inflation where it mentioned that measures favouring competition tend to put pressure on costs, prices and profits and tend to be a good tool against inflation.
the basis of a checklist, a systematic and comprehensive evaluation of trade and trade related measures, and more particularly, the effects on consumers and on domestic competition. Certain paragraphs are worth quoting:

INDICATIVE CHECKLIST FOR THE ASSESSMENT OF TRADE POLICY MEASURES

a) ...
b) What is the expected effect of the measure on the domestic price of the goods or services concerned and on the general price level? c) What are the expected economic gains to the domestic sector, industry or firms in question (technically, the increase in producer's surplus)?
d) ...
e) ...
f) What are the direct costs of the measure to consumers due to the resulting higher prices they must pay for the product in question and the reduction in the level of consumption of the product (technically, the reduction in consumers' surplus)? Are there specific groups of consumers which are particularly affected by the measure?
g) What is the likely impact of the measure on the availability, choice, quality and safety of goods and services?
h) What is the likely impact of the measure on the structure of the relevant markets and the competitive process with those markets?
i) ...
j) What will be the expected effect on investment by domestic firms in the affected sector, by potential new entrants and by foreign investors?

The checklist is however to be used with trade measures "other than those dealing with unfair trade practices" which excludes antidumping laws. However, once the link between external and internal commercial policies has been recognised, the same reasoning can be applied to antidumping measures specially when one considers that, as argued in chapter 1, antidumping actions are no more that discriminatory safeguard measures.

On 23 October 1986 a Recommendation for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade policies which refers expressly to the checklist was adopted. Two areas of consideration are worth quoting:
Considering that the effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports;

Considering the need for increased co-operation between competition and trade authorities at the national and international levels to avoid or minimise conflicts between laws, regulations and policies in the field of trade and competition;

This Recommendation invites members when negotiating export limitation arrangements and when licensing export and import cartels to take into account their effect on competition of the countries involved. It is important to note the introduction of the "foreign market" to be considered a lacuna of antidumping laws condemned in chapter One of this chapter.

Point five mentions that care should be exercised when using unfair trade laws so that proceeding initiated by enterprises are not misused for anticompetitive purposes. Collaboration and co-operation to overcome jurisdictional problems is favoured. Finally, procedural arrangements to avoid or minimise conflicts between trade and competition policies are recommended at the national and international level. As in most OECD Recommendations, problems are well identified and reflected solutions are exposed, but member states always maintain their total freedom : "... without prejudice to each government's full freedom of action...".

As argued in chapter 2463 Recommendations of the OECD are not binding, although legal steps taken by countries where most firms have their place of business have an important political impact. This latter recommendation favours the consideration of the economic interest of other groups than the domestic industry, which is the reasons why antidumping measures are usually anticompetitive. Indeed, an important economic group, which consists of commercial users including downstream producer, is not considered in the injury test. An assessment of the injury caused to this group of commercial users, when deciding whether to impose duties, would greatly improve antidumping assessments.

463 Chapter 2, section 2.5.
Commercial users, like domestic producers, also provide 'jobs' in the importing country and their importance is growing\(^{66}\). Moreover, downstream and commercial users are often nationals of the importing country; their economic interests should form part of the economic health of said importing country and their competitiveness should be viewed as important a consideration for the importing country as the need to protect directly competing producers.

Industrial users and importers usually intervene into the antidumping process by supporting the exporter and also, if possible, by lobbying the authorities.\(^{65}\) A "community" or "public" interest clause in antidumping laws would tend to favour the balancing of a wider range of interests in the importing country and should, therefore, render antidumping enforcement more competitive.

In the following section the rights of affected parties, other than the domestic producers are discussed. The changes brought about by the adoption of a Lesser Duty principle and clauses of Public (and Community) interest are analyzed. It will help to focus on areas where clashes of competition and trade considerations will need to be reconciled in NAFTA.

### 4.3 Pressures to reduce antidumping duties

#### 4.3.1 The EEC system

#### 4.3.1.1 Legal standing


\(^{65}\) The only possibility for commercial users and downstream consumers is to support the argument of the exporter that domestic producers do not suffer any injury. They cannot argue that the injury they suffer outweigh the injury to domestic producers. Moreover the economic interests of exporters, independent importers, downstream producers and other commercial users of said dumped imports may differ and even contradict each other. These differences cannot be argued in the pleading for the exporter.
The EEC law has evolved\(^{466}\) to give the contestation right in antidumping cases to complainants, exporters and related importers.\(^{467}\) In the EEC, contestation is possible only by virtue of Article 173 of the EEC Treaty. Under this article individual decisions are reviewable by the European Court of Justice. In the EEC system, antidumping measures are adopted by regulation, which are of general application.\(^{468}\) Commercial users, although affected, are not named in the antidumping regulation. In Plaumann\(^ {469}\) the Court concluded that an applicant, if not named in the act contested, must be individually distinguished as the addressee.\(^{470}\) Commercial users’ legal standing is therefore fairly limited.

In Extramet (1991)\(^ {471}\), however, the right to contest of an independent importer (who was also a commercial user and seller) was accepted. The Court\(^ {472}\) reaffirmed the criteria of Plaumann and concluded that Extramet was "directly and individually concerned" since it was the largest importer and user of the product in the EEC and since its production had been very much affected by the regulation.\(^ {473}\)


\(^{468}\) In Ball Bearing the Court said that it was almost impossible for an importer to be individually concerned.


\(^{470}\) "... by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons...", Plaumann, p.47.


\(^{472}\) The Advocate General Francis Jacob submitted to the Court that one should be directly or individually concerned by an antidumping regulation if it could show that it was expressly or implicitly identified in the measure concerned or that it had participated in the preparatory enquiries in a manner which could be considered to have influenced their result, at least if its market position were substantially affected by the measure. These criteria were not retained by the Court.

\(^{473}\) Extramet was also very much involved in the investigation, very concerned by the result of the procedure.
Consumers have even less legal standing. In BEUC v. Commission\textsuperscript{474} a consumer group was refused the right to consult non-confidential information of an antidumping action.\textsuperscript{475} Consumer groups cannot object to antidumping measures if they are not authorised to see any evidence from the file. Because of these important limitations with regard to legal standing issues, competitive interests cannot be introduced in the antidumping enforcement very effectively.

\textbf{4.3.1.2 The Lesser Duty Principle}

In accordance with the GATT's Lesser Duty principle, the Council of the EEC maintains discretion to reduce the amount of duties to what is necessary to compensate for the injury suffered.

The amount of such duties shall not exceed the dumping margin...; it should be less if lesser duty would be adequate to remove the injury.\textsuperscript{476}

Since Allied II\textsuperscript{477} the Council must limit the level of definitive duties it imposes to that which is objectively necessary to eliminate material injury to a EEC industry.\textsuperscript{478} However no one is expressly entrusted with the function of ensuring that all relevant variables are used when assessing the injury. On the contrary, only domestic producers have legal standing in the importing country.\textbf{4.3.1.3 Community interest.}

\textbf{4.3.1.3 The Community Interest}

In 1979\textsuperscript{479}, the EEC introduced a new legal technique through enacting a "community interest" in the antidumping regulation. This concept can be viewed as

\textsuperscript{474} Case C-170/89, judgment of 28.11.91.

\textsuperscript{475} The "community interest" discussed in section 3.4 of this chapter was expressly argued. One wonders how the community interest can be defended if the concerned parties do not have any information.

\textsuperscript{476} Article 13 (3) of the EEC Antidumping regulation 2423/88.


\textsuperscript{478} For further discussion see Pevchin G., "Allied II: Limits on the extend of injury under the EEC Antidumping rules" in 1985 Annual Proceedings Fordham Corporate Institute, 1986, p.605.

\textsuperscript{479} 21 December 1979, EEC Antidumping Regulation Re. 3017/79, O.J. (1979) L339/1.
a way to ensure that the interests other than producers, are considered in antidumping inquiry.

**General Antidumping Regulation**

Article 10 paragraph 1 reads as follow:

Where the facts as finally established show that dumping or subsidization during the period under investigation and injury caused thereby, and the interest of the Community call for intervention, a definitive anti-dumping or countervailing duty shall be imposed by the Council.\(^{480}\) (Emphasis added)

Duties may therefore be imposed after it has been determined that dumping which is causing injury, and the Community Interest have been proved to exist. It is important to note that the provision for Community Interest is not contained in the section on injury. In other words Community Interest can be alleged as a reason to refuse to initiate an investigation. In fact, Van Bael argues\(^{481}\) that the Community Interest can only be assessed when considering whether or not it is necessary to intervene. Once the antidumping process has been initiated duties must cover at least the injury.

Vermulst writes in the same vein about Community Interests:

This is a positive development as political considerations should be confined to where they belong, i.e. the weighing of the Community interests, and should not enter other aspects of the antidumping investigation.\(^{482}\)

Jacques Bourgeois is of the opinion that the Community Interest clause "remains a tool to weigh conflicting interests in each case where they are claimed, within the framework of the overall investigation".\(^{483}\) There are still debates on the scope and purposes of the community interest clause. In the Guide to the European

---

\(^{480}\) Article 11 on provisional measures is similar but can be interpreted as limiting the consideration of the community interest to the assessment of injury caused during the proceedings: "Where preliminary examination shows that dumping or subsidy exist and that there is sufficient evidence of injury caused thereby and the interest of the Community call for intervention to prevent injury being caused during the proceeding, ... the Commission shall imposed a provisional duty...".


Communities’ Antidumping and Countervailing legislation, the Commission defined the concept as follow:

Article 12 Community interest

Community interest may cover a wide range of factors but the most important are the interests of consumers and processors of the imported product and the need to have regard to the competitive situation within the Community market.

The Commission has yet not issued any criteria of how to co-ordinate conflicting commercial interests of commercial users and consumers against those of the producers within the EEC.

Balancing the interest of domestic producers and those of commercial users involve the balancing of different policies of the EEC. Undistorted competition (EEC Treaty article 3)f) and the establishment of a commercial policy towards third countries, which includes antidumping actions (EEC Treaty article 3)b), are two of the goals of the EEC which often follow opposite routes. There is no indication on how to reconcile particular trade considerations with domestic competition.

The duty for the Commission to balance conflicting policies was addressed in Continental Can484 and in Extramef485. The case law seems to suggest a balancing test486 where competitive considerations should be of primary importance. Although Continental Can did not involve issues of trade and competition law, the efforts to reconcile conflicting policies are relevant:

... But if Article 3f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires a fortiori that competition must not be eliminated.... Thus the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives of the Treaty, are limited by the requirements of Article 2 and 3. Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the Common Market.487

---

486 For further discussion on the existence of duty of the Commission to balance conflicting interests and the constitutional grounds to do so, see Wesseley T., EC Antidumping and Antitrust: Introductory Remarks on a Complex Relationship May 1993, Master Thesis, Fordham Law School.
In Extramet (1992), the Advocate General Francis Jacob reiterated the "special status of competition policy under the EEC Treaty".

The special status of competition policy under the EEC Treaty is reflected in Article 3(f)... The fundamental importance of the objective was emphasized by the Court in Continental Can.

It is true that, by virtue of Article 3(b), the activities of the Community also include "the establishment of a common customs tariff and a common commercial policy towards third countries" and that it is in the framework of that policy that actions against dumping is taken: see article 113 of the Treaty. None the less, while the Treaty recognizes the need for protection against dumping as a necessary evil, that need must not be met without taking account of the objective set out in Article 3(f).

Both Advocate Generals have emphasised, the obligation for the Commission to balance conflicting policies, the primacy of competition rules and the need to take into account competitive considerations much more systematically. Their position has not been followed by the EEC Court.

4.3.1.3.1 Allegation of the state of competition in the EEC

Right from the beginning Community Interest was unsuccessfully argued in opposing antidumping actions initiated by a firm in a dominant position or practising restrictive agreements within the EEC. The Court opened the door to consideration of antitrust elements in antidumping procedures in Mercury (USSR).
...if an infringement of Article 85 and 86 is discovered and a proceeding is initiated under Council Regulation No 1, the Commission may review the present proceeding in accordance with Article 14(1) of Regulation (EEC) No 2176/84.

The state of competition inside the Community was argued many times with a few successes. In Photocopier (Japan), Ferro-silico-calcium (Brazil) and in Typewriters (Japan) it was argued that a full duty would reduce competition or create a dominant position. These arguments were rejected and Community Interest was equated with the needs of the domestic competing industry. In the Japanese Sensitised Paper case, however, the competitive conditions of the market of industrial users justified a very low level of duty compared to the margin of dumping. In Glycine (Japan) the dominant position of the EEC producer justified a duty "that would not fully eliminate the injury".

4.3.1.3.2 Commercial users

Stanbrook relates that "Community Interest" is always argued in cases involving downstream producers or a commercial consumers, but the answer of the Commission and the Court is usually that the interest of domestic producers out weight those alleged without further analysis.

In Extramet, Advocate General Jacobs would have required the Commission to assess market power and balance more systematically other interests than those of the complainant forcing a balancing of trade and competition policies.

---

494 A similar language can be found in Calcium silicide (Brazil), OJ (1987) L129/5.
495 OJ 1987 L 54/29.
497 O.J. 1984 L335/43.
500 Vermulst E., Antidumping Law and Practice of the US and the EC, 1987, p.246
501 There are, however, a few cases where the interest of commercial users led to lower duties but without extensive discussions. One can think of Ferro-Chromium from South-Africa and Sweden EEC No. 1355-78; in Wrought Titanium from Japan O.J. C 207/4 (1979), in Soya Meal from Brazil O.J. L.106/10 (1985), in Codeine and its salt (Czech., Hung., Pol., Yugos.) OJ (1983) L57/19.
concentration which creates a dominant position as a result of which effective competition is significantly impeded is to be considered incompatible with the common market...

48. ... there is no evidence that the institutions made any serious attempt to perform the balancing exercise required of them...

50. I also consider that the Council failed to give proper consideration to the question whether the imposition of a duty was consistent with the need to avoid distortion of competition in the common market.502 (Emphasis added)

Extramet had four arguments. One of them was that the Commission had to consider restrictive business practices of the parties; it was abusive for the complainant, in a dominant position, to initiate an antidumping investigation. Extramet also argued that the complainant was responsible for its own injury since it had refused to supply Extramet. Extramet did not have any other choice than to import.503

The Court quashed the antidumping regulation on the ground that the Commission had not considered whether the plaintiff's injury was self-inflicted.504 The ECJ agreed that the Commission had to consider the impact of the alleged abuse of dominant position but avoid the more fundamental discussion on the coordination of antidumping and competition rules.505

### 4.3.1.3.3 No Injury finding

The Council maintains full discretion to reduce duties from the level of dumping margin to a level adequate to remove injury.506 The Community Interest and the

---

502 Case C-358/89, Opinion of the Advocate General rendered on 8 April 1992, at paragraph 44, 48 and 50.

503 Extramet was suing the complainant for abuse of dominant position in French national courts.

504 In Ferro-Silico from Brazil O.J. L 322/87 the argument was put to the Commission that the EEC industry could not have suffered injury since it refused unilaterally to supply to a specific group of customers. The Commission concluded that there was no evidence of that refusal.

505 Temple Lang has argued that the EEC "may have a duty not to take antidumping measures which would have the effect of creating a dominant position... or strengthening such a position..." in "Reconciling European Community Antitrust and Antidumping...", 1988 Annual Proceedings Fordham Corporate Law Institute, 1989, Chapter 7, p.30.

506 Article 13.3 of the EEC Antidumping Reg. It is worth remembering that in 1984, in Allied Corporation case, that the Advocate General van Themaat argued that the amount of duty should...
Lesser Duty principle are sometimes used in parallel to conclude the absence of causal injury.\textsuperscript{507} In \textit{Allied Corporation v. Council}\textsuperscript{508} Advocate General Verloren van Themaat suggested a theory that the amount of duties should not exceed the level required by the Community Interest. The Court in \textit{Allied} did not base its decision on the Advocate General's opinion but whether the failure of the Commission to consider a lower level of duty would have been sufficient to eliminate injury.

Bourgeois reports that the argument of "meeting competition" was once accepted for community interest and led to a finding that the dumping did not cause any injury.\textsuperscript{509} In \textit{Certain Sodium Carbonate from the Soviet Union}\textsuperscript{510} and \textit{Synthetic Fibres of Polyester}\textsuperscript{511} the absence of competition among domestic producers was one of the elements leading to a finding of no-injury. In \textit{Glycine (Japan)}\textsuperscript{512} the Council decided that the duties would not eliminate the injury so no protective measures were taken.

In the above referenced cases, the argument of Community Interest was introduced by downstream producers and their consideration would tend to encourage more competitive antidumping measures. The Commission and the

\textsuperscript{506} (...continued)
not exceed the level required by Community Interest. The premise was that if the EEC industry is monopolistic or oligopolistic it should be in the interest of the community to reduce the protectionist duty. The court did not say anything on the level of duty and condemned the Commission's failure to consider whether a lower level of duty would have suffice to eliminate the injury.

\textsuperscript{507} "Whereas the "community interest" ingredient has result in little appreciable difference between antidumping policies of the United States and the Community, the Community's restrictions on the levels of protective measures to that necessary to eliminate injury has produced a considerable difference." Stanbrook C., 1985 Annual Proceedings Fordham Corporate Law Institute, 1986, p. 633.

\textsuperscript{508} Opinion of the Advocate General on the 21 Nov. 1984, reported in \textit{Allied} 3 (1985) C.M.L.R., p.572.


\textsuperscript{511} O.J. (1987) L 103/87.

doctrine have argued that Community Interest may also include considerations of industrial policies and foreign relations.\textsuperscript{513}

**4.3.1.3.4 Foreign policies**

In *Typewriters (Japan)*\textsuperscript{514} the Court rejected the argument that it is not in the Community Interest to protect inefficient producers. In *Kraftliner (USA)*\textsuperscript{515}, it was decided that it is not in the interest of EEC consumers to become dependant on a single non-EEC source of supply, a principle repeated in *Aspartame*\textsuperscript{516}. The Community is said also to take into account the way in which its major trading partners implement their respective domestic antidumping rules.\textsuperscript{517}

**4.3.1.3.5 Industrial policy**

Community interest has also been used to take into account the strategic importance of the relevant industry within the Community\textsuperscript{518}. Temple Lang writes that the Community Interest should be used for regional discrimination and for

---

\textsuperscript{513} For instance in *Hydraulic excavators*, O.J.(1985) L 176/64 the Council decided that "in the light of the present trade relations with Japan" it was not in the community interest to accept undertakings.


\textsuperscript{516} Council Regulation EEC No 1391/91, O.J. No L 134/1.


\textsuperscript{518} "It may also involve industrial policy considerations, such as the need to maintain a viable industry in the Community" Bourgeois J., "Anti-trust and trade policy: a peaceful co-existence?" in *Int'l Bus. Lawyer*, (February 1989), p.59; Besseler and Williams in *Antidumping and Antisubsidy Law*, 1985, p.171, write that Community Interest cover the strategic importance of an industry or the need to maintain a viable industry within the Community.
implementing industrial policies and for market integration. The EEC industrial policy guidelines refer to community interest defined in terms of competitive industry. There are stories of profound disagreements between pro-industrial and competition considerations amongst EEC Commissioners.

4.3.1.3.6 Conclusion on Community Interest

In practice Community Interest has been argued to cover various interest-groups: consumers, commercial users, unions and municipal authorities. With exceptions, the interests of the community have been equated with those of directly competing producers. When convenient the Commission has refereed to Community Interest, at all levels of the antidumping process, to refuse initiating an antidumping investigation, to reduce the level of duty under the margin of dumping, when taking into account the domestic competition, to terminate an investigation.

---

519 He cites Photocopier as an example of an important range of office equipment, important for the EEC office industry as a whole, which justified strong protection. 1988 Annual Proceedings Fordham Corporate Law Institute 1989, chapter 7, p. 7-33-35 and 7-73. Canadians have used their public interest clause to handle regional situations. The American constitution, however, seems to prohibit that one region be exempted from duties imposed on goods entering another area in another region. Horlick G., "The United Nations Antidumping System" in Antidumping Law and Practice, Jackson J, and Vermuslt E. (Ed.), 1990, p.103 note 9.

520 "only a competitive industry will allow the community to maintain its position in the world economy, which constitutes the essence of the Community", Industrial policy in an open and competitive environment - Guidelines for a Community approach

521 What was heard through the vineyard in the De Haviland case is a good example of this.


523 Codeine from Eastern Europe O.J. L 16/1/83 it was decided that protective measures would not be of any benefit to the injured industry.


525 Idem.

refuse imposing antidumping duties, to assess the best form of remedy and to protect employment.

Community Interest has been used indiscriminately and without great rigour. Although alleged frequently during the investigations,

... It can be said that in many cases, once dumping and injury are found and measures are likely to give relief to the complainant industry, there is a presumption that such measures would be in the community interest.

Since the Commission is in charge of the enforcement of both antitrust and antidumping policies, it is quite implausible that it would intervene aggressively to challenge antidumping measures. Extended private enforcement in favour of downstream and commercial users would improve the competitiveness of antidumping measures of the EEC and would provide the Community Interest clause with a more useful role.

4.3.2 The Canadian system

There is no Lesser Duty Rule in the Canadian Antidumping system, but there is a Public Interest clause which is discussed after the legal standing issue.

4.3.2.1 Legal standing

Rights of legal standing are more restricted in the Canadian antidumping system than in the EEC. Article 40 of the antidumping regulation defines interested parties as the importers, exporters and the domestic competitors. The Director of Investigation can also intervene in antidumping investigation, under article 125 of


528 The form of the relief in Glycine (Japan) where the Commission rejected price undertakings was influenced by antitrust consideration: "...It is not to be in the Community's interest to accept the undertakings offered because of the effect these price undertakings could have in this case on the competitive situation and structure of the glycine market."


the Competition Act. The Director has done so very rarely. Recently, the Director intervened in the Beer(USA) case in the context of a "Public Interest" inquiry discussed below.

4.3.2.2 Public Interest

A concept of Public Interest was introduced in the Special Import Measures Act (SIMA) legislation of 1984.

45(1) Where, as a result of an enquiry referred to in section 42 arising out of the dumping or subsidising of any goods, the tribunal makes an order or finding described in any section 3 to 6 with respect to those goods and the tribunal is of the opinion that the imposition of an antidumping or countervailing duty, or the imposition of such duty in full amount provided for by any of those sections, in respect of the goods would not or might not be in the public interest, the Tribunal shall, forthwith after making the order or finding:

a) Report to the Minister of Finance that it is of such opinion and provide him with a statement of the facts and reasons that caused it to be of that opinion; and b) Cause a copy of the report to be published in the Canada Gazette.

2. Where any person interested in an inquiry referred to in subsection (1) makes a request to the tribunal for an opportunity to make representations to the tribunal on the question whether the Tribunal should, if it makes an order described in sections 3 to 6 with respect to any goods in respect of which the inquiry is being made, make a report pursuant to paragraph (1a) with respect to those goods, the tribunal shall afford such person an opportunity to make representations to the Tribunal on that question orally or in writing, or both, as the Tribunal directs in the case of that inquiry.

531 Stagemann K., "Consideration of the Consumer interest..." in The Consumer and International Trade, OECD, 1984, p.249. The Canadian Consumers Association has intervened once under the old legislation in Tetanus immune from USA ADT-3-74; In the Korean Cars case, the Director of the Competition Bureau intervened under section 125 of the Canadian Competition Act and argued that Hundai was a positive competitive influence for Canadian consumers with more competitive prices and greater product choices. Other factors had caused the alleged injury. The Tribunal stressed: "... given the intense competition from other participants ... price suppression cannot solely be attributed to the dumping...". There was a finding of no injury.

532 Inquiry No.: NQ-91-002.

533 R.S.C., Chapter S-15 came enforce in 1 December 1984. It was amended by the Canadian International Trade Tribunal Act S.C. 1988, c.56, amalgamating the Canadian Import Tribunal, Tariff Board of Canada and the Textile and Clothing Board, and creating the new CITT.
The EEC clause was studied\(^{534}\) and used as a model but the Canadian concept is quite different, if only because there is no "Lesser Duty" rule in the SIMA. The procedure is also different; the Public Interest consideration takes place during the investigation on injury by the Canadian International Trade Tribunal (CITT). The Canadian Minister of Finance may, after a recommendation by the Canadian International Trade Tribunal (CITT) that public interest would be better served with a duty lesser than the margin of dumping, reduce or annul a duty. No criteria\(^{535}\) are specifically set out in the legislation. The position of the Tribunal has been to stay away from the public interest clause.

... it is to be applied on an exceptional basis, as for instance when the relief provided to producers causes substantial and possibly unnecessary burden to users and consumers of the product.\(^ {536}\)

Only two formal reports have made positive recommendations for lesser duties: the Grain Corn\(^ {537}\) case and the Beer\(^ {538}\) case. The public interest clause has also been mentioned in a few other cases without formal reports being made under article 45 SIMA. In the Grain Corn case the Ontario Corn Producers had alleged subsidisation.\(^ {539}\) During the enquiry\(^ {540}\) on injury, several commercial users of corn made written and oral representations on the anti-competitive character of the measures and many hundreds of letters were sent. Barrels were calculated to be subsidised for US$ 0.849 (CAN$1.10) a bushel. The Tribunal recommended a duty of CAN$ 0.30.


\(^{535}\) Section 41 of the SIMA regulation determines that users, consumer groups, exporters and importers of similar goods and like products are "interested parties" under article 45 of SIMA.


\(^{537}\) Report of the Canadian Import Tribunal under section 45 of the Special Import Measures Act 20 October 1987, "Public Interest Grain Corn".

\(^{538}\) Opinion No.: PI-91-001, 25 November 1991 In the matter of an opinion of the Canadian International Trade Tribunal, under section 45 of the Special Import Measures Act, resulting from the section 42 Inquiry NO. NQ-91-002.

\(^{539}\) Provisions on injury are applicable to dumping and subsidies.

\(^{540}\) The enquiry lasted 6 days and included 35 written submissions and 35 witnesses.
The Tribunal protected its judicial freedom and rejected demands for general policy declarations or strict economic analysis.

...without having to evaluate competing claims as to how injury and benefits should be distributed between domestic interest...or without making use of new and unfamiliar welfare economics-based methodologies.\(^{541}\)

After the Tribunal's decision the Minister met the various opposing groups and decided to reduce the duties from the initial assessment of CAN$1.10 to CAN$0.46, CAN$0.16 more than the recommendation of the Tribunal. The Minister also instructed the Tribunal to reconsider the Public Interest in 18 months. The review indicated no further modification.\(^{542}\)

The second complete report under article 45 SIMA took place in the Beer case. A totally different approach from the Grain Corn case was followed by the Tribunal. The Director of Investigation and Research argued that the beer industry in British Columbia was a regulated oligopoly and that there were already sufficient non-tariff barriers for duties to be highly restrictive. An agent of the exporter submitted that the whole duty was superfluous to make the price no longer remotely competitive.

The Tribunal concluded that duties which cover more than the injury are excessive and thus not in the public interest.\(^{543}\) After expressing the difficulty of assessing a proper level to cover the injury, the Tribunal observed that:

competition in the B.C. market and the consumer interest would be better served by reducing some of the anti-dumping duties from the full margin of dumping.\(^{544}\)

There were, however, no further indication of how and to what level duties should be reduced.

\(^{541}\) Decision of the Canadian Import Tribunal 20 October 1987 in Public Interest Grain Corn, p.6.

\(^{542}\) The finding lapsed in March 1992.

\(^{543}\) This a test similar to the one proposed in Allied Corporation v. Council by Advocate General Verloren van Themaat who suggested a theory that the amount of duties should not exceed the level required by the Community Interest. See discussion in previous section.

\(^{544}\) Opinion of the CITT in the BEER case No.:PI-91-001.
In the Women's Footwear\(^545\) case, footwear from Brazil and other countries, were said to be dumped at an average margin of 26\%. Although invited, no representations on public interest were made to the tribunal, which then decided not to conduct a public interest inquiry. A similar situation took place in Fresh, Whole Yellow Onions (USA)\(^546\). No report was made.

In the recent Bicycles\(^547\) decision, public interest arguments were raised during the inquiry on injury. In its subsequent Opinion on Public Interest, the Tribunal held that the market would remain competitive even though a full duty was imposed.

### 4.3.2.2.1 Procedure

There is debate as to whether the public interest inquiry should take place as an integral part of the injury inquiry, or whether it should be undertaken after the principal investigation.

In the Grain Corn case the Tribunal held a separate inquiry on the public interest, some six months after the determination of injury. Interested parties were given 30 days to argue their special interest. The Tribunal issued a very detailed judgment based to a significant degree on econometric analysis. A similar procedure was followed in the Beer case. A second enquiry took place two months after the determination of an injury.

A different procedure, however, was followed in the Bicycles case. The Notice of Commencement of Inquiry (NQ 92-002) of 17 August 1992 invited each interested party wishing to participate at the hearing on injury, to notify the Secretary of the Canadian International Tribunal before 11 September 1992. In the same notice, "representations concerning the Public Interest question referred to in subsection 45(2) of the SIMA" were mentioned; interested parties under article 45(2) were asked to report within the same time limit as ordinary interested party.

---

\(^{545}\) Inquiry No 89-003.

\(^{546}\) Decision from the CITT No CIT-1-87.

\(^{547}\) Decision of the CITT, No CIT-002.
In *Bicycles* there was no independent inquiry on public interest. Rather, it was considered as part of the general inquiry on injury.

Determining whether the approach in *Grain Corn/Beer* or that in *Bicycles* is the right one depends to a large degree on the nature and purpose of the public interest clause. Was section 45 SIMA enacted to implement the Lesser Duty principle of the Tokyo Round? or was the Public Interest consideration enacted to establish more clearly the discretion of the Canadian antidumping authorities not to impose antidumping duties notwithstanding any injury caused to the domestic production.

For either of these two positions a preliminary inquiry must take place to assess the injury and a level of duty. This does not mean, however, that in terms of procedure, the inquiry on public interest ought to take place months after the general inquiry on injury. It means that pleadings on special reasons to lower duties can only take place after injury has been proven.

4.3.2.2.2 Criteria for Public Interest

A fundamental problem with the Canadian public interest consideration is the same as discussed above with respect to the EEC. There are no explicit criteria of when and how this clause should be applied: which political consideration should be retained, which economic principles, which time period should be used to assess damages, to what extent the tribunal may recommend subsidies or other types of remedies to help the suffering industry to reorganise itself and when and how to weigh the different injuries to the different interest-groups in the "public".

The president of the CITI writes that the public interest provision was placed in SIMA as a 'consumer interest' clause. Rugman writes that it was an attempt to "offset the significant producer bias of SIMA through an examination of the impact of the public interest of countervailing and antidumping duties."

---


Whether or not consumers’ interests were the effective purpose for introducing a public interest clause, giving such a role to the Tribunal is very troublesome. It would mean that the CITT would have to quantify and distribute the injury and the net benefits between domestic interest-groups. This kind of decision involves normative and ethical factors for which the Tribunal does not have any guidelines and is, arguably, not qualified.

National antidumping laws are authorised by the GATT and the way national authorities enforce them is now accepted practice. The effective enforcement of a Public Interest consideration would be a good way to alter this accepted practice in the antidumping process. Clear policy changes should, however, be adopted first.

4.3.2.3 Proposals

Criteria have to be adopted to determine when and how to weigh opposing and/or competing interests. It is suggested that the following procedural criteria should apply when enforcing the Public Interest clause.

A. The public interest inquiry should be a part of the general injury determination in order to give to interest-groups other than the domestic producers, the opportunity to hear all the evidence. Public Interest arguments should, however, take place in a second stage of such inquiry, i.e., after the determination on injury is made.

B. Consumer groups and commercial users of the alleged dumped goods are not generally aware of the dumping enquiry and 30 days is not sufficient time for an interested group to make representations concerning Public Interest. The law should require direct notification of the antidumping investigation to antitrust and competition authorities, as well as a public notification in a distributed daily newspaper, (not just the Official Gazette). The delay should be extended to 60 days and notification of an opposing interest should result in the interruption of the time limit (with possibilities for submitting written detailed notes within 90 days). Such notification to the competition authority would allow it to enquire, as they do in the case of mergers, about the structure and potential effects on the importing market.
C. The competition authority should systematically answer the notification of an antidumping investigation if 1) the plaintiff(s) are in a dominant position in the sense of the Canadian Merger Guidelines, or 2) plaintiffs would be considered in a dominant position according to the Predatory Prices Guidelines or 3) the complainants are parties to a legal suit or have been condemned to civil or criminal offence of the Competition Act in the year prior to the preliminary determination.

In using recent EEC case law, one can suggest that in weighing the interests of various groups, inside the Public Interest, the CIT may use the following substantive criteria:

I. Balancing the interest of commercial users against those of domestic producers should be more systematic. This would, however, involve a clear change of policy and would require either the adoption of a lesser duty principle or systematic public interest enquiries.

II. Lesser Duty and Proportionality: duties should always be proportional to the injury suffered and as minimal as possible.

III. Competition within the domestic country should never be eliminated. Therefore in the situation of there being only one domestic producer, a comparison with prices of similar goods abroad should be mandatory. Differences are possible and acceptable, but these differences should be addressed.

IV. Competition should be restricted only to the extent necessary to protect domestic producers. This criteria is parallel to the second criteria, mentioned supra, but with an emphasis on the possibility of using a remedy other than duties if the tribunal sees that said remedy would fit better.

V. In case of intervention by the Director of the Competition Bureau mentioned in the procedural point C) above, the need to ensure the respect of competition laws and to detract infractions to the Competition Act should be weighed against the need to impose antidumping measures. Foreign competition may sometimes be the only discipline against domestic cartels or monopoly. In that context the process envisaged by article 31 of the Canadian Competition Act, authorising the Council of ministers to reduce trade measures if the Canadian market is not competitive.
Balancing conflicting interests is always a difficult thing which can only occur on a case by case basis. Criteria and guidelines must however be in place to indicate to the judge that other interests besides domestic producers should be considered. The consideration of interests other than those of the domestic industry would imply a change of policy and practice and it is understandable that one state cannot undertake such a change of trade position alone at the detriment of abuses by other states. Antidumping measures are strategic actions.

In the context of NAFTA, the introduction of such a balancing operation would render antidumping laws more competitive and would be an excellent transitional process towards the exclusive reliance on aggressive competition laws. The revision of such balancing operations is however very problematic since it clearly involves political and social choices. The balancing obligation may be protected with a Privative clause\textsuperscript{550} and the possibility of using safeguard measures which are not reviewable by the bi-national tribunal would always remain possible.

4.3.2.4 Conclusion

The purpose of a Public Interest clause can be viewed differently in Canada, since SIMA does not contain any explicit provision encouraging Lesser Duty. It can, therefore, be argued that the only purpose of the Public Interest enquiry is to implement article 8 of the Tokyo antidumping code. The Public Interest clause would not introduce a change of policy where the weighing of conflicting interests, parallel to conflicting considerations of trade and competition, should take place.

Whether the purpose of section 45 is only to enforce the Lesser Duty rule or whether section 45 has introduced other possibilities would have an impact on the parameters of the administration of the Public Interest consideration. In practice, however, the Canadian Public Interest clause, like the European one, is rather under-used and antidumping duties are quite automatic once dumping and injury exist. Canadian antidumping enforcement is probably as biased in favour of

\textsuperscript{550} In Canadian administrative law, the purpose of a "privative clause" contained in a statute is to limit appeals of decisions rendered by a specialised administrative tribunal.
domestic producer (and inflating dumping margin in constructing costs and prices) as any other national system.\textsuperscript{551}

More importantly SIMA should be amended to introduce a clear "Lesser Duty" principle. This way the case law may follow the example of the EEC where the absence of comprehensive and systematic efforts to assess lesser duties may invalidate an antidumping determination.

\subsection*{4.3.3 The US system}

Standing rights in the US are comparable to those in Canada and in the EEC with the important exception that there is no public interest clause where rights of downstream producers can be argued, even unsuccessfully.\textsuperscript{552}

The US antidumping law does not include a general public interest clause. When negotiating a suspension agreement\textsuperscript{553} or enforcing section 337 of the Tariff Act of 1930, which proscribes unfair methods of competition in imports into the US, the ITC must first determine that the public interest of the US needs such a suspension agreement.\textsuperscript{554} Otherwise once dumping has been and calculated, and injury proven, the imposition of antidumping duties becomes automatic for the full margin of dumping.\textsuperscript{555} The Commerce Department views the calculation of dumping margins as a mechanical exercise, and the ITC, in its determination of material

\textsuperscript{551} Magnus wrote in "The Canadian antidumping system" in Antidumping Law and Practice, Jackson J. and Vermuslt (Ed.), 1990, p.222 : "...the Canadian system operates on a prospective basis in that no dumping duty assessment need in fact ever be made unless an exporter has chosen for some reason not to increase his import price up to the normal value determined by Revenue Canada...the Canadian system does not lead to the automatic imposition of a definitive dumping duty on affected imports once an injury finding has been made". This comment must be contested. The fact that a duty is paid or that instead, foreign prices are forced to increase, does not change the level of discretion that Revenue Canada may enjoy in determining the necessary increase in price. Undertakings are not less biased than antidumping duties.


\textsuperscript{553} Called an undertaking under Canadian and EC law.

\textsuperscript{554} ...after considering...public health and welfare...competitive conditions... directly competing articles consumers..." section 19 U.S.C. # 1337(d)-(f) (1982); see discussion in Zeitler W. "A Preventive Approach to Import-Related Disputes:" Harvard Int'l L. J. vol.28 (1987) p.69.

\textsuperscript{555} Contrarily, under safeguard measures the President maintains a veto.
injury to US industry, is precluded from considering the impact on other interest groups, i.e. consumers, downstream producers and national welfare.\(^{556}\)

The American political system makes the introduction of such a discretionary public interest clause implausible.\(^{557}\) Congress would never delegate such discretion over foreign trade matters to the Administration:

a Congressman might admit the utility of such clause in the abstract. But no Congressman would want it used against a petitioner from his district, which means that the proposal, even if meritorious, is unlikely to ever be approved by any Congress.\(^{558}\)

Notwithstanding the absence of such an express clause protecting the public interest, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have expressed concerns regarding competition in many trade proceedings.\(^{559}\) In the seventies the Antitrust Division intervened in many antidumping cases with very little success\(^{560}\). Intervention has since become more selective.

The FTC has been the only party that has presented estimates of the costs to the consumer and the economy of the relief requested by the petitioners in the proceedings, and the FTC has usually been the only party cross-examining the economist presented by the other party.\(^{561}\)

\(^{556}\) Under Section 19, the ITC is not authorised to weight the effects of the dumped imports against the effects of the other factors that may be contributing to the overall injury. In fact the petitioner has only to prove that its industry is unhealthy and then under the new "bifurcated injury test" announced by the ITC, the exporter must assume the burden of proof. See further discussion in section 1.6.3.1 in chapter 1.

\(^{557}\) Discussions as to whether or not it is reasonable to foresee such a phasing out of antidumping action are reserved for chapters 7 and 8.


\(^{560}\) For further discussion on the attempts of the Antitrust Division during the seventies to reconcile antitrust and antidumping see Stagemen K. "Antidumping Policy and the consumer", *J.W.T.L.* vol.19 (1985), p.466.

The USA may be, however, the most receptive system to pressures from various interest groups. This can be viewed as a positive or a negative trend. Lobbying is very strong in the USA and it can be considered a fair expression of democracy. Newspapers are full of condemnations by downstream producers of the biased decisions of the ITC and the Commerce Department. On the other hand, as argued in chapter 1, more studies are drawing lines between antidumping successes and the personal relationships between producers, congressmen, civil servants etc\textsuperscript{562}. Results obtained on an ad hoc basis do not extend the rights of consumers and commercial users.

In the debate on the 1988 Omnibus Trade and Competitiveness Act, Senator Peter Wilson tabled an amendment requiring the ITC to produce an annual report on the negative economic impact of trade import restraint:

My amendment would require the ITC to report on the harm to consumers resulting from protectionism. If the import restraint program on apparel makes Mrs Jones pay more for her kids [sic] back-to-school clothes, then we would fuss up and tell her that her own Government is taking money out of her pocketbook, and we should fess-up and tell Mrs Jones how much more this wonderful government protectionism is costing her.

My amendment would also require the ITC to do an assessment of job losses on [sic] caused by our protectionism. If Jim Smith, a steelworker in my State of California, is laid off because his own government has cut off his employer's access to raw steel, then we should fess-up and tell him that his own government has put him out of work.

Mr. President my amendment would require a little honesty with the American consumer. My amendment would require a little honesty with American workers.\textsuperscript{563}

Since US antidumping law does not contain any formal opening for consumer groups, downstream producers or any other groups and since no rule of Lesser Duty has been implemented, it can be argued that the American antidumping

\textsuperscript{562} See discussion in chapter 1, section 1.7 and 1.8.

system does not transmit to American consumers all the rights envisioned by the GATT.

4.3.4 The Mexican system

At present Mexico's antidumping law refers to the possibility of imposing a duty covering less than the margin of dumping. There is no public interest" clause in the Mexican antidumping law. Moreover the Mexican antidumping system does not provide for judicial or quasi-judicial adjudication. It would be difficult to introduce the possibility of having private litigants introducing additional considerations. Moreover provisions for legal standing and grounds for judicial review are being revised by the Mexican authorities. Under article Annex 1904.15, Schedule of Mexico, Mexico has agreed to amend its antidumping legislation before the entry into force of NAFTA. Unfortunately the Mexican text was not available at the time this thesis was completed.

4.4 Antitrust liability in antidumping actions

Liability is examined in the context of the co-ordination of antidumping and antitrust measures. It would not be useful to be able to initiate a complaint about dumping if it would result in antitrust liability.

It is clear that, in any country, the initiation of a legitimate antidumping investigation does not cause liability for the plaintiff. In the USA, the Noerr-Pennington doctrine exempts US citizens from antitrust liability when they legally ask for governmental intervention and protection. Temple Lang and Marcos Mendes

---

564 Article 29 of the Regulation: The competent administrative authorities should consider the possibility of making the countervailing duty less than the margin of dumping or the subsidy allowed if in their opinion a lesser amount is sufficient to eliminate the injurious effects on domestic competition.

argue that there is a European Noeer-Pennington doctrine. It seems a basic principle of law that the legal enforcement of rights provided for in a statute should not constitute at the same time an infraction to another statute. This is true for Canada, Mexico and most countries.

The antidumping actions are, however, exceptions to the general principle of the GATT in favour of free trade and non-discrimination. As an exception the antidumping process must be interpreted narrowly and the procedure must be fully respected.

The antidumping process must not involve any sharing of information between competitors. The information received in antidumping procedures may only be used "for the purpose for which it was requested" which excludes antitrust measures. In the USA lawyers and persons involved in the administration of an antidumping file must be under "protective order". In Europe, the same principles of confidentiality apply but lawyers do not have access to confidential information.

The Advocate General Francis Jacobs and the European Court of justice, in the recent Spanish Bank concluded in favour of a restrictive use of the information

---


567 Article 8(1) of the EEC Antidumping Regulation.


569 APO is an administrative protective order which authorises lawyers involved in antidumping cases to have access to all confidential information with the obligation not to divulge any part of it even to their own client. Article 84-88 of SIMA provides for a similar protective order.


571 Direccion General de Defensa de la Competencia et Association Espanola de Banca Privada et autres Case C-67/91.
received during competition investigations. It was decided that information received by the Commission under article 2, 4, 5, 11 of Regulation 17 cannot be used by national authorities for the enforcement of national or EEC competition law.572

Antidumping investigations cannot be used to form cartels or oligopolies, or for restricting competition.573 Undertakings to raise prices in order to avoid antidumping duties can be concluded only under the umbrella of the antidumping regulation with the participation of the authorities of the importing country. Otherwise they constitute an illegal cartel infringing competition rules.574 Informal settlements such as a withdrawal of a petition in exchange for commitments by foreign exporters or foreign governments raise antitrust problems.575

Staiger and Wolak have suggested that US antidumping actions can be used by domestic firms to promote collusion between domestic firms and foreign firms to their mutual advantage.576 In Europe, Professor Messerlin has also demonstrated that EEC firms have been able to capture EEC antidumping procedure: firms colluding have paid the fines for cartelization imposed by the Competition Directorate, DG IV, but thereafter have been able to limit the penetration of imports in initiating antidumping investigation.577

572 The exchange of confidential and other information between the parties is one of the arguments submitted by France in the challenge of the GUS-CEC Agreement. For further discussion see chapter 2, section 2.4.2.5 of the present thesis.


574 Earlier in Pioneer 1983 ECR 1825, at p.1904, the Court had stated: restrictions imposed by public authorities cannot justify the implementation by private persons, of concerted practices intended to restrict competition. In the EEC, for example in Aluminium from Eastern Europe, producers argued that they had agreed on a price-fixing cartel in order to avoid an antidumping investigation (where, they argued, a similar or worst undertaking would be negotiated).


577 Messerlin P. "Antidumping or Pro-cartel law" World Competition vol.13 (1990), p.465.
Temple Lang wrote\textsuperscript{578} that the initiation of an antidumping investigation by a firm in a dominant position may constitute an abuse under 86. Potential liability does not establish rights of private enforcement. In Europe, where the Court has denied the BEUC, the right to access non-confidential information in an antidumping procedure, initiating a case for antitrust liability becomes very difficult since there is no access to the evidence. Moreover, it is doubtful that the one Direction of the Commission, (DGIV for instance), would initiate proceeding against trade measures negotiated by another Direction, (DGI).

In the USA, private actions by consumer groups are possible in domestic courts for antitrust violations. In Kissing\textsuperscript{579}, a consumer union filed suit concerning a Voluntary Export Restraint on steel from Japan to the USA. The standing of the consumer group to challenge the trade agreement was not contested.\textsuperscript{580} Parallels can be drawn for antidumping actions, but with the important limitation that the GATT expressly authorises antidumping laws, which is not the case Voluntary Export Restraints.

It can be argued that the best safeguard against abusive antidumping procedures is strong enforcement of private antitrust rights, both in the importing and in the exporting countries. In chapter seven and eight of the present thesis, a system of private enforcement for NAFTA is suggested, and in chapter nine, proposals for

\begin{itemize}
\item \textsuperscript{579} 506 F.2d 136.
\item \textsuperscript{580} On 18/2/1981 the Attorney General of the USA wrote about antitrust liability of import restraints:
\end{itemize}

\begin{quote}
... The antitrust risks that would be raised by concerted, voluntary, private behaviour by foreign producers have led us to conclude that in any negotiations between our government and a foreign government in which our government seeks a reduction in imports from that country, United States negotiators should emphasize the need for the foreign government to provide protection to its companies from actions under United States antitrust laws, by ordering, directing, or compelling any agreement restraining exports to the United States in terms as specific as possible.

...where such negotiations are implemented through voluntary private behaviour serious antitrust risks arise. Copy of the letter reproduced in Grey R. \textit{United States Policy Legislation A Canadian view}, 1982, p.30
\end{quote}
expanded private rights in the domestic judicial system of trade partners are submitted.

4.5 Trade measures for competition purposes

Article 31 of the Canadian Competition Act authorises the Chamber in Council to lower tariffs if domestic competition needs to be stimulated. This measure has not been used very often but is another example of the possible beneficial interaction between antitrust and antidumping measures. There is also an important discretion that could be more fully exploited: under article 15 SIMA, specific products can be totally or partially exempted from antidumping duties. Such provisions do not exist in the US system nor in the Mexican legislation.

4.6 Conclusion

The head of the Directorate in charge of antidumping measures in the EEC once said to the European Parliament:

the public interest element in dumping is a tacit acknowledgement of the overlap of political and legal considerations.

This is why most authors in Europe doubt that the ECJ would quash a decision where Community Interests are mentioned. This distinction is, however, incomplete. The best use of a Public or Community Interest clause would be to reintroduce competitive considerations into the antidumping process and change the general practice of national antidumping authorities.

Article 14: The Governor in Council may, on the recommendation of the Minister of Finance, make regulations exempting any goods or class of goods from the application of this Act. See also Nozick R and Neff C., Competition Act 1992. 1992, p.37 and Roberts R., Roberts on Competition/Antitrust: Canada and the United States. 1992, p.475.


Except for procedural matters.
Ross Denton has suggested a public interest clause referring to an elaborate investigation into a wide range of variables. This would have the positive effect of forcing an informed debate on the effective impact of antidumping measures.\footnote{\textsuperscript{584} Such analyses might examine inter alia: a) the effect of dependency on foreign supply, both in terms of the affected industry and downstream users and overall national security (including military security); b) the effect of the dumping on the consumer of the product, particular attention being given to trade-off between lower prices and long-term availability and alternative supplies including inter alia: - the availability of alternative suppliers; - the possibility of arbitrage, the existence of barriers to entry and re-entry in the particular industry, and any industry-specific characteristics of the international market which might point to eliminate the possibility of predation; c) evidence of cross-subsidization by foreign firms, paying particular regard to cross-subsidization across product, rather than simply geographical markets; d) evidence of prolonged sales at lost, taking into account the relevant cycle, the relationship between fixed and variable costs and the potential for cross-subsidization above c); e) the participation of the alleged predator in a government-sponsored elevation plan, including, for example, special financing or fiscal programs, government-sponsored private procurement programs, exemption from antitrust or other restrictive regimes; f) any evidence of intention to eliminate current competition or to exclude future competition; (footnote) g) the present and likely level of research, development and investment funding in the domestic industry (in order to see whether the domestic industry is in natural or enforced decline); h) whether the attribution of "unfairness", determined through the level of the dumping margin, significantly exceeds the amount of injury caused to the domestic producers by the dumped imports; i) whether the imposition of antidumping duties (up to the level of the dumping margin) would restore the domestic industry to profitability).}

The greatest difficulty is to identify all these variables so as to isolate them from external factors such as inflation, foreign debt, currency fluctuations and to balance them. Such investigation is further complicated by the confidential nature of the information. Most importantly this long and elaborate investigation would certainly slow down the antidumping process. Both the exporters and the importing country tend to favour a rapid determination of antidumping duties for certainty and business planning.

Denton's test is nothing more than the introduction of a better injury determination, through the back door of a public interest clause. Is a public interest clause necessary for such a change? Can the injury test be amended, along the lines proposed by Diane Wood without referring to a public interest clause? The answer must be that a legislative amendment is necessary for such major changes and that the introduction of a Public Interest clause is one way to do so. More importantly, a policy declaration to the effect that antidumping laws will no longer be enforced

to protect the Canadian, US or Mexican production only would have to be expressed.

The role of a Public Interest clause is more complicated when antidumping legislation contains a Lesser Duty provison. One may argue, in these circumstances, that a Public Interest clause does more than to introduce a Lesser Duty rule. A Public Interest clause would provide antidumping authorities with the right to ignore altogether the injury and level of dumping margin in the decision to impose antidumping duties. Is the purpose of a Public Interest clause to alter the purpose of antidumping laws? or were Public Interest clauses enacted in order to give more flexibility to national authorities when derogation from the usual practice seems necessary?

Antidumping actions are politico-legal actions and they must remain as transparent as possible. It is important that more distinct decisions be made on economic, legal and political considerations of "dumped" imports. If administrative discretion is to increase (and this may be the only practical way to reconcile antidumping and antitrust rules) lobbying will become very important.585 Is lobbying better than recourse to the Courts? Both procedures can be transparent and this is the crucial element. Both can give rights to many parties.

John Jackson has recommended that further discretion be given to civil servants as a solution to reconcile the dichotomies586 between antidumping and antitrust laws:

whatever system exists should leave to the government officials as much discretion and elbow room as possible to make the necessary decisions because those officials inherently feel that they will make the best decision possible.587

585 It is interesting therefore to note the introduction in the European Parliament of a Code of Lobby and lobbyist are being registered. Financial Times 20/7/92.

586 Not everybody agrees that competition and trade policies can or even ought to be harmonised. Bourgeois is a strong sceptic of this movement towards efficient trade laws: "There are important limitations to the extent to which competition policy consideration can or should be taken into account" Bourgeois J., "Antitrust and Trade Policies: A Peaceful Co-Existence?", Intl Bus. Lawyer, February 1989, p.65.

Jackson seems to have a great deal of confidence in civil servants! This trust is however not shared by everyone:

bureaucrats in industrialized countries have been left by ministers to play God for too long in the field of international trade and competition; handing out a little bit of regulation here, doing a little bit of negotiation there, cartelizing one industry after another, until they have helped not only to screw up the GATT system but also, and more importantly, to screw up the economies in whose interests they might actually have believed they were working.588

In order to introduce some flexibility into the US system, a detailed regulation with clear parameters seems to be the only possible legal methodology.589 A final determination may also be left to the Congress or to a Congress representative, after proposals made by the Administration, along the line of the Canadian referral to the Finance Minister. The important risks are the delays. Antidumping measures are a rapid answer to business conflicts. Any solution must respect the nature of antidumping actions.

In practice the EEC community interest and the Canadian Public Interest clauses have not had any serious impact on the antidumping process. It can be argued that GATT antidumping law provides rights to consumers and other commercial producers when it refers to restrictive business practices in the exporting and importing country590 and to a Lesser Duty principle. Most national antidumping laws do not transmit these rights to their nationals.

589 Otherwise the Congress, protective of its final authority over these sensitive political issues, would refuse the amendment.
590 Article 3.4 of the Antidumping Code.
PART III Efforts of coordination of antitrust and antidumping actions within free-trade areas.

Relationships amongst member states of any regional economic arrangement, as in free-trade areas, are by definition privileged. Economic, cultural and legal collaboration is favoured within regional groupings. The principle of non-discrimination was introduced in trade relations during the negotiations of the Havana Charter and the GATT negotiations as a safeguard against isolation and frustration of states which was considered to have led to economic and military wars.

It is argued in chapter 5 that the fundamental right of states to develop privileged relations is older than the GATT and has not since been abolished. What the GATT did, however, was to provide guidelines to member states to ensure that these mutual regional privileges would engender authentic and further integration. It is suggested that the phasing out of antidumping measures is a crucial variable for the realisation of "trade-creating" free-trade areas.

In chapter 6, experiences of successful co-ordination of antidumping and antitrust actions within free-trade areas are analyzed before a model is proposed for NAFTA.
Chapter 5 Political, economic and legal aspects of free trade areas

5.1 Introduction

This chapter focuses on the implications of free-trade areas in international economic law with a special emphasis on antidumping measures between member states. It is argued that the right to form discriminatory regional groupings was customary international law. The GATT law and the GATT practice have not seriously changed this essential right of states to ally for security and trade purposes.

Article XXIV of the GATT contains guidelines (rather than conditions) for the realisation of "trade creative" free-trade areas and invites member states to phase out all regulations restricting trade between them, including antidumping regulation. In this sense, free-trade areas tend to lean towards customs union and common market while reconciling the forces of regionalism with the multilateralism advocated by the GATT.

Finally, the fundamental link between trade and security justifies trade blocks and explains why antidumping measures can be phased out within a regional economic grouping, but not on a multilateral basis.

5.2 Definitions

Agreements for regional integration are concepts having economic, political and legal features and, it is not unreasonable to expect that the interpretations given by the three disciplines would converge. Economic groupings of states can be presented in five main categories based on their respective level of integration: free-trade
area, customs union, common market, economic union and political union. These concepts are, however, extensible and there is no legal category.

"Customs union" is the oldest concept where a group of States offer trade privileges exclusively to each other. Most studies of regional arrangements start with an analysis of customs union and then distinguish other types of integration. A customs union is an arrangement of states where trade measures between member states are eliminated, members adopt a common external commercial policy and where customs revenue is apportioned.

Before the GATT, a "free-trade area" was traditionally defined as an imperfect customs union. Internally, it is like a customs union, but externally, states maintain their respective tariff and trade policies with non-members. Since there are differences in tariffs, the country with the lowest tariffs could "let in" products that are usually restricted or non-existent in the member state with higher tariffs. "Rules of origin" have to be designed to confine intra-area free trade to products originating in, or mainly produced in, that area. The purpose of rules of origin is thus to limit the benefits of the agreement to producers of the member states only.

The concept of "common market" is said to have been introduced by the Spaak Report in 1956. A common market involves not only the integration of product markets through the trade liberalisation that results from customs union, but also

---


592 El-Agraa writes: "In both a FTA and a CU members remove all impediments on mutual trade", International Economic Integration, 1988, p.11; El-Agraa & Jones The Customs Union Theory, 1981, p.47; Imhof R., Le GATT et les zones de libre-echange, 1979, p.41-45; articles XXIV 8(a) and XXIV 8(b) of the GATT.

593 Rules of origin tend to become very political and detailed due to the subdivision of production by multinational firms. In the NAFTA, for example, more than 600 pages of the agreement deal with rules of origin for a very comprehensive list of products.

594 P. Robson writes that the term was in widespread use from the mid-1950's. The Economics of International Integration, 1987, p.18.
the integration of factors of production through the elimination of free movement of goods' obstacles.

An "economic union" is a common market where the harmonization of fiscal, monetary, industrial, regional, transport and other economic policies exist. El-Agraa talks about the "complete unification of monetary and fiscal policies" .... [as well as] existing member nations effectively becom[ing] regions of one nation.\textsuperscript{595}

A "political union" amongst countries assumes a union with a single economic policy and a supranational government. This confederation also enjoys a great economic unity. "The participants become literally one nation....with a central parliament with the sovereignty of a nation's government".\textsuperscript{596}

This list is not exhaustive and there are various mid-term levels and forms of economic integrations. The European Economic Agreement, EEA\textsuperscript{597}, is, for instance, more than a usual free-trade area (since competition policies and legislation have been completely harmonized) but less than a customs union since member states do not share the same external economic policies.\textsuperscript{598}

\textbf{5.3 Political reasons for regional arrangements}

"Groupings of states by a common bond of policy"\textsuperscript{599} have existed for many years: the British Empire is an obvious example\textsuperscript{600}. Article 21 of the Covenant of

\textsuperscript{595} El-Agraa A., International Economic Integration, 1988, p.2. One can recognise the discussion around the monetary union in Europe where some countries argue that a common market does not require a harmonisation of monetary policies - while others argue that such a general harmonisation is necessary for the better functioning of the EE market and that, in any case, an economic union is a natural next step after a common market.

\textsuperscript{596} El-Agraa A., International Economic Integration, 1980, p.2.

\textsuperscript{597} Discussed in chapter 6, section 6.2.3.

\textsuperscript{598} The agreement is said to be an "association" agreement authorised by article 228 of the EEC treaty. The EEA is considered by many of its member states as a step towards full membership into the EEC. In fact, Sweden, Finland, Norway and Austria have applied for membership into the EEC.


\textsuperscript{600} For a list of existing arrangements before and after World War I, see Viner J., The Custom Union issue, 1950. Most authors dealing with the customs union issue have analyzed, some in more details, existing regional arrangements since World War II.
the League of Nations recognised, in 1921, the co-existence of regional groupings and the then new global organisation\textsuperscript{601}. Article 52 of the Charter of the United Nations encouraged regional arrangements\textsuperscript{602}. These articles are primarily concerned with political and security arrangements, but as Bowett puts\textsuperscript{603} "while security may have been the main concern it has never been contended that collective security was the only domain in which the principle of regionalism could operate".

Trade and security are closely interlinked. Many historians would agree that the US economic isolation led to trade tensions and World War II\textsuperscript{604}. Although the best way to avoid a war with a country may be to trade with it and make it economically dependant, the usual pattern, on the contrary, is to try to punish it by imposing trade and military sanctions\textsuperscript{605}. During World War II, the link between trade and war (or security) became very obvious\textsuperscript{606}. The slogan of the US administration became "If goods can't cross the borders, soldiers will"\textsuperscript{607}.

In this context, the Bretton Woods\textsuperscript{608} system was conceived to stimulate trade. The ITO was intended to be part of the UN family and Article 1 of the Havana

\textsuperscript{601} Article 21 of the Covenant of the League of Nations: "Nothing in this Covenant shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understandings like the Monroe doctrine for securing the maintenance of peace".

\textsuperscript{602} Article 52 (1): "Nothing in the present Charter precludes the existence of regional arrangements or agencies dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

\textsuperscript{603} Bowett D. The Law of International Institutions, p. 166.


\textsuperscript{605} See discussion in chapter 1, section 1.8, on the argument that antidumping may be considered also economic sanctions to force the exporting country to change its domestic and foreign economic policy.

\textsuperscript{606} "One of the surest safeguards against war is the opportunity of all people to buy and sell on equal terms and without let or hindrance of political character." taken from Gardner R., Sterling-Dollar Diplomacy, 1980, p.3. The USA had not yet joined the Allied Forces, but recognized that a major reason for the breakdown of the last peace settlement laid in the inadequate handling of economic problems and in their own economic isolation. They were also conscious of the harm they did in refusing to join the League of Nations.

\textsuperscript{607} Gardner R., Idem, p.3.

\textsuperscript{608} The International Monetary Fund (the IMF), the International Bank for Reconstruction and Development (the World Bank) and the International Trade Organization (ITO).
Charter refers expressly to the objectives of the United Nations: "stability and well-being which are necessary for peaceful and friendly relations among nations". International trade would be crucial for all nations to avoid war.

Regionalism can also be viewed in perspective of the fundamental need of states for security and related trade relations. Regionalism allows states with similar concerns to ally. The difficulties for universalism or multilateral relations - differences in power, culture and needs - are the reasons for regionalism. Within a smaller regional forum, a consensus may more easily be reached. Regional arrangements were an essential element of the post-war reconstruction and it is reasonable to expect that this was recognized by the GATT.

The UN itself admitted that greater progress may be achieved among states with similar political and economic institutions when it established regional economic commissions like the Economic Commission for Africa, the Economic Commission for Europe, the Economic and Social Commission for Asia and the Pacific, and the Economic Commission for Latin-America.

Even economist Viner wrote that the rationale for a customs union had to be political. In 1950, he analyzed most of the numerous customs unions or integration agreements that had existed for centuries and concluded that racial, language and cultural reasons seemed to have been the main determinants to the formation of regional arrangements. Al-Agra agrees with him:

\[609\] A desire for security pushed the USA to encourage the integration of Europe when the EEC was being tested in GATT for its compatibility with article XXIV. See also on the issue Haight F., "The Customs Union and Free-Trade Area exceptions in GATT", J.W.T.L, vol.6 (1972), p.392.

\[610\] In fact, all the OECD countries but one, are involved in international economic integration as well as 2/3 of the GATT members.

\[611\] Viner argued that "strong countries will not voluntarily enter into the union except as part of a political union and for predominantly political reasons" Viner J., The Customs Union Issue, 1950, p. 69. Later he writes that small countries mainly want to form regional arrangements for economic reasons while more powerful states tend to do it for political reasons. See Viner J., Idem, p.91-92. See also a similar discussion in the context of the EEA and the reasons for EFTA states to join the EEA as opposed to the reasons for the EEC to do so. Stragier J., "The Competition Rules of the EEA Agreement and their Implementation", E.C.L.Rev., vol.14, issue 1, (1993), p.30.

\[612\] Idem, p. 95. He also adds at page 103: "customs union preceded by close association of language, race, culture or need of unity for external danger.... To accept as obviously true the notion that the bonds of allegiance must necessarily be largely economic in character to be strong, or to (continued...)
In reality almost all existing schemes of economic integration were either proposed or formed for political reasons even though the arguments popularly put forward in their favour were expressed in terms of possible economic gains.\textsuperscript{613}

Many economists agree that the traditional customs union theory fails to provide for an economic rationale.\textsuperscript{614} Krauss has introduced an important distinction between developing countries, which are more likely to join such unions for economic reasons, and developed countries which may join for both or a mixture of economic and political reasons.\textsuperscript{615}

According to an expert from the Group of Thirty, the desire to pursue "geopolitical objectives such as the prevention of military conflicts and mass migrations among neighbors" is said to be a very important consideration in today's sharp increase in the negotiations of bilateral and regional free-trade agreements.\textsuperscript{616}

Bhagwati seems to confirm this trend in the case of NAFTA:

there are strong non-economic, political and cultural reasons driving Mexico towards a free trade area with her Northern neighbor. The Hispanic destiny that many in America fear from illegal immigration and integration with Mexico has

\textsuperscript{612} (...continued) accept unhesitantly the notion that where the economic entanglements are artificially or naturally strong the political affections will also necessarily become strong, is to reject whatever lessons past experience has for us in this field. The power of nationalist sentiment can override all other consideration; it can dominate the minds of the people, and dictate the policies of government, even when in every possible way and to every conceivable degree it is in sharp conflict with what seems to be and are in fact the basic economic interests of the people in question".

\textsuperscript{613} El-Agraa A., International Economic Integration. 1982, p.7.

\textsuperscript{614} See EL-Agraa M. International Economic Integration, 1988, p.126, approving Cooper and Massell to the same effect. Jovanovic argues that because international economic integration is a "second-best" solution "it is therefore not surprising that general principle may not be found." International Economic Integration, 1992, p. 276.

\textsuperscript{615} This distinction of purpose between developing countries and developed countries in joining seems to be recognised by many. Developing countries pushed for the inclusion of free-trade areas in the GATT. Jackson concludes that the GATT practice is quite tolerant of regional arrangements amongst Developing Countries "probably reflects a recognition that the purpose of regional arrangement amongst Developing countries is somewhat different than a similar arrangement among Developed Countries... Economic-efficiency goal may not be the only one.... The DCs seem more interested in broadening their limited markets so as to promote industrial development ... even if this cause dislocation of resources world wide". The World Trade and The Law of GATT, 1986, p.590.

its flip side in the American destiny that Mexico's reforming elite, trained in the top United States universities, hopes for.\(^{617}\)

### 5.4 Political impact of regional arrangements on international relations

There is no contradiction between regional and multilateral relations. On the contrary, it can be argued that multilateral relations and the GATT "discipline" regional agreements while regional arrangements stimulate multilateral relations in the GATT.

Successive GATT rounds over the past 30 years have been motivated, at least in part, by the desire of countries outside the European Community to minimize their competitive disadvantage in the emerging single European market. The establishment of the European Economic Community in 1957 was followed by the Dillon Round in 1960-62 and the Kennedy Round in 1964-67 which resulted in a 30% reduction in the industrial tariffs of most developed countries. The accession of Denmark, Ireland and the UK was followed by the Tokyo Round. Dunkel, Secretary General of the GATT, wrote that these rounds might not have taken place if the establishment of the Community and its subsequent enlargement had not persuaded its trading partners of the need to ensure that the process of worldwide liberalization keep pace with the development of the EEC's internal market.\(^{618}\)

Some of the rules contained in these regional agreements are later extended to the multilateral scene if experience of their application at the regional level proved to be positive. A good example of this is the move to establish an integrated market in the European Community for the services sector and the inclusion of services in the Uruguay Round negotiations. The rules on disputes settlement of the Canada-US FTA have been exported to the GATT.

Multilateral trade liberalisation enables the regional integration process to stay on a liberal track while regional integration enables the economies involved to play

\(^{617}\) Bhagwati J. "Multilateralism At Risk", *World Economy* vol.13 (June 1990) p.149.

an active role on the global scene. Regional cooperation schemes in Latin America and Asia began to take shape as countries concerned brought their economies and trade policies in line with the disciplines and principles of a market-economy-orientated GATT system.

Mexico's participation in NAFTA is far from a rejection of trade with the rest of the world. Indeed, Mexico's active participation in the GATT started before it initiated negotiations with the USA.

It seems inconceivable that Mexico could have considered entering into such regional arrangements without previously ensuring its rights under the multilateral trading system provided by the GATT.619

The same pattern is true of the Eastern European countries and their free-trade areas with the EEC. The ASEAN region is another good example where these new industrialised countries put their domestic economic policies in line with the GATT and then formed free-trade areas which, arguably, improved their economic strength.

At the same time, this has moved these developing and newly industrialised countries from the status of "watchers" to active participants in the GATT. The traditional "North-South" division is slowly eroding when countries with very different economic levels are joining together; NAFTA is a good example of this erosion. These countries are emerging as one of the driving force behind the negotiations.

Regional arrangements have always existed for security reasons and seem to have had a beneficial spill-over effect. Their economic effects are difficult to assess with precision as will be discussed in the next section. It is therefore reasonable to assume that the founding members of the Bretton Woods system, which included the ITO (and therefore the GATT), did not see any duality between regional groupings and multilateral exchange. In section 3.6, it is argued that States have an international customary right to form regional arrangements which existed before

---

the signature of the GATT and which has not since been altered in any important manner.

5.5 Economics of regional integration

Regional integration may result in: (1) economies of scale; (2) a better division of labour within the integrated market bringing specialisation and thus efficiency and better quality; (3) an improved international bargaining position; (4) an increase in internal competition; and (5) a reinforcement of the international position of the member states of the union. If the integration goes beyond the level of customs union, the coordination of fiscal, monetary, employment and other related policies, may bring "higher rates of economic growth, better income distribution and full employment".\(^\text{620}\)

On the other hand, free-trade areas and other regional groupings may reduce trade with countries outside the free-trade area and therefore lead to a reduction of trade with outsiders. Although the motives for forming a union may be political, economic consequences will flow. Assessing these consequences and putting a dollar value on them is extremely difficult since many products and variables interact while inflation, currency value and market forces affect calculation.

The economic theory of customs union is said to be a relatively recent branch of economic analysis. Before Viner's work, it was generally accepted that customs unions necessarily yielded economic benefits, but there was no specific analysis of their impact. Viner suggested a theory based on a "trade diversion and trade creation" analysis. He emphasised the widespread use of economic groupings for

many centuries and their general acceptance. He then underlined the peculiar fact that both protectionists and free-traders seemed to favour customs unions.

From these facts, that customs unions may be either protectionist or liberalising. He then established the premise of his theory: for a customs union to be in the direction of free trade, "it must be predominantly a movement in the direction of goods being supplied from lower money-cost sources than before" (trade creation). On the other hand, "if the customs union has the effect of diverting purchases to higher money-cost sources (trade diversion), it is then a device for making tariff protection more effective."

The merits of a customs union are then more or less evaluated with regard to the volume of trade created versus trade diverted. As Viner clearly points out, answers to this evaluation cannot be given a priori and a factual analysis must be done.

This so-called orthodox theory has been criticised by various economists because of its assumptions, and also because it ignores the importance of product differentiation, terms of trade, trade suppression, cost reduction, intra-industry trade

---

621 Viner wrote: "The fact that customs union was generally regarded as compatible with most-favoured-nation obligations had the result that customs union was promoted where otherwise some other form of preferential arrangement would have been chosen. If actual customs unions were nevertheless comparatively rare, it was because there were formidable barriers to mutual agreement to establish them, rather than because the most-favoured-nation principle stood in the way." Viner J., The Customs Union Issue, 1950, p. 14.

622 "It is a strange phenomenon which unites free-traders and protectionists in the field of commercial policy, and its strangeness suggests that there is something peculiar in the apparent economics of customs union." Viner J., Idem, p.41.

623 Robson has extended the content and definitions of trade diversion and trade creation and writes: "Trade creation refers to a union-induced shift from the consumption of higher-cost domestic products in favour of lower-cost products of the partner country....(this) gives rise to a production effect - the saving in the real cost of goods previously produced domestically - ...(and) to a consumption effect - the gain in consumers' surplus from the substitution of lower-cost for higher-cost means of satisfying wants.... Trade diversion refers to a union-induced shift in the source of imports from lower-cost external sources to higher-cost partner sources. This shift can also be regarded as having two aspects: an increase in the costs of goods previously imported from abroad, owing to the shift from foreign to partner sources; and a loss of consumers' surplus resulting from the substitution of higher-cost partner goods for lower-cost foreign goods of a different description." The Economics of International Integration, 1987, p.15.

624 "The correct answers will depend on just how the customs union operates in practice" Viner J., The Customs Union Issue, 1950, p.43.
and trade in intermediate products. Others affirm that the simplicity of these concepts is misleading.

However, most economists have confirmed the value and merits of Viner's basic rules. For McMillan and McCarthey, customs unions are beneficial under specific conditions - as long as commodities imported are neither net substitutes nor net complements of the goods produced within the customs union. Along the same line, Bo Sodersten writes: "A customs union is more likely to lead to an increase in welfare if the union partners are actually competitive but potentially complementary". In other words, trade creation is likely to be great, and trade diversion small, if the prospective members of a FTA are natural trading partners, i.e. if they are geographically close and if they are already major trading partners.

Robson suggested improvements and precisions and provided guidelines using the size of the customs union, the resultant average tariffs level and the overlap in the range of products produced by each member state. For instance, if tariffs of

---

625 For contributions criticising Viner's theory one can look at Vanek General Equilibrium of International Discrimination: The case of customs union, 1965; Johnson The Gains from Freer Trade with Europe, 1958; Robson The Economics of International Integration, 1987; Jovanovic, International economic integration, 1992; El-Agraa and Jones, The Theory of Customs Union, 1981 and many others.

626 Jones J. and El-Agraa A., The customs union issue, 1950, p.3.


630 "(1) The larger is the economic area of customs union, and the more numerous are the countries of which it is composed, the greater will be the scope for trade creation as opposed to trade diversion. (2) The relative effects can be related to the height of the 'average' tariff level before and after the union. If the post-union level is lower, the union is more likely to be trade creating; if it is higher, trade diversion effects may be more likely. (3) Trade creation is more likely the more competitive are the economies of the member states, in the sense that the range of products produced by higher-cost industries in the different parts of the customs union is similar.

(continued...)"
prospective member countries are high, there will be little trade with third countries to be diverted, and a lot of trade is likely to be created within the FTA.

Bhagwati argued that "a meaningful examination of the incentives to form and to expand trade blocs will have to be in the new and growing field of political-economy-theoretic analysis". 632

In another article, Bhagwati suggested 633 that one way to reduce trade diversion would be to rule out free-trade areas and to admit only customs unions. Since the US is the main partner of new arrangements and is a low-tariff country, this would induce an average reduction of tariffs in the other member states of the CUs.

Assessing the effective impact of a free-trade agreement may be considered even more difficult today because of the great availability of trade restraints to be used by the new union (antidumping, countervailing and Voluntary Export Restraints which will inevitably distort trade. These trade instruments are selective as well as elastic thus producing various levels of protection.

Haufbauer of the Institute of International Economics, evaluated the trade diversion of the NAFTA at a maximum of 2% against South American countries and 1.5% against Asian countries. He concluded that trade diversion was going to be very small compared to the benefits of the free-trade agreement. 634 This calculation cannot take into consideration the fact that the jobs lost will have direct political costs and require social readjustments.

631 (...continued)
Likewise, the smaller is the overlap, the smaller will be the possibilities for reallocation, which is the source of trade creation. (4) For a specified overlap, trade creation is more likely to predominate the greater are the differences in unit costs for protected industries of the same kinds as between the different parts of the customs union, since these will determine the allocation gains to be derived from free trade among the members." Robson P., The Economics of International Integration, 1987, p.22.


634 Annual Conference of the American Society of International Law, Sub group of International Economic Law, conference on regional integration, 30 March 1993. This data seems to have been confirmed by the Asian Development Bank: "NAFTA may have only a minimal effect in diverting trade from Asia because tariffs between Mexico and the US are already 'quite' low" in "ASIAN economies head for growth spurt" FT 17-18/4/93.
Although the impact of regional arrangements should be assessed case by case, economists tend to follow certain lines of thought. For instance, Bhagwati is generally skeptical of regional arrangements. For him, regionalism is not quicker, not more efficient and not more certain than multilateral relations and, based on historical examples of the USA and the British Commonwealth, he concludes that trade blocks will fragment the world economy, instead of unify it.

My belief that FTAs will lead to considerable trade diversion because of modern methods of protection, which are inherently selective and can be captured readily for protectionist purposes is one that may have been borne out in the EEC. It is well known that the EEC has used anti-dumping actions and VERs profusely to erect Fortress Europe against the Far East. Cannot much of this be a trade-diverting policy in response to the intensification of internal competition among the member states of the EEC.635

Whether free-trade areas are better or rather more trade-diverting than customs unions or other types of unions also remain debatable. Again, there is no consensus amongst economists.

5.5.1 Free-trade area vs customs union vs common market vs economic union vs political union

El-Agraa and Jones argue that customs unions should be preferred to free-trade areas because the latter would cause more trade diversion due to the presence of the rules of origin.636 As to the preference of a customs union or a common market, they emphasise the political character of the decision and the important loss of sovereignty of the second alternative.637 Robson, on the other hand, concludes that free-trade should be preferable to customs unions.638

---


637 It is interesting to note that Jovanovic refuses to consider the sovereignty variable "it is not a valid criticism of any international treaty to say that it entails a loss of national sovereignty. All treaties do so... The real issue is : do the countries' concessions constitute a mutually beneficial deal." Jovanovic M., International Economic Integration, 1992, p.10-11.

638 Bagwatti seemed to agree with Robinson in its article "Customs Unions and welfare impacts" Econ. Journal, vol. 81, p.580. However, in 1992, he suggested in "Regionalism vs Multilateralism", World Economy vol.13 (1990), p149 that in order to reduce distortion only customs union should be accepted by the GATT.
Sven Arndt concludes that customs unions will lead to trade losses for some external countries and trade gains for others, but usually results in a superior type of integration. Haight thinks that because in a free-trade area member States lack the political will to harmonize, free-trade areas will never bring sufficient integration and should therefore be abolished.

Even if economists seem to agree that a general non-discriminatory tariff system would be the optimal situation, there is still no consensus among them as to the best form of integration nor as to the effects of such integrations. All of these forms of integration can be introduced independently as there is no legal or economic necessity that one stage follow another.

It could be argued that free-trade areas and even customs unions are only temporary unions that will either fade away or strengthen towards common markets. Maluch has even written that the incentive to form customs unions would persist until the world becomes a big customs union. It is suggested here that this process would be intensified when internal antidumping duties are phased out.

---

640 Haight F. "Customs Unions and free-trade areas under GATT" J.W.T.L. vol.6, p.391.
641 "In the case of free trade areas it may likewise be shown that, although a free-trade area may be superior to a customs union, a free trade area is itself inferior to a non-discriminatory tariff reduction." Robson, The Economics of International Integration, 1987, p.46. Viner also emphasises the "mirage" of regional arrangement which may eventually act as a psychologic barrier to multilateral trade. The Customs Union Issue, 1950, p.134-139.
642 For an analysis of the difference between these various integration unions see Van Themaat, P.,"Some preliminary observations on the intergovernmental conferences : the relations between the concepts of a common market, a monetary union, an economic union, a political union and sovereignty", C.M.L.Rev., (1991), p.291. All authors mentioned in footnote 2 also discuss the edges between the notions.
643 Names and referencesxxx The argument is that, in a FTA, enterprises will face further internal competition and will soon push for harmonization of their external tariffs and other trade policies. Similarly, within a customs union, some level of harmonization of fiscal and monetary policies becomes necessary otherwise the free movement of persons, goods and service is restricted by the various taxation systems of the member countries.
644 In its conclusion, Machlup F., A History of Thought on Economic Integration, 1977, p.112.
The difficulty when assessing the merits of a specific free-trade area or the choice between a free-trade area, a customs union or a common market is that this judgment necessarily involves a subjective evaluation of the injury to the rest of the world which makes the exercise very complex.

It is not the purpose of the present thesis to assess the economic impacts of any free-trade area. It can be concluded that an agreement of regional integration is a strategy of trade which can have either positive or detrimental effects and that political considerations are very important determinants of success.

Assuming that trade remedies with outsider countries are not abused, one can argue that the further the integration is favoured the better the union will grow and invite new member states. It is therefore reasonable to conclude that the phasing out of antidumping duties, which can only increase integration, is a crucial criterion for the realisation of a trade-creative rather than trade-divertive free-trade area. Further empirical evidence would be necessary to confirm this affirmation. On the other hand, the guidelines of the GATT already seem to confirm this interpretation.

5.6 International law on free-trade areas

Regional arrangements have existed for centuries. In order to understand the direction offered by the GATT Law on regional arrangements, it is important to try to understand the context in which the right to form regional arrangement was addressed during the ITO and the GATT negotiations as well as what was the intention of the parties so as to appreciate the role of regional integration agreement in the GATT.

Indeed, it is usually admitted that there are three approaches of interpreting treaties: (1) the subjective approach, which looks primarily at the actual intentions of the parties; the principal question of this approach is concerned with the "real will"\textsuperscript{645}; (2) the textual approach, which places the principal emphasis on the actual

words of the treaty, i.e. "What did the parties say?"; and (3) the teleological approach which seeks to interpret the treaty in light of its objects and purposes, which may have to be constructed in light of subsequent developments in international organisation. The three approaches are recognised by the Vienna Convention on the interpretation of treaties and have effectively been used by tribunals and courts.

5.6.1 International customary law on free-trade areas

There seems to be no doubt that states have a right to form regional arrangements. The question put to the International Law Commission, the ILC, was whether this right was so fundamental that an implied "custom union exception" existed in every clause of most-favoured-nation. This was the position of the EEC delegate. Most representatives, and this is indeed the conclusion reached by the ILC, considered that there was no rule of customary international exception in favour of the right to form customs unions from the operation of a previously negotiated MFN clause.

In fact, the principle of "Most-Favoured-Nation" was itself a creation of the GATT. Most authors agree that the GATT did not codify an existing international custom. Sauvignon relates that all the various working groups

---

646 Idem, p.320.

647 "There was no disagreement between the members in respect of the right of States to join together in any way they wished, which was recognised as a prerogative of their sovereignty." International Law Commission, Yearbook 1976, vol II, part two, p.45, paragraph 27, reported in Utor E., "The MFN Customs Union Exception", J.W.T.L. vol.15, p.377.


649 Schwarzenberger, however, argued that there was a international customary principle of non-discrimination which existed before the GATT. See his article in "Equality and discrimination in international Economic Law", Yearbook of World Affairs, vol. 25 (1971), p.163.

650 60. An American Senate subcommittee concluded that the concept of non-discrimination in trade was already embodied in agreements in the 12th century, although the expression "most-favoured-nation clause" only appeared in the 17th century after the boom of world commerce during La Renaissance: States wanting concessions from other States were forced to offer some in return. Until the 18th century, the "unconditional MFN" - guaranteeing equal treatment without requiring directly reciprocal compensation - was used exclusively. In 1778, the USA innovated the "conditional MFN" - equal treatment conditional upon adequate compensation - and the conditional MFN (continued...)
dealing with the MFN issue during the negotiation for the Havana Charter and the GATT came to the conclusion that the MFN clause was not of a customary nature. In 1978, the International Law Commission reiterated that, although frequent in bilateral treaties, the MFN application did not reach the status of international custom. It would have been illogical to recognize an international customary exception of the MFN principle which was not itself recognized as customary.

This is to say that, before the work for the ITO and GATT started, the only customary right which existed was the right of states to join together. Any subsequent treaty which would reduce this right to form freely regional arrangements would have to be clearly expressed and restrictively interpreted.

5.6.2 Preparatory works of the Havana Charter and the GATT

The concept of a free-trade area did not exist before the GATT. The idea of enlarging the customs union exception to include free-trade areas came from two different interest-groups with two different, indeed conflicting aims.

At the first preparatory meeting, the French suggested that imperfect and unfinished customs unions be incorporated as another acceptable exception to MFN. The US delegate agreed with this principle:

There were two or three comments to the effects that it takes time to complete a customs union and that some period of grace ought to be allowed for working it out. I think that it is a reasonable position. It obviously is a complicated matter, and as long as the definite decision has not been made to have the customs union, as long as the working out of the details is actually in process,

650 (...continued) treatment began to spread all over the world. After World War I, the USA no longer stood "as an underdeveloped nation for Europeans and in the 1920's United States' policy changed reflecting its broader and more important export interests". The non-conditional MFN became the norm again. See further discussion in Ustor E., "The MFN Customs Union Exception", J.W.T.L. vol.15, p.377; Ustor E., "International Law Commission: The Most-Favoured-Nation Clause: J.W.T.L. vol.11 p.462; and in Jackson J. and Davey W. International Economic Relations, 1986, p.428.

651 Sauvignon E, La clause de la nation la plus favorisée, 1972, p.7-8.


it seems to me that there should be no rigid application of the most-favoured-nation clause in that case.\textsuperscript{654}

On the other hand, Lebanon proposed that developing countries should be given an explicit right to conclude regional preferences without forcing the States concerned to agree on common external tariffs and trade policies. The parties did not accept this principle, but article 15 of the Havana Charter was adopted to recognise the specific needs of developing countries.\textsuperscript{655} Article 15 was, however, contained in part II of the Havana Charter which was to be enforced along with the replacement of the rest of part II of GATT, when the ITO was to be adopted. Therefore no similar article exists in the GATT today.\textsuperscript{656}

Lebanon and Syria suggested the concept of preferential tariff agreements, where tariffs and duties are only partially removed on mutual trade between a group of States, possibly to compensate for the rejection of an explicit exception in favour of developing countries.

Les dispositions du présent chapitre ne devront donc pas être interprétées comme faisant obstacle... à la formation de zone de libre-échange...entrainant une supression importante des tariffs douaniers et autres règlementations commerciales restrictives entre Etats membres appartenant à la même region économique.\textsuperscript{657}

This was the first official introduction of the "zone de libre-échange" into the discussion. The French used the same expression "zone de libre-échange" but suggested a different meaning and concept:

on entend par zone de libre-échange un groupe de territoires douaniers d'Etats membres entre lesquels les tariffs douaniers et autres règlementations

\textsuperscript{654} GATT E/PC/T/C.11/PV 7, p.25; taken from Imhoff R. Le GATT et les zones de libre-échanges, 1979, p.190 note 2.

\textsuperscript{655} Article 15(1) : The members recognize that special circumstances, including the need for economic development or reconstruction, may justify new preferential agreements between two or more countries in the interest of the programmes of economic development or reconstruction of one or more of them.

\textsuperscript{656} There is, however, a Decision of the Contracting Parties of 28 november 1979 on the Differential and More Favourable Treatment, Reciprocity and fuller Participation of Developing Countries which contains reference to less stringent conditions for regional economic arrangements in their favour. 26th Suppl. BISD 205 (1980).

\textsuperscript{657} Taken from Imhoof R., Le GATT et les zones de libre-échanges, 1979, p.191.
restrictives... portant substantiellement sur le commerce de tous les produits...sont éliminés. (Emphasis added)

The French made another crucial attempt to include the formation of customs unions and free-trade areas as one of the "objectives" of the Havana Charter. It was finally agreed that regional arrangements were a "means" to reach the goals of the Charter. This principle was to be added to the section on customs union rather than to the initial goals.

The Contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements.

This express reference to the purpose of expanding world trade underlines that regional economic arrangements were other means to achieve the goals of GATT: i.e. to expand trade. There was no contradiction between MFN treatment and regional integrations which were seen as "green houses". As with tariff reductions and the MFN treatment, it can be argued that integration arrangements were viewed as strategies to stimulate and encourage the growth of world trade and peace.

The failure of the Havana Charter is also evidence of the fundamental character of regional arrangements. It is, therefore, important to look at the reasons why States refused this famous project.

### 5.6.2.1 The collapse of the Havana Charter

In April 1947, parallel to the general ITO negotiations, the largest ever attempted scale of tariffs bargaining (to become the GATT) started. The American

---

658 For the French the economic integration "devait figurer d'une maniéré formelle parmi les buts de la Charte". reported from the Travaux Préparatoires by Imhoof R., Le GATT et les zones de libre-échange, 1979, p.58-59.

659 This principle is now contained in GATT Article XXIV discussed in section 5.7.2. For further details on the negotiations see Imhoof R., Le GATT et les zones de libre-échange, 1979, and Haight F, "The Customs Union and Free-Trade area Exceptions in GATT", J.W.T.L. vol.15, p.395.
and the British negotiators were going to confront each other again over the fundamental issue of the Imperial Preferences.\(^{660}\)

At the end, a frustrating agreement was reached: the USA was to reduce their tariffs generally by 50% and Britain agreed to further discussions on Tariffs and Preferences in three years "in the light of all the circumstances existing at the time". The American negotiators accepted. The American public never did.

The final drafting of the ITO Charter took place in Havana during the winter of 1947-48 and the Charter was signed on 23 March 1948. It was at the third step, domestically, that the ITO was destroyed. President Truman did not believe, as Roosevelt did, in multilateralism, nor did the newly elected republican congress which distrusted losing sovereignty for an organisation conducted by people asking for support.

There is limited literature on the reasons for the failure of the Havana Charter. Richard Gardner, in his famous book *Sterling-Dollar Diplomacy*, argued the Havana Charter was never ratified because: 1) the effects of the GATT negotiation on tariff reductions were affecting US producers; 2) the changes at the Congress of the majority who distrusted the employment guarantees contained in the Havana Charter and Europeans in general; 3) the underestimation of the needs for reconstructing Europe; 4) new unknown negotiators without personal friendships with their British counterparts; and importantly, 5) the refusal of Britain to give up its Imperial Preferences.\(^{661}\) All countries insisted on maintaining existing regional arrangements. The importance of regional arrangements appeared to have transcended the USA-UK conflict.

The continuous practice of the member states of the GATT to accept any regional arrangement confirms that, although most authors would argue that article

\(^{660}\) Richard Gardner writes that the disagreement was mainly an Anglo-American affair since the Dominions did not show any enthusiasm for the system of Preferences and, in fact, ended up giving them up. *Sterling Dollar Diplomacy*. 1980, at p. 358.

\(^{661}\) The British were also infuriated to have to reimburse with interests the USA for the WAR Loan. In the US, the Loan and the multilateral obligations attached, had been secured because of the Soviet communism threat. In Britain, multilateral undertakings contained in the agreement had been accepted "as unfortunate accompaniments of a badly needed loan".
XXIV of the GATT imposes "conditions" to be respected by regional economic arrangements, it is suggested that article XXIV of the GATT should be interpreted as providing guidelines for successful integration. The fundamental right to form such arrangements has not, otherwise, been altered by the GATT or any treaty.

### 5.7 GATT Law on free-trade areas

The preparatory works of the Havana Charter and the GATT seem to demonstrate that states wanted both, to expand trade generally, and on a non-discriminatory basis (the lack of which was considered to be a source of the frustration which lead to World War II), and to maintain privileged regional arrangements which had always existed and were considered as necessary. In fact, there was no pragmatic dilemma between the desire of the states to enact a general principle of non-discrimination in their trade relations, and the desire and necessity to continue regional economic activities.

Indeed, the right of states to form integration arrangements is automatic under the GATT. The only obligation of member states is to notify the GATT. The initiative for disapproval must come from the Contracting Parties. Working groups usually analyse free-trade agreements, make recommendations and may require information from member states. In practice, however, free-trade areas or customs unions are always implemented. Contracting Parties either accept regional arrangements as GATT legal, or give member states a waiver.\(^{662}\) These results may be interpreted to demonstrate the fundamental character of the right of states to form economic arrangements.

#### 5.7.1 The place of article XXIV in the GATT

Article XXIV of the GATT is usually interpreted as an exception to the MFN clause of article I. For Jackson the central focus of the GATT is the reduction of

---

\(^{662}\) A waiver can be given under Article XXIV:10 or under Article XXV:5.
tariffs and the central obligation is the MFN. Like Jackson, most authors usually analyze regional groupings and multilateral trade as being dichotomous. Imhoff, however, argues that the GATT is based on three main precepts or principles: 1) the non-discrimination principle, 2) a reduction of tariffs, and 3) economic integration. None of the three are in opposition, but are rather different means to achieve expansion of world trade. He writes that economic integration is un moyen indirect de réaliser les buts du GATT et l'expression de la certitude que l'expansion du commerce mondial résulte d'abord du développement du commerce régional.

In fact, when one looks at the rationale behind the MFN clause its incompatibility with customs union diminishes.

The Contracting Parties chose the MFN because they conceived it as the best means of avoiding war and ensuring equality of competition for the purpose of increasing trade. Regional arrangements can have the same effects.

Where it is plausible that a customs union may be beneficial or detrimental economically, it is reasonable to expect the GATT to establish criteria distinguishing between, on one hand, discriminatory agreements of exchange of preferences which are viewed as detrimental and, on the other hand, integration agreements which are seen as "green house" of international trade. These guidelines are contained in article XXIV (4) to (9).

---

663 Therefore "the very nature of such arrangements (regional) involves a departure from the Most-Favoured-Nation principle" Jackson J., "Equality and Discrimination in international Economic Law", Yearbook of international Law, 1983, p.227.


665 Imhoff R. Le GATT et les zones de libre-échanges, 1979, p.9.

666 Espiel H., "The Most-Favoured-Nation Clause its significance in the GATT", J.W.T.L. vol.25, no.1, p.49. See also to the same effect Thiebaut & Flory, Le droit international économique, 1992, p.27.
5.7.2 Article XXIV (4)

Article XXIV (4) reads:

The Contracting Parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreement.

The second sentence of paragraph 4 is also relevant:

They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Contracting Parties.

There are various opinions as to the relationship between the enunciation of these two principles in paragraph 4 and the other more detailed rules of article XXIV.

Some authors argue that paragraph 4 imposes additional conditions in addition to those of paragraphs 5 to 9 of article XXIV. Jackson and others such as the EEC Commission, argue that paragraph 4 is just a general principle which does not add anything to the following paragraphs, but is useful for interpreting conditions imposed by other paragraphs. Paragraph 10, which envisages waivers, mentions only the non-respect of paragraph 5 to 9. This seems to favour the arguments that paragraph 4 does not add anything to paragraphs 5 to 9. The question remains whether the respect of paragraph 4 only is sufficient to abide by article XXIV.

The GATT secretariat seems to consider that the purpose of paragraphs 5 to 9 is to ensure conformity with the rule enounced in paragraph 4. If the agreement respects the criteria of paragraphs 5 to 9, then the purpose of paragraph 4 is respected.667 Others argue that paragraph 4 contains principles, the respect of which would be sufficient.668

667 The argument is based on the word "accordingly" at the beginning of paragraph 5 after the enunciation of the principle in paragraph 4. 'Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area...'.

668 For Dam, "trade creation" is the necessary and sufficient criterion for that a free-trade area must respect. Dam K., *Regional Economic Arrangements and the GATT: The legacy of a Misconception* Univ.of Chic.L.Rev., vol.30 no.4 (1963), p.615.
This is a rather theoretical debate since all free-trade agreements are effectively accepted by Contracting Parties. In fact, most authors would argue that none of the free-trade agreements submitted to the GATT respect paragraphs 5 to 9 of article XXIV. Regional arrangements are, nevertheless, always accepted by the Contracting Parties, with or without waivers. Such an attitude of member states seem to favour the following pragmatic conclusion: paragraph 4 contains the principle encouraging regional integration which can be respected even if the conditions of paragraphs 5 to 9 are not fulfilled. If paragraph 4 is respected, a regional arrangement can be considered to respect parameters of article XXIV of the GATT.

Another debate concerns the scope of the second sentence paragraph of paragraph 4 of article XXIV. It can be argued that the second sentence of paragraph 4 requires that the effects on trade of an arrangement be evaluated with regard to every other country. Paragraph 5 speaks of "on the whole" and of "the general incidence" and paragraph 6 envisages the possibility of renegotiation of tariffs if there is evidence of a necessity for a "global evaluation". Others argue that the second sentence has introduced the "trade creating - trade diverting" test into the GATT. Assessing the impact of an arrangement, either globally or country by country is terribly difficult. It can, however, be said that the GATT is concerned with global trade, even at the price of national detriments.

---

669 In 1981, Huber concluded that none of integration arrangements presented to the GATT since 1947 respected the conditions of article XXIV and yet, none of them has been refused. "The practice of GATT in examining Regional Arrangements under XXIV", Journal Common Market Studies, vol.19 (1981) p. 281. In 1963, Dam wrote: "Not a single customs union or free-trade area agreement which has been submitted to the Contracting Parties has conformed fully to the requirements of article XXIV." in Univ. Chic L. Rev, vol.30 no.4, p.615; In 1992, Bhagwati wrote that he was convinced that as a general rule free-trade areas are trade diverting and should be abolished in favour of customs unions in "The threat to World Trading System", World Economy, vol.15 no.4, p.443.

670 But as Allen said: "...it is one of the tacit assumptions of the GATT exception embodied in Article XXIV that the expanding free market engendered by the removal of internal trade barriers will streamline production and, by a more efficient allocation of resources, division of labour and specialization of production, reduce costs so that the trade diversion problem mentioned above will be reduced to acceptable level". Allen J., The European Common Market and the GATT, 1960, p.27.
5.7.3 Article XXIV (5)

The Contracting Parties have a right to form a FTA and to use an "Interim Agreement" leading to a full free-trade area. "Interim agreements" do not have to respect the other conditions of paragraphs 6, 7, 8, and 9 and they also benefit also from the presumption of validity. In fact, article XXIV authorises three types of regional arrangements: interim agreement, free-trade area and customs union.671

The only obligations are that the union members notify the GATT (article XXIV(7)), to make relevant information available and discuss with other contracting parties. It is also mentioned (article XXIV(5)(c)) that an interim agreement must envisage the formation of the free-trade area or a customs union "within a reasonable period of time". Jackson relates a proposal by South Africa during the preparatory works to fix any sort of time limits were refused.672

The amount of latitude left to states again confirms the importance that the States gave and still do give to the formation of customs unions in order to stimulate trade. All of this latitude given to member states in the creation of their integration union, is again evidence of the importance that the negotiators gave to the formation of FTAs and CUs.

5.7.4 Article XXIV (7)

Paragraph 7 stipulates the only obligations of members states: prompt notification and the willingness to make available such information to the Contracting Parties. Paragraph 7(b) states that the Contracting Parties can make recommendations to member states. The initiative to reject such an agreement must come from the CONTRACTING PARTIES, who work with a procedure of

671 The main difference between a free-trade area (FTA) and customs union (CU), is that in a CU, member states have common external tariffs. Article XXIV(5)(b) requires that external tariffs and duties with non members "shall not on the whole be higher or more restrictive than the general incidence...prior to the formation of such union...". This criterion which seems to introduce a distinction between trade-creating and trade-diverting regional arrangements has been interpreted and applied very loosely.

consensus. Such initiative has never taken place. If the practice of consensus were to disappear, paragraph 7 would probably become very determinant.

5.7.5 Article XXIV (8)(b)

Article XXIV(8)(b) requires that duties and other restrictive regulations of commerce be eliminated on substantially all the trade within a free-trade area. Most of the doctrine centres on the interpretation of "substantially all". Although this wording is ambiguous and problematic, it is argued here that the expression "duties and other regulations restrictive of commerce" is also crucial.

5.7.5.1 "... duties and other restrictive regulations of commerce be eliminated..."

It is argued here that, in accordance with GATT foundations for more trade liberalisation and, to ensure that the regional arrangement is a real integration arrangement, antidumping duties must be eliminated within a free-trade area.

As seen in chapter 1, economists have demonstrated that most, if not all, antidumping measures restrict trade. Therefore, maintaining antidumping duties within a FTA would not respect the guidelines of the GATT "to eliminate duties and other regulation restricting trade".

Furthermore, if one follows Jackson's distinction that both the MFN (GATT article 1) and the tariff concessions (GATT article II) are found in PART I of the GATT, which refers to international obligations, and that the dispositions of part II form a "code of conduct" designed to protect the value of the tariffs

---

673 GATT XXIV(8)(b) : A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

674 These restrictions may be justified on grounds of security, structural differences or other arguments of social justice but, in all cases, the direct impact of antidumping duties is to increase prices.

675 It also contravenes the "National Treatment" obligation (GATT Article III); see discussion in chapter 3 of this thesis.

concessions, one may wonder why the "discipline" of antidumping duties is necessary when the tariffs that they are supposed to protect have disappeared.

The answer may be, as was argued in chapter 1, that tariffs are not the only barrier to entry and therefore, until other barriers are put down, antidumping regulations may be kept to "countervail" the effects of non-tariff barriers. However, since the GATT recommends that such regulations should be phased out, the ultimate and best solution would be to put down these other barriers in order to further integration and establish a "trade-creating" free-trade area.

Another argument in favour of interpreting article XXIV(8)(b) as indicating the phasing out of antidumping duties, is the fact that, in most active free-trade agreements\textsuperscript{677}, member states have expressly retained jurisdiction to impose antidumping duties. If it were clear that antidumping duties were outside of the scope of "regulations restricting trade", member states would not have needed to retain such a right to use antidumping measures.

Internally, free-trade areas and customs unions are supposed to be identical.\textsuperscript{678} "... regulations restricting trade" are to be eliminated in both customs unions and free-trade areas. Exceptions to this elimination of "regulation restricting trade" are mentioned: quotas and tariffs imposed under articles XI, XII, XIV and XX can be retained. It would have been easy to include article VI in the list, since antidumping laws existed when this article was drafted.\textsuperscript{679}

\textsuperscript{677} See the Israel-USA FTA, the old Australia-New Zealand CER, the Canada-USA FTA, the EEC-EFTA FTAs, the Europe Agreements.

\textsuperscript{678} The only difference between paragraphs a) (customs union) and b) (free-trade areas) of paragraph 8 of article XXIV of the GATT is the reference, in paragraph a) on customs union, to the external trade policies.

\textsuperscript{679} It can be argued that the list of exceptions in paragraph 8(b) is not limitative and that safeguards measures, for instance, are an implicit exception not mentioned. Jackson J., World Trade and the Law of GATT, 1969, p.610.
In any case, phasing out antidumping duties would reduce administrative costs. More importantly yet, it would stimulate and reinvigorate domestic competition and force domestic enterprises to face the new international economic order of trade blocks.

5.7.5.2 "... on substantially all trade within a FTA"

Jackson writes that the term "substantial" "is just as "studiously ambiguous as reasonable". When dealing with the EFTA agreement (European Free Trade Association) the following comments were put forward:

It was also contented that the phrase "substantially all trade" had a qualitative as well as a quantitative aspects and that it should not be taken as allowing the exclusion of a major sector of economic activity...the quantitative aspect... was not the only consideration to be taken into account.

The EFTA states argued that when article XXIV was adopted it was thought that each "individual member of a free-trade area should have a certain latitude in respect of some products", especially since Britain had some preferential arrangements with the Commonwealth countries. No conclusion was reached. It is important to note that the phrase used was 'substantially all the trade' and not 'substantially all products'.

There is no consensus as to the necessary percentage needed to reach the "substantial" criteria nor any indication given in the preparatory works. Authors talk about percentages between 80% and 90%. The term "substantial" would seem to

---


683 Idem.

require that all important restrictions to trade be eliminated, including antidumping duties. \(^{685}\)

5.7.6. Article XXIV (10)

Finally, Article XXIV itself envisages the possibility of regional arrangements which would not follow the criteria there mentioned and which could still be beneficial for world trade. The paragraph seems again to confirm that the right to form regional arrangements is supercides the criteria mentioned for successful free-trade area or customs union.

5.8 Interpretation of the GATT practice

States have always joined together for various purposes. Moreover, when the negotiations of the ITO and the GATT took place, Europe had to be reconstructed. It was unthinkable that regional arrangements would not be tolerated. In the years following these trade negotiations, the cold war was fierce and regional arrangements were again formed for security reasons within the context of the UN.

The formation of the Common Market marked what Bhagwati calls a "watershed" on article XXIV of the GATT. The USA let the EEC "emasculat[e] the Article somewhat so as to seek GATT approval of an imperfect union". \(^{686}\) A more optimistic and pragmatic view is that free-trade areas can have a beneficial impact on international trade. Since only their actual implementation can reveal their impact, States have decided to be tolerant of these bona fide attempts.

The basic approach underlying Article XXIV was not altered in the Uruguay Round; the Contracting Parties confirmed their support for the fundamentals. Encouraging regional integration does not imply a negation of multilateral trade negotiations. The GATT will always remain necessary since some issues cannot be

---

\(^{685}\) This obligation does not apply to interim agreements which, however, need to provide a plan and schedule which ultimately would lead to the elimination of restrictions on substantially all trade.

tackled effectively in a regional framework. For example, all of the new issues of trade and environment, trade and intellectual property, as well as trade and investment, require multilateral negotiations. Since markets are globalising, trade partners need each other's internal markets more than ever. The commercial interdependence can only increase.

Professor Messerlin and Dr Hindley have just completed a study on regional arrangements for the GATT secretariat and came to the conclusion that the defects of the GATT guarantees of market access, relative to those obtained through regional integration arrangements, provide an "insurance" motive for such arrangements. They concluded that the misuse of antidumping actions, more particularly, seem to incite states to conclude integration arrangements. This argument confirms a pragmatic conclusion to the effect that regional arrangements are an effective alternative to multilateralism towards increased world trade.

There are also alarming comments about the formation of 3 blocks of trade activities: the Americas, Asia and Europe. Two lines of arguments can be used to oppose that point. Firstly, only 40% of world trade takes place inside blocks, so self-sufficiency and isolationism are still very much irrational.

Secondly, trade blocks are only strategies of negotiations. Negotiations between 3 blocks, duly authorised by their member states, would be easier than between 105 countries with very divergent needs and interests. Competition between the 3 blocks would stimulate each of them to become internally stronger. Blocks would try to become more self-sufficient but would still need to increase their exports, for purposes of efficiency and economies of scale. Technology requires wider markets, often world-wide markets, and nothing can substitute export markets. Consequently, blocks would need to negotiate agreements increasing access to each other's internal markets.

---


688 The desire to avoid antidumping and antisubsidy actions from the USA was certainly the important motive for Canada to initiate negotiations with the USA for a free-trade area. See discussion in chapter 7, section 7.3. Similar considerations existed from some EFTA countries in the negotiations of the EEA with the EEC.
markets. The same natural commercial pressures, which are stimulating the formation of blocks, should keep pushing the 3 blocks towards the conclusion of further trade agreements. Modest free-trade agreements between these 3 blocks would be a situation closer to a "world-wide free trade area" than to a plethora of trade walls braking flows of trade at every national frontier.

What seems crucial to avoid trade and military wars, would be to maintain trade interdependence between blocks. The commercial necessity for the other block's internal markets should favour this. After all why would Japan accept all of the voluntary export restraints and bilateral trade restrictions if it did not need the US market? This economic interdependence would reduce the danger of general war.

There remains a danger, however, if two-track solutions were to be prescribed. The USA wants to introduce market forces into Russia's controlled economy and controls into Japan's market economy. This dichotomy of treatments may lead to a general distrust and disguise in the GATT system and would be very detrimental. The GATT has evolved into a system of rules of law which has benefited all member states in increasing transparency and previsibility. A move backwards resulting from the USA losing its economic hegemony, would be regrettable.

### 5.9 Conclusion

This thesis suggests that trade blocs are legal. Regional groupings and trade blocs, whether referring to the British or the Hasbourg Empire, have always existed. A pragmatic analysis of international relations confirms that states have a customary right to form regional arrangements. It is reasonable to assume that member states wanted this principle to be recognised in the GATT when they codified international trade rules. The GATT does not seem to have altered this fundamental right of states to form economic blocks.

Indeed, under the GATT, the right to form customs unions or free-trade areas is automatic. One can argue that the right to form regional integration

---

689 See Bhagwati J.,"Japan must now say 'No'" FT 16/4/93 and "Clinton, Japan and Russia" FT 17/4/93 Editorial.
arrangements is as fundamental as the GATT principle of non-discrimination. Although around sixty free-trade arrangements have been notified to the GATT, most of which are not active, no regional arrangement has ever been refused by the Contracting Parties. The practice of the GATT Council to adopt decision by consensus in addition to the presumption of article XXIV in favour of regional groupings have continued the international customary right to form economic integration areas. Article XXIV of the GATT contains guidelines for successful regional arrangements. The best way to ensure a "trade-creation" free-trade area can be viewed as revolving around the willingness of member states to phase out antidumping actions inside the integrated zone. A free-trade area where antidumping duties are phased out appears to be the minimum level integration necessary for successful trade deal.

If antidumping duties are phased out, internal competition would be expanded. With all enterprises within NAFTA subject to the same internal competition, it is plausible that they would lobby for some harmonisation of their external tariffs, competition thus leading to further integration. This crucial legal step, phasing out of internal antidumping duties, will further integration and push free-trade areas closer to customs unions. This would explain why free-trade areas, imperfect customs unions, were accepted: they can effectively lead to further integration. Regional and multilateral trade can therefore be reconciled in the GATT.

690 Conversation with Mr. Petersmann after a lecture he gave in London on June 1992.
Chapter 6 Experiences of other free-trade areas in dealing with internal measures.

6.1 Introduction

The purpose of this chapter is to look at the way states which share closer economic relations have dealt with transnational restrictive business practices.\(^{691}\)

Five models of free-trade agreements will be analyzed for their different solutions in dealing with competition: (1) the European Free Trade Association, EFTA; (2) the free-trade agreements between countries of the EFTA and the European Economic Communities (EEC), hereafter called "EFTA-EEC FTAs"; (3) the new European Economic Association agreement, the EEA; (4) the new free-trade area between the EEC and Poland (together with Czechoslovakia and Hungary, called the Europe Agreements); and (5) the free-trade area between Australia and New-Zealand at its different stages, the Australia New Zealand: Closer Economic Relations-Trade Agreement, hereafter called the "Trans-Tasman CER".

In the second section, the legal methodologies used to phase out antidumping measures amongst the founding members of the EEC, and between the EEC and new members joining the EEC, are analyzed. The EEC experience in co-ordinating enforcement at the national and European levels is also fruitful when addressing possibilities for the Bi-National Tribunal of NAFTA.

6.2 Provisions on restrictive business practices (competition) contained in agreements of free-trade areas

\(^{691}\) In chapter 1 dumping was defined as a transnational restrictive business practice.
When two or more states decide to further their commercial relations, tariffs are the first and most obvious limitations to be eased. Restrictive business practices may also limit and distort the increased flow of trade stimulated by the reduction of tariffs. Since economies tend to become more interdependent within a free-trade area, the way member states deal with restrictive business practices on their own territory has a direct impact on other member states' internal flow of trade. Moreover, maintaining dual treatments for domestic firms and firms of other member states limits these efforts of integration within the free-trade area. In fact, the more economies are integrated, the more this co-ordination between antitrust and antidumping seems to become necessary and beneficial.

6.2.1 The European Free Trade Agreement, EFTA

EFTA was signed at Stockholm on 4 January 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. It came into force on 3 May 1960. It is said to have been founded as a reaction to the creation of the EEC.

Article 15 of the convention of EFTA addresses two forms of restrictive business practices similar to those envisaged by Articles 85 and 86 of the EEC Treaty. The nature of the obligations in the two agreements is, however, different. In articles 85 and 86 of the EEC Treaty, restrictive practices are prohibited while under article 15 of EFTA, these practices are declared incompatible with the Convention as so far as they frustrate the benefits expected from the removal of absence of the duties.

---

692 Dual treatments for domestic firms and firms of the other member states of the FTA also infringe the obligation of National Treatment, as argued in chapter 3, as well as the provisions of article XXIV(8)(b) of the GATT, as argued in chapter 5.
693 And to sections 1 and 2 of the Sherman Act.
694 Article 15 of the EFTA: "agreements which have, as their object or result, the prevention, restriction or distortion of competition within the Area of the Association" (15.1a) and "actions to take unfair advantage of a dominant position within the Area of the Association"(15.1b) are declared incompatible with the Convention as so far as they frustrate the benefits expected from the removal of absence of the duties.
Firms were not granted any rights of direct effect. Article 15 refers to a procedure of consultation between states through the EFTA Council where firms do not have legal standing. The EFTA Council does not have any power under this article to compel firms to supply information, to modify their practices, or to launch investigations on its own. A public statement by the EFTA Council at the Ministerial level has, however, increased the useful character of this forum.

Any firm which feels that its activities are hampered by practices of this nature taking place in another Member State may refer the case to the competent authorities in its own country.

.... Member States are ready to investigate cases wherever there is some prima facie evidence of infringement of article 15 and they will not make such an investigation dependent upon the submission of a formal complaint or a fully documented case. As to the possibilities of taking action against infringements of Article 15, Member States have the ability to take administrative, and in many cases, legal measures.

In practice, the following steps are normally envisaged:

(a)... the matter will be taken up bilaterally with the Member State or States in whose territory the party or parties to the practice are located...
(b)... If the bilateral discussions lead to a common agreement... the Member State will use administrative means to influence the parties and if unsuccessful will, in appropriate circumstance, consider using such legal powers...
(c)...Reports ... on these bilateral discussions will be circulated to all Member States vis the Secretariat...the aim of this exchange of information is to obtain that all Member States interpret the provisions of the Convention in the same way.
(d)...If it has not been possible to resolve the case bilaterally.... The matter may be referred formally to the Council which may make decisions or recommendations by majority voting.

This common understanding did not provide for any direct effect in favour of firms. States were still the only entities responsible for the application of article 15.

Unilateral actions against a firm in a dominant position outside the territory of a complaining state, was not envisaged by the treaty. Domestically, member states

---

695 Article 15 envisages the publication of public reports to put pressure on firms having these practices.
696 Agreed statement by the members of the EFTA adopted during the 1964-65 review.
remained entirely independent in dealing with abuse of market power, subject to their obligation to the OECD member states.\(^{697}\)

Antidumping actions between member states remained possible under EFTA.\(^{698}\) There was, however, a boomerang clause in paragraph 2 of article 17 for re-export of dumped goods free of charge.\(^{699}\)

In 1966 the EFTA countries agreed to notify and consult each other when introducing antidumping measures and when changing their own legislation on antidumping.\(^{700}\)

This decision encouraged the EFTA Council to become a more efficient forum where all aspects of "unfair practices" could be discussed, indirectly where dumping and abusive practices. On a few occasions the process of article 15 was initiated; bilateral discussions solved the disagreements. At no occasion did the Council deal with a case which involved both an abuse of a dominant position (or restrictive business practices) and dumping by the same firm.\(^{701}\)

A reason for the relative success of the EFTA Council can be that members had equal economic power. A similar process contained in the bilateral free-trade areas between the EEC and EFTA countries (the EEC-EFTA FTAs) turned out

---

\(^{697}\) In order to favour the building up of a body of similar interpretations on "abuse of dominant position", the Council, in 1968, approved a definition proposed by a working group:

(i) the word agreement means...
(ii) the words prevention means...
(vii) the territory of a single Member State can be considered to constitute "a substantial part" of the Area of the Association if the firm or firms holding the dominant position are able to exert a dominant influence on the flow of intra-EFTA trade at issue in the particular case." EFTA secretariat publication June 1987.

\(^{698}\) The fifth and last article concerning "Rules of Competition", article 17, deals with dumping: "Nothing in this Convention shall prevent any Member State from taking action against dumped or subsidised imports consistently with other international obligations."

\(^{699}\) "Any products which have been exported from the territory of one member State to the territory of another Member State and have not undergone any manufacturing process since exportation shall, when reimported into the territory of the first Member State, be admitted free of quantitative restrictions and measures with equivalent effect. They shall also be admitted free of customs duties and charges with equivalent effect, except..." This article 17(2) is very similar to article 91(2) of the EEC Treaty."

\(^{700}\) This second obligation was also undertaken by member states of NAFTA in article 1903 which envisages a review by the Bi-National Tribunal.

\(^{701}\) Discussion with Mr Aschenbrenner, Legal service, EFTA Secretariat, 2 October 1992.
to be inefficient, probably because the EEC was (and is still) economically much stronger than any of the EFTA Country.

6.2.2 The free-trade agreements between the European Economic Community and the countries member of the European Free Trade Association, the EEC-EFTA FTAs

Although negotiated bilaterally, the bulk of the free-trade agreements between the six EFTA countries with the EEC is identical. In all cases, the rules on competition, on dumping and on Joint Committees are the same. These free-trade agreements are still in force today. There has never been any formal or de facto process of harmonisation or co-ordination of antidumping and antitrust actions within the EEC-EFTA FTAs. In fact, the EEC has imposed important antidumping duties against imports from EFTA countries without co-ordinating actions against a dominant position or restrictive agreements in the exporting EFTA country or inside the EEC. There was, however, a Joint Committee which was supposed to make a recommendation "with a view to seeking a solution acceptable to the Contracting Parties".

Article 23 of the EEC-EFTA FTAs is similar to Article 17 of EFTA. It condemns two practices: restrictive agreements and abuse of dominant position which affect trade between the EEC and one or more of the EFTA countries. The second paragraph of article 23 states that any measure against restrictive practices should be taken in accordance with the procedures laid down in Article 27.

---

702 They were all signed on 22 July 1972.
703 For instance, there has been many antidumping actions against Swedish exports. For a list of all antidumping cases by product or by country of origin between 1979 to 1989 see Van Bael I. and Bellis J.F. Anti-dumping and other trade laws of the EC, 1990, at Table I p.413 to 478. Dr Hindley and Professor Messerlin have argued that the reasons why most states join regional arrangements, such as Sweden and other EFTA countries, is to escape the imposition of antidumping measures. "Regionalism and Market Access", Regional Integration and the Global trading system, 1993.
704 Article 27.2 of the EEC-EFTA FTAs.
705 23.2 Should a Contracting Party consider that a given practice is incompatible with this Article, it may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 27.
Article 27 envisages that, but for exceptional circumstances, consultation in the Joint Committee would always proceed any antitrust action.

Paragraph 1 of article 25 of the EEC-EFTA FTAs is similar to article 17 of EFTA: it maintains the rights for member states to impose antidumping measures; the article then continues:

under the conditions and in accordance with the procedures laid down in Article 27.

Both measures against restrictive business practices and against dumping must therefore respect the procedure of article 27.

Article 27

2. In the cases specified in Article 22 to 26 [which includes 23 - competition offenses - and 25 - dumping -], before taking the measures provided for therein or, in cases to which paragraph 3(d) applies [exceptional circumstances], as soon as possible, the Contracting Party in question shall supply the Joint Committee with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Contracting Parties.

In the selection of measures, priority must be given to those which least disturb the functioning of the Agreement.

3. For the implementation of paragraph 2, the following provisions shall apply:

a) As regards Article 23 [rules on competition], either Contracting Party may refer the matter to the Joint Committee if it considers that a given practice is incompatible with the proper functioning of the Agreement...

The Contracting Parties shall provide the Joint Committee with all relevant information and shall give it the assistance it requires in order to examine the case and, where appropriate, to eliminate the practice objected to.

If the Contracting Party in question fails to put an end to the practice objected to within the period fixed by the Joint Committee, or in the absence of agreement in the Joint Committee within three months of the matter being referred to it, the Contracting Party concerned may adopt any safeguard measures it considers necessary to deal with the serious difficulties resulting from the practices in question; in particular it may withdraw tariff concessions.

...  
c) As regards Article 25 [dumping], consultation in the Joint Committee shall take place before the Contracting Party concerned takes the appropriate measures.
In practice, for bureaucratic and diplomatic reasons, the EEC has been ignoring this procedure.\textsuperscript{706} The EEC used to inform the EFTA country concerned by the dumping investigation, but no consultation as such has ever taken place.

Although the process of mediation and consultation through the EFTA Council worked quite well in practice, it proved inefficient when transposed into the EEC-EFTA FTAs.\textsuperscript{707}

There is no common agreement amongst member states as to what constitutes an abuse of a dominant position. Another important limitation is that the system of regulation of restrictive business practices remains an international process for states only. In the EEC-EFTA FTAs, affected industries have no other recourse than to report to their government. Although, initially some authors took a different position, it is now accepted that firms have no direct access to the process of complaint\textsuperscript{708} and cannot invoke the provisions of the agreements.

In fact, the objectives and the wording of the EEE-EFTA FTAs do not seem to support a direct application in favour of private parties. Notwithstanding their similarities, the wording of article 23 of EFTA and articles 85-86 of the EEC are very different: 1) Article 23 of the EEC-EFTA does not stipulate that the practices are prohibited; 2) Article 27 of the EEC-EFTA does not provides for specific remedies and recourse to national courts is not mentioned; 3) The Joint Committee does not have the power to address recommendations directly to undertakings, nor

---

\textsuperscript{706} Discussions with M. Jacques Bourgeois 27/5/93 on the functioning of the EEC-EFTA FTAs while he was head of the Directorate in charge of external relations of the EEC.

\textsuperscript{707} A similar concept of a Joint Council is used in the free-trade agreement between the EEC and the East European countries, discussed after in section 6.2.4 hereafter.

\textsuperscript{708} In NAFTA states have agreed to trigger the consultation and arbitration process each time they are asked by a private national.

\textsuperscript{709} Dr Hunnings has, however, argued that rules of competition contained in the EEC-EFTA FTAs were directly applicable. His main argument is that the European Court regards international treaties to which the Community is a party as in principle directly effective in internal law. He argues that the Community is "monists". This seems an inaccurate statement in view of the position of EEC members of the issue. Hunnings N., "Enforceability of the EEC-EFTA Free Trade Agreement" in 2 E.L.Rev. (1977), p.163. Waelbroeck's comments seem more convincing: Waelbroeck M., "Enforceability of the EEC-EFTA Free-Trade Agreement : A Reply" 3 E.L.Rev. 1978, p.27. See also Llavero M., "The Possible Direct Effect of the Provisions on Competition in the EEC-EFTA Free-Trade Agreements in the Light of the Kupferberg Decision" in Legal Issues of European Integration, 1984, vol 2 p.83.
to compel them to produce information; 4) Another important argument is that European states are dualist. In order to integrate into their domestic law, new rights and obligation to private litigants negotiated in a treaty, dualist countries must enact explicit national legislation to this effect. None of the provisions of article 23 of the EEEC-EFTA FTAs were "introduced" into domestic legislation.

Enforcement being by governmental action only, it was, therefore, subject to economic threats and political pressures from the stronger party - here the EEC - to the detriment of a more commercially wise application of the law.

The EEC-EFTA FTAs were supposed to expire with the entry into force of the new European Economic Association agreement, the EEA, on 1 January 1993. Now that Switzerland has voted against joining the EEA, the future of the EEA is uncertain.

There is no explicit mention in the EEA that EFTA will become "ineffective" with the entry into force of the EEA. If all member states of EFTA had agreed to the EEA, EFTA would have been useless. Now the relations between Switzerland and the other members of EFTA should continue to be governed by the rules of EFTA. There is no provision extinguishing EFTA when one (or more) member(s) join other trade arrangement(s).

Problems of discriminatory treatments may, however, appear from the parallel enforcement of EFTA and the EEA. The EEA is not a group of bilateral agreements, but one agreement between eighteen countries. Under the principle of non-discrimination of the EEA, EFTA countries cannot give preferential treatment to Switzerland without doing the same to EEC countries, members of the EEA. It is also against the principle of non-discrimination contained in EFTA, for Sweden, for example, to give preferential treatment to France and not to Switzerland. As a result, this would leave Switzerland with all trade privileges that the other EFTA

\[710\] This is an important difference with the new European Economic Arrangement, the EEA for which national legislation is being implemented.
countries may received from the EEA, without the EEA obligation.\textsuperscript{711} This is, however, difficult to accept politically.

In any case, the EEA provides useful guidelines on the concessions and legal steps undertaken by EFTA members in order to become member of the EEC. The process towards the EEA and eventually the EEC, is one of the possible routes that Canada and Mexico could follow in order to obtain the USA's approval for a NAFTA without internal antidumping measures.

\textbf{6.2.3 The European Economic Association (EEA)}

Since the creation of EFTA, its members have tried to find an acceptable solution to the problem created by the division of Western Europe into two regional economic groups.\textsuperscript{712} After the United Kingdom and Denmark left EFTA to join the EEC\textsuperscript{713}, the free-trade areas between the EEC and the EFTA countries were signed. In order to further the integration between the two groups, proposals to phase out antidumping actions with the EEC were put forth by the Swedish Delegation in 1984. Working groups were mandated on 2 October 1985. This possibility proved to be impractical without further harmonisation of competition laws. Then, on the 1 January 1986, Spain and Portugal joined the EEC. The urge to realise an "European Space" increased.

On 17 January 1989, President Delors spoke at the European Parliament of a possible extension to the EEC to include countries member of EFTA. Negotiations for further integration between the two groups started on 20 June 1990. A first association agreement was concluded on 21 October 1991. The European Court of Justice declared it \textit{ultra vires} because it created a EEA panel of judges which would undermine the autonomy of the European Court, hence contrary to the foundations

\textsuperscript{711} Switzerland would not be bound by the obligations agreed upon by the other EFTA members towards the EEC members. It can be argued that the most-favoured- nation principle protects trade privileges not trade obligations.

\textsuperscript{712} As a matter of a fact, the preamble to the Stockholm Convention reiterates the desire for a wider European solution to the question of economic integration.

\textsuperscript{713} On the 1/1/73.
of the Community. The EEC Court stated that the different aims and contexts of the EEA and of the Community, conflicted with both the obligation of the EEC Court to interpret the EEC law with homogeneity, and, the foundations of the Community.\(^{714}\) The Court concluded that the only way in which laws governing the EEA zone could be kept uniform is for its own Court to predominate disputes.

The institutional provisions of the EEA were amended. Disputes over the judicial interpretation of the EEA are now to be resolved through a joint political committee, rather than a fully fledged court. Furthermore, the EEC Commission was given jurisdiction over most important competition cases involving EEC and EFTA firms.

In the EEA Joint Committee, which is responsible for the application of the agreement\(^{715}\), each group speaks with one voice\(^{716}\). It shall meet at least once a month. The EEA Joint Committee (assisted by working groups and subcommittees\(^{717}\)) takes binding\(^{718}\) decisions by consensus\(^{719}\) on amendments\(^{720}\), operation\(^{721}\) and interpretation of the EEA Agreement\(^{722}\).

\(^{714}\) *(45) Consequently, the agreement's objective of ensuring homogeneity of the law throughout the EEA will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of the community law.*

\(^{715}\) Article 92 of the EEA.

\(^{716}\) Article 93 of the EEA. This is the so-called two pillars principle of the EEA.

\(^{717}\) Article 94.3 of the EEA.

\(^{718}\) Article 104 of the EEA.

\(^{719}\) Article 93.2 of the EEA.

\(^{720}\) Article 102 of the EEA.

\(^{721}\) Article 92.1 of the EEA.
In case of disagreement on the interpretation of the EEA, a request to the EEC Court is possible; the affected Party may also decide to impose safeguard measures.\(^2\) The EEA Joint Committee, as was the Joint Committee under the old EEC-EFTA FTAs, is essentially a political organ but its powers and functions are expanded and more detailed.\(^3\)

On 10 April 1992 the European Court cleared the new EEA Agreement under the condition that the Joint Committee's decisions must not be contrary to its own rulings. A protocol to that effect had to be added. Article 56 allocating the jurisdiction between the EFTA Authority and the EEC Commission was also accepted by the Court.\(^4\)

6.2.3.1 The content and the organisation of the EEA

In the EEA Agreement, the EFTA countries have accepted almost all Community rules concerning the free movement of goods, services, capital, persons and competition. Most of the relevant primary legislation has been simply transposed into the EEA Agreement. For instance, Article 3(f) of the EEC Treaty is mirrored in article 1(2)(e) of the EEA Agreement, Article 3 of the EEA is

\(^{222}\) (...continued)

\(^{222}\) Article 11.2 of the EEA.

\(^{223}\) Article 11.3 of the EEA.

\(^{224}\) There is also an EEA Council, at the Ministerial level, which will give an impetus to the implementation of the Agreement and will take the political decisions leading to amendments of it. It is formed of the members of the EEC Council, members of the EEC Commission and one member of each EFTA State. Finally there is a Joint Parliamentary Committee made of equal number of representatives of the EFTA and of the EEC for a total of 66 members. See Article 89ss on the institutions of the EEA.

\(^{225}\) "The following are compatible with the Treaty establishing the European Economic Community:

(1) The provisions of the agreement which deal with the settlement of disputes, as long as the principle that decisions taken by the Joint Committee are not to affect the case-law of the Court of Justice is laid down in a form binding on the Contracting Parties;

(2) Article 56 of the Agreement, dealing with the sharing of competence in the field of competition." Opinion of the ECJ 10/4/92.
parallel to article 5 of the EEC Treaty, articles 53, 54 and 59 are replicates of 85, 86 and 90 of the EEC Treaty.\textsuperscript{726}

The way to integrate all this secondary legislation into the EEA is original. It has been stated that there are over 1500 EEC legal instruments that will be incorporated into the legislation of the EFTA countries. The "acquis communautaire" is the catchword for the provisions of Community secondary legislation which the EFTA states have agreed to make part of their internal legal orders. The "annexes" form the vehicle through which the "acquis communautaire" is integrated into the EEA Agreement\textsuperscript{727}.

There are 1500 Community acts listed in annexes. They had to be adapted. The process of adaptation was quite ingenious. Some acts required standard adaptations; they were collected in one "Protocol on horizontal adaptations". There is also a second "Protocol of sectoral adaptations" for adaptations particular to one area. Finally there are specific adaptations.\textsuperscript{728}

Provisions on competition are organised along this pattern: the primary legislation is identical and directives and regulations are integrated in annexes. Five Protocols are also relevant in providing details.

**6.2.3.2 Provisions dealing with dumping and competition**

Anti-dumping measures within the EEA are abolished with the entry into force of the treaty, without any transitional period.\textsuperscript{729} The abolition of antidumping

\textsuperscript{726} There are exceptions to the mirror principle due to the fact that the EEA is a free-trade agreement and not a customs union. Community rules concerning common policies towards third countries are not part of the agreement. Direct and indirect taxation do not form part of the Agreement. There is no binding co-ordination of economic policies, so the EFTA countries will not participate in the European Monetary System nor in the European Monetary Union and border controls will remain. Moreover, the agreement does not provide for free-trade of agricultural nor any fisheries products. Finally, there is no common transport policy.

\textsuperscript{727} At the signature of the EEA, the acquis was composed of about 1500 Community Acts, including 160 regulations, 950 directives, 120 decisions and 300 formally non-binding decision. This amounts to about 12,000 pages of printed legal text.

\textsuperscript{728} This process has reduced the EEA Agreement to manageable proportion.

\textsuperscript{729} Article 26 of the EEA and Protocol 13.
actions is made possible by the adoption of articles 53 and 54 of the EEA which are perfect duplications of articles 85 and 86 of the EEC Treaty as well as by the introduction of the "direct effect" in favour of private litigants through the "acquis communautaire".

The enforcement of these articles is shared between the EEC Commission and the EFTA Surveillance Authority. Article 55.2 paragraph 2, adds that each Authority may authorise its member states to take action and may request the other Authority to authorise states within its jurisdiction to take such measures.

An EFTA Surveillance Authority and an EFTA Court are going to perform functions similar to those of the EEC Commission and the EEC Court, over the EFTA territory when they have jurisdiction to article 56. Article 56 provides for the allocation of jurisdiction between the two authorities. The law of the territory where the horizontal agreement or the abuse of a dominant position take place, is the criteria retained to assess jurisdiction.

In case of potentially concurrent jurisdiction, the EEC Commission will often have exclusive jurisdiction over cases involving one or more EFTA countries. Although the population of EFTA is roughly 10% of that of the EEC, 33% of the turnover of enterprises must take place on the territory of EFTA in order to give jurisdiction to the EFTA Authority.

---

730 Created on 2 May 1992 by the EFTA members "Agreement between the EFTA states on the Establishment of a Surveillance Authority and a Court of Justice".

731 This can be seen as some sort of positive comity directed towards the member states of each competent authority. See discussions at section 2.4.2.5 and 2.6 of chapter 2.

732 Article 108 of the EEA. The Protocol 21 at article 5 mentions that agreements infringing 53(1) [similar to 85(1)] must be notified to the competent authority in order to benefit from an exemption under 43(3). Those infringing 53(1), when the EEA comes in force, ought to be notified to the competent authority within 6 months, unless they are modified to conform to 53(1) or, are covered by a block exemption or other mirror legislation of the EEC.

733 Article 56(a): "individual cases where only trade between EFTA States is affected shall be decided upon by the EFTA Surveillance Authority;"

734 Article 56.2: "... cases falling under Article 54 shall be decided upon by the Surveillance authority in the territory of which a dominant position is found to exist. The rules set out in paragraph 1(b) and (c) apply only if dominance exists within the territories of both surveillance authorities."
Article 56
1. Individual cases falling under Article 53 ...
(a) cases where only trade between EFTA States is affected shall be decided by
the EFTA Surveillance Authority.
(b) without prejudice to subparagraph (c), the EFTA Surveillance Authority
decided, ..., on cases where the turnover of the undertakings concerned in the
territory of the EFTA States equals 33 per cent or more of their turnover in the
territory covered by this Agreement.
(c) the EEC Commission decides on the other cases as well as on cases under
(b) where trade between EEC Member States is affected...[unless it is not
appreciable 56.3]
2. Individual cases falling under Article 54 shall be decided upon by the
surveillance authority in the territory of which the dominant position is found
to exist. The rules set out in paragraph 1(b) and (c) shall apply only if
dominance exists within the territories of both surveillance authorities.

Protocol 23 provides both authorities with extensive obligations to collaborate,
exchange information, and right to be heard in the cases handled by the other
authority. Files must also be transferred if it becomes evident that the other
authority has jurisdiction over the case. This latter obligation reduces the difficulty
of the firms to identify the appropriate authority to notify.

The mirror provision of article 90 EEC is 59 EEA. Finally mergers, other than
those where the thresholds are fulfilled in the territory of the EFTA countries, are
governed by the Regulation (EEC) No 4064/89 for which the EEC Commission
has exclusive jurisdiction; again Protocol 24 sets out extensive obligations of
collaboration and co-operation between both authorities.

In case of a conflict as to which authority has jurisdiction, the Joint Committee
would decide. If no consensus is reached in this Joint Committee, the matter
is sent to the EEC Court which has declared, in disguised words, in its two opinions
on the EEA Agreement, the supremacy of the EEC law over any other treaty.

735 Article 58 EEA Agreement and Protocol 23.
736 Article 57.2(a) of the EEA Agreement.
737 Article 111 of the EEA Agreement.
738 Article 93 of the EEA states that the EEC states and the EFTA states have one voice each.
This is called the "two pillar" principle of the EEA.
The EEA zone is more integrated than most free-trade areas. The direct effect of the treaty provisions in favour of private litigants would ensure the aggressive enforcement of competition laws throughout the EEA territory. The very strong balance in favour of the EEC's jurisdiction makes sense when the EEA is perceived as a stepping stone to full membership to the EEC.\footnote{Austria, Finland, Norway and Sweden have applied for full membership to the EC.}

Since antidumping actions are to be phased out within the EEA, firms would become subject to similar pricing regulation throughout the EEA zone. This is why it was important that member states from both groups had fairly similar market conditions before undertaken such process of integration.\footnote{Following the example set by the EEC in completing its internal market, the EFTA countries expanded their objectives from free movement of industrial goods to include free movement of services, capital and people. They have also adopted the standards and regulatory rules of the EEC.} The necessity to reach similar market conditions, before antidumping measures can be phased out between member states, is also relevant for the relationship between the EEC and Eastern countries.

\subsection*{6.2.4 The so-called Europe Agreements}

The Europe Agreements refer to three agreements between the EEC on the one hand and Poland, Czechoslovakia and Hungary on the other. The agreements are also "association" agreements concluded under article 238 of the EEC Treaty\footnote{Article 238: 'The Community may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.'}.

They provide for a transitional period of 10 years. The bulk of these agreements is identical but the bilateral agreement with Poland contains a few more ambitious provisions. In the present discussion, reference will be made to the agreement with Poland because in the "Joint Declarations" attached to the agreement, Poland is said to envisage that "certain competition rules may be directly applicable at a later stage". This process, it is argued, constitutes the last stage before phasing out antidumping duties. The association agreement with Poland contains, therefore, a
comprehensive process of integration where competition rules may, eventually, supplement antidumping rules.

The free-trade agreement between the EEC and Poland is also interesting for the purpose of this thesis because of some similarities between the situations of Poland and that of Mexico. Both Poland and Mexico are parties to free-trade areas with a geographic neighbour. Both are said to have many monopolies and state enterprises. Both have to enact effective competition laws as a condition of the free-trade agreement. Both face important economic and "social disparities" with the other commercial partner of their respective free-trade area. Both have achieved great economic changes in the recent past. While Mexico joined the GATT in 1986, Poland is hoping for full membership soon. Finally, both countries seem "convinced that these free-trade agreements will create a new climate for their economic relations and in particular for the development of trade and investment, instruments which are indispensable for economic restructuring and the technological modernisation".

For a detailed analysis of existing monopolies and state enterprises in Eastern Europe and in Poland see Newbery D; and Kattuman P. "Market Concentration and Competition in Eastern Europe" in World Economy, vol.15 no.3 (1992), p.315. At page 322, the authors argue the difficulty of introducing competition in Eastern economies where there are no small and medium size enterprise and where all the employment is concentrated into a few enormous integrated firms. "The hardest and in many ways the most important task for these countries will be to establish and implement a vigorous and preferably politically independent competition policy, and to undertake a restructuring and demonopolisation of the large state enterprises before they are privatised. The paper has demonstrated that considerable progress might be made in this direction if enterprises were made fragmented into their component establishments, which should reduce the imbalance in bargaining power between the state and the enterprises as well as increasing flexibility and competition.".

Preambles of the Europe Agreement.

12th preamble of the Europe Agreement.

4th preamble of the Europe Agreement.

11th preamble of the Europe Agreement; Poland has a status of "observer" at the GATT.

13th preamble of the Europe Agreement.
However, the ultimate purpose of Poland is membership to the EEC whereas there is no discussion of a customs union in North America. With this perspective a key obligation of the Europe Agreement is that existing and future legislation will approximate that of the EEC; this obligation is binding on future governments. Poland will have to harmonise some 7000 acts and regulations over a period of ten years. So far, Poland was made to adopt a legislation on competition similar to the European one.

6.2.4.1 The Content of the EEC-Poland FTA

Article 63 of this Europe Agreement adopts the criteria of Articles 85 and 86 (and 92) of the EEC Treaty, in so far as trade between the EEC and Poland is affected. There is also express reference to the law under 85, 86 and 92 of the

---

747 The last paragraph of the preamble to the agreement states:
"Recognizing the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective."

Moreover article 1.2 states that the aim of this agreement is ...
"to provide an appropriate framework for Poland's gradual integration into the Community. To this end, Poland shall work towards fulfilling the necessary conditions;"

748 Article 68 to 70 of the Europe Agreement.

749 OECD Publication The Economy of Poland, Annex I p. 174

750 Again these comments are applicable also to Czechoslovak and Hungary.

751 Barry Hawk's "Fortune Telling" proves to be true:
... Grand historical programs are not complete without some fortune telling. So I close with seven predictions for the twenty-first century. The EEC's competition rules may ultimately prove to be the model of choice over the Sherman Act in the twenty-first century.... It will be interesting to see whether the Eastern Europe nations' antitrust legislation will look more like the Sherman Act or more like Articles 85 and 86. Hawk B., "International Application of the Sherman Act in its Second Century" in Antitrust L.J., vol. 59 (1990), p.170-171.

752 Article 63.1 of the Europe Agreement:
"The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Poland: (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition; (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Poland as a whole or in a substantial part thereof; (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods."
EEC Treaty and to the obligation of Poland to approximate its legislation with the EEC's, in parallel to the absorption of the "acquis communautaire" into the EEA agreement.

Article 63.3 envisages that the Association Council shall, within three years of the entry into force of the Agreement, adopt rules implementing articles 63.1 and 63.2. These rules would address the sharing of jurisdiction for the application of articles 63.1 (i) and (ii) between Poland and the EEC as does article 56 of the EEA Agreement between the EEC and EFTA.

Along the lines of the Council of EFTA and the Joint Committee of the EEC-EFTA FTAs, the Europe Agreements provide for an Association Council. This Association Council, consisting of members of the EEC Council and EEC Commission on the one hand, and, of members of the Government of Poland, on the other shall be able to take binding decisions.

The Association Council, as were the EFTA Council and the EEC-EFTA Joint Committee, is also the forum where antitrust and antidumping actions would be discussed. Because the EEC and Polish economies are not as integrated as those of the EEC and EFTA, it was inconceivable that the use of antidumping actions would be immediately terminated. Rules for the implementation of competition regulation have not yet been adopted! Until these implementation rules are adopted

---

753 Article 63.2 of the Europe Agreement:
"Any practices contrary to this article shall be assessed on the basis of criteria arising from the application of the rules of articles 85, 86 and 92 of the Treaty establishing the European Economic Community."

754 Moreover article 11.1 of the Joint Declaration adds that existing agreements should be dealt with in a manner similar to what is provided for in article 7 of the Regulation 17: "The Association Council shall establish appropriate measures to ensure that all agreements covered by article 63(i) of the Agreement and affecting trade between the Contracting Parties and which were concluded before the entry into force of the Agreement will be dealt with in a manner similar to what is provided in Article 7 of the Council Regulation (EEC) no 17/62."

755 According to Article 118 of the Agreement it shall enter into force the first day of the second month after all States have notified the other that they have ratified it. In the mean time there is an Interim Agreement providing for some trade privileges and the beginning of the approximation work.

756 Article 101 of the Europe Agreement.

757 Article 102 of the Europe Agreement.

758 Article 103 of the Europe Agreement.
and even after their adoption - a Party which is of the opinion that articles 63.1 (i) or 63.1(ii) have been infringed can take **appropriate measure** after a minimum of 30 days of consultation within the Association Council.  

63.6 If the Community or Poland considers that a particular practice is incompatible with the terms of the first paragraph of this article, and:
- is not adequately dealt with under the implementing rules referred to in paragraph 3, or
- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry, it may take appropriate measures after consultation within the Association Council or after 30 working days following referral for such consultation.

The unilateral application of antidumping measures would therefore constitute an appropriate measure, under Article 63.6. There is no criteria for "adequately dealt" and there are risks that the Association Council would end up being a rubber stamp for EEC actions as was the Joint Committee of the EEC-EFTA FTAs. The second paragraph of Article 63 refers to injury caused to a Party and to its industry. Injury to a Party could be interpreted as injury to the country as a whole, i.e. injury to downstream producers and consumers.

This referral to the Association Council, prior to the imposition of any antidumping duty, is clearly expressed in articles 30, 34.2 and 34.3 and

---

759 The semantics of the offense resemble those of the EEC-EFTA FTAs in using the expression "appropriate measures."

760 Article 30 of the Europe Agreement:
*If one of the Parties finds that dumping is taking place in trade with the other Party.... it may take appropriate measures...[in application of Article VI GATT; Poland is an associate member of GATT since 1969]...with the conditions and procedures laid down in article 34.*

761 34.2: *In the cases specified in Article 30, 31 and 32, before taking the measures provided for therein or, in cases to which paragraph 3(d) applies, as soon as possible, the Community or Poland,... shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to the two parties....

762 34.3 For the implementation of paragraph 2, the following provisions shall apply:
'...c) As regards Article 30, the Association [Council] shall be informed of the dumping case as soon as the authorities of the importing party have initiated an investigation. When no end has been put to the dumping or no other satisfactory solution has been reached within thirty days of the matter being referred to the Association Council, the importing party may adopt the appropriate measure'.

---
follows the lines of the process contained in EFTA and in the EEC-EFTA FTAs.\textsuperscript{763} A compulsory period of 30 days of consultation before the imposition of antidumping duties would be very valuable if indeed respected. An additional obligation to justify their calculations and decisions would also be greatly beneficial in order to develop some sort of practice or guidelines.

In the Europe Agreements, the process of consultation is, however, strictly international, i.e., accessible to states only. Although diplomatic negotiations may be more flexible, private enforcement tends to be more effective. Article 11.3 of the Joint Declarations regarding article 63 of the agreement with Poland\textsuperscript{764}, had, however, the possibility of a further step of "direct application" of competition rules:

Parties may request the Association Council at a later stage, and after the adoption of the implementing rules referred to in Article 63(3), to examine to what extent and under which conditions certain competition rules may be directly applicable, taking into account the progress made in the integration process between the Community and Poland.

In that sense the agreement with Poland is unique because it is the only of the Europe Agreements which envisages the possibility of having its competition rules directly applicable. The "direct effect", which was also introduced into the process of integration of the EEA, seems to be the turning point before the abolishment of antidumping actions. This presupposes, however, that firms are subject to similar conditions in their home markets. Poland and the EEC are still too far apart; maybe after ten years of transitional integration and with the approximatisation of their respective laws, the provisions of the agreement will be given direct effect. By then, Poland may be ready for full membership to the EEC. This is assuming that the EEC will effectively trade with Poland and the other East European countries in reducing trade barriers.\textsuperscript{765} The similarities in market conditions seem also to have

\textsuperscript{763} Article 34.3 d) envisages exceptional circumstances where prior notification and consultation do not have to take place before the imposition of trade measures.

\textsuperscript{764} The agreements with Czechoslovakia and Hungary do not contain this provision.

\textsuperscript{765} Many newspapers articles have been written on the protectionist attitude of the EEC towards Eastern countries.
been the decisive criteria leading to the free-trade area between New Zealand and Australia.

6.2.5 The Australia-New Zealand Agreement for Closer Economic Relations

The Australia-New Zealand Agreement: Closer Economic Relations-Trade Agreement (Australia-New-Zealand CER) deserves special attention because it is the only free-trade area where antidumping actions have been phased out without the adoption of a supranational legislation or any other supranational authority to control restrictive business practices that may affect trade within the regional arrangement.

This pattern, with necessary adaptations, is very relevant to NAFTA. Numerous parallels can be drawn between the Canada-USA trade relations and the Australia-New Zealand commerce: the disparities in economic strength, population and economic structure of its member states. The economic interdependence of the two Trans-Tasman countries is, however, much smaller than that of the countries in NAFTA. Farmer writes that the largest number of business transactions that occur in both Australia and New Zealand have no connection whatsoever with the other country. It is said however that, for 1992, Australia was New Zealand's largest trading partner and New Zealand was Australia's fourth largest trading partner.

Some important differences exist, however, between the Trans-Tasman CER and NAFTA: Australia and New Zealand have had a common labour market since 1920; importantly, the Australia-New Zealand CER envisages expressly that ultimately a customs union may be established between the two countries. Antidumping actions between Australia and New Zealand were phased out from 1

---

767 Financial Times, 20/2/92.
768 Article 21 : "The Member States recognise that the objectives of this agreement may be promoted by harmonisation of customs policies and procedure in particular cases. Accordingly the Member States shall consult at the written request of either to determine any harmonisation which may be appropriate".
July 1990, seven years after the entry into force of the free-trade agreement signed on 1 January 1983. The following section will look at the functioning of the agreement during the first seven years and at the legislative changes brought about after the review of 1988 in a the desire to supplement antidumping actions by competition measures.

6.2.5.1 The Trans-Tasman FTA before the review of 1988

A first New-Zealand-Australia Free-trade Agreement (also called NAFTA) was signed in 1965. Kirby writes that "it is generally believed that NAFTA produced little overall effect in Trans-Tasman trade but .. did provide the forum... to search for a new framework for trade liberalisation"\(^{769}\). Another free-trade agreement, the Trans-Tasman CER, was signed on 1 January 1983.

Provisions dealing with restrictive business practices and dumping were very innovative. The Trans-Tasman CER stipulated very extensive obligations of consultation and co-operation between member states before imposing antidumping measures and, in some circumstances, the agreement provided for inter-industry consultations.

Upon request for the initiation of an anti-dumping action from an industry affected by goods imported from the other member state, the requested state must give to the other member state a prompt written notice and an opportunity for consultation. Upon request, the state affected by imports must provide the other state with the following: the tariff classification and description of the relevant goods; a list of all known exporters thereof and an indication of the element of dumping occurring with respect to each exporter; access to all non-confidential evidence relating to those goods; the volume; degree and effect of dumping; and the nature and degree of injury and the causal link between the dumped goods and the injury.\(^{770}\)


\(^{770}\) Article 15 of the Trans-Tasman CER.
Consultation could also take place when one member state was of the opinion that goods were dumped from a country outside the Trans-Tasman CER into the other member state. A special consultation process existed when a member state wanted to impose safeguard measures, authorised during the transitional period only. If a prompt solution could not be reached

the member state into whose territory the goods are being imported shall refer the matter to an industry advisory body for investigation, report and recommendation for appropriate action...

Although this surveillance process involving industries from both countries was a good "watch-dog" to counteract exaggerated allegations of injury, it would probably raise problems of cartelization under antitrust laws in NAFTA. Similar comments can be made for article 13 which envisages consultations amongst members of an industry in an effort to rationalise production within the free-trade area.

The free-trade area did not provide for any supranational executive or judicial authority. Consultation was the only procedure for the settlement of disputes but tighter time limits and procedures were adopted to ensure rapid solutions of antidumping conflicts. This process of consultation has similarities with the exchanges which could take place inside the Council of EFTA and the Joint Committee of the EEC-EFTA FTAs with the important difference that in the

---

771 The other Member State must then examine the possibility of taking action consistent with its international obligation against the said dumped goods. Article 15(8) of the Trans-Tasman CER.

772 Where no other solutions could be found, and only during the transitional period - i.e. before the 1/1/88 - and "...where goods are imported in such increased quantities and under such conditions as to cause, or to pose an imminent and demonstrable threat to cause, severe material injury to a domestic industry producing like goods; and,...such increased imports are occurring as a result of ... government measures taken to liberalize tariffs..." a member State could notify the other member State of its intention to impose safeguard measures. Article 17(1) of the Trans-Tasman CER.

773 Article 17(3) of the Trans-Tasman CER. After consultation for 90 days, safeguard measures may be applied for the minimum level possible and for a determined period of time. Quotas were only to be applied "in the most extreme circumstances" when other safeguard measures are insufficient: Article 17(6) of the Trans-Tasman CER.

774 Consultations and collaborative work for harmonising requirements relating to restrictive business practices can also take place when differences in legislation "impede or distort trade in the free-trade area". Article 12 of the Trans-Tasman CER.
Trans-Tasman CER, there was a strong informal and formal participation of firms involved in the complaint for dumping and restrictive business practices. In chapter 8, it will be argued that aspects of this process could be used in NAFTA.

6.2.5.2 The 1988 Review and the phasing out of antidumping duties inside the Trans-Tasman territory

Article 22 of the Trans-Tasman CER stated that member states should meet annually and that a general review of the operation of the agreement shall be undertaken in 1988. The review of 1988 resulted in three protocols and seven understandings aimed at accelerating the movement towards a single market.\(^7\)

In the Protocol on the Acceleration of Free Trade in Goods, member states agreed to eliminate remaining tariffs, quantitative import restrictions and tariff quotas by 1 July 1990. Article 4 of that Protocol provided that from that date neither country will take antidumping actions against goods from the other member states. Anti-competitive conducts are to be subject to both countries' competition laws.\(^6\)

The second step was to pass from a strictly international system - where, as discussed in the previous section, enterprises were, however, sometimes involved in consultations - to a system where firms had direct rights to ensure the respect of competitive behaviour. This was done by extending the prohibitions on anticompetitive use of market power, contained in section 36 of the New Zealand Commerce Act and in section 46 of the Australian Trade Practices Act, to cover the use of market power throughout the combined Trans-Tasman market.

The Australia-New Zealand CER was innovative in many ways. The geographic focus of analysis of the offense, the abuse by a dominant firm, is expanded to any

\(^7\) For further details on these protocols and understandings see "A Single Market for Goods and Services in the Antipodes" by Thomson G. in World Economy, vol.12 no.2 (1989), p.207.

\(^6\) In July 1988 a Memorandum of Understanding on Harmonisation of Business Law was signed which committed both government to further harmonise all relevant legislation with a view to fully realise the objectives of the CER: 'article 1 ...(c) to eliminate barriers to trade between Australia and New Zealand...(d) to develop trade between New Zealand and Australia under conditions of fair trade'.

market within the territory of the free-trade area. Abuses anywhere in the Trans-
Tasman territory is an offense to the CER. It introduced this new offence through
the simple amendment of domestic legislation instead of using a supranational
legislation or a treaty applicable to the whole free trade territory, as it was done in
the EFTA, the EEC-EFTA FTAs and the EEA.\textsuperscript{777}

The new section 36A of the New Zealand Commerce Act prohibits any person
with a dominant position in a market in Australia, in New Zealand or in New
Zealand-Australia (called "australasia") from using that position to restrict entry into,
or deter competition in, or eliminate a person from, a market in New Zealand.
Section 46A of the Australian Trade Practice Act does the same and prohibits firms
with a substantial degree of market power in a trans-Tasman market or part of it,
to seek to eliminate or substantially damage a competitor, or prevent the entry of
a person, or deter competition, in a market in Australia.

Both the Australian and New Zealand amendments have addressed the "origin"
of the market power. Now a dominant position in any Trans-Tasman market may
be subject to the New Zealand legislation if such a practice affects a market in New
Zealand; a firm with substantial degree of market power in a Trans-Tasman market
may be subject to the Australian legislation if it affects markets in Australia.\textsuperscript{778}

Courts of the territory where effects are felt have been given additional
jurisdiction to deal with offenses perpetrated in the territory of the other member
state. Courts can now move to the district of the seller who is alleged to be
infringing one of the two legislations.\textsuperscript{779} A dominant firm in Australia (or in any

\textsuperscript{777} Or the EEC, as discussed in the following section.

\textsuperscript{778} This extension is given further legislative support in the Commerce Act section 4 : "...Section
36A... extends to the engaging in conduct outside New Zealand by any person resident or carrying
on business in Australia to the extent that such conduct affects a market, not being a market
exclusively for services, in New Zealand." The amended Trade Practices Act declares:"for avoidance
of doubt that the Commonwealth, the States, the Australian Capital Territory, and the Northern
Territory, and their authorities, are not immune, and may not claim immunity, from the jurisdiction
of the courts of Australia and New Zealand in relation to matters arising under section 36A... of
the Commerce Act 1986 of New Zealand". Mirror provisions support the Australian extended
jurisdiction.

\textsuperscript{779} Lawyers of both jurisdictions have been given the right to plead in front of both courts.
Enforcement agencies have agreed to collaborate for collection of evidence, information, subpoenas.
Judgments are enforceable equally all over the Australasia territory.
Trans-Tasman market) selling below cost in New Zealand could infringe the New Zealand law even if it did not have a dominant position in New Zealand assuming that the business practice affects the New Zealand Market.

For example a New Zealand firm, not resident in Australia but seeking to do business there, may claim that a firm with substantial market power in Australia is infringing the Australian Trade Practices Act by selling below cost. The same New Zealand firm could argue that an Australian firm having a dominant position anywhere in Australasia is selling below cost in New Zealand, therefore infringing the New Zealand Commerce Act. Similarly, a firm in Australia could allege contravention to the New Zealand Commerce Act by a firm with a dominant position anywhere in Australasia if the impact was targeted for New Zealand. In other words the targeted market by the restrictive business practice determines the applicable law and which court will hear the dispute.

Article 36A of the Commerce Act states:
...for the purpose of... restricting the entry of any person into any market... preventing or deterring any person from engaging in competitive conduct in any market... or eliminating any person from any market...

Article 46A of the Trade Practices Act states:
... for the purpose of eliminating or substantially damaging a competitor of the corporation, or of a body corporate that is related to the corporation, in an impact market; or ... preventing the entry of a person into an impact market; or deterring or preventing a person from engaging in competitive conduct in an impact market.

It is, therefore, conceivable that an abuse would not have any successful effects but would be condemned because of its purpose. In practical terms, however, if there is no real damage it is doubtful that private litigants would initiate a suit; competition authorities may do so to deter recidivism.

The thresholds of market power of the New Zealand "dominant position" and the Australian "substantial degree of market power" are, however, argued to be different. This distinction is interesting because differences also exist between the Canadian concept of a dominant position and the US monopoly.
Kerrin Vautier writes that when it amended the Trade Practices Act, the Australian Government wanted to lower the threshold of market power required for the offense. She writes that the relevant marginal note in the Act changed from "monopolisation to misuse of market power". The Parliament expressly rejected that "substantial degree of market power meant the capacity to control a market or the power to affect prices". The Australian Trade Practice Commission wrote that "market power should be seen relative to the market power of other participants in the market". The 1986 Explanatory Memorandum also wrote that

...Dominance connotes a greater degree of interdependence from the constrains of competition than is required by a "substantial degree of market power" ... more than one firm may have a substantial degree of power in a particular market.

This concept is quite different from the New Zealand "dominance" which has been applied mainly in cases of mergers. Vautier again writes that the dominance test clearly does not envisage total dependence of action. But it certainly envisages a sufficient level of market power to enable the dominant party to act without restraint to an appreciable (large) extent, over time, without itself suffering detrimental effects. Being in a position to act in this discretionary manner suggests that there could be no more than one dominant firm in a market.

From these differences Longdin writes

In a case involving predatory pricing it may be easier to demonstrate that a New Zealand company is in a breach of section 46A than to show that an Australian company is in breach of the counterpart section 36A.

The threshold of market power is, however, not the only variable to be considered in predation cases. The types of tests sponsored by each country to identify ex-ante predation and the injury test are also relevant. It is far from certain

---

782 At p. 214 of the Explanatory notes reported by K. Vautier in "Trans-Tasman Trade and Competition Law" idem at p.86.
783 Idem p.87
that the effective application of Australian and New Zealand tests would lead to different results.

Other legislative provisions had to be amended. The relevant courts of both countries had to have their jurisdiction extended to abuses taking place in the other's territory. Courts of both countries were made able to sit in the other country or take evidence and submissions by means of video-link or telephone.

Both the Australian Trade Practice Commission and the New Zealand Commerce Commission were given new investigatory powers to obtain evidence in the other country and to collaborate.\textsuperscript{785} In the Joint Statement\textsuperscript{786} that they issued, they envisage the possibility that they will undertake preliminary investigations of facts on behalf of the other and that joint investigations will be carried out.\textsuperscript{787} Finally, judgments and orders, including injunctions, made by each Court in proceedings for anticompetitive behaviour in Trans-Tasman, became enforceable by registration in the corresponding court in the other country.\textsuperscript{788}

The Trans-Tasman solution to the problem of anticompetitive antidumping actions has allowed both countries to maintain their full sovereignty and independence. This is probably the most adaptable model that could be transposed into the NAFTA context together with some aspects of the European pattern.

6.3 Provisions on restrictive business practices in common market of the EEC

The European Economic Community is not a free-trade area. Some provisions can, however, provide guidelines for the phasing out of antidumping laws. As discussed in chapter 5, a customs union is defined as a regional trade arrangement

\textsuperscript{785} Section 23 of the Evidence Act 1905 in Australia with similar amendment in New Zealand.

\textsuperscript{786} "Enforcement of new Trans-Tasman Competition Cases" Joint Statement by the Competition Commission (N.Z.) and the Trade Practice Commission (Australia) concerning the enforcement of section 36A of the Commerce Act 1986 and section 46A of the Trade Practices Act 1974, and related provisions". July 1990.


\textsuperscript{788} See Report "Courts to treat NZ as a Seventh State" 29 Australian 29 June 1988, p.3.
where countries share common foreign trade policies and within which, there is no restriction to trade between member states. A common market goes one stage further; it creates a single market within the common trade frontiers of the member states. Therefore, it follows that firms should necessarily be subject to the same treatment all over the common market territory.

Within the common markets of the EEC, antidumping laws have been replaced by supranational rules on competition directed to firms. Parallel national competition laws are still applicable to national transactions when they do not affect trade between member states. This last point is, however, debatable. Even small markets can affect the global strength of the common market. But there are important political contingents. In practice the domestic laws on competition of the member states of the EEC have evolved towards adopting similar criteria and patterns.

In the EEC Treaty, as was the case for EFTA and the EEC-EFTA FTAs, rules on dumping are considered along with other rules on behaviour of firms. Dumping is treated in parallel with articles 85 and 86, all under the title of Competition. This clearly reveals the symmetry between the two sets of rules.

Internal antidumping measures have been permitted during the transitional period during which the original member states set up their customs union. For the founding members Article 91 stated:

1. If during the transitional period, the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised within the common market, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorise the injured Member State to take protective measures, the conditions and details of which the Commission shall determine.

789 In fact, in the EEC, Chapter I entitled Rules on Competition (the Second Title of Part THREE of the Treaty) is divided into three sections: Section 1, entitled "Rules applying to undertakings", goes from articles 85 to 90; Section 2, entitled "Dumping" and deals with intra-community dumping corresponds to article 91; and Section 3, entitled "Aids granted by States" covers articles 92 to 94.
A similar process was envisaged during the three year transitional period for the accession of new Member States (respectively, Denmark, Ireland and the United Kingdom\textsuperscript{790}; Greece\textsuperscript{791}; and Portugal and Spain\textsuperscript{792}. The Antidumping Regulation was amended in 1973 to authorise the Commission, to amend, revoke, with or without retroactive effects, antidumping measures imposed during the transitional provision of any Act of Accession\textsuperscript{793}.

John Temple Lang writes that the Community Institutions have never had any reason to give any official explanation of why this was done.

Apparently it was assumed that dumping could occur and might be harmful, while tariffs were still applicable to intra-community trade in some products, and that after the end of the transitional period antidumping measures would not be appropriate.\textsuperscript{794}

The process was more elaborate for the accession of Spain and Portugal. When they joined the EEC article 380 of the Act of Accession envisaged that during the transitory period, antidumping actions should be phased out between the new EEC members and the Communities as well as amongst Spain and Portugal.

A regulation was adopted pursuant to article 380 which provided the Commission with the authority, after consultations with member states\textsuperscript{795}, to communicate with the dumper and make recommendations that dumping be terminated. If the dumper did not comply, the Commission could authorise member states to impose duties for a certain period of time and under specific conditions. Antidumping duties had to be phased out within a maximum of five years after the date on which they took effect, they were confirmed or reviewed, and, in all cases, before the expiration of the transitional period.

\textsuperscript{790} Treaty of Accession OJ 1972 L/73.
\textsuperscript{793} Council Regulation No 1411/77 OJ L 160/4, article 1.
\textsuperscript{795} There was no consultation procedure for dumping from non EEC members.
The second paragraph of article 91 EEC contained a so-called "boomerang clause" the main purpose of which is to counteract and arbitrage the effects of dumping in order to discourage the dumper.

91.2 As soon as this treaty enters into force, products which originate in or are in free circulation in one Member State and which have been exported to another Member State shall, on reimportation be admitted into the territory of the first-mentioned State free of all customs duties, quantitative restrictions or measures having equivalent effect. The Commission shall lay down appropriate rules for the application of this paragraph.

It is clear that the ultimate goal of the two sub-paragraphs of article 91 of the EEC Treaty is to supplement antidumping actions by more competitive rules regulating behaviour of firms throughout the territory of the common market. This purpose has to be understood, in the wider context of the completion of the common market, as a means to promote a harmonious development of economic activities, an accelerated raising of standards of living and closer relations between states belonging to the common market. Antidumping actions amongst member states were considered as important limitations to the realisation of these goals.^^**

The functioning of the EEC is also very informing of the difficulties and legal problems related to the enforcement of competition by various tribunals and different jurisdictions.

6.3.1 The functioning of the EEC Competition system supplementing antidumping actions

The application of competition rules at the national and supra-national levels, by national courts and by the EEC Commission and the EEC Court, is a fundamental characteristic of the functioning of the EEC competition system. According to article 88 of the EEC Treaty, the authority of the member states to enforce 85 and 86 remains as long as the Commission has not initiated any

---

796 The same principle, but more detailed, is reiterated in article 3 where the Commission is authorised to adopt regulations and directives for the realisation of the so-called four freedoms - goods, persons, services, capital - enhanced by a system of undistorted competition.
The right of national courts to apply article 85 and 86 derives from the direct effects of article 85 and 86.

This enforcement of competition rules by two levels of jurisdiction has raised, however, difficult and unresolved issues because it addresses fundamental rights of private parties and the homogenous application of articles 85, 86 and 90 throughout the territory. In other free-trade agreements analyzed, a single central organisation was in charge of the application of supranational provisions. Since all member states were dualists, it was doubtful that countries would apply provisions of the free-trade agreement directly. The process of decision was not binding but discussions took place in only one central institution with little possibility of contradiction.

For political sensibility and practical necessity, national courts of the EEC member states were made responsible for enforcing competition rules. The harmonisation of the application of articles 85 and 86 by national courts was facilitated by the process of referral of article 177 of the EEC Treaty. Article 177 invites national Courts to refer to the European Court for its legal opinion on an interpretation of the law. The decision of the European Court is a binding statement of law but it is up to each national court to apply the law to a particular set of facts of its case.

Although national Courts maintain an important discretion, this referral to a central court brings about much more uniform application - and therefore further integration - than the process of co-ordination and collaboration of the EFTA Council, the EEC-EFTA Joint Committee or the EEA Joint Committee. The

---

797 Article 9(3) of the Regulation 17: under article 2 (negative clearance), 3 (investigation either on application by third party or on its own initiative, or 6 (exemption).
798 BRT v SABAM (case 127/73).
799 For example, the EFTA Council or the EEC-EFTA Joint Committee.
800 This process was borrowed from the German system of referral of their Constitutional Court.
801 This is true even if a certain practice or body of rules can be formed in those fora, more particularly inside the EFTA after the ministerial declaration of 1968, since cases were referred to special committees whose opinions are somehow intellectually binding as far as their legal content is concerned - a little bit like the decisions of the Panels of the GATT.
uniform application of the EEC law is also reinforced by the powers given to the Commission to enforce the law throughout the common market and by the rights given to private litigants.

On 13 March 1962, Regulation 17 came into force; the EEC was still in the middle of the transitional period which initially was to last for twelve years until 1970.\textsuperscript{802}

Regulation 17

... empowered the Commission to enforce the competition rules in various ways, and it was hoped that it would lead to their uniform interpretation and application, despite the very different attitudes towards competition and various kinds of distortion of it adopted by national laws.

Article 3(2) of Regulation 17 states that any natural or legal person who claims a legitimate interest may apply to the Commission to investigate and terminate infringements to articles 85 and 86. That person also has the right to be heard (article 19(2)).\textsuperscript{803} Direct actions for damages by private litigants are also possible in national courts but for various reasons there are almost no private actions under articles 85 and 86. Arguments involving the application of article 85 and 86 take place in defense to action for the enforcement of contracts in national courts. The Commission has always greatly favoured enforcement by national courts.\textsuperscript{804} This leads back to the initial comments on the difficulties in co-ordinating parallel enforcement by national and supra-national jurisdiction within the EEC.

Some of these problems are: (1) the possibility that the Commission declares null and void a contract retrospectively while it has been executed; (2) the possibility to allege or oppose comfort letters in national courts; (3) the rights and obligations of private parties and national courts during the waiting period for an

\textsuperscript{802} Before 1962 member states were the only authorities to apply the new legislation and Professor Korah writes that there was little enforcement by the national authorities. Korah V. EEC Competition Law and Practice, 1990, p.89.


\textsuperscript{804} This is reiterated in the principle of "subsidiarity" embodied in the Single Community Act.
answer from the Commission for an exemption under 85(3) or any other procedure; (4) the difficult co-operation between national courts and the Commission when enforcing the law.

For the purpose of the present thesis it is sufficient to say that:

(1) Regarding the possibility for the Commission to impose conditions in order to grant an exemption under article 85(3) for an agreement already enforced, it is difficult to see another alternative than authorising the national courts to balance the allocation of damages this change of conditions; Commission Guidelines have indeed been issued for national courts: "The Notice on Cooperation between National Courts and the Commission in Applying Article 85-86 EEC Treaty".

(2) If a party has received a comfort letter it is hoped that the national courts, in another decision, will be authorised to equate them to formal decision (Perfumes). Another alternative would be a judgment based on some sort of "rule of reason" where the tribunal would conclude that the agreement is globally pro-competitive and not infringing 85(1), as evidenced by the comfort letter. The very content of the comfort letter should influence the decision of the Court. Problems of rules of evidence and procedure in certain Member States would, however, appear. A third alternative would be to amend Regulation 17 to authorise courts to implement 85(3) when necessary or to try another referral to put aside Delimitis. A final possibility would be to argue that for a Court to enforce an agreement which obviously infringes 85(1) but which benefits from comfort letter (or should benefit from one), is not an usurpation of the Commission's exclusive jurisdiction under article 85(3).

(3) In the recent Delimitis case the EEC Court was very clear about the obligation of the Commission to help national courts. Authors seem, however, to agree that only formal decisions of the Commission were considered in Delimitis.

---

807 C-234/89, Judgement of the 28/2/91.
In case of doubt the national court should adjourn, take interlocutory measures if possible and ask the Commission for advice as soon as possible.\textsuperscript{808}

6.4 Conclusion

This review of the main international agreements addressing issues of restrictive business practices (or competition) leads to the conclusion that states have used five main patterns to regulate competition within regional economic arrangements.

(1) The less integrating model is the conclusion of multilateral and bilateral arrangements of collaboration between competition authorities. These arrangements were discussed in chapter 2. A process of positive comity allows states to establish relationships between domestic competition and trade but there is usually no further promise of integration or increased trade. The other four models are part of trade agreements where co-ordination of competition issues becomes important.

(2) The second model of EFTA and the EEC-EFTA FTAs which contain provisions against abuse of a dominant position and restrictive agreements opposed to the goals of the treaty but without binding obligations nor dispute resolution procedure. These free-trade agreements provide, however, a political forum where consultation must take place before the imposition of antidumping measures. The provisions of the treaty were not directly enforceable in national courts and national competition laws were not harmonised.

(3) The third model is the EEA. The EFTA countries have accepted EEC legislation and agreed to subject themselves to the EEC Court for most significant matters. In that model, provisions for competition are directly applicable and antidumping measures will be phased out after the agreement has been ratified.

The EEA is considered a transitory period before full membership to the EEC. Parallels can also be drawn to the Europe Agreements. Internal antidumping measures have been maintained but a new competition legislation of East European countries must follow the provisions on competition of the EEC treaty. As for EFTA members, the ultimate purpose for Poland, (and Eastern countries) is a full membership to the EEC. Councils and similar Joint Committee will quite probably disappear when full integration is reached.

The model of the EEA could be applied in North-America if Canada and Mexico were willing to become members of the United States of North-America, like the EEC. Canada and Mexico would have to integrate into their legal systems the case law of the USA. The US antitrust authorities would have the main, and often the exclusive, jurisdiction over NAFTA competition issues. (4) The fourth model is the EEC where a single new supra-national competition law replaces national antidumping laws amongst trading partners. This involves an important loss of sovereignty from less powerful states. It also necessitates a supra-national authority which will ensure some homogeneity in the application of the competition rules throughout the territory covered by the supra-national legislation.

The antitrust system of the USA may be cited as the best model of an homogeneous application of a competition law on a vast territory. Even there, however, inside a single country, the same competition law is applied differently by the different tribunals. This is evident when one looks at the tests on predation retained by the various US courts.

The EEC Treaty, for political reasons and practical necessity, decided to rely on existing national courts to enforce provisions of new competition rules. A central Commission and a central court are the three major forces providing guidelines to national authorities. This system of parallel legal orders carries, however, practical problems of homogeneity and co-ordination. For example the EEC has experienced difficulties with exemptions under article 85(3).

(5) Finally the fourth model is found in the Trans-Tasman agreement where there is no common court and no directly applicable supra national legislation. The
extraterritorial application of domestic competition laws has been institutionalised. Jurisdiction over the market source of the business practice has been extended to cover any market in Australia, New Zealand or Australasia.

This type of methodology to phase out antidumping measures seems to be the only plausible solution for NAFTA. Changes in policy, effective collaboration and legislative amendments would still be necessary. In Part IV hereafter, the Mexican, American and Canadian laws are analyzed with a view to develop a model for the regulation of business practices in NAFTA.
PART IV Phasing out antidumping laws within NAFTA

The three NAFTA member states' antidumping laws have similar detrimental impact; in their absence NAFTA members would tend to integrate further. In Part IV, alternatives to the enforcement of antidumping laws are suggested for the regulation of restrictive business practices within NAFTA.

As argued throughout this thesis, antidumping laws have an important strategic role in trade relations, in countervailing, not only transnational predation and price discrimination, but also the effects of national structural differences and non-tariff barriers. If antidumping laws were phased out, and contrary to what is usually proposed, all aspects of national competition systems should be able to reach foreign detrimental practices, national economic differences and non-tariff barriers.

Two models for the resolution of conflicts of extraterritorial application of domestic competition laws are proposed in chapter 7. In chapter 8, an application of the proposed models are done after existing competition laws are compared. Amendments to competition laws, parallel amendments to antidumping laws, especially the increased use of a Public Interest clause, and transitional methodology are also suggested.
Chapter 7 The regulation of restrictive business practices within NAFTA

7.1 Introduction

The purpose of chapter 7 is to compare the national antidumping laws of member states of the North American Free Trade Area (NAFTA) before suggesting how, legally, internal antidumping laws might be phased out. Indeed, the existing system of review of the Bi-National Tribunal and the new rules on competition contained in NAFTA seem to favour the eventual merging of antidumping and antitrust laws. The extraterritorial application of all domestic competition laws appears to be the only pragmatic alternative to antidumping enforcement.

7.2 Existing national antidumping laws and their similar impact

The main differences between antidumping laws of NAFTA member states are: (1) The injury test and the fact that only the US and Canadian laws envisage the "cumulation" of imports of like products when making determinations of material injury; (2) In Canada and the USA, investigations are handled by two different governmental bodies; (3) Unlike in Canada and the USA, investigations in Mexico are not conducted in a quasi-judicial manner and legal standing differ; (4) In Mexico, provisional antidumping measures may be imposed within 5 days; (5) In the Mexican and US legislation there is no consideration for "Public Interest"; (6) There is a Lesser Duty principle only in the Mexican legislation; and (7) Standards of judicial review are very different and this may have a direct impact on the access to the Bi-National Tribunal provided by Chapter 19 of NAFTA.
7.2.1 Differences in the determination of injury

Since the Tokyo Round of negotiations of the GATT which ended in 1979, domestic producers have been required to prove that imports cause "material" injury. The Antidumping Code gives a non-exhaustive list of criteria to be examined in article 3.

In the Canadian lexicon, "material injury" means "something more than any injury that is not immaterial". The US law defines material injury as "harm not inconsequential, immaterial, or unimportant". The Mexican law does not require proof of material injury and, in addressing this issue, refers to very broad criteria. This difference in language is, however, inconsequential since Mexico has signed the GATT Antidumping Code and agreed to apply its trade remedies in line with the provisions for material injury. In all cases, the requirement of injury of antidumping laws is not very stringent.

An important difference involves the cumulation of the impacts of all imports of like products alleged to be dumped. There is no such cumulation under the Mexican antidumping law. In Canada, cumulation of the sources of injury is the general practice which has withstood a constitutional challenge. The exclusion of a group of imports from the cumulation or from the imposition of antidumping duty is possible when the margin of dumping is very low or the injury is minimal.

809 Holbein J., Ranieri N. and Grebasch E., "Comparative Analysis of Specific Elements in the United States and Canadian Unfair Trade Laws" Int'l Lawyer vol.26 no.4 p. 887, and article 2(1) and 42 of SIMA.


811 Article I paragraph VIII of the Mexican Regulation Against Unfair International Trade Practices.

812 See chapter 1, section 1.6.2.3.


814 See Countertop Microwave Ovens From Japan, Singapore and the Republic of Korea (ADT-9-81); Alpine Ski Poles from Norway, France, the Federal Republic of Germany and Italy (ADT-5-84) and in the very recent Certain Hot-Rolled Carbon Steel Plate and High-Strength Low alloy (continued...
the USA cumulation is mandatory since 1988; a discretion exists for the de minimis principle to apply.\textsuperscript{815}

It can be argued that the aggregation of injury from all sources is authorised by article 3(1)(2)(5) of the Antidumping Code which talks about "volume of the dumped imports", "the consequent impact of these imports", "all the relevant economic factors" and "the effects of dumping". For antitrust lawyers, however, cumulation may be one of the most alien rules since it does not relate the abusive act and the injury caused.

In an effort to bring antidumping actions closer to competition measures within NAFTA, such cumulation practice should be avoided between NAFTA members. This would imply a discriminatory treatment in favour of NAFTA members. The right of states to integrate, a measure favoured by the GATT\textsuperscript{816}, subsumes some necessary discrimination. Although it would be preferable if states would never cumulate imports from any source, a non-cumulation principle amongst NAFTA member states would stimulate integration and favour the phasing out of antidumping laws.

7.2.2 Differences in the agencies enforcing the law

In both the USA and Canada, two different agencies are involved in determining dumping and injury standards. In Mexico, on the other hand, the Secretariat determines both the existence of dumping and the injury caused by it. It is doubtful, however, that such a difference in agencies affects the integrity of the decisions. It should be remembered that Mexico has promised to make profound

\textsuperscript{814} (...continued)

plate from Belgium, Brazil, the Czech Republic, Denmark, the feral republic of Germany, Romania, the United Kingdom, the United States of America and Macedonia in Yugoslavia Inquiry NQ-92-007.

\textsuperscript{815} City Lumber Co. v. United States 457 F.2d 991 (1972) was the first case where cumulation was decided against the "hammering effect" of "many nibbles at once". The law was amended in 1988 and made cumulation mandatory except for the right of the ITC to ignore "negligible imports" (de minimis); 19 USC section 1677. See Horlick G., "The US Antidumping System", Antidumping Law and Practice, Jackson J. and Vermulst E. (Ed.), 1990, p.162.

\textsuperscript{816} See discussions in chapter 5 of this thesis.
changes to its antidumping law, including improved transparency of the antidumping law procedure. 817

7.2.3 Legal standing and quasi-judicial process

Another problem with the Mexican system, is that neither the importers nor the exporters have effective legal standing during the dumping and injury determinations, since the process is administrative rather than quasi-judicial. 818 The lack of representation by concerned parties will have to be changed.

In the USA, as far as the initiation of the investigation is concerned, the complainant enjoys a presumption of standing which the respondent must rebut. 819 This practice should, however, be circumscribed to take into consideration the decision of the 1990 GATT Panel on US Antidumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden which declared this practice contrary to article 5 of the GATT Antidumping Code, as discussed in chapter 1 820. The risk of the US presumption is that the antidumping procedures may be "captured" by small interest-groups to the detriment of other members of the industry.

The Mexican legislation requires that petitioners account for 25% of the domestic production of the good in question. In Canada, the complainant must represent Canadian producers whose collective output constitutes a "major

817 Mexico has undertaken to: "amend its antidumping ... statutes and regulations,... to provide... for the full participation in the administrative process for interested parties, including foreign interests, as well as the right to administrative appeal and judicial review of final determinations of investigations, reviews, product coverage or other final decisions affecting them...". Annex 1904.15 of NAFTA which contains the list of changes to domestic laws that Mexico has to implement before the entry into force of NAFTA.

818 In theory, Article 15 of the Mexican Regulation on Antidumping requires the publication of the initiation of the enquiry "convening all importers, exporters and representatives of foreign governments, as well as those persons who might have judicial interest in the result of the investigation". Article 30 gives the complainant and the importers and exporters "who have been accredited as having a legal interest in the outcome" (as well as their government), a right to request a conciliation meeting. In practice these rights are not often applied.


820 See discussion in chapter 1, section 1.6.2.4.
proportion" of domestic production of like goods.\footnote{Article 42(3) of the Canadian Special Measures Import Act, SIMA.} De facto, the Department of National Revenue is said to require that the complainants represent 50% of the national production. In small economies like Canada, an industry may often consist of only one or two companies. The investigation on legal standing is, therefore, easier.

### 7.2.4 Imposition of Duties

Under Mexican law, antidumping duties may be imposed 5 days after a complaint.\footnote{Article 16 of the Mexican Regulation Implementing the Antidumping Act. However, in practice, no provisional duties are imposed before 65 days. Discussions with Johane Osenbarg, External Affairs Canada, Ottawa 12/5/93.} In NAFTA, Mexico has, however, undertaken to abolish the possibility that duties may be imposed before a complete preliminary determination.

The main problem caused by the rapid imposition of Mexican preliminary duty is that exporters affected are not offered much opportunity to justify their price or to influence the determination of preliminary duty in any way.

In Canada, provisional antidumping duties may be imposed after the preliminary investigation of Revenue Canada\footnote{Article 38 of SIMA.}, i.e. within 90 days of the initiation. In US law\footnote{Section 1673 b(b)(1)(A) of the US Trade Act of 1979.}, provisional duties cannot be imposed until both the ITC and the ITA have made a preliminary positive determination which can be done within 160 days after a dumping petition has been filed. Only Canada has a sunset clause of 5 years\footnote{Article 76(5) of SIMA.} after which antidumping duties are automatically phased out.

As far as the right to appeal or review antidumping decisions, Mexico has not, yet, developed a definite practice. Moreover, rights of appeal and standards for judicial review will have to be more clearly defined before the entry in force of NAFTA. In Canada and the USA, rights of appeal and review are fairly extensive, with the important limitation that only interested parties, i.e. those who had legal
standing to initiate or oppose the initial antidumping investigation, can appeal or ask for judicial review. Grounds for judicial review are examined in subsection 7.3.2.

7.2.5 Public Interest clause

Only the Canadian law has a procedure for inquiry into the "Public Interest" before assessing antidumping duties. Unfortunately, considerations of Public Interest, like those on Community Interest, have been equated with the domestic industry's interests. Therefore, in practical terms, the provision on Public Interest does not affect the inquiry. Introducing, extending and reinforcing considerations of Public Interest would render antidumping determinations much more competitive.

7.2.6 The Lesser Duty principle

Only the Mexican law contains a Lesser Duty rule implementing article 8 of the GATT antidumping code. The Canadian Act does, however, refer to a possible investigation into the Public Interest. Under US law, antidumping measures must cover the entire margin of dumping, once injury has been identified. In practice, such differences are negligible, as both the Lesser Duty and the Public Interest considerations have not had any serious impact on dumping determinations.

The most important differences between the three legal systems are the rights of judicial review which determine when and how exporters can appeal to the Bi-National Tribunal for decisions rendered by antidumping authorities. A brief description of the functioning of the Bi-National Tribunal should help to explain the reasons why national rights of judicial review are so crucial for firms of NAFTA.

7.3 The Bi-National Tribunal of NAFTA

---

826 See discussions in chapter 4 of this thesis.
827 See discussions in chapter 4, section 4.3.2.
828 See chapter 4, section 4.3.3.
Restraining US antidumping and countervailing actions was the main reason behind the initiation of negotiations for a free-trade area by Canada in 1984. Because the two countries could not agree on a complete code on restrictive business practices before the end of the negotiations, they created a "Bi-National Tribunal" whose function was to ensure the "fair" application of the antidumping and antisubsidy laws by each national authority.

Authors have contested the constitutionality of this tribunal, where final determinations and rights of US producers are left to a non-US body. So far, no decision of any Bi-National Panel, has been contested on these grounds.

It is interesting to note that NAFTA does not provide for a "Tri-National Panel". As in the Canada-US FTA, a new panel is set up for each antidumping conflict between producers of the two countries concerned. The third country is not involved at all by a Bi-National Panel set up between the two other NAFTA countries. If similar and related decisions from two different NAFTA countries were sent to Bi-National Panels at the same time, the NAFTA Commission, under its general powers of Chapter 20, would propose an ad hoc cumulated inquiry.

NAFTA member states would replace judicial review of final antidumping and countervailing duty determinations with binational panel review. The grounds for review are supposed to be those applicable in the legal system of the importing country. There are two difficulties with this new Bi-National judicial system. Grounds for review differ between Mexico, Canada and the USA, so exporters do

---


830 Article 2001: The Free Trade Commission ‘...
2. The Commission shall: ... (e) consider any other matter that may affect the operation of the Agreement. 3. The Commission may: ... (c) take such other action in the exercise of its functions as the Parties may agree’.

831 Article 1904.3 of NAFTA: "3. The panel shall apply the standard of review described in Article 1909 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority."
not appear to be treated equally depending on the country of exports. Moreover, Bi-National panels seem to be creating law and furthering harmonization of the laws more than some would like it.

7.3.1 Criteria for judicial review

Grounds for judicial review were a very sensitive issue during the NAFTA negotiations. In addition, a certain lack of independence of the Mexican judiciary system was often reported.832

7.3.1.1 The US system

The US system is said to offer the greatest opportunity for revision833: An administrative decision can be reviewed if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law".834 A two-tier test is then applied: if the congressional intent is clear, there should be no review; if the intent is not clear, the court may consider whether the conclusions reached were reasonable.835 The reasonable test is not very stringent and standards for judicial review are recognised to be accessible.

7.3.1.2 The Canadian system

---


835 "... then the question for the Panel is whether the ITA's conclusions are based on a permissible construction of the statute, keeping in mind that a reviewing body must afford great deference to the interpretation of a federal agency charged with implementing a statute. More specifically, the doctrine of deference means that, in this review, the Panel cannot impose its own construction of the statute and regulations if the ITA proposes a reasonable interpretation." In the Matter of Red Raspberries from Canada (USA-89-1904-01) decision of the Binational Panel 15 December 1989.
Chapter 7 page 261

The Canadian standards of judicial review are usually considered to be more restrictive. This has led most practitioners and authors to conclude that, in the context of the Canada-USA FTA, "the United States is somewhat 'disadvantaged' vis-a-vis Canada." 836

Two points must be made. In Canada, when statutes contain a "privative clause", their revision is subject to a "patently unreasonable" test. In absence of such a clause, specialised tribunals' decisions are reviewable under an "unreasonable test". 837 SIMA has been interpreted as containing a privative clause in its article 76(1). In 1990, the Canadian Supreme Court reiterated that revision of the decisions of Canadian International Trade Tribunal, (including those under SIMA) would be exercised only in cases of "the most egregious errors" 838.

However, the recent Bi-National Panel on Beer concluded that decisions under SIMA were reviewable when "unreasonable". 839 Indeed, some would argue that a careful reading of article 76(1) confirm that SIMA should not be protected by a private clause. 840 In any case, the Act implementing NAFTA contains an amendment to article 76 of SIMA which clearly takes the privative clause away from the decision of the CITT. 841 Decisions of the CITT are now subject to a new ground for review contained in Article 18.1 (4)(f): "if the tribunal has acted in any other way that was contrary to law". Some would argue

---

836 Graham W. "Dispute resolution in the Canada/US Free Trade Agreement: one element of a complex relationship" Paper presented to a Joint Meeting of the International Section of the N.Y. State Bar And the Canadian Bar Association, Toronto, October 1991. Also to the same effect see Horlick G. "The US-Canada FTA and GATT Disputes Settlements Procedures - The Litigant's View", J.W.T. vol.26 no.2 (1992), p.5. This may explain why Americans asked for judicial revision in only 4 cases out of 24 brought in front of the Bi-National Tribunal.


839 BEER case CDA-91-1904-01, 6 August 1992.

840 This is, in fact, the position taken by the Canadian Legal Service during the negotiations on NAFTA. Discussion with Johane Osenbarp, Ottawa, 12/5/93.

841 The new article 76 reads: Subject to section 61(3) and Part Li or II, an application for judicial review of an order or finding of the Tribunal under this Act may be made to the Federal Court of Appeal on any of the grounds set out in subsection 18.1(4). The old article 76(1) read as follows: "Subject to this section, subsection 61(3), paragraph 91(1)(g), section 96.1 and Part II, every order and finding of the Tribunal under this Act is final and conclusive." (Emphasis added)
that this ground is so wide that Canadian standards for judicial review are now very similar to the American ones.\footnote{842}{It can be said that the disappearance of the privative clause was not necessary since the distinction between patently unreasonable and unreasonable is fading away. Professor Evans, Law School York University (Ontario), has argued that no clear line can be drawn between the two types of revision. "Patent Unreasonableness as a standard of judicial review" Paper prepared for Department of Justice's Tenth Administrative Law Seminar, Ottawa, 4 February 1993.}

In any case, in the recent \textit{Carpet}\footnote{843}{An inquiry made by the Canadian International Trade Tribunal Pursuant to Section 42 of the Special Imports Measures Act Respecting Machine Tufted Carpeting Originating in or Exported from the United States of America Case No. CDA-92-1904-02.} case, the majority of the Panel greatly expanded the grounds for review under the "patently unreasonable" test.

2. A reviewing tribunal today must review "how" a tribunal reached any challenged finding or decision to determine whether it has a rational basis, and it must make at least such "evaluation of the merits" so as to satisfy itself that there is a "logical relationship" between ultimate findings in a decision and the evidence supporting them.

3. A reviewing panel today may have to perform "an in-depth analysis" in analysing the manner in which a tribunal arrived at its finding and decision and their logical ties to the evidence....

5. On judicial review, the courts in Canada are free to examine not only the findings and observations made by the tribunal in its reasons, but also the entire administrative record.\footnote{844}{\textit{Carpet} case above mentioned, at p.16-17.}

Panel reports are binding on parties only and do not constitute "Law" but they carry an important, though indirect leading force. Although the law is evolving rapidly, one can reasonably conclude that grounds for judicial review are fairly similar in Canada and the USA.

\textbf{7.3.1.3 The Mexican System}

As for the Mexican criteria for judicial review, the new antidumping law refers to Article 238 and 239 of the Mexican Taxation code for the proper grounds for
review.\textsuperscript{845} They are similar to those mentioned in article 18 of the Canadian Federal Act.\textsuperscript{846}

Authors report that "the idea of judicial review is not well-known in Mexico".\textsuperscript{847} Because of the absence of such a concept, Peter McLaughlin wrote, before the ratification of NAFTA:

To apply the standard of review... would take a long time because Mexican practitioners would need to become familiar with its concept and application... Such a substantial intrusion upon Mexico's administrative and judicial sovereignty would be politically sensitive and could result in Mexico opting out of such resolution framework.\textsuperscript{848}

Far from opting out, the Mexican Government insisted on the dispute resolution to be signed by the USA and agreed to enact legislation providing fair standards on judicial review.\textsuperscript{849}

Negotiators were suspicious about the Mexican brief of "Amparo".\textsuperscript{850} The Amparo is a recourse open only to Mexican citizens only parallel to judicial

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{845} Article 238 of the Mexico Taxation Code (US Translation): 'An administrative decision shall be declared illegal when any of the following grounds have been proven: I. The incompetence of the official who issued, or ordered or possessed, the procedure on which the decision was based; II. Omission of the formal requirements stipulated in the laws, affecting the defense arguments of the individuals and the meaning of the contested decision, including the absence of grounds or motivation, as applicable; III. Failure to comply with procedure, affecting the defense arguments of the individual and the meaning of the contested decision; IV. If the facts on which the decision was based did not occur, were different, or were misjudged, or if the decision was handed down in violation of the applicable provisions or when such provisions were ignored; V. When the administrative decision handed down in exercise of discretionary powers is not consistent with the purposes for which the law confers such powers.
\item \textsuperscript{849} Point 20 of Schedule C of Annex 1904.15 d reads: Mexico shall amend its antidumping and countervailing duty statutes and regulations, and other statutes and regulations to the extent that they apply to the operation of the antidumping and countervailing duty laws, to provide the following:... (20.) a standard of review to be applied by binational panels as defined in Article 1911.
\item \textsuperscript{850} Discussions with Jonathan Freid, Principal Legal Adviser to Canada for the NAFTA negotiations, telephone conversation 22/2/93, meeting in Washington 26/3/93 and with Johane Osenbap, Ottawa, 12/5/93.
\end{itemize}
\end{footnotesize}
revisions. US and Canadian delegates worry that exporters to Mexico may be caught in a parallel revision process and may lose the effective possibility of referring decisions to the Bi-National Tribunal. Article 1905, which gives recourse to Parties when they consider that the establishment and the good functioning of panels has been prevented by the domestic administration of a member state, is said to have been enacted to avoid complications with the Mexican domestic court system.

Moreover, the respect of judicial review is now a ground for the extraordinary challenge procedure.

The referrals to the Bi-National Tribunal seem to have "de-politicized" antidumping and countervailing cases. Many are, however, complaining that the Bi-National Panels are "Making the Law" while its only function is supposed to ensure the fair application of the existing law. Although this may be contestable, in political and legal terms, it reminds the strongly "Pro-European" trend taken by the European court of Justice in the sixties with the "direct effect" theory.


The panel manifestly exceeded its powers, authority or jurisdiction... for example by failing to apply the appropriate standard of review. Article 1904.13(a)(iii) of NAFTA. Another important change is the lengthening of the time for the issuance of committee decisions from 30 days to 90 days, Annex 1904.13(2).

The Canadian expectation that panels would result in removal of politically sensitive AD/CVD order that would have been affirmed in the US Courts has largely been realised" from "Injury Determinations at the US International trade Commission", page 30 from Stein M. Before the Antidumping and Countervailing Conference sponsored by the Canadian Importers Association Inc., Toronto, Canada 24 march 1993.

I remain convinced, however, that the panel review process is flawed. I base that conviction on more than the occasional, breathtaking excursion from US law -- such as when the Pork panel substituted its notions of due process ostensibly embedded in the FTA for those of the US Constitution...... Should this sort of analysis continue, we shall see a body of panel jurisprudence develop that diverges from national case law" p.30 from "Injury Determinations at the US International trade Commission", Stein M. Before the Antidumping and Countervailing Conference sponsored by the Canadian Importers Association Inc., Toronto, Canada 24 march 1993.

Finally, a last comment is that any new amendment to national antidumping law is now subject to binding arbitration to the Bi-National Tribunal.\textsuperscript{856} This confirms the desire of member state to at least maintain the status quo as far as the regulation of business practices in NAFTA is concerned. The provisions on competition contained in NAFTA reiterate this desire to further harmonize antidumping and antitrust laws.

\textbf{7.4 New provisions on competition and monopolies in the NAFTA}

Unlike the Canada-US Free Trade Agreement, NAFTA contains a Chapter on "Competition Policy, Monopolies and State Enterprises". This chapter consists of weak provisions forcing member states to adopt and maintain measures to proscribe anti-competitive business conduct. There are also obligations of cooperation similar to those of the Canada-US Memorandum of Understanding.\textsuperscript{857}

\textbf{NAFTA Article 1501: Competition Law}

1. Each Party shall \textit{adopt or maintain measures} to proscribe anti-competitive business conduct, and shall take appropriate action with respect thereto, recognizing that such measures will enhance the fulfilment of the objectives of this Agreement. To this end the Parties shall consult from time to time about the effectiveness of measures undertaken by each Party.

2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.

\textsuperscript{856} Article 1903 of NAFTA. Review of Statutory Amendments: '1. A Party to which an amendment of another Party's antidumping or countervailing duty statute applies may request in writing that such amendment be referred to a binational panel for a declaratory opinion as to whether: (a) the amendment does not conform to the provisions of Article 1902(2)(d)(i) or (ii); or (b) such amendment has the function and effect of overturning a prior decision of a panel made pursuant to Article 1904 and does not conform to the provisions of Article 1902(2)(d)(i) or (ii).}

\textsuperscript{857} See discussion in chapter 2, section 2.4.2.1.
These "soft" obligations are expressly excluded from the application of the rules on dispute settlement:

3. No Party may have recourse to dispute settlement under this Agreement for any matter regarding this Article.

This obligation of co-operation falls short of the obligation for "positive comity" contained in the GUS-CEC Agreement or in the OECD Recommendation of 1986 on Restrictive Business Practices. The differences between the economies of Mexico, USA and Canada, together with the fact that Mexico has never had an effective competition law, may explain why the USA did not want to limit its rights to apply its antitrust legislation extraterritorially, even at the risk of losing benefits of a process of positive comity.

There is no provision in NAFTA similar to those contained in articles 85 and 86 of the EEC Treaty, articles 15 of the EFTA Treaty or articles 53-54 of the EEA Treaty, where abuse of a dominant firm is condemned if it affects trade between member states.

Article 1502.3 of NAFTA condemns the use of monopoly power in a non-competitive manner. Its language is limited, but leans towards an eventual co-ordination of the market power of exporters and their capacity to discriminate, cross-subsidize and predate in the importing market. Article 1502.3(d) is specially relevant to the correlation between monopoly power in the exporting country and abusive acts in non-monopolized markets, as it is sometimes the case when firms

858 Discussed in chapter 2, section 2.4.2.5.

859 1502.3: "Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates: (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement whenever such monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges; (b) except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale; (c) provides non-discriminatory treatment to investments of investors, to goods, and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and (d)..."
pursue dumping practices. Monopoly is, however, very restrictively defined: the sole supplier or buyer of a product.  

1502.3 (d)...does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiary, or other enterprise with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct.

The process envisaged in Chapter 15 of NAFTA is one of public international law level, i.e. a system of state obligations without any direct rights given to enterprises. Contrary to what was done in EFTA, the EFTA-EEC FTAs and the Europe Agreements, there is no common agency or political body where the relation between dumping and the abusive acts of the exporter in a dominant position can be discussed.

It would be conceivable to allow for a wider advisory role of interpretation to the Bi-National Tribunal or to the NAFTA Commission. Some power of interpretation has been given to the Free Trade Commission by article 2020, but only on an ad hoc basis. Binding consultation and conciliation should take place inside the Commission, before imposing antidumping measures against firms from member states of NAFTA. In that forum, the relationship between an exporter in a dominant position and its capacity to export at prices lower than those in its home market, could be interrelated.

An alternative would be to give firms a right to ask for judicial review of decisions of national domestic tribunal in competition cases, to a Bi-National

---

860 Restrictive practices other than pure monopolization would lead to dumping but would not be caught by this provision.

861 Article 2020: Referrals of Matters from Judicial or Administrative Proceedings:
1. If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties and its Section of the Secretariat. The Commission shall endeavour to agree on an appropriate response as expeditiously as possible.

862 The NAFTA Commission is a political organ, like the European Councils of the EEA, the EFTA and the Europe Agreements, and its interpretation would be political rather than legal. However, because of the various stages of economic development of the NAFTA member states, a political Commission may be better than a legal entity.
Antitrust Tribunal. Determinations of domestic tribunals in antitrust cases are, however, extremely lengthy and, in the USA, in front of juries. Judicial review of jury decisions by a non US tribunal may bring about serious constitutional objections. Until substantive and procedural standards are addressed, it is implausible that the USA would put its precious antitrust system at risk.

However limited, Chapter 15 is clearly the first step towards harmonised antidumping and antitrust laws, where antidumping measures would eventually become unnecessary. This position is reinforced by the Permanent Working group on Trade and Competition established under article 1504 of NAFTA.

Article 1504: Working Group on Trade and Competition

The Commission shall establish a Working Group on Trade and Competition, comprising representatives of each Party, to report, and to make recommendations on further work as appropriate, to the Commission within five years after the date of entry into force of the Agreement on relevant issues concerning the relationship between competition laws and policies and trade in the free trade area.  

The Bi-National Tribunal or the NAFTA Commission does not have any authority to address infractions mentioned in Chapter 15 of the NAFTA. Besides the process envisaged by the Recommendations of the OECD, there is, therefore, no dispute settlement procedure or mechanism between NAFTA members to regulate the misuse of market power and other restrictive transnational business practices in the absence of antidumping measures.

As laws stand, if antidumping were to be phased out, further steps would have to be undertaken to let firms (or member states) reach restrictive business practices which origin or take place in the territory of another member state.

---

863 The mandate of this working group is much wider than the one established under section 1907.2 and seems to cover discussion involving subsidies, safeguards and all discipline of firms. 1907.2: 'The Parties further agree to consult on: (a) the potential to develop more effective rules and disciplines concerning the use of government subsidies; and (b) the potential for reliance on a substitute system of rules for dealing with unfair transborder pricing practices and government subsidization.'

864 There is no such OECD type of agreement of collaboration between Mexico and the USA or between Mexico and Canada. Mexico is not yet a member of the OECD.
7.5 Proposals for phasing out antidumping enforcement

From the other free-trade areas' experiences examined in chapter 6, reliance on existing (maybe improved) domestic laws against restrictive business practices seems to be the only realistic alternative to enforcement of antidumping laws. It is not plausible that the USA would relinquish so much sovereignty over regulation of business practices to a third independent body.

US antidumping laws (as others) treat foreign producers differently from domestic ones. Until the US Congress and the US business community accept the basic principle that Mexicans and Canadians should be treated on equal footing in terms of business practices, phasing out antidumping laws will remain impossible.

It is also doubtful that Mexico and Canada would accept a system like that of the EEA and delegate to the US executive and US Supreme Court authority over the NAFTA territory. It is, however, possible that the USA would agree to a system which would maintain rights to apply US antitrust laws abroad or provide US firms with effective antitrust rights in the other NAFTA member states. Much further political will would be necessary. In that sense the experience of the Trans-Tasman CER is very useful.

It is submitted, however, that all aspects of national competition systems should be able to reach foreign restrictive business practices. As argued in chapter 1, antidumping laws have an important strategic role in trade relations: they counteract many non-tariff barriers. For this reason, if antidumping laws were phased out, and contrary to what is usually proposed, they would have to be replaced by an institutionalised system of extraterritorial application of all national competition laws (not only rules on predation and price discrimination, as most authors have said).

The European experience is the best evidence of this need to coordinate more than just rules on predation and price discrimination in order to replace antidumping actions. Article 85 and 86 have replaced the antidumping system between member states, while introducing a complete system of competition. The
same can be said of the EEA, where antidumping actions are to be phased out: EFTA countries had to accept, not only a competition system identical and parallel to the EEC's, but also the final authority of the EEC Court and the Commission's final determination on all important competition issues.

One may argue that Australia and New Zealand have only provided their anti-predation laws with extraterritorial application. Four comments may be given which should explain why the Trans-Tasman CER cannot be transposed directly into NAFTA.

Firstly, by far the largest number of business transactions that occur in both Australia and New Zealand have no connection with each other. Therefore, whatever rules and principles are extracted from the Trans-Tasman experience, they do not apply de facto to the majority of their economic activities.

Secondly, harmonisation of group-boycotts, exclusionary practices and merger laws are said to be on the agenda of both governments as a normal consequence of increase shared economic activity.

Thirdly, there are almost no structural differences between the New Zealand and Australian societies. The language, the culture and systems of laws, are all very similar. New Zealand was supposed to become a state of the commonwealth of Australia at the inception of the commonwealth of Australia. Both countries also have very similar economies.

Finally, in terms of semantics and concepts, the New Zealand infraction of abuse of a dominant position can very well be interpreted to include tying, other vertical or horizontal arrangements as well as other restrictive practices in addition to predation. No amendment would be necessary for existing law to reach any abuse of a dominant position in Trans-Tasman.

---


866 Idem.

867 For example, social security, unemployment benefits and similar social programs are administered jointly and one can collect money from anywhere in the other country.

868 Or the Australian abuse of substantial market power.
There is no reason why practices, which are considered to be potentially restrictive domestically, such as tying and vertical restraints, should not be so when they take place in transnational markets or if there effects are transnational. A comprehensive and effective system of competition must be in force all over the NAFTA territory.

7.6 Proposals for a system of conflicts of laws

Two archetypes for the regulation of business practices within NAFTA are hereafter suggested which rely greatly on existing competition laws. Competition laws of NAFTA member states will be compared in chapter 8 and the feasibility of implementing such models will after be confirmed with the help of three factual examples.

The Australian model where the court where the effects of a restrictive practice has effects, has jurisdiction, is discarded. It would become difficult in NAFTA, to isolate the territory where the effects of a restrictive business practice take place. For example, exclusionary practices against US firms in Mexico will lead to excess capacity of US firms and will encourage exports below cost to Canada. Effects would occur in Mexico when it foreclosed its markets and lead to higher prices in Mexico. US firms would also feel the effects of excess capacity and of losses of economies of scale. Canada may suffer from an abrupt penetration of low-price goods leading to safeguard measures or possibly low-price exports to countries outside the NAFTA. At the same time, the exclusionary practices in Mexico may be a reaction to the impossibility of Mexican firms to penetrate the US market due to US business practices or US trade measures.

Rather, in the first model suggested the applicable law would be the law where the restrictive business practice takes place. In a supplementary and, also alternative, model, jurisdiction would be allocated on the basis of the turnover of the firms concerned.
7.6.1 First Model: "The law of the territory where the restrictive business takes place"

Along this system of conflict of laws, a firm in Mexico could allege contravention to the Mexican Competition Act by a firm with a dominant position anywhere in NAFTA, if the market where the restrictive business practice is Mexico. Transborder cross-subsidisation by firm A in a dominant position in the USA, where profits made and used to subsidise sales below cost of a related firm B in Mexico - in order to weaken a competing firm Z in Mexico so that Z cannot penetrate the US market - would also constitute infringement of the Mexican law. In other words, the market targeted by the restrictive business practice would determine the applicable law and which court will should hear the dispute. Courts of the applicable law would move to the district of the seller who is alleged to be infringing one of the laws which they normally enforce.

This choice of system of conflict of laws, focusing first on the market where the restrictive business practice takes place to determine the applicable law, is original. It is a mid-way solution between the US "effect doctrine" and the European "positive comity". Contrary to the process of positive comity, the law of the country where the restrictive business practice takes place is enforced by the affected foreign competitors, not by the public authority of the country where the restrictive business practice takes place. It gives extraterritorial rights to domestic producers but contrary to the effects doctrine, it is the law of the territory where the practice took place which becomes the applicable law.

Restrictive business practice may, however, take place over more than one territory. International cartels infringe many national laws. A similar pricing practice in various countries will also infringe various national laws. A second principle of allocation of jurisdiction is suggested in cases of concurrent jurisdiction which could also be used as a distinct models.

---

869 See discussion in chapter 2, section 2.4.2.5 and 2.6.
7.6.2 The Second Model: Allocation of jurisdiction based on the 33% more of the turnover of the firms concerned.

If a state or a private party want to oppose a practice which is not taking place on its territory, a process of positive comity should be initiated. If two or more states want to exercise jurisdiction over a practice, or, if a private litigant and a state want to allege infractions to different laws, jurisdiction should be allocated the following way:

1. The US law would be the applicable law except:

2. Where sales of the firm concerned in Mexico (or Canada) represent 33 1/3% or more of all sales in NAFTA, the Mexican (or Canadian) law should prevail, as the case may be.

3. If sales in one of the NAFTA country represent less than 33 1/3% of a firm's overall sales in NAFTA, but, if that firm is in a dominant position in the same country, both member states should collaborate to their mutual satisfaction. If necessary, recommendations of the NAFTA Commission should be used. The impossibility for the two member states to come to a mutual agreement would justify a state to terminate the agreement after due notice. (Safeguard measures could always be used.)

Further rules should address mergers and joint ventures. Since the Canadian and Mexican rules on mergers and joint ventures have basically copied the US law, merging these laws should not be impossible.

7.7 Conclusion

Most actions which used to lead to dumping and antidumping actions would be dealt with by the extraterritorial application of domestic laws against restrictive business practices. In this context, differences in the national treatment of business practices by each NAFTA member state would become a sensitive issue. It is therefore necessary to compare the Mexican, American and Canadian legislation on price discrimination, predation, horizontal arrangements, resale price maintenance, vertical restraints, as well as other abusive acts, in order to assess what the results
of the system of conflict of laws discussed above, would be.
Chapter 8 Implementation of the chosen model of regulation of restrictive business practices for NAFTA

8.1 Introduction

Before relying on the extraterritorial application of competition laws, in both models suggested in the previous chapter, states will want to reassure their business communities that they will be treated fairly, equally and according to known and trustworthy rules. Moreover, differences in domestic competition laws would maintain national markets separated which in turn would facilitate dumping, and reduce the appeal for the phasing out of antidumping measures.

In the subsections below, differences and similarities between the systems of the three countries will be brought to light in order to assess the legal impact of relying on competition legislation instead of antidumping laws. In recent literature, a few authors have started discussing this issue in the context of the Canada-USA FTA. Some more optimistic authors concluded that the Canadian and US laws on price discrimination and predation are fairly compatible. Others emphasized the important differences in procedure, delays, costs and social attitudes between Canada and the USA. All authors draw parallels between antidumping laws and domestic laws against predation and discrimination only. It is suggested here that this approach is incomplete.


The discussion of the present thesis is original on three aspects. Firstly, most of these authors recommend the use of domestic laws against price discrimination to replace antidumping laws. As argued in chapter 1, price discrimination practices are not condemnable per se; moreover provisions against domestic practices of price discrimination are already highly criticised. It is proposed, instead, that only "abusive" price discrimination practices should be stopped within NAFTA. This is why laws against abuse of market power are considered to be more efficient for regulating business practices.

Secondly, if antidumping laws are phased out, they should be replaced by the application of a comprehensive legislation on competition (not only by laws against predation and price discrimination) addressing all anticompetitive practices. All aspects of national competition systems must therefore be analyzed in order to assess their comparative extraterritorial effects. Differences in policies, in the purpose of the laws, and in the scope of governmental intervention, also become important.

Thirdly, there is no literature on the new Mexican legislation on competition and no one has yet discussed the feasibility of phasing out antidumping laws within NAFTA. In the following section, domestic laws against all forms of restrictive business practices, in force within the territory of NAFTA, are compared.

8.2 US, Canadian and Mexican domestic legislation on competition

8.2.1 Background and policies of the three competition laws

There is a great deal of literature on the origin of the Sherman Act in 1890. Some authors have argued that the "hatred" of monopolies which were seen as "some sort of unjustified power, especially one that raised obstacles to equality of

---

872 For example, a wider legal tolerance of tying arrangements in the exporting country may lead to higher prices in the exporting country and lower prices in the importing market. The tolerance of monopolistic behaviour in the exporting country would facilitate cross-subsidization in favour of lower prices in the importing market.
opportunity — the reason for which these people left Britain, constituted the basic rationale of the Sherman Act.

Others affirmed that economic efficiency and consumer benefits were and are still the main concerns of the Sherman Act. Today, there is still no consensus as to the intent of Congress and the role of economists and economic considerations in referring to monopoly in the Sherman Act. As argued in chapter, the most reasonable answer to the debate is probably that, throughout US history, both purposes have existed. At the time of the adoption of the Sherman Act, economic expertise was limited; there was probably no clear distinction, or contradiction, between the objection to large trusts and the social benefits derived from economic efficiency. Canada enacted the first legislation against monopolies in 1889, a year before the Sherman Act. Notwithstanding its contemporary adoption, in 1889, Canadians are said to have been preoccupied with different problems when they enacted the Canadian legislation. The large country and the small population made

---

873 Dunlop, McQueen & Trebilcock Canadian Competition Policy, 1988, quoting Letwin W. Law and Economic Policy in America in footnote 12, p.59


876 See chapter 3, section 3.5.3.

877 S.C. 1889, c.41.
private and state monopolies seem inevitable, a "... defensive necessity"\textsuperscript{878}, "...a feeling that in some cases "big" might be "beautiful"\textsuperscript{879}.

Making too much money (considered to be the result of controlling big enterprises) was condemned more seriously than the enterprises themselves. For instance, although some large Canadian monopolies made a lot of money at the time, legal historians write that, in Canada, "the greed of gain" and the "vulgar ostentation of the common rich" were no more valued within business than outside it\textsuperscript{880}. This, according to Dunlop, led the general public to object to unfair and unreasonable abuse of economic power rather than to monopolies as such.\textsuperscript{881}

Today, the Canadian legislation is still focusing more on the abuse of business power than on the existence and the expansion of monopolies. The Sherman Act, on the contrary, condemns the anticompetitive formation of a monopoly, known as monopolization. In 1986, the criminal offence against monopolies was repealed in favour of a civil fault. The civil offence of abuse of a dominant position is now actionable only by the Director of the Competition Bureau.\textsuperscript{882} This has led the Director of the Canadian Competition Bureau to affirm that:

\begin{quotation}

\textsuperscript{878}Dunlop B., McQueen D. and Trebilcock M., \textit{Canadian Competition Policy}, 1987, p.20.

\textsuperscript{879}Roberts R., \textit{Competition/Antitrust: Canada -United States}, 1992, p.3; Calvin Goldman, then director of the Canadian Competition Bureau, said, at the annual meeting of the ABA in 1988: "The small and geographically segmented nature of most Canadian markets often leads to high levels of domestic industry concentration... many Canadian companies may still be too small to achieve an efficient scale of production... competition policy must have a high regard for the efficient allocation of resources and industry performance rather than promoting competition for competition's sake" \textit{Antitrust L.J.}, vol.57, (1988), p.402.

\textsuperscript{880}Dunlop B., McQueen D. and Trebilcock M., \textit{Canadian Competition Policy}, 1987, at p.20 quoting Michael Bliss A \textit{Living Profit}: Studies in the Social History of Canadian Business, p.33-39. Bliss also wrote:"Over a thirty-year period there was not one favourable reference to the straightforward goal of making money in Canada's most important business journal, the \textit{Monetary Times}"

\textsuperscript{881}This may also explain why Canada took so long to adopt rules against mergers.

\textsuperscript{882}There is no possibility of private actions for damages caused by an abuse of a dominant position. Other infractions are still criminal, such as price discrimination and predatory pricing, horizontal price maintenance, conspiracies, double ticketing, resale price maintenance, and bid-rigging, all infractions contained in Part VI of the Act.
As far as the monopoly law is concerned, the Competition Act is now conceptually more similar to Article 86 of the Treaty of Rome than to Section 2 of the Sherman Act.\textsuperscript{883}

Before the 1986 Competition Act, the federal criminal power\textsuperscript{884} of the Canadian Constitution was the only uncontested ground for the adoption of a law on competition. Laws on restrictive business practices have probably been constitutionally challenged more than any other Canadian laws. The burden of proof and the necessity to prove "mens rea" in criminal cases, made enforcement very difficult. Only recently did the Supreme court confirm the constitutionality of private rights of actions for antitrust matters.\textsuperscript{885} The constitutionality of the Competition Act, and its administrative tribunal, are now generally accepted.\textsuperscript{886} Enforcement of competition is now, therefore, more pragmatic.

Another important characteristic is the openness of the Canadian economy to international trade. An important role is assigned to foreign and international competition in the implementation of competition policy. These features are reflected in the purpose clause of the Competition Act of 1986.

The purpose of this Act is to maintain and encourage competition in Canada ... in order to expand opportunities for Canadian participation in the world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Moreover, the role of competition laws in the national economic organisation of Canada, brings the Canadian competition system closer to the European than the

\textsuperscript{884} Article 91.
\textsuperscript{886} In 1992, the Canadian Supreme Court confirmed the constitutionality of the price fixing provisions of the Act in R. c Wholesale Travel Group Inc. Supreme Court of Canada [1991] 3 S.C.R. 154. In Nova Scotia Pharmaceutical Society v. The Queen, 9 July 1992, the power of the Competition tribunal to enforce its decisions through contempt orders, was also confirmed. Leave to appeal, from an unanimous Appeal Court decision affirming the constitutionality of the merger provisions of the Act and of the Competition Tribunal, has been denied in Alex Couture Inc. et al. v. Le Tribunal de la Concurrence, jugement de la Cour D'Appel du Québec, 9 Septiembre 1991, 200-09-000250-909.
US ones. The previous Director of the Canadian Competition Bureau made it clear:

... the maintenance of competition is not viewed as an end in itself. Rather, it is viewed as a vehicle for promoting a diverse set of objectives relating to the efficiency of the national economy and its performance in meeting the needs of various participants.887

Another important consideration is that Canadian producers may be part of a global North American production, i.e. Canadian firms may produce only parts of a final product888. In that sense some experts refer to the Canadian "branch-plant economy". The lack of legal standing for Canadian firms to initiate an antidumping investigation against an exporter of fully produced goods to Canada is problematic. When national economies further integrate, the need for common trade policies increases. As argued in chapter 5, this natural pressure of free-trade areas towards custom unions is evidence of the potentially positive impact of free-trade areas.

As seen in chapter 7, NAFTA member states have undertaken to maintain regulation against restrictive business practices.889 On 16 December 1992, the Mexican President presented the Federal Act governing Economic Competition to the Mexican Congress. The President explained the purpose of the new legislation:

Modernizing Mexico's economy is not an end in itself but rather is the best strategy for making sustained and permanent improvements to the living conditions of all Mexicans... The present administration is meeting this challenge by, among other things, promoting competition in the manufacturing sector and creating a system of economic regulations capable of encouraging competitiveness, creativity and participation by all Mexicans in the production and marketing of goods and services.890 (emphasis added)


888 The best example of this rationalisation of the industry is the Auto-Parts treaty which exempts autoparts from any tariffs or duties between Canada and USA if used in the process of a final product.

889 Article 1501.1 of NAFTA.

890 Speech of the President, Congress of Mexico 17/12/92.
In this sense, the objectives of the Mexican Competition Act more closely resemble that of the EEC and Canada, where economic competition is only one of the variables used to promote economic welfare in society.\textsuperscript{891}

The organization of the Mexican statute has great similarities with the old Canadian Bill C-352 which contained a list of \textit{per se} infractions, a list of condemnable infractions and rules governing mergers and joint ventures. One can also notice the important influence of the US system: firstly, there is a general reliance on the rule of reason; secondly, there is no mention of predation, as possible abuse, seemingly in accordance with the Chicago School of thought which argues that predation is implausible.

The Mexican proposed legislation contains a list of "inherently restrictive practices" which render any contract legally void and its economic agents criminally liable\textsuperscript{892}. These are infractions \textit{per se}. There is also a list of acts "inherently monopolistic" which, if committed by a perpetrator having substantial market power, are deemed restrictive practices when they involve agreements whose purpose is or could be to "unfairly displace other market agents, substantially impede their access, or establish exclusive advantages in favour of one or more persons"\textsuperscript{893}. A Commission, on its own initiative or upon request, will investigate and condemn these acts.\textsuperscript{894} Private damages, up to double the amount, can be awarded against the violator after the Commission's findings.\textsuperscript{895} The Mexican, US and Canadian laws on restrictive business practices have, therefore, different backgrounds and their social importance vary. It will be argued in the following section, however, that the actual content and the tools used by the three domestic sets of legislation laws are fairly similar and, in any case, compatible.

\textsuperscript{891} It is interesting to note that the Mexican Commission, although an autonomous body, like the US Federal Trade Commission, is "reporting to the Department of Trade and Industrial Development". This reflects the role of competition within the Mexican economy and its interaction with other economic variables, including trade.

\textsuperscript{892} Article 9 of the Mexican Competition Act.

\textsuperscript{893} Article 10 of the Mexican Competition Act.

\textsuperscript{894} Article 30ss of the Mexican Competition Act.

\textsuperscript{895} Article 38 of the Mexican Competition Act.
8.2.2 Standing, procedure, enforcement, costs and delay

There are procedural differences between the Mexican, US and Canadian competition systems.

In the USA around 90% of the antitrust cases, including joint ventures and mergers, are initiated by private parties. In Canada it is only recently that the Supreme Court confirmed the constitutionality of private actions. Abuses covered by other provisions of the Act, such as price discrimination, tying and other arrangements, can lead to private damages. There is no private right to damages for infractions to article 78 and 79 of the Canadian Competition Act; the law should be amended to include them. There are no private rights of contestation of mergers and joint ventures, however.

The Mexican law does provide for private damages for any offenses committed under the Mexican competition Act, but only after the Commission has concluded to an infraction. Claims can be for double the amount of damage.

Injunction seems to be easily accessible in the USA, and to some extent in Canada, but such procedure appears absent in the Mexican legal system.

Contingency fee arrangements are common in the USA. Until recently, they have been very rare in Canada. Class actions are more liberal in the USA than in Canada; they do not seem to exist in Mexico. Finally, in the USA, successful plaintiffs can be awarded all their costs and can never be condemned to the costs of the defendants. In Canada, whomever loses must pay the costs of the winner.

The consequence is that a series of antitrust actions may be launched in the USA without any investment in legal or other fees, whereas in most other countries, plaintiffs must invest in litigation from the start, and risk bearing costs themselves if they are unsuccessful.

---


807 Article 36(1) of Canadian Competition Act: "Any person who has suffered loss or damage as a result of a) conduct that is contrary to any provision of Part VI, or b) the failure of any person to comply with an order of the Tribunal or another court under this Act, (...)." Part VI of the Act covers criminal prohibitions of the Act. Damages must be recovered within 2 years of (1) the initiations of the criminal procedures, or (2) the day of the infraction.
Both Canada and the USA have effective mechanisms in place to aid foreign courts and tribunals in the gathering of evidence within their respective territories. The US rules of investigation are, however, much broader than in any other country. These expansive discovery procedures have caused many countries to adopt blocking statutes, as discussed in chapter 2. The US attitude towards litigation is certainly unique. There are some differences in costs and patterns of judicial proceedings which can constitute impediments to phasing out antidumping measures and which should first be reconciled. It can, however, be concluded, that, if private rights were expanded in Mexico and Canada, the systems of the three jurisdiction would be fairly compatible. The problem of the US treble damages is dealt with in section 8.3.

8.2.3 The treatment of price discrimination

There is no need to repeat all the objections that economists have to price discrimination laws.\(^{898}\) It is usually argued that domestic laws against geographic price discrimination follow patterns similar to antidumping laws and should, therefore, be used as alternatives to antidumping laws.

As previously mentioned, price discrimination practices are not per se detrimental to the importing country, and should not be systematically condemned. Rather, they should be assessed under a rule of reason against the parameters of the offence of abuse of a dominant position. Nonetheless, it is worth comparing existing domestic laws against price discrimination since they remain applicable nationally to all firms within the NAFTA.

Criminal and civil infractions against price discrimination exist in Canada, but there have been only a few legal suits. Section 50(1)a of the Canadian Competition Act\(^{899}\) envisages criminal offences of predation and price discrimination. Only

\(^{898}\) See discussions in chapter 1, section 1.2 and 1.3).

\(^{899}\) 50(1)(a) of the Canadian Competition Act: "Everyone engaged in a business who is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that concession or other advantage is granted to rebate, allowance, price concession or other advantage that, at the time the articles are sold to such (continued...)"
competition between buyers of a supplier (the secondary-line) is addressed and, unlike the Robinson-Patman Act, there is no clear requirement of injury. Differences in prices, not based on volume, infringe 50(1)a. There is also a provision against geographic price discrimination in 50(1)(b):

Every one engaged in a business who...engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; is guilty of an indictable offence and is liable to imprisonment for two years.

The defense of temporarily "meeting competition" would be admissible, since the Canadian infraction requires a "policy", i.e. more than one occasion. Because of the criminal nature of the offense, the intent of the perpetrator must also be proven beyond reasonable doubt. The requirement of lessening competition has been interpreted in parallel with the test of the provision against predation. Only predatory price discrimination practices would infringe 50(1)(b). The civil offence of article 78 against an abuse of dominant position, can also cover practices of price discrimination.

US law on price discrimination is found in the Robinson-Patman Act and can be used to prevent injury to competition at the primary, secondary and tertiary-line. The required effects on competition are however mitigated.

It is to be observed that section 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations "in their incipiency", before the

---

899 (...)continued

899 Purchaser, is available to such competitors in respect of a sale of articles of like quality and quantity; is guilty of an indictable offence and is liable to imprisonment for two years."

900 Article 2(a) of the Robinson-Patman Act: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who grants or knowingly receives the benefits of...such... discrimination."
harm to competition is effected. It is enough that they may have the prescribed effect.\textsuperscript{901}

Section 2(b) allows for a defense of "meeting competition" if the discrimination is in good faith, i.e., the seller must believe that it is necessary to offer a low price to get the sale.\textsuperscript{902} The defense based on cost justification is similar to volume consideration in Canadian law. This defense is, however, not very useful because it is practically impossible for large enterprises to allocate costs to particular goods. Changes of market conditions\textsuperscript{903} are also accepted as defense.

The Mexican law does not address price discrimination specifically, but Article 10-VII of the Mexican Economic Competition Act reads as follows:

In general, any act which unduly hinders or impedes free and open competition in the manufacturing, processing, distribution or marketing of goods and services. These acts, if the perpetrator has substantial market power, are deemed restrictive practices if their

purpose is or could be to unfairly displace other market agents, substantially impede their access, or establish exclusive advantages in favour of one or more persons.\textsuperscript{904}

This civil infraction seems to cover injury to any of the three lines of competition. Although there is no express mention of which defense would be acceptable, it seems clear that any business justification would demonstrate that its purpose was not to unfairly displace other market agents etc...

Antidumping laws, on the other hand, give rights to first-line competitors only. Most authors usually argue that if domestic price discrimination laws were to replace antidumping laws, first-line injury should be addressed by competition laws (The Canadian law would have to be expanded).

As mentioned in chapter 1, laws on price discrimination tend to protect small businesses at the detriment of larger and more economically efficient firms. It is therefore a policy choice whether a country favours small firms at the detriment of

\textsuperscript{901} \textit{Standard Fashion Co. v. Magrane-Houston Co.} 258 U.S. 346.

\textsuperscript{902} It is only permissible to "meet" competition, not "beat" it.

\textsuperscript{903} Section 2(a) of the Robinson-Patman Act.
higher prices. If integration is furthered within NAFTA, concerns other than efficiency would be considered and, it may become reasonable, as is the case in Europe, to have strict provisions against geographic price discrimination, in an attempt to bring national barriers down.

8.2.4 Treatment of predatory pricing

The US law does not have a specific prohibition against predatory pricing. Section 2 of the Sherman Act, section 13 of the Robinson Patman Act or section 45 of the Federal Trade Commission Act can, however, be used to challenge predatory pricing. Most allegations of predation are made under the Sherman Act for monopolization or attempted monopolization practices.

The strict monopolization offense under the Sherman Act is very rarely argued. Condemnation requires "(1) possession of monopoly power in the relevant market and (2) the willful acquisition and maintenance of that power as distinguished from growth or development due to a superior product, business acumen, or historic accident". In the Matsushita case, the ability to recoup was the crucial point which led the Supreme Court to conclude that the evidence available could not sustain a petition for summary judgement because predation was implausible.

The results of surveys of antitrust decisions seem to lead to the conclusion that when monopoly power is alleged and proven, which requires a very high level of market share, the Areeda test seems sufficient to prove predation. If the defendant does not have monopoly power, there is usually an analysis of its intent.

Allegations of predatory price discrimination under the Robinson Patman Act require proof that the goods were sold under cost (possibly referring to the threshold of variable costs of the Sherman Act) and in different markets at different

prices. On the other hand, the Federal Trade Commission requires that market conditions make predatory pricing a rational and plausible strategy for the predator. This test is, in fact, close to the one sponsored by the Canadian Bureau of competition. Attempted monopolization requires: (1) specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct directed toward that end, and (3) a dangerous probability of successful monopolization.\footnote{ Joskow P. and Klevorik, "A Framework for Analysing Predatory Pricing Policy", \textit{Yale L.J.}, vol.89 (1989), p.213, discussed in section 1.4 of chapter 1 of this thesis.} In the third requirement for attempt to monopolize, the dangerous probability, there is a \textit{de facto} prerequisite for a high threshold of market power.

In Canada, predatory pricing is expressly prohibited under section 50(1)b, 50(1)c and 79 of the Competition Act. Article 50(1)c provides that:

\begin{quote}
 every one engaged in a business who engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect, is guilty of an indictable offense and liable of imprisonment for a term not exceeding two years.
\end{quote}

The Canadian Guidelines suggest a fairly narrow approach to criminal predation in sponsoring the test proposed by Joskow and Klevorick, the so-called two-tier test\footnote{ Warner P. "Canada... (continued...)}. The Director will first look at the firm's market power and the other conditions of the market to find out whether recoupment by the alleged predator would, within two years, invite the entry of competitors. If the market share of the alleged predator is 35% or more, the Director proceeds to an assessment of entry conditions. If a firm appears to have market power, then a price/cost comparison is undertaken where prices set above average variable costs are judged on surrounding consequences.

Most authors have concluded that US and Canadian tests on predation are similar\footnote{ ... both Canadian and US courts examine "other factors" in determining whether prices in that range are predatory. These other factors are similar in both countries" Warner P. "Canada... (continued...)\}. This can be correct only as far as criminal infractions are concerned and...
when enforced by public authorities, since there have been only a handful of predation cases in Canada and no private actions.

The Canadian Competition Act also has a new civil infraction against all forms of abuses, including predation. Offenses to article 78 and 79 of the Canadian Competition Act are discussed in section 8.2.5.

The Mexican law does not condemn predation as such. As for price discrimination, the catch-all provision of article 10 paragraph VII could be used if the purpose of the practice was "or could be to unfairly displace other market agents, substantially impede their access, or establish exclusive advantages in favour of one or more persons."

Altogether, the injury tests of the three laws - i.e. in Canada, "effect or tendency of substantially lessening competition or eliminating a competitor"; in Mexico, the "purpose is or could be to unfairly displace other market agents, substantially impede their access, or establish exclusive advantages in favour of one or more persons"; and in the USA "monopolize or attempt to monopolize" can be considered to be somehow compatible, although the US test seems more aggressive.910

8.2.5 Other abusive conducts of firms with market power
As mentioned before, dumping and antidumping measures are not just about price discrimination and predation, but are strategic tools used as a buffer between social

909 (...continued)
United-States* L.& Policy Int'l Bus, vol.23 (1992), p.791, 877; The study for the Chambers of Commerce by Feltham I, Wonnacott R., Mathieson R. and Salen S.,"Competition (Antitrust) and Antidumping laws in the context of the Canada-Free Trade Agreement", Can.-US L.J. vol.17 (1991), p.162, concluded: "US and Canadian competition laws presently available to remedy unreasonably low transborder pricing in the form of predation are essentially the same in that each require injury to competition, and each take into consideration both objective evidence of below cost pricing and market structure and, in appropriate cases, evidence of subjective intent".

910 A difference in threshold of market power necessary to trigger an investigation of the offence of predation, is consistent with the variant purpose of the three sets of legislation which differ as to the protection offered to small and/or national businesses. The main threats for Canadian and Mexican firms are obviously US firms. US firms do not need protection from Canadian and Mexican firms. For US firms, the threat comes from Japanese firms. Similar concepts of favouritism exist in US trade laws against foreign firms.
and structural differences. Therefore, phasing out antidumping actions will require that all forms of abuses by firms in a dominant position, which may lead to dumping, be addressed by the system replacing antidumping laws.

The new provisions against abuse of a dominant position seem to cover all forms of abusive behaviour. Nozick and Neff have labelled it the "shopping list" and 

NutraSweet\(^{911}\) confirmed that article 78 contains a non exhaustive list of abusive practices.\(^{912}\) Concerning horizontal agreements, the Supreme Court said:

"A consistent pattern in the anti-competitive acts cited in s. 78 (save for that in para. f)) is that the competitor of the dominant firm is a target, not a fellow actor. While the tribunal is reluctant to conclude that all horizontal arrangements are excluded from ss 78 and 79...

In this case, there was not enough evidence for the tribunal to conclude that there was an abusive combination. It can, therefore, still be reasonably argued that any infraction contained in the Competition Act, if committed by one or more firms in a dominant position, is covered by articles 78 and 79.

The Canadian legislation requires that, in order to be abusive, practices less fatal than predation, for instance vertical squeezing\(^{913}\) or the use of fighting brands\(^{914}\), must "lessen competition". The meaning of "lessening competition" can therefore be interpreted as requiring a lower threshold of injury than predation. Therefore, a practice which lessens competition, even though it does not eliminate a competitor - nor attempt to - could be viewed as detrimental and could constitute an abusive practice.

Article 10 of the Mexican proposed Act is similar to article 78 of the Canadian Competition Act: both provisions require injury to competition. One may ask if the expression "unfairly displace other market agents, substantially impede their access, or establish exclusive advantages in favour of one or more persons" of the Mexican

\(^{911}\) Canada (Director of Investigation and Research) v. NutraSweet Co. (1990), 32 C.P.R. (3d) 1 (Competition Tribunal).

\(^{912}\) In fact in NutraSweet seven out of the eight alleged abuses were not mentioned in article 78 of the Competition Act.

\(^{913}\) Article 78(a) of the Canadian Competition Act.

\(^{914}\) Article 78(d) of the Canadian Competition Act.
legislation is synonymous with the Canadian injury test or whether it requires different levels or types of injury to competition.

These provisions of the Mexican and Canadian laws call for assessments under a rule of reason, on a case by case basis, and on the particular impact of a specific business practice. In this sense, these provisions seem to be compatible and fairly adequate to cover a wide range of business practices.

The US legislation does not have such a "catch-all" provision. Article 1 of the Sherman Act prohibits certain horizontal and vertical agreements while article 2 prohibits monopolization. As is the case for the Canadian and Mexican laws, it is the US practices to assess business on a case by case basis through a rule of reason analysis.

As far as predation and price discrimination are concerned, the tests of the three countries are fairly similar in their approach although the US monopolization threshold is probably higher than what could be expected from the two other jurisdictions. The Canadian legislation on price discrimination contains the least competitive provisions, where evidence of injury is not even always necessary. The new Mexican legislation seems, intellectually speaking, the best one since there is always an inquiry into the impact on the market. This type of legislation, relying on assessments based on rule of reason is, however, risky when handled by unexperienced officials.

8.2.6 Vertical Restraints

Vertical restraint is one of the areas where the most convergence between the Canadian, US and Mexican laws exist. Tied selling, exclusive dealing, and territorial market restriction are all subject to case by case approach codified in the Canadian Competition Act\(^\text{915}\) and in the Mexican Economic Competition Act\(^\text{916}\). This is

\(^{915}\) Article 75 of the Canadian Competition Act.

\(^{916}\) Article 10 of the Mexican Competition Act.
broadly analogous to the rule of reason developed in *Sylvania* as far as non-price vertical restraints are concerned.

In Canada, resale price maintenance and attempts to influence upward spiral or discourage reductions in price are subject to criminal infraction. Refusal to supply to price discounters and attempts to induce such refusal to supply by any person are also criminal.

Resale price maintenance agreements are treated in the USA as vertical price-fixing and are subjected to the same per se ban as horizontal price fixing agreements. In *Monsanto* the US Supreme Court was asked by the Department of Justice to address the issue and to change that state of the law. The Supreme Court refused to do so. The dissenting judge referred to the clear position of the Congress which had expressly asked not to change the law.

The situation is different under the Mexican legislation. Article 10 admits the possibility, under a rule of reason analysis, that vertical resale price maintenance may promote inter-brand competition by restraining intra-brand competition. The same is true for tying arrangements, exclusive distribution systems, refusal to deal and other vertical relationships: if perpetrated by a "firm with a substantial market power with the effect of displacing other market agents etc...." (the injury test of article 10 of the Mexican Act) these practices may constitute illegal monopolistic practices.

**8.2.7 Horizontal agreements**

In Canada, naked price fixing and market allocation arrangements are criminal. Once consent to enter into an agreement has been proven, the requirement of

---

918 Article 61(1)(a)(b) of the Canadian Competition Act.
919 Certain exceptions to the prohibition the refusal to supply to price discounters, such as a situation where a distributor has failed to provide a level of service that might reasonably be expected by consumers. This exception applies to the offense of refusal to supply, not to the basic prohibition of price maintenance.
article 45 to prove the mens rea is satisfied. In the US legislation, horizontal arrangements are illegal per se under article 1 of the Sherman Act. The Mexican legislation has borrowed the US concept of illegal practices per se, without any inquiry into the effects on the market, for horizontal arrangements. The three sets of legislation are very similar.

8.2.8 Joint ventures and Mergers

Canada is said to have borrowed from the USA its new legislation on mergers and their guidelines. The new test is whether a proposed merger "prevents or lessens, or is likely to prevent or lessen, competition substantially". This is very similar to article 7 of the Clayton Act which is concerned with whether the effects of the merger "may be substantially to lessen competition or to tend to create a monopoly".

The Merger Enforcement Guidelines (MEGS) issued in March 1991, indicate that the emphasis on enforcement will be upon horizontal mergers. Vertical mergers raise concerns in only two instances: "when they raise objectionable barriers to entry to a market, or where they facilitate consciously parallel pricing practices, in a downstream or upstream market, for more than two years". Article 92 suggests factors to assess whether a merger prevents or substantially lessens competition, criteria which are similar to those contained in the US Department of Justice Merger Guidelines.

Chapter III of the Mexican law is also organized along the American pattern, but the threshold for notification is different: "12 million times the basic minimum wage applicable within the federal district". This was probably seen as necessary in view of the very rapid change in value of the peso in recent years. In this area as well, laws are very compatible.

8.2.9 Intellectual property rights

A word should be written intellectual property rights which are now recognised a direct impact on free movement of goods and therefore on free trade. It is said
that US pharmaceutical manufacturers, computer software producers, and the recording industry made their support for the NAFTA talks conditional on substantial reforms in Mexican intellectual property laws.\textsuperscript{921} In 1991 Mexico enacted new legislation on intellectual property which attempted to eliminate the vast majority of problems cited by US industries. Chapter 17 of NAFTA contains very extensive enforcement obligations for member states as far as protection of intellectual property is concerned. It is probably the most treatment of intellectual property rights in a free-trade area and should be used as a model for an international code on intellectual property.\textsuperscript{922}

There are detailed provisions on substantial (article 1714), procedural and remedial aspects of civil and administrative recourse (article 1715), on the accessibility and fairness of provisional measures (article 1716) on the obligation to have criminal procedures (article 1716), the possibility of enforcing intellectual property rights at the border (article 1718). Intellectual property rights and their enforcement should not be an impediment to the phasing out of antidumping duties since harmonization of national laws will be very well monitored.

\textbf{8.2.10 Conclusion on the comparison of domestic laws}

Differences exist between the Mexican, US and Canadian laws on competition with regard to the threshold of market power which is necessary before competition


\textsuperscript{922} Article 1714: Enforcement of Intellectual Property Rights: General Provisions "1. Each Party shall ensure that enforcement procedures, as specified in this Article and Articles 1715 through 1718, are available under its domestic law so as to permit effective action to be taken against any act of infringement of intellectual property rights covered by this Chapter, including expeditious remedies to prevent infringements and remedies to deter further infringements. Such enforcement procedures shall be applied so as to avoid the creation of barriers to legitimate trade and to provide for safeguards against abuse of the procedures. 3. Each Party shall provide that decisions on the merits of a case in judicial and administrative enforcement proceedings shall: (a) preferably be in writing and preferably state the reasons on which the decisions are based; (b) be made available at least to the parties in a proceeding without undue delay; and (c) be based only on evidence in respect of which such parties were offered the opportunity to be heard. 4. Each Party shall ensure that parties in a proceeding have an opportunity to have final administrative decisions reviewed by a judicial authority of that Party and, subject to jurisdictional provisions in its domestic laws concerning the importance of a case, to have reviewed at least the legal aspects of initial judicial decisions on the merits of a case. Notwithstanding the above, no Party shall be required to provide for judicial review of acquittals in criminal cases...."
authorities initiate an investigation into barriers to entry and the concentration of the market. The tests are, however, compatible.

An increased reliance on the rule of reason, joint guidelines and policy declarations would facilitate the convergence and harmonisations of competition enforcement. A greater exchange of professionals and lay people of all three jurisdictions would be necessary in order to ensure that the positions are understood and adaptations are made. In other words, the political will is the determinant variable.

8.3 Application of the models proposed in chapter 7

Two archetypes systems are suggested in the previous chapter. One model suggested that the law of the territory where the restrictive business practice take place would be the applicable law. The other one was based on the turnover of the firms concerned. After an analysis of the competition laws of the NAFTA member states the following precisions can be added.

8.3.1 "The law of the territory where the restrictive practice takes place"

Because the differences between domestic laws of the member states of the NAFTA are more important than they are within the Trans-Tasman CER, the defendant of any action should always have the right to submit any defense that would be received in the home legal system of the plaintiff or the respondant.

In the case of public enforcement, the defendant should have the right to oppose any defense recognised by its own national legislation, besides defences admitted by the applicable law. This would increase the availability of defences which often tend to tolerate aggressive pricing practices. It would also favour non-discrimination between competitors and lead to the harmonisation of domestic laws when applied to non-nationals.

Double or treble damages should not be imposed on foreign defendants unless the law of the defendant’s place of business allows for such a multiple compensation. Double and treble damages would also be possible in counterclaims
if the principal claim could lead to double or treble damages. To facilitate this process, the Canadian legislation should be amended to authorise double damages in competition actions.

During the transitory period member states should have the right to present a brief as *amicus curiae*, opposing any practice on its territory which would go against its public policy. Until the end of a transitional period, national courts should be obliged to respect policies reported in the brief as *Amicus Curiae* from other NAFTA governments.

### 8.3.1.1 Examples of the proposed model

Three sets of examples will try to clarify this abstract proposal:

**First example** - One may imagine a US manufacturer of fancy shoes for woman named "Best US Shoes" which sells in the big cities of the USA, Mexico and Canada through distributors and retailers. Best US Shoes has a market share of 60% in the market for fancy shoes within NAFTA. Best US Shoes is tying its sale to the sale of shoe wax, a market in which it has no power.

Assume that there are trade barriers to enter the market for fancy shoes, but the market for simili wax is very young. There is only one US producer of simili wax who also produces regular wax, Big US WAX, and a potential Mexican exporter of simili wax, Cheap Mexican Wax. Best US Shoes does not export shoes or wax outside NAFTA.

According to the first scheme proposed in this thesis, a potential Mexican exporter, Cheap Mexican Wax, may sue Best US Shoes under US law for the alleged illegality of the tying arrangements, having the purpose of foreclosing the US market to the Mexican exporter. The "target" market is the USA, where the alleged restrictive conduct (restrictive business practice) takes place and where the foreclosure is exercised. The US law would be the applicable law, enforced in the USA, by US Courts and US lawyers, since the defendant’s place of business is in the USA.
Under US law, tying arrangements are illegal *per se* if: 1) the products are separate; 2) the seller has economic power in the market of the tying product; and 3) a not unsubstantial amount of commerce in the tied product is affected. A US defendant can always prove that the tying was necessary to protect goodwill of the tying product. Under the Mexican law, tying will be subject to a rule of reason where the market power and the conditions of the market will have to be assessed to determine whether such practices are monopolistic.

Let us assume that the tying cannot be justified on the basis of protection of the goodwill since the products of Cheap Mexican Wax are made of all natural products and are, in fact, of better quality. The tying is justified on the basis of the need for Best US Shoes to become more environmentally friendly, according to new US regulation, forcing firms to re-utilize their chemical rubbish. Therefore, Best US Shoes, had to invest in R.& D. to invent a new simili wax which uses chemical rubbish. A substantial amount of commerce in the market of wax is affected by the tying between shoes and wax.

Since the plaintiff's national legislation, the Mexican law, would accept a defense of reasonableness based, presumably, on business rationales, Best US Shoes may be able to prove a defence based on various business justifications for its tying arrangements, including the financially viable respect of environment regulation.

If one changes the above mentioned facts to a potential Canadian exporter of wax, the solution would be similar since tying arrangements are also subject to a rule of reason in Canada (as in Mexico). Best US Shoes would thus be entitled to a defense of reasonableness.

**Second example** - Another example could involve schemes of resale price maintenance which are *per se* illegal in Canada and the USA, but subject to a rule of reason in Mexico. Let us imagine that a Mexican manufacturer of tyres has a scheme of resale price maintenance throughout the NAFTA territory. A US retailer

---

refuses to follow the scheme; its contract is therefore terminated by the manufacturer while other distributors are ordered not to sell him anything. The US retailer sues the Mexican manufacturer and alleges the illegality of the R.P.M. According to the scheme proposed by this thesis, the target market is the US (in fact all the NAFTA territory), the applicable law would be the US law, but because the defendant is Mexican and the Mexican law regulates RPM along a rule of reason, the Mexican firm would be able to argue that the R.P.M. was reasonable. The US government would, however, be able to present a brief as amicus curiae, opposing any resale price maintenance on its territory. Until the end of a transitional period, national courts should be obliged to respect policies reported in the brief as Amicus Curiae from other NAFTA governments.

If a Canadian Manufacturer had such a scheme of RPM, the solution to the above example would be different since resale price maintenance is illegal per se in Canada. No special defense could be submitted by a Canadian manufacturer against a US retailer.

Third example - Imagine that Best US Shoes administers a pattern of price discrimination. Prices tend to be low in Mexico and very high on Fifth Avenue in New York; all shoes are exported from the US. In US dollars, their prices vary from $20.00 in Mexico city to $50.00 in Manhattan. The full cost of producing these shoes is $25.00. The allegation is that the purpose of Best US Shoes is to weaken and eliminate Cheap Mexican Shoes, a competitor in Mexico and a potential competitor in the US, so that Cheap Mexican Shoes would not be able to penetrate the US market. (A situation similar to the one in AKZO\textsuperscript{924} with allegation of cross-subsidization).

According to the proposal of this thesis, the "target" market is Mexico where the restrictive business practices take place, although the purpose is to avoid the presence of Cheap Mexican Shoes in the US where effects of this strategy are, therefore, also felt. The applicable law would be the Mexican law, applied by

\textsuperscript{924} AKZO ECJ Case C-62/86 3 July 1991.
Mexican Courts and Mexican lawyers, unless otherwise agreed. However, the trial will take place in the USA, which is the place of business of the defendant. The defendant, Best US Shoes, may submit a defense of meeting competition recognised by the rule of reason of the Mexican law.

As discussed in chapter 7, these three examples prove that the proposed model of applicable law would work. In cases of concurrent jurisdictions, a second principle of allocation of jurisdiction would be based on the turnover of the firm(s) involved. This second pattern of jurisdictional allocation may also constitute a comprehensive alternative to the first model suggested. This second model would involve calculation of turnover as will the EEA agreement put into force one day. In the context of the superior population and economic power of the USA, such allocation seems reasonable. It is far from certain that the governments of Mexico and Canada would agree with this statement.

8.4 Amendments to existing competition and antitrust laws

Domestic competition laws of NAFTA are compatible but, some amendments would be necessary in order to give nationals the rights to complain about firms in a dominant position in another state.

It is interesting to note that the Trans-Tasman CER does not contain any provision extending jurisdiction over offenses similar to those prohibited by Article 1 of the Sherman Act or article 85 of the EEC treaty. Any party to a cartel agreement would probably be infringing its national legislation against cartels. Moreover, a horizontal agreement would also be caught by a provision against abuse of a joint-dominant position if the market share of the parties in the agreement reached the level of "dominance".

The advantage of using an offence of abuse of a dominant position, rather than automatic provisions against transnational price discrimination, is the flexibility that such concept offers. Public officers and members of the courts enforcing the law use
their discretion in assessing whether there is dominance and abuse. Their qualifications and experience become, therefore, crucial.

On the other hand, per se rules provide for clear answers and certainty, which businessmen appreciate. Unfortunately, they miss particular cases and necessary exceptions occasioned by market forces. If experienced officers administered the law, it would better to rely on the transnational application of legal provisions based on some sort of rule of reason, rather than any automatic price difference infraction or worse yet, per se infraction. Based on the assessment of a rule of reason, the Canadian abuse of a dominant position, the Mexican set of potentially monopolistic infractions, and the US law on attempts to monopolize, should all be able to catch any transnational abuse of market power, if their territorial application were extend.\textsuperscript{925} National competition laws would, therefore, have to be amended to provide NAFTA legal person with legal standing to allege infringement to any of the three national law.

Article 79 of the Canadian Competition Act should, therefore, be amended to cover a wider market source. Instead of reading

Where, on application by the Director, the Tribunal finds that:
(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business....

The article could read....

(a) one or more persons substantially or completely control, throughout the NAFTA territory or any part thereof, a class or species of business....

An additional paragraph could read:

\textsuperscript{925} This is not to say that national per se infraction against horizontal agreements should be abolished! Horizontal agreements are condemned everywhere on a quasi per se basis. As soon as a firm from any member state of the NAFTA participates in one of those arrangements the law of that country would catch the agreement. The remaining case would be cartel affecting NAFTA where none of the firms reside in NAFTA nor have a representative, a world cartel excluding NAFTA firms. In that case the GUS-CEC Agreement may find application if one of the firms resides in the EC. The 1986 OECD Recommendation on RBFs would also find application. As far as liability and financial compensations are concerned the dilemma of the effects doctrine or implementation doctrine remains.
This Act extends to the engaging in conduct outside Canada by any person resident or carrying business in Canada, USA or Mexico to the extent that such conduct affects a market in Canada.

In the Mexican law, only one article refers specifically to the limit of the Mexican geographic area: article 1 states that the provisions of the Act "shall be in effect throughout the territory of the Republic...". This article should be amended to read:

The Act shall have effect throughout the NAFTA territory for an infraction taking place in any market within the NAFTA if it lessens competition in Mexico.

Article 11 of the Mexican proposed legislation requires that the perpetrator of a restrictive business practice have substantial power over the relevant market, and does not limit the relevant market to Mexico. Article 12, which provides criteria for determining the relevant market, does not limit the source of dominance to an area in Mexico. Although the Mexican law, as written, does not prohibit the consideration of market power or abuses outside the geographical territory of Mexico, an amendment would clarify it:

This Act extends to the engaging in conduct outside Mexico by any person resident or carrying business in Canada, USA or Mexico to the extent that such conduct affects a market in Mexico.

The USA favours the "effects doctrine" and would reach practices anywhere. However, US laws would still have to be amended to give clear rights to Canadian and Mexican nationals to allege that a firm having market power anywhere within the NAFTA is using that power in order to foreclose the US market, thus infringing US law.

National laws would also have to admit the possible application of a defense recognised by another national system. Evidence of such accepted defences could be presented to Courts with experts, as any other specialised evidence. Decisions of Courts applying these defences should be enforceable.

National courts should be authorised to sit in the country of the place of business of the respondent. Provisions allowing states to oppose objections based on public policies and related defence by firms of "foreign compulsion" should be expressly authorised by all national laws.
Collaboration between enforcement agencies could initially take place along the lines of the Treaty of Collaboration in Criminal Matters between the US and Canada.\(^{926}\) In North America, it is possible that professional corporations for lawyers will object to lawyers from other jurisdictions pleading in front of other courts.

A solution would be to authorise lawyers to follow their court and their own national law when a court goes to hear a case in another country. This would avoid situations where lawyers end up arguing about foreign law in front of an unfamiliar court. In other words the legal system of the infringed law as well as its officers, would move to the district of the respondent.

### 8.5 Abolishing Export cartels

Although conspiracies, cartels and horizontal combinations are prohibited by the three systems of legislation, the same systems exempt export cartels.\(^{927}\) One of the purposes of the NAFTA is the creation of an integrated market within its territory. The maintenance of detrimental exceptions, namely cartels in favour of domestic firms only, is a great impediment to this integration process. Export cartels often lead to import cartels and vice versa. An export cartel in one country of the NAFTA will ultimately affect NAFTA as a whole. It is therefore fundamental that all cartels be made illegal within the NAFTA.

One solution would be to exclude the NAFTA states from the legislative exception in favour of export cartels. For example article 45(5) of the Canadian Competition Act could read:

... the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to export of products from Canada to countries other than Mexico and the USA.

---

\(^{926}\) See discussions in chapter 2, section 2.4.2.1.

\(^{927}\) Article 45(5) of the Canadian Competition Act exempts export cartels. Article 6 of the Mexican Federal Act on Economic Competition exempts "Cooperative societies and associations that engage in direct sales of their products abroad" under certain conditions. Articles 61 to 65 of the U.S. Webb-Pomerene Export Trade Act and the 1984 Foreign Trade Improvement Act effectively exempt cartels which do not affect domestic commerce and domestic exporters.
Article 6 of the Mexican legislation, the Webb-Pomere Act and the Foreign Market Improvement Act would all exclude the possibility of exemption for exports, in part or in full, to NAFTA countries.

8.6 Parallel amendments to antidumping laws

Antidumping laws of the three countries would also have to be amended so that, at the expiration of a transitory period, no new antidumping investigation, nor existing antidumping duties, be maintained between member states of the NAFTA. Rules of origin of NAFTA would determine whether goods originate from Canada, the USA or Mexico and should therefore be exempted.

The main difference between national antidumping laws concerns rights of judicial review which are supposed to be corrected before the entry in force of NAFTA. Additional amendments to antidumping laws should also take place immediately in order to reduce the anticompetitive effects of antidumping measures as they are applied today in attempts to reduce national barriers.

The difficulty, if a state changes its antidumping rules for NAFTA member states only, is that an allegation of discrimination would be submitted by outside countries, under article 8.2 of the GATT Antidumping Code. The answer to this argument would be that discriminatory treatment in favour of member states is an inherent to the nature of free-trade areas.

The following changes would stimulate integration within NAFTA:

1. The introduction of binding consultation before imposition of antidumping measures on the model of the EFTA, the EEC-EFTA, or the Europe Agreement. A Commission (or Council) should also have the obligation to try to identify the source of dumping and recommend antitrust sanctions to the exporting country. The consultations could also take place bilaterally without a third body.

2. The importing country should be obliged to assess the level of concentration of the domestic market.
3. Instead of an automatic determination, a process of presumption of dumping and injury could be introduced, where importers and exporters, as well as other interested parties, have the possibility to rebut the presumption and provide rational justifications for their pricing practice.

4. Defences based on business rationale, especially for sporadic low price exports, fluctuations of exchange rate, reasonable and comparable percentage of profit and/or overhead costs with the importer bearing the burden of proof should be permitted.

5. Counterclaims by the importer to justify why importation is necessary (impossibility of finding goods domestically, etc...) and to prove restrictive business practices in the importing country should be permitted.

6. Cumulation of imports of NAFTA countries with other imports should be eliminated.

7. A Lesser Duty rule should be implemented.

8. A Public Interest consideration should also be implemented in the antidumping process along the proposals suggested in chapter 4, section 4.3.2.3. These improvements would narrow the gap between antidumping and antitrust enforcement before antidumping laws are phased out.

8.7 Proposals for a transitional period

As mentioned in chapter 7, joint declarations of policy and exchange of civil servants from enforcement agencies may help the process of harmonisation and integration. Reliance on each other's case law should also facilitate a harmonised solution.

Once States have developed their practice and markets have become more competitive (along with the help of amendments to antidumping laws), a transitional period, of perhaps 10 years, could be envisaged. During that period, a NAFTA member state should give a pre-notification of its intention to impose antidumping duties to the exporter and its own government. Consultation would then take place
within five days. The NAFTA Commission would be the proper forum for this consultation. The member state adversely affected by allegedly dumped imports, would have to provide the exporting member state with: 1) tariff classification and the description of relevant goods; 2) a list of all known exporters thereof and an indication of the specifics of dumping occurring with respect to each exporter; 3) access to all non-confidential information; 4) the volume, degree and effect of dumping; 5) the nature and degree of injury; and 6) the causal link between the dumped goods and the injury.

The purpose of the consultation should be the identification of detrimental pricing practices in the exporting country, if such exist, and/or a discussion of possible safeguard measures to help the importing country to adjust. In all cases, duties, quotas or tariffs should not exceed a short period of, for example, 3 years. If the importing state is still injured, a second period of protection with less protective devices (from duties to quotas to tariffs) can be envisaged. In no case, should the protection last longer than the transitional period.

During that transitional period, a right to "boomerang" imports ought to be introduced into the antidumping legislation, i.e. the obligation for each member state to accept the return of any low-price import, free of duty, charge and quota from any member state. This should reduce the incentive to dump. The semantics of article 91(2) of the EEC treaty and article 17(2) of the EFTA Treaty could be used as examples.\(^{928}\)

Another way to phase out antidumping measures would be to give a fairly large degree of latitude to a central body, namely the NAFTA Commission, as the founding members of the EEC did in the 60's in favour of the EEC Commission. Firstly, upon noting that actual dumping exists, the NAFTA Commission would issue a recommendation to those responsible for dumping with a request that it be brought to an end.

---

\(^{928}\) See discussion in chapter 6, section 6.3.1 for the EEC-EFTA FTAs and section 6.4.1 for the EEC.
In the second stage, if dumping continues, the Commission might authorise the injured state to take the necessary steps. Antidumping actions during that transitional period would not be unilateral and would require the intervention of the Commission.

When new member states joined the EEC, a similar process was used where the EEC Commission consulted the injured member states before addressing recommendations to the enterprises alleged to be dumping. In all cases, antidumping duties had to elapse within 5 years, and were not be renewable without a new investigation.

The advantage of the European technique is that some latitude is given to the Commission. On the other hand, states lose their initiative and it is probable that the USA would never accept such a reduction of its sovereignty. In this sense, a statutory gradual reduction in the level and duration of antidumping measures seems more realistic. Parallel negotiations would facilitate the identification of the structural changes to be undertaken in the importing or exporting country, which could be monitored with the help of subsidies and other governmental programmes during the same transitional period.

One question remains whether antidumping measures would have to be phased out all over the NAFTA territory or whether they could be phased out between two countries at the time or product by product. A transitional period should tolerate any necessary adaptation for an ultimate purpose. This is also why article XXIV(8) does not mention any criteria for the transitional agreement leading to a free-trade or customs union area. Once tariffs have been eliminated on one product, antidumping duties, which are said to exist to secure the reduction of tariffs, could be phased out gradually for that product. For instance, the schedule of tariff reduction could be followed. Since antidumping duties are not mandatory, there is nothing wrong with reducing their application stage by stage. The offer to phase out antidumping duties would, therefore, have to provide mutual benefits and each of the three countries would have to designate a product. Duties for the chosen three
products would be phased out gradually throughout the NAFTA territory along the new pattern of tariff reduction used in the Uruguay Round.

8.8 Conclusion

Differences exist between the Mexican, US and Canadian legislation with regard to the threshold of market power, which is necessary before competition authorities initiate an investigation into barriers to entry and the level of concentration in the delimited market. An increased reliance on the rule of reason, joint guidelines and policy declarations, as well as the use of cases from one another's jurisdictions seems necessary to push states towards converged and harmonised interpretations and enforcements.

Phasing out antidumping duties is the only realistic way to create an integrated North American market. When tariffs are abolished, other trade barriers will remain, such as differences in competition laws and intellectual property laws. The harmonisation of these laws is possible since the systems of competition of the NAFTA countries seem to encourage greater reliance on a rule of reason, approached case by case.

The transitional period may have to be longer than the schedule of tariffs since the domestic economies of Mexico, Canada and the US are fairly different. During this transitional period, a process forcing states and firms to collaborate should be implemented in order to address seriously the reorganisation of inefficient enterprises in any country. This is the only fair way to protect individuals who may be displaced by more efficient exporters while at the same time encouraging a competitive reorganisation of industries throughout NAFTA.

Finally, the background of the NAFTA, involving a superpower, a developing country and a middle range country, is an excellent laboratory for studying the framework and parameters of an international code on competition in another research. Parameters for such an eventual discussion are sketched out in the final Part V.
PART V  Towards an international code of conduct

It is worth addressing the question whether a multilateral agreement on competition should be negotiated and whether its adoption would lead to the phasing out multilaterally. This last chapter is not a summary of the overall conclusions of the thesis. It simply tries to open a new discussion on whether an international code on restrictive business practices would be feasible and what its main parameters would be.

The background of NAFTA, involving a superpower, a developing country, and an middle range country, is an excellent laboratory for some aspects of such an international agreement. Bi-National Panels, the administration of Public Interest Clauses, and the enforcement of a process of Positive Comity should improve the "level playing field" and transmit to nationals all the rights that the GATT has envisaged for them.
Chapter 9 Parameters, Issues and Comments on an International Code on Competition

9.1 Introduction

As discussed in chapter 2, the idea of an international agreement regulating restrictive and detrimental practices of firms is by no means new.\(^2\) Labour, peace and trade organisations have at various times suggested that behaviour of private firms should be regulated so that they do not inhibit efforts of states to stimulate trade, increase welfare and quality of life, and ultimately, avert wars.

The idea of an international code on competition is now back on the agenda of international fora because of trade imbalances. Newspapers are full of US condemnations against Japanese business practices and European subsidies.\(^3\) The lack of access to some foreign markets is the political\(^4\) explanation for trade

---

\(^2\) See discussion chapter 2, section 2.2.

\(^3\) *Japan's trade surplus heads for record* FT 14/2/93; *US urges Japan to increase semiconductor imports* FT 31/3/92; *Britain to step up calls for Japanese market access* FT 17/2/92; *Tokyo pressed for economic package...urged Japan to open its rice market to imports...* FT 15/2/93; *US to seek greater market access in talks with Beijing* FT 15/2/93; *French restrict food imports* FT 6/8/92; EC says Japan must open up legal and financial services* FT 18/12/92; *Japan revises offer to open service industries* FT 9/12/92; *EC, Japan 'far apart' on car imports* FT 9/2/93; *Uruguay Round talks await signal ...liberalisation of South Korea's rice market...* FT 3/2/93; *US tough on public contract* *Indignant EC sprays to defuse its directive, Community officials see utilities as an important market-opening initiative* FT 3/2/93; *Rice link with 'fast track' attacked* FT 9/2/93; *Japanese defend chip agreement against attacks* FT 13/3/92; *Japanese fear trouble as trade surplus soars* FT 13/2/93; *EC attacks US claims over procurement bids*, *Clinton keeps up aircraft pressure* FT 23/2/93; *Japan rice lobby applauds GATT veto* FT 28/2/92; *Japan urged to open markets* FT 28/2/92; *Europeans join appeal to Japanese* FT 17/2/93; *US unhappy over access* FT 22/2/93; *Japan willing to open market more* FT 19/12/92; See as well just to quote one of them "Trade's new diplomat" *Economist* 27/2/93.

\(^4\) Although discussions on market access have accelerated in the eighties and nineties, trade imbalance between Japan and the US began in the seventies. Discussion on the closure of the Japanese market were in fact initiated in the seventies and culminated in the Structural Impediment Initiative, SII, at the end of the eighties and discussed below under section 9.3.6. For a discussion of the early US perception of the closure of the Japanese market see Weil F. and Glick N., "Japan-Is the market open? A view of the Japanese market drawn from US corporate experience" *L&P Policy Int'l Bus*, vol.11 (1979), p.845.
imbalances. US firms assume that exporters benefit from privileges at home which would explain why they can export so strongly. There are allegations of monopolization and cartels abroad. Americans now want to address the domestic competition laws of their trade partners. The Structural Impediment Initiative between the USA and Japan is evidence of this trend.

Another reason to press for international rules on antitrust behaviour is that the USA now has a strong opponent to the extraterritorial application of its domestic antitrust laws: the EEC. At the same time, the EEC imperialism is also expanding. More clashes of jurisdiction take place. The recent GUS-CEC Agreement on competition/antitrust collaboration\(^{932}\) is evidence of the importance of the issue.

With 70% of world goods and investments produced by multinationals, the same firms have to deal with various domestic laws.\(^{933}\) Different and opposite national requirements are costly and counterproductive. More are asking for collaboration amongst authorities and legal consistence. The spill over effects of foreign trade cartels are also having discouraging effects. Export cartels attract import cartels, and their tolerance by one state leads to tolerance of import cartels in another state.

Trade measures have boomerang effects and governments are now lobbied by their own producers for more consistent and competitive standards on restrictive business practices.

9.2 Attempts towards international code on competition

Various attempts were discussed in chapter 2. It is worth reiterating that the secretariat of the Economic Conference of the League of Nations (May 1927) proposed some regulation of "industrial agreements". The secretariat of the International Labour Organisation (May 1944) wanted to supervise (and register) industrial arrangements. The Havana Charter (April 1948) contained a whole

\(^{932}\) See chapter 2, section 2.4.2.5.

\(^{933}\) See the report of the United Nations World Investment, 1992, UN Publications, DR2/853.
Chapter V on restrictive business practices and its Chapter II dealt with the protection of domestic employment guaranties and fair labour standards.\textsuperscript{934}

These first three attempts took place in fora concerned with employment and labour standards. The secretariat of the League of Nations seemed to think that industrial organisations can maintain stable employment; so did the ILO. The Havana Charter was in fact the "Final Act of the United Nations Conference on Trade and Employment". This reflected domestic policies aiming at full employment.\textsuperscript{935}

As discussed in chapter 5 of this thesis, this chapter II of the Havana Charter is one of the main reasons why the USA refused to adopt the Havana Charter. Curiously, the USA is now pressing for trade agreements, such as the NAFTA\textsuperscript{936} and the GATT\textsuperscript{937}, to include fair labour standards (as well as restrictive business practices and environment standards). This change of US position may prove that political scientists are right when they argue that "free trade" is an easy and maybe the best doctrine for economically powerful countries. It is less beneficial and certainly less easy when a country loses economic power.\textsuperscript{938} This discussion is, however, outside the scope of this thesis.

Today, the only universal code of commercial behaviour in force, is the limited resolution establishing a Set of Mutually Agreed Principles for the Control of Restrictive Business Practices adopted by the General Assembly of the United

\textsuperscript{934} See discussion in chapter 2, section 2.2. Other attempts took place in the context of the GATT, by New Zealand, in November 1954, and by a working group of the GATT, in November 1960. These propositions were all unsuccessful because states had too different domestic regulation on restrictive business practices.

\textsuperscript{935} Stone F., Canada, the GATT and the international trade system, 1984, Institute for Research on Public Policy.

\textsuperscript{936} "U.S., Canada and Mexico quickly clash over how to put teeth in Trade Pact" Wall Street Journal 19/3/93.

\textsuperscript{937} "Brittan optimistic of early GATT deal" FT 28/1/93 which reports that the US Congress is already insisting on environment and labour workers' rights to be put on the agenda of the GATT.

\textsuperscript{938} For an interesting discussion of the evolution and change in economic philosophy of the USA see Ruigrok W., "Paradigm Crisis in International Trade Theory" J.W.T., vol.25 no.1 (1991), p.77.
Nations in November 1980 which, as argued in chapter 2 of this thesis, does not provide for any form of dispute settlement procedure.

In the absence of any international agreement, a series of Recommendations of the OECD have, since 1967, encouraged expanded bilateral agreements. These Recommendations are acts of economically powerful countries where most multinationals have their head office. In that sense the OECD remains a very effective forum for the discussion and negotiation of any international economic agreement.

9.3 New proposals

New elements are now leading states to address competition problems as an international issue.

9.3.1 The GATT Trade Report Mechanism

With the mid-term review of the Uruguay Round Negotiations of the GATT, domestic policies gained importance. The Trade Policy Review Mechanism was put in place in 1988. Each country would alternatively be examined to assess whether GATT obligations have been implemented and are respected. This was the first step to a deeper analysis of the relationship between domestic policies, and more particularly, competition policy and international trade.

9.3.2 American Bar Association

In July 1990 the Antitrust section of the American Bar Association gave a broad mandate to a Special Committee on International Antitrust, to study harmonies and disharmonies in the application and enforcement of antitrust and competition laws.

---


940 This became very clear in the review of Switzerland see Focus No.84, September 1991, p.7: "Conclusion ... It [the Council] acknowledged the steps that had been taken in the field of competition policy and emphasised the need for continuing close links to be maintained and developed between domestic and external free trade."
throughout the world.\textsuperscript{941} The study focuses mainly on cartels, mergers and joint ventures.

The Special Committee recommended\textsuperscript{942}:

1. the strengthening anti-cartel laws, broadening their coverage, bolstering enforcement procedures and vitalizing the institutions and methodologies for detection and punishment of offending conduct;

2. the elimination of exceptions in favour of import and export cartels;

3. that Courts should be reluctant to dismiss cases involving foreign cartels;

4. the harmonization of reporting requirements, immediate inter-agency consultations, moderation of private actions and improved access to information abroad for transnational mergers.

5. the OECD as the best forum for consultation by member states.

The Special Committee rejected the idea that the competition law of the exporting country could be used against transnational RBPs and concluded that the best remedy remains the enforcement by the importing nation of its own antitrust laws.\textsuperscript{943} The Special Committee also rejected the idea of an international code on competition: it would be a political compromise necessarily non binding.

A few comments can be made.

1) The adoption of an international agreement does not imply that the US law would have to be repealed. The international agreement would probably increase some national standards and could be considered as a set of minimum standards. This agreement could impose the exchange of information, conciliation and an obligation to justify decisions. In case of unsuccessful conciliation, member states would remain free to use their domestic legislation, even extraterritorialy.

\textsuperscript{941} Barry Hawk was made its chairman and Eleanor Fox its reporter. A group of four experts were appointed, with two official commentators, a group of liaisons representing US and foreign governmental agencies and a group of research assistants.

\textsuperscript{942} A summary of the report is found in "Antitrust in a global environment: conflicts and resolutions", \textit{Antitrust LJ.} vol.60, p.525.

\textsuperscript{943} This rejection is against the US proposal for an environment and labour standards code where a competitor could ask for antidumping duties against an exporter who would not respect the regulation of its own country in the area of labour and environment. "Mexico, US and Canada clash on NAFTA" \textit{Wall Street Journal} 20/3/93.
2) The US standards may not always be the best ones for the regulation of international restrictive business practices. In international settings, dominance should be established with a lower threshold of market power than the US domestic standard. Three economists Willig, Ordover and Sykes, have argued that in an international action against monopoly the "market share requirements of section 2 of the Sherman Act should be relaxed as appropriate to take account of the producer’s overseas resources". Furthermore, most experts have argued that cross-subsidization is more frequent in international settings. National patterns do not always seem appropriate to control transnational behaviour and agreements of firms.

3) An international agreement on competition would also favour exchange of economic philosophies. Forcing countries to explain and justify parameters of their legislation would necessarily lead to more transparency and favour more consistency.

4) Finally, as discussed in the following section, a principle of "positive comity" would be an excellent additional step to be performed by states concerned by an international antitrust issue. In fact, this pattern of "positive comity" is put forward by the USA in the "Side-Agreements" to NAFTA on labour and environment standards: firstly, the regulation of the country of origin would be enforced and secondly, in case of non-satisfaction, trade measures would be imposed.

**9.3.3 European Positive Comity**

As discussed in chapter 2, this principle was first introduced in the bilateral agreement between the US government and the EEC Commission.

The positive comity has been criticized because "it is unrealistic to expect one government to enforce its antitrust law solely for the benefit of another". If the country of origin of the RBP was first asked to investigate, to report and justify its

---


decision, the debate on the defense to extraterritorial application of domestic laws would become more efficient. The policy of the exporting country would become clearer. Considering the international principle of estoppel, "positive comity with justification" is a positive step towards the building up of practices leading to some international standards and would improve the understanding of the other jurisdiction's policies. In any case discussions on positive comity have brought back the debate on the need for an international agreement on standards of business practices.

9.3.4 The continuous work of UNCTAD, World Bank, OECD etc.

In 1980 UNCTAD was asked by the General Assembly to compile a Handbook of all existing legislation on RBPs as well as annual comments by each country on the application of its own laws. This has helped all countries understanding laws of their commercial partners and has stimulated collaboration and co-operation. The World Bank has also undertaken studies of the competition policies of most countries.

The OECD has recently undertaken an analysis of the extent to which national differences in the procedures involved in merger review operates to the advantage or disadvantage of the reviewing authorities or the parties to the transaction. Two experts have been asked to analyze, in detail, a number of recent mergers which have been investigated by two or more national or supranational competition

---

946 Estoppel is not accepted universally in international law but can be considered under article 38(3) as a principle common to all nations. It would therefore be source of international law. See Nocker T. and French G. "Estoppel: What's the Government's Word Worth? An analysis of German Law, Common Law jurisdictions, and the Practice of International Arbitral Tribunals" Int'l Lawyer, vol.24 no.4, p.409.

947 An example of the beneficial impact of such exchange is the admission by the Group of 77, during the meeting of the 24 October 1991, that the best policy for them was to control RBPs of multinationals in adopting and enforcing their own competition laws. Differences in the content of these domestic laws may always remain but at least, in principle, the Group of 77 realised that the best solution for them was exactly what countries from the Group B (OECD countries) had been asking for some time: more domestic competition laws.


949 Experts D. Wood and R. Wish were retained by the Committee.
authorities of the OECD in an attempt to identify changes in timing, procedures and information sharing, and cooperation that are necessary to facilitate increased efficiencies and harmony in merger review procedure and process.

The Centre for International Studies of the University of Toronto has been commissioned by the OECD to undertake a vast study of Competition Policies in a Global Economy. The purposes of the study are threefold. Firstly, to analyze the role of national competition policies in a world of increasingly interconnected markets; secondly, to produce a consistent framework to investigate the differences in domestic competition policies in the USA, Japan, the EEC and Canada, which have an impact on competitiveness in international trade, investment and innovation; thirdly, to propose alternative policies designed to reduce frictions. This work will be presented to the OECD in May 1993.

What was considered utopian 3 years ago it now widely admitted: there is a serious need for an international code on competition.

9.3.5 The NAFTA laboratory

The NAFTA experience, although regional, is another recent attempt to address the issue of competition on a multilateral basis. It is worth a specific mention for two main reasons.

Firstly, NAFTA has brought together three countries with very different economies and social organizations; moreover, NAFTA is a North-South agreement. Like most countries of the EEC, Mexico has a civil law tradition while the USA and Canada (other than Quebec for its provincial jurisdiction) share a common law tradition. Until December 1992, Mexico did not have any effective competition law. These elements make NAFTA challenging intellectually, economically and legally, and a good laboratory when discussing the parameters and minimum provisions for an international code on competition.

Secondly, NAFTA is the only international agreement where the USA has agreed to surrender some of its sovereignty over antidumping measures to bi-
national tribunals\textsuperscript{950}. It can be argued, however, that the GUS-CEC Agreement on competition goes further than NAFTA in asking parties \textit{to justify} their decision whether or not to act on restrictive business practices, an element which is not included in Chapter 15 of NAFTA. Article 1507 of NAFTA is, nonetheless, more audacious than the GUS-CEC Agreement in creating a permanent working group responsible for studying issues of trade and competition in their widest application.

For these reasons it can be argued that some provisions of the NAFTA, more particularly its bi-national tribunal, may be the best if not the only pragmatic solution to reconcile detrimental antidumping actions and restrictive business practices leading to dumping in the context of a world-wide agreement.

\textbf{9.3.6 US-Japan Structural Impediment Initiative, SII}

The SII is probably the strongest catalyst to an international code on competition. On 4 September 1989, Japan and the US signed the Structural Impediment Initiative pact, SII. Although this agreement is strictly bilateral it deserves mention because of its crucial impact on international trade negotiations. Trade imbalance\textsuperscript{951} between the USA and Japan has led the USA to ask for discussions with Japan on the reasons why the Japanese do not buy US goods. US businesses have been complaining that the Japanese distribution system was an "impenetrable [system of]... long-established exclusive relationships between industrial purchasers and their domestic suppliers, ... new market entrants would create undesirable 'confusion' or 'disorder'"\textsuperscript{952}.

The SII, which is reported to have taken a year to negotiate, is very long and detailed. It was supposed to be a "two-way street". The USA was supposed to overhaul the education system, encourage executives to take longer-term attitudes, reduce the budget deficit, and speed the introduction of the metric system. The

\textsuperscript{950} See discussions on the functioning of the Bi-National Tribunal in the NAFTA in chapter 7, section 7.3 of this thesis.

\textsuperscript{951} For example Japan accounted for 74\% of the US trade deficit in April 1992.

Japanese agreed to a lot of detailed obligations: an increase in the size of the average Japanese house from 89 square meters to 95 square meters by 1995 and the creation of 25,000 footpaths over the next decade.

The discussion quickly focused on non-traditional barriers such as the distribution system, the vertical relationship, i.e. "Keirestu", the horizontal collaboration agreements and cross-shareholding, i.e. "zaibatsu" and the lack of aggressive enforcement by the Japanese Fair Trade Commission, JFTC. Although analysis of the Japanese legal system existed, and some political scientists had initiated discussions on the business practice and competitiveness of the American business, the US government wanted, for the first time, to understand the industrial structure and organisation which made Japan so successful in the world economy.

Since the beginning of these talks, economists and jurists have studied the impact of these different relationships between economic agents, the keiretsu

---


956 "Japan" special issue FT 13/7/92, Okita S. "Japan Catch-up capitalism" World Link fall 1992; Special Report "How Japan works" Intern. Herald tribune 22/6/92; "The man who discovered Japan... that the West misunderstand" FT 12/10/92.
system\textsuperscript{957}, their labour relationships\textsuperscript{958}, their way of controlling quality, their close relationship with other stakeholders.\textsuperscript{959}

Important differences in social organisation were identified.

1) For instance, Japanese banks, as a matter of principle, are creditors, owners and members of the same economic group as their manufacturing clients. The same is true for overseas firms.

2) Firms are greatly encouraged to save, not to distribute dividends, and to reinvest into the firm. The "saving/investment" pattern reflects a crucial macro-economic policy of Japan.

3) Horizontal collaboration, for economies of scale and other purposes, is a common business practice.\textsuperscript{960} Some of these horizontal arrangements would be illegal \textit{per se} in the USA.

4) The longer working hours of the labour force and the great resistance to any change\textsuperscript{961} are also marked.

5) The traditional monthly meetings of business competitors have alarmed most US antitrust authorities.


\textsuperscript{959} Speech by Minoru Makihara "Shrimps to global strategies" \textit{FT} 16/3/92.


\textsuperscript{961} "Working hours blow in Japan" \textit{FT} 25/7/92.
6) Japanese academics and business people are convinced of the benefits of collaboration over competition.\(^\text{962}\)

7) More importantly, the USA realised that every act of every economic agent, including programmes of research and development, seem to have been "organised" according to a macro-economic plan.\(^\text{963}\)

Two important consequences of the SII talks are the inter-influence of Asian/Western business practices, and the comprehensive approach now adopted by states when dealing with international economic relations.

The mutual influence Japan and US business practices are numerous.\(^\text{964}\) The influence of the Japanese organisation is very strong in the US car industry\(^\text{965}\). The new internal organisation of General Motors where collaboration and close relationship with suppliers of parts have been initiated by the new director Lopez\(^\text{966}\) is evidence of this influence. GM also announced a new programme of cooperative education for technicians closely linked to employers.\(^\text{967}\) The Japanese type of labour contract has been adopted by Rover\(^\text{968}\). Horizontal collaborations and cross-shareholding are growing\(^\text{969}\) and even the social role of firms is now addressed in public fora\(^\text{970}\). The Japanese system of distribution had been copied by Kodak\(^\text{971}\).

---


\(^{964}\) \textit{Washington Shouldn't Be quick to Copy Foreign Business Intervention Tactics" Wall Street Journal} 5/3/93; "The Economics and all that JAZZ" \textit{FT} 13/1/92; "Japanese lessons" \textit{FT} 4/2/93; "Japan is the catalyst for conversion" \textit{FT} 9/3/92.

\(^{965}\) "Collusion course" \textit{Sunday Times} 20/12/92; "After years of growth in US car Market, Japanese surge is over... Did Big Three learn Lessons" \textit{Wall Street Journal} 4/3/93.

\(^{966}\) "Detroit feels whip hand of the Lopez Revolution" \textit{FT} 1/10/92. It was, however, announced on 16/3/93 that Lopez was leaving to join Volkswagen, "General Motors says Lopez will leave" \textit{FT} 16/3/93.

\(^{967}\) "Job Retraining linked closely to employers work in Cincinnati" \textit{Wall Street Journal} 19/3/93.

\(^{968}\) "On board with Rover Unions" \textit{FT} 22/9/92.

\(^{969}\) "Fashionable federalism" \textit{FT} 18/12/92; "Growing taste for alliances in the food industry" \textit{FT} 18/1/93.

\(^{970}\) See \textit{The Era of no-commitment capitalism} by Lowenstein L., 1993, New York.
Collaboration between producers of steel seems to follow the Japanese model.\(^{972}\) Recently one could read that SEMATECH, a consortium of the US government with the US industry in semiconductor, demonstrated world leadership production technology using all-American processed equipment.\(^{973}\) This very affirmation is evidence of a successful industrial policy in the Japanese way.

US antitrust has also greatly influenced Japanese practices. The Japanese Federal Trade Commission is now enforcing\(^{974}\) more severely the anti-monopoly and anti-cartel laws\(^{975}\), has raised cartel fines\(^{976}\), begun imposing criminal fines\(^{977}\), objected to resale price maintenance\(^{978}\), safeguarded the discount system\(^{979}\), and forced groups to become more transparent\(^{980}\).

\(^{971}\) (...continued)

\(^{971}\) "The revenge of Big Yellow" The Economist 10/11/90.

\(^{972}\) "German steel crisis prompts talks" FT 18/2/93 and a series of article on the necessary collaboration between European producers to cope with the depressed steel industry.

\(^{973}\) FT 22/1/93.


\(^{975}\) "Japan monopoly body orders end to building cartel"FT 11/7/92; "JVC investigated under Japan's anti-trust laws" FT 7/4/92; "Japan's electronics companies face price-fixing inquiry" FT 31/3/92.

\(^{976}\) "Japan raises cartel fines" FT 13/2/92.

\(^{977}\) "Anti-monopoly moves in Japan" FT 25/2/93.

\(^{978}\) "Japan's discounts safeguarded" FT 11/2/93.

\(^{979}\) "Japan's discounts safeguarded" FT 11/2/92.

\(^{980}\) "Mover to make Japanese groups more transparent" FT 11/2/93; "Japan's trade 'umpire' thrives on tension" FT 24/3/92.
Japanese firms now argue that overstaffing and life-long employment may not always be the best solutions. Since the recession Japan has started realising that tight and long term contracts may not be as flexible as western types of shorter contracts. Although one can read about the Japanese complaint of a disappearing "work ethic" since the Western presence in Japan, it is reasonable to assume that all can learn from exchanging views.

Secondly, the CIA talks are a very strategic initiative, the pattern of which could be used for eventual international negotiation on restrictive business practices. Although the CIA did not involve the EEC, Europeans have initiated parallel studies, enquiries and discussions. The CIA has brought about a whole new series of questions in international trade.

Newspapers are still full of accusations of Japanese unfairness. The conclusion of the SII talks may be that differences between US and Japan organisation are more a question of "economic management" than "impediments".

The important consequence of the CIA talks is that the traditional distinction between domestic and foreign economic policies, written in article 2(7) of the UN Charter, seems now to be eroding. And that is quite something. It is now widely

---

981 *Japan's fallible firms* Economist 27/2/93; *Japan learns lessons from a burst bubble* FT 26/10/92; *Overstaffing may put staring on Japan's social contract* FT 12/1/93; *Pioneer shakes Japanese faith in jobs-for-life system* FT 9/1/93; "Tough middle age for lifetime job" FT 13/1/93.

982 *Japan ponders shift in business ties* FT 12/3/93.

983 *Japan laments lost of old work ethic* FT 13/5/92.

984 It is said that arising proportion of electronic equipment is now manufactured on behalf of the big international suppliers by outside contractors. This seems to be a mix of the Japanese close relationship with their suppliers and the western independent contractors. "Farewell to sweat-shops" FT 16/3/93.

985 *How Japan works* Independent 28/2/92; Special Issue "Japan and the EC" FT 13/11/92.

986 For instance see "Unofficial Trade Barriers in Japan Pose Policy Dilemma for Washington" The Wall Street Journal 19/3/93. "A Fortress under siege: Structural barriers facing foreign companies in the Japanese market are lifting, but slowly" by Stefan Wagstyl in FT 30/7/92; "Inside the charmed circle... Japanese firms prefer to conspire rather than com pete with each other..." Economist 5/1/91.

987 The US FTC initiated a few months ago an investigation into the distribution system of the Japanese keirestu in the US. There is no reason found yet to believe that these systems of distribution are restrictive or lessen competition. Discussions with Mr. Abbott MacCarthey, FTC, Washington 27/3/93.
admitted that all sorts of aspects of a social organisation may have a direct impact on trade and should, therefore, be addressed when dealing with international economic relations.

### 9.4 Fundamental social differences

Before initiating negotiations for an international code on competition some fundamental differences between national systems should be considered. Competition systems and antitrust laws are reflections of fundamental social choices. As argued in chapter 3, the differences between countries of civil law background and those of common law background, are major. The role of government, legislation and judges as well as their social organisation differ.

Whether different legal systems are the consequences of different cultures or vice versa, is outside the scope of this thesis. What matters for the purpose of such international negotiations is that these differences lead to differences in concepts and approaches to regulation of business practices.

#### 9.4.1 Antitrust vs competition

If international discussions are to take place, some minimal agreements on meanings of terms used would be necessary. When negotiators use the word competition and antitrust do they mean the same thing? Or are they referring to the systems of different countries? Behind the terms competition and antitrust lie important legal and economic differences.

National competition laws are based on two distinct concepts: market power or market dominance. Market power is "the ability to vary price without suffering large variations in sales, fundamentally due to a lack of alternative products." In

---

988 See for instance, Burstein D. *Euroquake*, 1991, p.370, where the social organisations of Japan, Europe and America are put in parallel. It is interesting to note that economic policies of Germany and Japan are grouped together.

principle, laws on dominance (like the EEC) do not prevent an economic agent from holding a dominant position but only from abusing it. Stronger constraints are usually imposed on the conduct of dominant firms. This is an important difference between the EEC and the US system.

The US anti-trust legislation is against the creation of monopolies and specifically how an alleged monopoly is formed. Laws on abuse of a dominant position start from a different point: monopolies exist. Only their abusive behaviour are, therefore, controlled. Historically, in Europe, state monopolies were in place before the EEC Treaty. It would not have been possible to prohibit monopolies or their creation. The threshold of market share, the list of barriers to entry and the time scale to analyze injury and recoupment, vary between systems based on dominance or market power.

It is suggested that the term "antitrust" law should be used to refer to a system based on the rules of market power where prices are the prime consideration. Laws on "competition" should be used to refer to systems based on the concept of

---

990 Initially the Japanese antitrust system seemed to refer to a concept of market power. It was soon greatly influenced by the German competition law. The main characteristics of the Japanese competition system concern cartels, cross-sharing and other horizontal arrangements. In 1949 securities ownership between competitors were legalized in so far as such directorates did not lessen competition; mergers and international contracts did not have to be approved, only pre-notified. In 1953 certain concerted practices and cartels were exempted along the German exemptions. In 1957 small firms were allowed to join together in order to realize economies of scale and rationalize cyclical or depressed industries.

991 According to Michelin [1983] ECR 3461 a dominant company "has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market".

992 The case law of the EEC has changed this principle. Because of the de facto relation between the definition of a market (to assess dominance) and the alleged abusive act, the Commission (and the Court) may consider that what led to dominance is in itself abusive. Firms in a dominant position would attract suspicion from the Commission since they may have used abusive acts to gain dominance. In this regard the difference with the US system has therefore reduced a great deal.

993 As mentioned this section is not a comparative analysis of existing legislation. It is worth, however, mentioning that in the EEC, for instance, a firm with 50% market share is considered dominant; in New Zealand, 40% would be sufficient, while in Australia some have argued that in the case of vertical restraints a market share of 25% would be enough to constitute 'substantial market power'. In Canada a market share of 35% authorises the Director to look at the barriers to entry. In the USA the market share of a monopolist is fairly high. It is difficult to draw a clear line since Judges of lower Courts have taken opposite positions. It seems that a market share of 35% would be a minimum while some argue that in absence of barriers to entry a market share of 75% is pre-condition for a monopolist.
dominance which means the capacity to affect upstream or downstream producers. This distinction would shed light on the use of two words for two types of legislation which may only partially cover the same type of behaviour.

There is another distinction which could be usefully exploited. It can be argued that antitrust provisions are part of a competition system. A competition system should also be defined as containing other objectives, such as industrial policy, market integration, protection of small and medium enterprises and environmental standards.

Competition laws, such as the Canadian and Mexican ones, expressly refer to goals other than efficiency in their legislation. The new Commissioner for Competition in the EEC, Mr. Karel Van Miert, has announced that the EEC competition directorate would take into consideration other values than price efficiency when applying competition rules. In that sense the term "competition system" gets closer to a "system of rules of ethics" or "code of ethics" of firms where consideration other than price efficiency are weighed as part of the enforcement of the competition system.

It seems wrong, however, to conclude that if a country favours a system of antitrust strictly based on efficiency (and even price efficiency), the other social variables are ignored. In the USA, one could argue that the system of antitrust is exclusively based on price efficiency. The FTC and the DOJ enforce legislation without taking into consideration social values or environmental standards. Often the Department of Commerce and the ITC decide that the domestic industry needs to be protected. Even if the FTC and the DOJ favours an aggressive enforcement small enterprises may sue under the Robinson-Patman Act for price discrimination practices which are in fact very efficient.

---

994 See discussion in chapter 8, section 8.2.1 of this thesis.
995 See discussions in chapter 3, section 3.5.4 of this thesis.
996 This affirmation would be contested by judges of the 11th circuit and others but the affirmation is limited to the purpose of the argument.
997 "... at the bottom what counts are the jobs", Speech given by Trade Representative Kantor ABC News 6pm, 18/3/93.
The only difference, and the reason why the EEC system seems to be a better model for an international code on competition, is that in the USA there is no coordination of these various facets of a country's economic policies. This coordination may sometimes be called "industrial policy".

Efficiency and antitrust rules cannot stand by themselves. The STT talks revealed\textsuperscript{998} that other laws, such as those on property, banking, advertising, as well as cultural and educational differences, have a direct impact on the access to a market. In that sense the EEC competition system, where antitrust provisions, competition, intellectual property rights and the free movement of goods, have to be weighed and co-ordinated with the parallel application of various domestic laws, more closely reflects the legal juggling, characteristic of any international setting. Another reason why the EEC model can be useful, is because it brings together coordination and centralised authority, which is typical of civil law countries, and at the same time, a strong (Common Law) Court which de facto follows its precedents.

The purpose of the above comments is not to identify which system is the best one. What matters is to understand that different social organizations lead to using different legal terms, different legal conceptions and different expectations. This may become very important around a table of international negotiations.

\textbf{9.4.2 Industrial policies}

The discussion on industrial policy is parallel to the above discussion on differences between competition systems. The very definition of what constitutes an industrial policy is not determined. In his excellent Chapter "Antitrust Law as Industrial Policy: Should Judges and Juries Make it?" Professor Areeda addresses the difficulty of definition:

Industrial policy is a term without precise meaning. It embraces the mix of government decisions affecting the demand for and the surplus of goods and services.... Taking other relevant social values into account, industrial policy seeks to maximize goods and services desired by our people as customers and

\textsuperscript{998} See discussion in section 9.3.6.
as citizens...[it] is affected by virtually every public policy.... A different and very powerful form of industrial policy is society's allocation of income between consumption and savings.... Yet another type of industrial policy arises from the relative incentive from each type of activity....

Japan has been accused for some years of "industrial targeting". The EEC Commission has official guidelines on industrial policy. It is, however, inaccurate, to say that Japanese and Europeans have strong industrial policies while the USA favours a free market economy. Americans have trade, taxation and labour laws, besides direct industrial policy laws, which favour and stimulate one industry over another. "Buy American" laws are definitely forms of industrial policy. This type of incentive is very frequent in public procurement.

Protectionism is a form of indirect industrial policy. The general policy of protectionism against any exporter of micro chips is a good example: Japanese and Korea are alleged to be dumping notwithstanding the bilateral US-Japan semiconductor pact signed 1986. Tariffs against EEC chips producers have also been asked for by US industry. The USA is even thinking of bringing antidumping and ant subsidy suits against these foreigners and using the money collected to fund a US technology consortium. Is not it an industrial policy?

A similar pattern exists with the car industry in the USA. Tariffs and Voluntary Exports Restraints or Agreements can also be considered as forms of industrial policy if their object is to favour one economic sector for the overall benefit of

---


1002 See the EC publication "Industrial policy in an open and competitive environment - Guidelines for a Community approach.

1003 See the ruling of the GATT against the "Buy American" policy in sonar mapping system - an underwater radar system which uses ultrasound to detect objects. See "GATT ruling US/EC tension" FT 14/5/92.

1004 "US senators seek Airbus 'dumping' action" FT 25/2/93.
society. Maybe these types of intervention should be labelled "negative industrial policy" because instead of stimulating an area of the economy with subsidies and some direction, it only isolates that industry from world competition and de facto puts it to sleep.\textsuperscript{1005}

Subsidies are other forms of industrial policy. The recent row between the USA and the EEC over Airbus subsidies is an example of mutual hypocrisy\textsuperscript{1006}. The question is not whether or not the USA should be using its defense budget to subsidise its aviation industry but whether, if one admits that subsidies are given, they constitute acts of industrial policy in discussing level playing fields.

Besides indirect industrial policies, the USA has now direct legislation to favour and co-ordinate research and development. A recent US government report has led to the creation, in 1990, of a Trade Promotion Co-ordinating Committee to "unify and streamline" export promotion efforts. The US Bill for a Civilian Technology Corporation attempts to help with the funding of research and development and therefore constitutes industrial policy. The Bill for the "National Critical Technologies Development Corporation Act of 1992" which would become the parallel to the Japanese Minister of International Trade and Industry would certainly act as an industrial policy maker.

The economic value of an industrial policy may be contested.\textsuperscript{1007} Some have argued that "Japan achieved its economic miracle not because of government planning but in spite of it".\textsuperscript{1008} Pure Chicagoers would probably disagree with any form of governmental intervention; in fact they object to almost any legislation other than those on contracts and property and maybe police and army. This thesis is, however, not concerned with the benefits or lacunae of industrial policies

\textsuperscript{1005} It has been proven that American car companies have priced their goods over the limit they had initially fixed. "The Big Three want 25% tariff", Wall Street Journal

\textsuperscript{1006} "EC surprised by Clinton's attack on Airbus subsidies" FT 13/2/93; "Germans ridiculed the US"; "Washington rejects EC report on air subsidies" FT 22/3/93 ... ( "US denied engaging in massive, systematic support of its commercial aircraft industry and denied using defense and aerospace R & D, contracts to do so".

\textsuperscript{1007} "The limits to promoting high-technology industry" FT 1/2/93 discussing a recent book on the issue by Laura D'Andrea Tyson; "Do not adjust your set" The Economist 27/2/93.

\textsuperscript{1008} Wall Street Journal 12/3/93.
nor whether a specific public policy should be labelled industrial policy or not. The only point of the present discussion is to emphasise that pure efficiency and price considerations never stand alone in any domestic economic system. Whether one calls them social policies, labour laws and standards, promotion of research and development, taxation benefits for this or that, or whether these policies are more or less co-ordinated between business and government does not matter. All these economic policies interact with antitrust laws (and can even be considered as part of a country's competition policy). Importantly, all these forms of industrial policy have an impact on international trade and have to be addressed together when discussing the content of an international code on competition.

9.5 **An international code on competition: general issues and proposals**

It is unrealistic here to discuss specific rules to be included in such an international code on competition. Much more studies of various aspects of national competition systems would have to be undertaken. The work has started in the OECD, the World Bank and similar fora.

This section only attempts to underline a few fundamental issues which will have to be addressed if an international code is to be negotiated. A tentative recommendation of the EEC system as the best model for an international code on competition will be suggested. This conclusion is not based on a detailed comparative analysis of specific legal solutions, but merely on an assessment of the structural organisation of the EEC system which seems a to better reflect economic theory on international predation, and better able to co-ordinate and reconcile various levels and types of jurisdiction.

---

<sup>1009</sup> Delors calls for social policy to help jobless. *FT* 2/2/93.

<sup>1010</sup> How to mend the labour market. *FT* 9/2/93.

<sup>1011</sup> Japan steps up action to aid recovery of economy. *FT* 24/2/93.

<sup>1012</sup> For a brief discussion on industrial policies see Matsushita M. "Coordinating International Trade with Competition Policies" in *The Uruguay Round of Negotiations* Peltersmann (Ed.), 1988, p.395.
As argued in chapter 3, although three economic "blocks" can be identified, there are two main legal traditions in international relations. Domestic legal systems are organised generally either following a system of induction, from solutions given on a case by case basis, or along a pattern of deduction from pre-established principles. The first system alleges to offer more flexibility, the second more certainty. The first is usually called common law, the second civil law.

It is important not to limit the concept of civil law to European countries because Japan and other Asian countries as well as some African and South American countries are considered to follow a tradition of civil law, i.e. a legal system of deducted solutions from pre-established and pre-organised sets of rules which are supposed to be self-sufficient and coherent. It is, however, remarkable that, although the US occupation forces implemented competition legislation along the US model both in Germany and in Japan - and therefore their semantics are similar - the competition system of Japan seems much closer to that of the EEC and Germany, than of the US.

Differences in legal systems lead to important differences in other areas which have a direct impact on the general economic policy of a country. Initiating discussions on some provisions of national competition systems will necessarily lead to discussions of other aspects of domestic and foreign economic policies of a country. This is why the exercise will be so long. Some basis issues will be discussed hereafter.

9.5.1 A binding agreement?

There are a few binding international agreements and often their language is quite vague. Such is the case of the Subsidy Code of the GATT which attempts to prohibit export subsidies and to tolerate production subsidies. But what about production subsidies which encourage and facilitate eventual exports? Because of the necessary political compromises taking place in international fora, international treaties are usually drafted in more or less vague terms.
A more detailed agreement with fairly extensive definitions, that is not binding, but requires the justification of decisions, should be favoured. States could always refuse to follow provisions of the agreement, but they would have to differentiate legal from political considerations. This process would also favour a better understanding of foreign domestic pressures.

9.5.2 Rule of reason or per se

Another important decision will be whether the code should contain a set of per se infractions or alternatively, infractions determined along a so called "rule of reason". A determination based on a rule of reason offers more flexibility and should allow the introduction of more sophisticated defences for particular business decisions. On the other hand, a rule of reason requires a fairly high level of expertise and knowledge from those who would administer it. Moreover the need for certainty should not be underestimated. In the context of multilateral applications, a principle of rule of reason may not be such a good idea.

Business practices often require, however, some balancing. In the area of vertical restraints, for example, a rule of reason is almost necessary: some restraints are beneficial as long as competition inter industry is maintained. It would therefore be important not to prohibit practices which may be reasonable and beneficial.

The best way to avoid restricting efficient practices would be to establish a list of a few per se prohibitions, such as horizontal agreements (cartels) amongst competitors when together they hold more than, say, 20%\textsuperscript{1013} of the market share.\textsuperscript{1014} Such a rule would still need exception for joint ventures on research and development between firms having more than 20% market share. A set of limited of per se prohibitions, in addition to an extension of the rights of potential or actual

\textsuperscript{1013} Here 20% is mentioned on a purely arbitrary basis since the EEC Block exemption for specialization refers to 20-25% market share and the Block exemption for Joint Venture also refers to similar level of market share.

\textsuperscript{1014} Scale economies can be gained in production and distribution when competitors, specialise, co-ordinate their actions and pull together more buying power.
exporters to initiate antitrust investigation in the country they want to penetrate\textsuperscript{1015}, seem reasonable and not too inhibitive to business.\textsuperscript{1016}

9.5.3 Dominance versus market power

Another question is whether to condemn unsuccessful attempts to abuse. The answer depends on the purpose of such a code. If it is a code of "ethics", the success of the practice would have no relevance. If, however, the code is considered to regulate prices only, an intention without result should not be prosecuted. No need to say that intent, which is always difficult to assess, would be very difficult to prove in an international setting.

There is no doubt that the definition of barriers to entry favoured by Chicago economists cannot be maintained for an international code. Cultural and structural differences do constitute barriers to entry and it is doubtful whether the USA would move backward from the lessons they gained from the CIA talks. In that sense the position taken by the EEC as to what constitutes a barrier to entry would serve as a better model: investment facilities, technology advancement, legal patent and other legal rights.

9.5.4 Practices which would be "abusive" behaviour

What constitutes an abuse in one society is something very specific to the economic organisation of that society. As mentioned in section 9.4, a competition system reflects fundamental choices of a society concerning the role, the rights and the obligations of firms and governments in economic activities. Actions and obligations of firms and governments may however be eroded. An example of these adaptations is what is happening in the EEC with legal and state monopolies. In the EEC states monopolies are numerous and seemed to have been legally protected by article 90 EEC Treaty. The Commission and the Court have began to consider

\textsuperscript{1015} See discussion in section on 9.6 private positive comity.

\textsuperscript{1016} In addition foreign exporter should be given, in antidumping procedures, the right to oppose counterclaims based on the provisions of the competition system of the importing country along the pattern developed in chapter 8.
these legal or state monopolies abusive if they do not perform well the functions for which they were created.\textsuperscript{1017}

What constitutes an abusive act can be considered the core difference between the EEC and the US systems\textsuperscript{1018}. Generally speaking, the US antitrust system is more tolerant of various practices than the EEC. This can be explained by the fact that the EEC system attempts to weigh many variables besides efficiency. In the context of an effective international code on competition, it is probable that states will want to address more than price efficiencies otherwise concessions made in such a code on competition laws may be eroded by changes in fiscal policies, property laws, environmental laws etc.

Moreover, a business practice which may be abusive in a domestic market because of the relative size of the other competitors may not be so abusive in the international context with foreign competitors. In that sense, it will be very difficult to agree on an established principle. Relying on a general rule of reason for anything other than naked cartels, as the new Mexican legislation does, brings the discussion back to the uncertainty carried by such balancing operations. Parameters and presumptions may be indicated but it would be doubtful if States were to agree on fixed rules.

\textbf{9.5.4 A single infraction of abuse of a dominant position}

\textsuperscript{1017} In the Hofner, Case C-41/90, Judgment of 23 April 1991, O.J. No. C 132/7, 23 May 1991, Porto di Genova, Case C-179/90, O.J. No C 10/8, 16 Jan 1992., and RTT v. GB-INNO, RTT v. GB-Inno, Case C-18/88, O.J. No. C 15/13, 21 Jan 1992, the Courts were confronted with inefficient legal monopolies. The Courts reaffirmed that the creation of a dominant position through the grant of exclusive rights within the meaning of article 90(1) is not in itself incompatible with 86. Where a legal monopoly behaves in an anticompetitive manner such as reserving to itself without justification, a related activity in a distinct market (RTT), such as refusing to use modern technology, extracting payment for services not requested and charging disproportionate prices (Porto di Genova), such as being the exclusive provider of a service and being incapable of satisfying demand for executive recruiting services while private executive placement companies are legally prevented from providing the same services (Hofner), such as discriminating in favour of its own programmes against foreign programmes (ERT), its practice may constitute an abuse of a dominant position.

\textsuperscript{1018} Discussion with Mr. Kuyper, ex-deputy Attorney General July Thursday 16/6/92, Brussels, EEC Commission during stage at the EEC Commission, DG IV.
An interesting possibility would be to retain a single infraction: the abuse of a dominant position by one or more firms. As mentioned in chapter 6, the Trans-Tasman CER contains no transnational provisions against restrictive agreements. In other words, member states can complain only if the restrictive agreement result is an abuse of dominant position. In Australia (and possibly in New Zealand) a firm with a market share of 25% can be viewed as dominant and there may be more than one firm holding a substantial degree of market power in the same market.

If, for instance, the threshold of market share for dominance were considered to be 25%, any act by firms or groups of firms holding less than 25% would be presumed legal. Some have already suggested this rule in the area of joint venture for research. Pitofsky would be open to such an idea for some mergers. Such a single infraction would also allow small enterprises to get together for selling, buying or advertising abroad and to benefit from economies of scale. If abusive acts were alleged to be taking place, other countries would have a right to require consultation only if the perpetrator's market share abroad and in the importing country was over 35%.

Such a single infraction of abuse of a dominant position could also cover mergers and joint ventures. Experience and mutual understanding will be necessary before States agree upon what constitutes an abuse. For this reason, as was mentioned in section 9.5.2, at the beginning, a few per se infractions, rather than elaborate abuse based on rules of reasons, should be favoured for certainty purposes.

Harmonization of the delays and requirements for the notification of mergers and joint ventures may be the first area where a consensus may be reached because

---

Chapter 9 page 334

of the proliferation of transnational agreements.\textsuperscript{1023} This issue was very well treated in the Report of the ABA Special Committee on International Antitrust and recommendations from the special group of the OECD should favour such an agreement.

9.5.6 The best institution: GATT, MTO, UNCTAD, OECD or a new forum?

Which international forum would be most adequate to begin negotiations on such an international code on competition and which one would eventually provide a forum for the settlement of disputes? The creation of a new forum is useless and unwise financially; other institutions and fora already have adequate infrastructure in place.

The UNCTAD has lost the confidence and trust of rich countries. Moreover, there is already an UNCTAD code on restrictive business practices which is more or less a political compromise. It is implausible that the position of developed and developing countries would change. The UN is too wide a forum to initiate such complicated discussions.

The GATT has already 105 members, most of which are developing countries, so the arguments against discussions at the UNCTAD apply to discussions at the GATT. Whatever moral factors might justify discussions involving all countries, restrictive business practices would be better dealt with by countries where multinationals have their head offices and countries with the biggest markets. It is understood, however, that any rule negotiated amongst a more limited group of countries would be applicable world-wide.

The OECD seems to be the best forum to initiate discussions and studies on the content of the international code on competition and on the possibility of introducing defences of restrictive business practices into antidumping cases. The OECD is known to be an efficient institution, and has only 24 member countries. Its code on investments and its recommendations for harmonization of taxation laws

\textsuperscript{1023} These global alliances are frequent in the semiconductor industry. See a description of a few of these global alliances between US EEC and Japanese companies in "Partners thank each other for the memory" FT 14/7/92.
are widely respected. Although most of its instruments are non binding, the OECD has initiated many valuable exchanges.

It would, however, be difficult for the OECD to become a centre for the settlement of disputes. Member states probably want the OECD to remain a forum for negotiation where most work is kept secret and not publicised. Since there is still much work to be done in terms of research and study, the OECD is the proper forum to start the ball rolling. The results would have to be transferred to a central organization.

According to the Uruguay Round proposals, a MTO (Multilateral Trade Organisation) would be founded and would exist in parallel with the GATT. Old members of the GATT would be invited to join the MTO and would have to comply with all its rules (i.e. improved rules which used to be contained in the old GATT codes). This would ensure that members of the MTO are subject to all the same rules. Non-members of the GATT will be able to join just the MTO. The MTO would be a good forum where disputes on restrictive business practices and their impact on market access and dumping could be solved. At the beginning the MTO will have only a few members since some of the GATT codes have less than 25 members. To join the MTO, a State would have to conform to all old GATT codes.

At the beginning, restrictive business practices should be alleged only as a defense to the presumption of dumping determined by national authorities. For these antidumping cases the MTO should provide for a tribunal or panels similar to the bi-national tribunal of the NAFTA. This tribunal would not act as an appeal tribunal but would limit its investigation to judicial reviews. This way, states would not relinquish too much sovereignty but exporters would be assured of a non-biased application of national antidumping laws.

9.6 Proposed alternatives

9.6.1 Private positive comity
An alternative would be to give to exporters or potential exporters rights of access to the tribunals and competition authority of the market which is alleged to be closed to foreign producers. Positive comity would be enforced by private litigants not by the public authority where the restrictive practice takes place. A preliminary system of conciliation involving both private parties and their government's representatives could be put in place for an interim period.

The other alternative is the one proposed by the US in the parallel agreement to NAFTA: a reinforced positive comity. Trade remedies are used against imports when the government of the exporting country refuses to enforce its own legislation on competition, labour and environmental standards against its national exporters.

9.6.2 The non-violation procedure of the GATT

Besides being addressed in the context of defense to antidumping measures, in reversing presumptions of dumping, RBPs could be used in the application of the "non-violation" procedure of article XXIII:2. The existing procedure of dispute settlements in the GATT authorise states to complain of violation of obligations specified in the GATT and its codes and for "injurious consequences arising out of acts not prohibited expressly by the GATT". Violations of the provisions of the GATT are considered to carry an irrefutable presumption of potentially adverse trade distortions and to constitute a "nullification or impairment" to the obligations of the GATT. Article XXIII:1(b) reads:

---


1025 Internal law would prescribe three types of obligations: obligations of conduct, obligation of result and obligation to prevent. The International Law Commission has also concluded that material damage is neither a constitutive element of an internationally wrongful act nor a (continued...)
If any Contracting Party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a)

...  

(b) the application by another Contracting Party of any measure, whether or not in conflict with the provisions of this Agreement.  
(c) the existence of any other situation, ...

Nullification and impairment are established in proving "adverse effect" and/or "frustration of reasonable expectations". In that sense the second paragraph of article XXIII of the GATT states that the dispute settlement procedure can be used when complaining about a loss of the benefits of the reduction of tariffs negotiated even though there is no infringement of a specific provision of the GATT.

It may be argued, along the lines of the proposals of the minority group of the Special Working Group of the GATT, that restrictive business practices or the lack of enforcement against them, constitute an impediment to one of the objectives of the GATT.1026

Some parallel agreement or guidelines and presumptions on what constitutes a restrictive business practice would still be necessary. In that sense the work undertaken by the OECD may lead to useful minimum standards.

**9.6.3 The ICSID type of tribunal**

Another possibility would be to use a tribunal like the World Bank, "ICSID". It is the only tribunal which brings together private parties (usually multinationals) and States to resolve problems of investment. This tribunal was created in response to pressures from Western firms which refused to invest abroad after all the expropriations of the sixties and seventies. When two States have signed an investment protection Treaty or, on a ad_hoc basis, a private firm may sue a

---

1025 (...continued)  
requirement of State responsibility. GATT recognises this possibility. An infraction of article XXIII does not depend on material damage. This is a civil law type of approach to fault.

1026 It should be remembered that the proposal to introduce a concept of restrictive business practices as impediment to trade was refused by the GATT members in 1960, because of the important discordance in domestic competition systems. See discussions in chapter 2, section 2.2.7.
country for not respecting a rule of international law. A similar pattern could be organised when a State wants to complain about actions of a private party.

9.7 Domaine Réserve

Clearly, countries have different economic policies. No one would dare argue that identical policies are necessary: "G7 finance ministers rediscover harmony - It does not mean that we have to have identical economic policies". In fact the existing international system is based on the principle of sovereignty and exclusive domestic jurisdiction. When the United Nations Charter was signed, one of its most crucial provisions was paragraph 7 of article 2 on the objectives of the UN which states that members of the UN would not intervene in "matters which are essentially within the domestic jurisdiction of any state".

The roots of the problem of dumping are often domestic competition policies. Until the traditional distinction between domestic and international affairs is phased out and the examination of domestic policies is allowed, problems of dumping practices and antidumping measures cannot be resolved.

9.8 Conclusion

An international code on competition may not be feasible. Competition is only one aspect of a country's economic policy and harmonisation of only one aspect of

---

1027 FT 1/3/93.

1028 Art. 2(7) UN Charter

Chapter I Purposes and Principles

Article 2

"The Organization and its members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following Principles.

... 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."
policy only may simply move the problem. Competition of competition laws is also a strong argument against harmonisation, since such competition will always stimulate innovation and force countries to try to outpace their neighbouring country in enacting better laws.

Parameters and guidelines as well as more transparency are, however, necessary. Presumptions and counterclaims could also be introduced in the antidumping laws where restrictive business practices, in both the importing and exporting country, would be assessed by the relevant competition authorities during the quasi-judicial antidumping process. A bi-national tribunal or an ICSID type of tribunal under the umbrella of the GATT would ensure a fair application by national authorities.

Increased transparency, collaboration and co-operation would only reduce discordance in international trade. More rights should be given to private and public persons to complain about the lack of enforcement in the exporting country. Importantly, provisions similar to article 7 of the EEC-US Agreement urging parties to justify their decisions on whether to condemn a business practice or not, is a useful step towards the estoppel precedent, and will prove provide guidelines for future cases.
CONCLUSION

It is worth recapitulating answers suggested by the present research since so many diverse issues had to be addressed in order to reach conclusions on the initial questions. The title of this thesis subsumes four main issues:

1. How do antidumping and competition provisions interact within a free-trade area?

2. Should antidumping measures be phased out within free-trade areas?

3. How may this be done in the context of the NAFTA?

4. Should (could) antidumping measures be phased out multilaterally in favour of an international code on competition?

1. How do antidumping and antitrust provisions interact within a free-trade area?

Actual policies, substantive rights and procedural standards of antidumping laws differ from those of antitrust (or competition) laws. It was argued in chapter 3 that the differences between rights and obligations imposed on domestic producers, as opposed to those imposed on foreign exporters, violate the obligation of National Treatment as contained in article III of the GATT and article 301 of the NAFTA. Within a free-trade area, the difference in treatment between domestic firms and firms from another member state becomes more shocking and counteracts the efforts of member states to create a free trade territory. The discipline of national treatment would constitute one of the best avenues for reconciling trade and competition standards and for reducing the anti-competitive effects of antidumping measures.

As discussed in chapter 2, various Recommendations and Decisions of the OECD have attempted to reconcile these dichotomies and encouraged states to weigh the anticompetitive impact of trade measures in their domestic markets as
well as in foreign markets. These acts have, however, a modest enforcing role, although the OECD provides an important forum of discussion for states.

States have also tried to reduce clashes of jurisdiction, as well as procedural and substantive standards dealing with pricing and other business practices, in bilateral and regional arrangements of collaboration. Within the common market of the EEC, where a high level of integration and harmonization of domestic economic policies exists, antidumping measures have been phased out. Currently a central competition law, parallel to the national competition laws, regulates restrictive business practices which affect trade between member states. The law is enforced nationally and at the Community level.

Increased integration tends to encourage the disappearance of antidumping measures between member states. In turn the absence of antidumping measures will tend to favour further integration. Indeed, it was argued in chapter 5 that phasing out antidumping duties within a free-trade area seems to be a crucial criteria for the realisation of "trade creating" free-trade areas (as indicated by Article XIX (8)(b) of the GATT).

2. Does the law require antidumping measures within free-trade areas to be phased out?

Firstly, it was argued in chapter 5 that there is no inherent conflict between multilateral economic relations and regional integration, including free-trade areas. Regional arrangements have always existed for security, cultural and economic purposes. It is unreasonable to think that the founding members of the GATT wanted to abolish this fundamental right of states to combine. It is more plausible to assume that member states wanted to maintain the positive aspects of regional groupings while ensuring the spread of their beneficial impact.

When it favours free-trade areas, the GATT does not hurt countries outside the area. The GATT requires that previous levels of trade with non-members of the FTA should be maintained. Although these statistics are difficult to appreciate, some economists seem to admit that trade diversion is minimal compared to trade creation in existing free-trade areas. Successful free-trade areas (and customs
unions) also tend to spread the beneficial impact of their economic integration over their frontiers. Countries outside an area of economic integration tend to apply for membership into the grouping, thereby increasing the geographical zone of the integration. Outside countries may also request multilateral negotiations, offering privileges already accounted for in a neighbour grouping, as was the case for the Tokyo Round pressed by European who were not members of the EEC.

Moreover, the concept of free trade area introduced by the GATT can be viewed as a transitional step towards further integration. Once they adjust to the reduction of tariffs, firms, and specially businesses which function on large and transnational markets, should lobby for equal external favourable trade policies and further harmonisation in order to be treated equally with trade partners from the other member states. This would consequently lead the free-trade area closer to a customs union, as members of the EFTA-EEC FTAs have been moving. In fact, some economists would argue that free-trade areas are inherently transitional. They either die out or lead towards further integration such as customs unions. In the initial negotiations of what is today article XXIV of the GATT, the US delegation accepted this new concept of free-trade areas as a legitimate step before the full realisation of customs unions.

To favour such increased integration within a free-trade area, the GATT recommends the abolition of "regulation restricting trade between member states". Tariffs and non-tariff barriers should therefore be reduced and eventually eliminated. Since there is no doubt that antidumping measures do restrict trade, they too should be phased out. The problem, however, is that States use antidumping laws as de facto "buffers" to counterbalance all forms of structural, social and legal differences and non-tariff barriers between countries. In order to phase out antidumping measures, some level of harmonization or adaptation of the economic policies of the countries concerned must be reached, the most important of which is competition policy.

Since the abolition of antidumping measures between member states of a free-trade area is a necessary condition to benefit fully from the process of integration,
(to the best advantage of the member states and states outside the free-trade area), harmonization of national competition laws and policies becomes a pressing and crucial step.

3. **How should antidumping measures be phased out within NAFTA?**

   As discussed in chapters 7 and 8, the most plausible model for NAFTA would be based on the experience of the Trans-Tasman CER, *i.e.*, a transnational application of domestic laws against the abuse of market power. In NAFTA, new provisions would take into consideration the dissimilarities between the competition laws of the three countries. Additional political, as well as much more exchange and collaboration between national administrations, would have to take place in order to harmonize practices and establish some consistency of enforcement of competition laws.

   Since the three jurisdictions prohibit horizontal agreements between competitors, there is no need to provide for the extraterritoriality of these prohibitions. As soon as a firm is part of such a scheme in any of the three country, national laws will catch the cartel. On the other hand, there is an important need for collaboration in enforcing these anti-cartel provisions. Furthermore, there exists a great need for harmonization and collaboration in the area of joint ventures and mergers. Joint ventures and mergers will tend to increase as a direct consequence of the integration and rationalisation process of the industry within the NAFTA. Cumulative regulations within NAFTA should be refined.

   In case of a conflict of applicable law, it is suggested that the law of the market where the restrictive business practice takes place, as opposed to the law of the market where effects can be felt, should be the applicable law.

   The main substantive differences between the Mexican, American and Canadian competition laws concern vertical restraints, price discrimination and thresholds of market power. There are also variations in the rights of private parties, the level of compensation as well as in the procedure and defenses for mergers and joint ventures.
To favour a narrowing of these national differences when enforcing the suggested system of conflict of laws, a respondent should always be authorised to submit additional defenses admitted under its national law, as well as those available under the plaintiff's national law. It is suggested that most defenses to antitrust actions tend to be arguments of economic efficiency. This assessment of efficiency should be done taking into consideration NAFTA. National Courts, as in Europe, would be responsible for enforcing policies of regional integration.

During the transitional period, objections for reasons of "ordre public" should be respected when duly argued by the relevant government.

The national court of the applicable law would have jurisdiction. It would sit in the district of the defendant wherever its place of business be in NAFTA. Lawyers with legal authority to argue on the applicable law should be authorised to follow their Court to the in other district. Other agreed arrangements should be possible as long as the "national interests" of any state are not at stake.

The discordance in solutions depending on the countries involved should not be overestimated. It should be viewed as a stimulus which will increase lobbying for change and activate the work of harmonization. Firms will have to be aware of the laws and defences which are available to their trade partners. This scheme would bring about further applications of the rule of reason.

According to the proposed model, the level of compensation should be determined by the applicable law with the restriction that compensation should not be higher than what would be awarded under the territorial law of the plaintiff, unless counterclaims are introduced. This way firms will not be encouraged to initiate litigation in another system.

A few amendments to NAFTA member states' competition laws would have to be introduced. First of all, the three national laws should recognise that dominance may take place anywhere within the NAFTA territory. These laws should also give legal standing to any legal person of a NAFTA state. Articles 78 and 79 of the Canadian Competition Act, creating the infraction of abuse of a dominant position, should be amended to provide for private rights of actions. The Mexican law
should introduce private rights before the end of the administrative and judiciary process.

Before the beginning of the transitory period, antidumping laws should be made less anticompetitive in order to narrow the gap between trade and competition actions amongst NAFTA member states. A sensible way to introduce the gradual consideration of commercial interests, other than those of firms competing directly on "like products", is through the adoption of a detailed public interest clause or a lesser duty rule. Independent importers and commercial users of the alleged dumped products are also "nationals" of the importing country and their commercial interests should be recognised. They are also part of the national industry. They provide jobs and their international competitiveness should be viewed as being as important as the survival of the industry directly competing with the imports.

The introduction of such a consideration of the impact of antidumping duties on commercial users of imports would alter considerably the injury test while also narrowing the gap between the standards of competition cases and those usually imposed in antidumping cases. It would be even more beneficial if the Competition authorities would systematically intervene in major antidumping cases and if an assessment of the concentration of the importing market was provided to the antidumping authorities. Notwithstanding such a legal and economic assessment of the needs of other interest-groups, a political decision to impose antidumping measures would always remain possible, but it would force governments to be more transparent as to which interest-group it was favouring to the detriment of another.

This gradual and transitional way of rendering antidumping measures more competitive and closer to competition laws would be reinforced with the continuous supervision by bi-national panels. Like the councils in the EFTA, the Europe Agreements and the EEC-EFTA FTAs, the NAFTA Commission would become a political forum where restrictive business practices and dumping may be discussed along the factors and criteria identified in the checklist of the 1986 OECD Recommendation.
Parallel to the transnational application of domestic competition laws, national antidumping laws should gradually be phased out. This operation may take place product by product along a methodology parallel to the multilateral negotiations of reduction of tariffs. A very short sunset clause should be adopted and antidumping duties should not remain in force for a longer duration than the transitional period.

Although some experts would advocate a drastic end to antidumping measures, it is implausible that the US lobby, including Washington lawyers, would tolerate such a drastic loss of privileges. Rather, it would be more convincing to emphasise the need to provide equal rights to US commercial users since they provide for many jobs. It would also be beneficial to stress the addition of new rights that would be available to US firms allowing them to take advantage of the provisions of the competition laws of the other NAFTA member states.

4. Should (could) antidumping measures be phased out multilaterally in favour of an international code on competition?

The discussion on an eventual international code on competition seems to follow logically the discussions on a system of competition for NAFTA. This discussion merely sets the grounds for further research.

The link between the use of antidumping measures and the threat to security is parallel to the need for further regional unions. Until two or more countries have formed a secure environment reflected in a comprehensive trade agreement, antidumping measures will remain strategic actions against the threat of disturbance caused by different foreign business practices and regulations. Outside the context of secure regional groupings, it is implausible that all trade protection laws will disappear completely.

International economic efficiency may indicate a rational organization and repartition of production without reference to any nationality. The world does not seem ready to accept an important dependence on another country’s producers because they are more efficient in purely economic terms. In fact, until economists can produce an adequate equation coordinating inflation, interest rates, currency value, trade balance, unemployment and economic stability on a short term -
because people live only for a short term -, it seems reasonable to feel "threatened" by a surge of imports causing massive job loss. Certain industries remain sensitive because of their geographical location, national pride or for security reasons. In a democratic society where the majority is influenced by the media, governments will be condemned if unemployment continues.\textsuperscript{1029}

There is no definite answer to the threat caused by foreign practices or to the limits of reasonable national identity. It is not the function of lawyers to judge these positions. Economists and political scientists lawyers are able to do so if they wish. The problem, however, rests in the legal means chosen to enforce such unclear and non-transparent policies. Most imports caught in antidumping procedures are very reasonably priced according to economists and most business people.

Therefore, if the importing country wants to help its domestic industry to adjust to a surge of imports, antidumping measures would not be the best tool for such a strategic use. Safeguard measures would be more transparent and efficient procedures. According to this, the focus would be on the reorganisation of the industry in the importing country and not only on the practices of firms in the exporting country, especially if the alleged dumping is beneficial to some interest-groups in the importing country.

Another parallel possibility would be to widen the "security" exception of article XXI of the GATT to include "sensitive products". A list of "fully tradable goods" and another list of "partially tradable goods" could be adopted. For the second category, the level of maximum penetration would be acceptable and no compensation would be required.

Lowenfield\textsuperscript{1030} and to some extend Caine\textsuperscript{1031}, have suggested the complete

\textsuperscript{1029} A title in the elitist Financial Times such as "Ford redundancy threat blamed on Japanese plants", 11/3/93 p.9, is evidence of some feelings that national identity is threatened by the surge of imports. John Kincaid expressed a similar opinion in his paper "Consumership versus Citizenship" (Conference on "Federal States and International Relations", London 13-14 April 1992): "Consumership is overtaking traditional notions of citizenship as individuals struggle to define what it means to be a good American in a Japanese car."

\textsuperscript{1030} "Fair or Unfair does it matter" Corn J. of Int'l L. 1980, p.205.
abolition of the distinction between fair and unfair trade laws. In view of the moralist US Congress, such proposals are unrealistic. Tarullo\(^{1032}\) has suggested the creation of a monetary entitlement for workers displaced by imports and the creation of local adjustment councils. This proposition is nothing but the adoption of an industrial policy.

Apart from antidumping measures within regional arrangements, antidumping laws will likely be maintained. They can, however, be made more transparent. It is hoped that the lobbying by other commercial interest-groups in today's sophisticated industry will press for a wider range of variables to be considered before imposing antidumping measures.

5. **Concluding comments**

  Within a regional grouping, the phasing out of antidumping measures is the only way to integrate economies, rationalise the production of the industry and fully use GATT's opportunities.

  In addressing domestic practices of government and business, governance models should evolve more coherently.\(^{1033}\) States have already initiated discussions on unemployment, labour standards, government procurement, and other domestic policies.

  Importantly, the traditional distinction between two spheres of public and private competition, states and firms, cannot be maintained. The competition between

\(^{1031}\) (...continued)


\(^{1033}\) See the discussion on the inter influence of business practices in chapter Nine section 9.1.6. Americans are now penetrating more and more the Japanese market and borrowing some beneficial aspects of their corporate governance models, while the Japanese have started realising the flaws of their inflexible corporate and social organisation.
states is a competition of corporate models\textsuperscript{1036} and of social (public) organisations. Perhaps some extremist proposals such as the one by Schoenbaum\textsuperscript{1037} for a unified system of remedies for both public and private unfair practices make sense.

The EEC competition system has already recognised this close interaction in dealing with unfair business and government practices in its system of rules. In fact, economists from the Chicago School would argue that all trade distortions come from states either through positive actions or tolerance of detrimental behaviour that the same government had earlier created.

Private and public sources of distortion should be addressed through an international code on competition. The EEC system is a more suitable model for an international code on competition because it has gained experience in addressing various policies based on elements additional to efficiency. It also puts into relation acts of governments and behaviour of firms. Finally, it has developed an expertise in administering a system of competition which functions in parallel to national competition laws.

Even with the adoption of such a code, it is doubtful that antidumping laws may disappear multilaterally. Security threats will remain. The need to improve the multilateral enforcement of antidumping laws is more urgent. The introduction of stronger "Lesser Duty" rules and effective "Public Interest" clauses should improve antidumping records.

To the extent that sporadic antidumping measures act as a valve against protectionist pressures and are better than economic isolation, they have improved international relations. They constitute, however, incomplete solutions to frictions caused by different domestic policies, laws and practices. Rather, the initial source of frustration should be addressed. It may be time to initiate discussions on an


international code on competition or preferably, on an international code of conduct for firms and governments.\footnote{1038} Only such a fundamental discussion can avert the threat of war. The traditional distinction between domestic and external policies, and the sacrosanct "domaine réservé", put forth by article 2(7) of the UN Charter, must be eroded.

Focusing only on antitrust provisions, a single aspect of an overall economic policy, may, however, simply move discriminatory treatments to other areas. The co-ordination of investments, monetary policies and trade was the very purpose of the Bretton Woods system. Indeed, the shape of the Bretton Woods triangular system must now include a fourth cornerstone, namely that of a competition policy. Perhaps this would succeed in resuscitating the great dreams of the World War II negotiators.

\footnote{1038} "Priorities and purpose at the Heart of capitalism" FT 12/5/92; "Ethics arrives on the Agenda" FT 8/12/92; "When you ask a silly question" FT 1/2/93; "Flying in the face of corporate ethics" FT 14/2/93.
BIBLIOGRAPHY

Chapter 1


Nicolaides P., "Does the International Trade System Need Antidumping Rules?", *World Competition*, vol.14 no.1, p.103.


Chapter 2


"International Co-operation in Antitrust, The Fulton-Rogers Understanding", 1959. (Canada and US)


"Preparations for A Handbook on Restrictive Business Practices" TD/B/RBP/, 29 January 1990 and other documents under the same quote.


"Revised Recommendation of the Council concerning co-operation between Member countries on restrictive business practices affecting international trade" [C(86)44(final)] (adopted by the Council at its 643rd Meeting on 21st May 1986).


US-Australia Antitrust Cooperation Agreement. (Text as initialled 5/17/82.)
Chapter 3


Grey R., "Trade Policy and The System of Contingency Protection in The Perspective of Competition Policy", 1 February 1986, 129 pages. (Paper presented to the OECD, which has not yet been made public although it has been used and cites numerous times.)


Chapter 4


Davey W., "An Analysis of European Communities Legislation and Practice relating to Antidumping and Countervailing Duties", in 1983 Annual Proceedings Fordham Corporate Law Institute, 1984, p.41


Gormley L., "Admissibility" 1992, ESC Conference UCL.


Council Regulation No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the EEC O.J. No L 209/1.


Canadian Import Tribunal, "Public Interest Grain Corn", Report of the Canadian Import Tribunal under Section 45 of the Special Import Measures Act, October 20, 1987.
Chapter 5

Anderson K., "Is an Asian-Pacific Trade Bloc Next?", J.W.T. vol.25 no.4, p.27.


Culbert J., "War-time Anglo-American Talks and the Making of the GATT", World Economy vol.10 no.4, p.381.


Focus NO 83, August 1991, p.10 "De facto application of the GATT".


Reported Discussions of the International Law Commission, 1498th meeting, 12 June 1978, p.125ss.


Eisenberg, J., "Predatory Pricing in the Context of Australian and New Zealand Competition Law", Commerce Act Enforcement Division, Commerce Division, Wellington.


Langenfeld, J. and Blitzer, M., "Recent Developments Article: Is Competition Policy the last thing Central and Eastern Europe need?", Am.U.J.Int'l L.& Pol'y Vol.6, p. 347.


Joint Statement by the Prime Minister of Australia, the Honourable Bob Hawke and the Prime Minister of New Zealand, the Right Honourable Geoffrey Palmer, 2 July 1990.

Opinion 1/92 of the Court of Justice of the European Communities, signed on 10 April 1992.

Opinion of the Court 14 December 1991, Opinion 1/91. Opinion delivered subsequent to the second subparagraph of Article 228(1) of the Treaty. "Draft Agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area."

Regulation (EEC) No. 2011/73 of the Council of 24 July 1973, amending Regulation (EEC) No. 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, J.O. No L 206/3.

Brazil P., "The Developing Closer Economic Relationship between Australia and New Zealand", 1988 Paper given by the Secretary to the Attorney-General's Department for the Bicentennial International Trade Law Conference, Canberra.

17th International Trade Law Conference, 1-2 September 1990, Session 5: Review of Developments in International Trade Law, "Recent Developments in Trans-Tasman Business Law", by John Broome, First Assistant Secretary, Business Affairs Division.


Act on the Privatisation of State-owned enterprises in Poland: The New Business Frontier

Agreement between the Government of the United States of America and the Commission of the European Communities regarding the Application of their Competition Laws.


Agreement on the European Economic Area, ESC ref: SN 102/2/92


Trade Practices Act 1974 (New Zealand - no other info on document)
Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Communities) and the Kingdom of Spain, the Portuguese Republic, concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and the European Atomic Energy Community.


"Privatisation of State-owned enterprises in Poland" in Poland: The New Business Frontier


Antimonopoly Law of The Republic of Poland, copy given by the OECD.


Commission Recommendation No. 3018/79/ECSC of 21 December 1979 on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community, J.O. No L 339/15.


Commission Decision No. 2177/84/ECSC of 27 July 1984 on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community, O.J. No L 201/17.

Commission Decision of 1 March 1989 closing the anti-dumping proceedings concerning imports into Spain of choline chloride originating in Belgium (IV/AD/87/1 - Choline Chloride), O.J. No L 63/32.

Convention Establishing the European Free Trade Association, EFTA.

Council Decision No. 813/86/ECSC of 14 March 1986 on protection against imports which are the subject of dumping between the Community of Ten and the new Member States or between the new Member States during the period throughout which the transitional measures laid down by the Act of Accession of Spain and Portugal apply, O.J. No L 78/10.


Council Regulation (EEC) No. 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community, O.J. No L 201/1.


Council Regulation (EEC) No. 812/86 of 14 March 1986 on protection against imports which are the subject of dumping between the Community of Ten and the new Member States or between the new Member States during the period throughout which the transitional measures laid down by the Act of Accession of Spain and Portugal apply, O.J. No L 78/1.
Council Regulation (EEC) No. 1411/77 of 27 June 1977 amending Regulation (EEC) No. 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, J.O. No L 160/4.


Règlement de la Commission pour l'application du paragraph 2 de l'article 91 du traité instituant la Communauté économique européenne, J.O. 597/60.

Current Issues in New Zealand Competition and Consumer Law, Competition Review, Vol. 2, December 1989,

Europe Agreement: EC/Poland, CAB/11/124/91A

Europe Agreement, EC/CSFR, 22.11.1991

European Economic Area - Main Agreement, copy given by the EC Commission.


Mexican President Salinas De Gortaro Carlos, Speach for the presentation of the proposed Federal Act Governing Economic Competition, Ministers of the Chamber of Deputies, Congress of Mexico, 17/12/92.


Parker R. "Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement" J.W.T vol.23, p.83.


Salinas De Gortari Carlos, President of Mexico "Address at the Annual Meeting of the American Society of Newspaper Editors", Harvard University, April 10 1991.


Legislation

Proposed Mexican legislation on Economic Competition, obtained from the Government of Canada, English version.


BOOK TEN Private International Law, Article 3076 to 3168 of the New Civil Code of Quebec

Special Import Measure Act, RSC 1985 Chap. S-15 and amendments


Canadian International Trade Tribunal Act, RSC

Competition Act RCS 1985 Chap.C-23

Competition Tribunal Act RSC chap C-26

Rules of procedures for Article 1904 Binational Panel Reviews, Canada Gazette, Part I June 13, 1992
Newsletters

FOCUS GATT Newsletter, No 86 November/December 1991

FOCUS GATT Newsletter, No 88 March 1992

Register of United States Barriers To Trade, External Affairs and International trade Canada, April 1992


First Report on Competition Policy (Annexed to the "Fifth General Report on the Activities of the Communities") Brussels-Luxembourg, April 1972
Chapter 9


A Bill "To Promote the industrial competitiveness and economic growth of the United Statews by stengthening and expanding the civilian technology programs of the Department of Commerce, amending the Stevenson-WydlerTechnology Innovation Act of 1980 to enhance the development and nationwide deployment of manufacturing technologies, and authorizing appropriations for the Technology Administration of the Department of Commerce, including the National Institute of Standards and Technology, and for other purposes". 103D Congress S.4, 21 January 1993.

A Bill "To establish a Government corporation to assist the private sector, through loans, loan guarantees, and/or equity technologies". 20 July 1992
Conclusion


BOOKS


Schioch L. and McDonald B., *Dynamic Change and Accountability in a Canadian Market Economy*, Ministry of Consumer and Corporate Affairs, 1976


Viner *Dumping*, 1923, Chicago, Univ. of Chicago Press, 112 pages.


Collective Papers and Reports

**European Economic Commission**

*Report on Competition Policy*, ECC, Luxembourg, 1972

*Competition Law in the EEC*, Commission of the European Communities, Brussels, 1981

**Organisation of Economic Co-Operation and Development**


Transfer Pricing and Multinational Enterprises, 1979

International Investment and Multinational Enterprises -

Responsability of Parent Companies for Their Subsidiaries, 1980

International Investment and Multinational Enterprises - Accounting Practices in OECD Member Countries, 1980

Harmonization of Accounting Standards, 1986


Accounting Standards Harmonization No.3, 1987

Buying Power - The Exercise of Market Power by Dominant Buyers, 1981

Consumer Policy During the Past Ten Years, 1983

*Competition Law Enforcement - International Co-operation in the Collection of Information*, 1984

International Trade and the Consumer, 1986
Competition and Trade Policies: Their Interaction, 1986

Competition Policy and Joint Ventures, 1986

International Investment and Multinational Enterprises - The OECD Guidelines for Multinational Enterprises, 1986

Competition Policy and Joint Venture, 1986

Interdependence and co-operation in Tomorrow's world, 1987

International Mergers and Competition Policy, 1988

Manual for the guidance for Chairmen of Subsidiary Bodies of the Organisation, 1988

Competition Policies in the OECD Countries, 1989

Competition Policy and Intellectual Property Rights, 1989

Predatory Pricing, 1989

Liberalisation of Capital Movements and Financial Services in the OECD Area, 1990

Competition and Economic Development, 1991

Consumers, Product Safety Standards and International Trade, 1991


World Bank, Washington


Conway P and Dhar S, The Economic Effects of Widespread Application of Antidumping Duties to Import Pricing, October 1991 - WPS 782
Dutz M., Enforcement of Canadian "Unfair" Trade Laws, October 1991 - WPS 776


GATT
Restrictive Business Practices, 1959

Canadian Government

Schioch L. and McDonald B., Dynamic Change and Accountability in a Canadian Market Economy, Ministry of Consumer and Corporate Affairs, 1976

A Proposal for Class Actions Under Competition Policy Legislation, prepared for the Department of Consumer and Corporate Affairs, Ottawa, Canada, 1976

Copyright in Free and Competitive Markets, ESC Publishing Ltd.

American Bar Association

Criminal Antitrust Litigation Manual, American Bar Association, 1983

Report of the Special Committee on International Antitrust, 26 June 1991, ABA Section of International Antitrust, 542 pages.

Association of the Bar of the City of New York

C.D. Howe Institute, Toronto


Trade Policy Centre, London


Institute for Research on Public Policy, Montréal


Group of Thirty, Washington


Institute for International Economics, Washington


**The Brookings Institution, Washington**


**Royal Institute of International Affairs, London**


**International Law Association, London**


**UNCTAD, Geneva**


