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The Protectionist Bias of the Antidumping Laws of the NAFTA Members and Reform Proposals Based on Competition Law

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La présente étude vise analyser les lois antidumping des pays membres de l'ALENA de manière faire ressortir le biais protectionniste de celles-ci proposer des réformes pour réduire ce biais.

La partie introductive de la présente étude va exposer les arguments favorisant la libre circulation des biens dans le contexte d'un zone de libre-échange et l'importance cruciale de diminuer les obstacles non tarifaires, particulièrement en ce qui concerne l'application des droits antidumping. C'est donc, par l'étude critique de l'application des lois antidumping l'intérieur d'un zone de libre-échange que la nature protectionniste des lois antidumping devient de plus en plus évidente.

La création de l'Organisation mondiale du commerce a été responsable de la croissance des échanges commerciaux multilatéraux. Malgré celle-ci, l'Annexe 1 de l'Accord instituant l'Organisation mondiale du commerce, contient l'Accord rélatif la mise en oeuvre de l'article VI. Ce dernier accord permet, sous certaines conditions, au pays membre de prendre des mesures antidumping.

Une analyse économique des motifs qui sous-tendent les lois antidumping démontrera que celles-ci sont dénouées de toute justification économique et ont pour effet d'empêcher des gains significatifs de l'échange. De plus, étant donné que le dumping entraîne chaque fois que le prix d'un produit exporté se trouve être inférieur au prix auquel cet exportateur le vend sur son propre marché, il existe dans

les méthodes de calcul de dumping une discrétion inhérente qui est souvent tranchée en faveur du producteur domestique.

Vu la nature protectionniste des lois antidumping, l'imposition des droits antidumping peut avoir des conséquences néfastes sur le commerce mondial, cause du détournement artificiel des échanges commerciaux.

C'est dans cette perspective que nous avons proposé des modèles de réforme des lois antidumping en se servant des dispositions appropriées des lois de la concurrence des pays membres de l'ALENA. Étant donné que l'objectif primaire des lois de la concurrence est de promouvoir l'efficacité des échanges commerciaux en intensifiant un environnement compétitif, celles-ci pourraient servir comme substitut approprié.

Malheureseument, la réalité politique qui influence les échanges commerciaux sur le plan mondial risque de faire obstacle une telle proposition. Notre étude se termine en retenant comme politiquement réalisable, une modeste proposition de réforme tout en apportant des modifications visant rendre les lois antidumping plus sensibles aux besoins des consommateurs et de l'économie générale, et non seulement aux intérêts des producteurs domestiques.

En conclusion, nous croyons que la complexité extraordinaire de ce problème devrait trouver une solution dans le contexte de l'ALENA et surtout en tenant compte de l'importance du rôle que l'OMC sera appelé jouer dans l'avenir des échanges commerciaux sur le plan multilatéral.

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LIST OF ABBREVIATIONS

Amer. J. Int'l L.	American Journal of International Law
Antitrust L. & Econ. Rev.	Antitrust Law and Economics Review
BISD	Basic Instruments and Selected Documents
BNA	Bureau of National Affairs
B.U.L. Rev.	Boston University Law Review
C.J. of Trans. Law	Columbia Journal of Transnational Law
CFR	Code of Federal Regulation
DOC	Department of Congress
F. Supp.	Federal Supplement
Fordham Corp. L. Inst.	Fordham Corporate Law Institute
FTC Watch	Federal Trade Commission Watch
Geo. Wash. J. Int'l Law & Econ	George Washington Journal of International Law & Economics
H. Doc.	House Document (United States Congress House Document)
I.L.M.	International Legal Materials
Int'l Trade Rep.	International Trade Reporter
IOCU	International Organization of Consumers Union
J. Dec. Econ.	Journal of Developing Economy
JWTL	Journal of World Trade Law

L.Ed.	Lawyers' Edition
Mich. Y. B. Int'l Leg. Stud.	Michigan Year Book of International Studies
Minn. Global Trade Review	Minnesota Global Trade Review
MIT	Michigan Institute of Technology
NPA	National Planning Association
OECD	Organization for Economic Co-operation and Development
Pub. L.	Public Law
Rev. Int'l Bus.L.	Review of International Business Law
S. Cal. L.R.	Southern California Law Review
Stanford J. Int'l L.	Stanford Journal of International Law
Stat.	Statute
Trade Reg. Rep.	Trade Regulation Reporter
U. Chi. L. Rev.	University of Chicago Law Review
U.N. Doc	United Nations Documents
U.S.C.	United States Code
UNTS	United Nations Treatise Series
USITC	United States International Trade Commission
Wall St. J.	Wall Street Journal
Wash. & Lee L. Rev.	Washington and Lee Law Review

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DEDICATION

To my dear parents, Pinelope and Nikiforos for their inspiration and endless affection.

INTRODUCTION

The fundamental building blocks of the North American Free Trade Agreement ("NAFTA") foster an increase in trade through the elimination of tariff and nontariff barriers and favour the strengthening of economic relations between the signatories. Article 102 b) of the Agreement specifically puts forth as an underlying objective, among several others, the pursuit of fair competition within the free trade area. Simply stated, NAFTA's benefits are only attainable in an open and competitive marketplace, free from trade distorting, protectionist practices such as antidumping laws and policies. For this reason, the centre point of the present thesis will evolve around the assessment of the World Trade Organization's Antidumping Agreement and the manner in which it has been implemented by the NAFTA signatories. The main objective of the thesis, therefore, will be to identify major impediments of legal, political and economic nature to fair competition in the free trade zone, specifically with regard to the use and application of the NAFTA signatories' antidumping law and policy. In addition, the legitimacy of antidumping measures within a free trade area will be discussed and critically analyzed in light of articles VI and XXIV of the GATT(WTO) Antidumping Agreement.

We will demonstrate that the efficiency and "fairness" rationales used in support of dumping, defined as international price discrimination, where a higher price is charged in the home market than in the import market, are not founded on sound principles. In political terms, all antidumping measures are biased in favour of

a privileged interest-group: the domestic producers. In order to determine where contemporary thinking about trade remedies went wrong, it is important to refer back to the origins of the GATT. Chapter one of the present thesis traces the history and evolution of the GATT in order to fully comprehend the present day existence of article VI of the GATT(WTO) Antidumping Agreement. After the end of World War II, maintaining peace and stability was the major objective of the western leadership. As such, the western leadership insisted that world trade be open and unregulated. Our analysis in chapters one and two of the thesis will demonstrate that the western leadership was to a certain degree successful in moving the world toward unrestricted international trade, however, and more importantly, that the GATT(WTO) also reveals some of the compromises that had to be made along the way. GATT provisions that allow trade remedies such as antidumping, are among the significant compromises. Furthermore, a clause by clause analysis of the WTO Antidumping Agreement will allow us to determine to what extent the drafting of the provisions provides for discretion in its application and enforcement by the GATT members.

Since the traditional economic rationale for antidumping measures has been the threat of international predation, its is crucial to analyze such rationale in light of the increase in transborder commercial activity within the NAFTA, domestic economic policies, and business practices. Analyzing the origins, purpose and functioning of the antidumping measures will allow their fallacies and weaknesses to surface. Once the fallacies are analyzed, alternative methods of reform or

replacement will be elaborated upon in order to provide a chosen option that will compliment the trade enhancing effects of the NAFTA. Consequently, chapter four of the thesis, will attempt to propose reform models and recommendations based on competition/antitrust principles. The comparative analysis of the NAFTA signatories' competition/antitrust regimes will be undertaken in order to determine, firstly, whether the obligation pursuant to section 1501(1) of the NAFTA has been adequately fulfilled, and secondly, whether certain competition/antitrust principles may be used to complement the inherent protectionist weaknesses of the NAFTA antidumping regimes or used as a substitution regime.

The last section of chapter four of the thesis will set out specific recommendations and methodologies by which the antidumping enforcement agencies and administrative courts of the three NAFTA parties can make their antidumping adjudication and enforcement processes more nearly complementary and more effective in preserving an efficient, competitive and trade enhancing free trade area using competition law provisions dealing with anticompetitive cross border trading analogous to dumping.

Despite the fact that the replacement of the antidumping regime with competition law principles is legally and economically feasible, we should not lose sight of the fact that regardless of the degree of economic integration the parties have agreed to abide by in the NAFTA, the principle of state sovereignty and the protection of special interest groups cannot be ignored. If we are to derive lessons from the past, we cannot allow unexplored the reality that suitable reform proposals

cannot be comprised of a full scale elimination of the antidumping regime and replacement by competition policy. Competition policy is probably one of the areas of public policy most influenced by changes in the trading environment. When trade policy manages to predominantly foster trade liberalization, it tends to strengthen the competitive process at the domestic level and it complements the enforcement of domestic competition law. On the other hand, trade measures such as antidumping can also inhibit domestic competition policies, since their underlying objective is to determine injury to competitors and not to the competitive process as a whole. From this perspective, the second part of chapter four, will address the growing conflict between competition law, on the one hand, and antidumping law on the other.

However, in order to lay the basis for the development of a regime to replace the current system of trade remedy laws, it will be apparent from the present analysis, that one cannot assume a one dimensional world in which the dictates of economic efficiency reign supreme. It would be futile to make reform proposals that simply assume away the policymaking processes that created the current trade remedy law regime in the first place. Consequently, in order to propose a functional model for trade reform within a fair competition law framework, chapter four, section two will complete the analysis by recalling the forces that perpetuate the trade remedy law regime that were previously seen in chapter three of the thesis. The explanation of why protectionism comes about, why it takes form, and why it continues, will be an integral factor in our proposal. Unlike competition policy, trade and investment policy is guided by a broader set of objectives, economic,

social, political and others. Thus, the public law model required to reconcile these diverse objectives does not lend itself easily to broad enforcement standards. The last section of the final chapter will conclude by emphasizing the crucial importance of undertaking reform without necessarily waiting for the NAFTA members to undergo a deeper integration process.

CHAPTER I

1. THE WTO AND THE NEW TRADE ORDER

1.1 Preliminary Remarks

Globalization and interdependence of the economies of the world is here to remain for at least the foreseeable future. In a world of steadily increasing global competition, many nations strive to remain competitive nationally as well as internationally. The successful conclusion of the Uruguay Round negotiations gave birth to the much awaited World Trade Organization (WTO) embracing an extensive array of new and detailed trade rules. The conclusion of the Uruguay round of multitlateral trade negotiations was the most extensive on the international trade level, involving more governments than under any previous round of negotiations. The Uruguay Round's *Final Act,* adopted at a ministerial meeting in Marakesh, Morocco on April 15, 1994, is comprised of 30 agreements and understandings as well as national commitments to lower tariff and nontariff barriers to trade. Finally, the *Final Act* encompasses some 27 decisions and declarations which add some precision to the agreements and understandings. We should not forget that the old 1947 GATT is encompassed in the *Final Act,* along with the appropriate modifications. All of these diverse agreements, understandings, decisions and declarations are brought together in a unified whole to be

administered by the World Trade Organization. The scope of many of the trade rules contained in the WTO agreements, is much wider than that of the previous provisions of the General Agreement on Tariffs and Trade (GATT). Specifically, areas such as agriculture, intellectual property and services now in the WTO agreements constitute fields not found in the former GATT agreements.[1] The WTO retains many of the GATT's institutional philosophies and practices,[2] but also possesses many significant new attributes, such as the enjoyment of clearly defined legal status and powers. The WTO's charter provisions establish an international organization, with legal personality, privileges and immunities, and explicit provisions concerning establishment of a secretariat, budgetary measures and the power to engage in relations with other organizations.[3]

The WTO charter, by contrast with the former GATT, requires all WTO members to accept the entire package of agreements negotiated under the former Uruguay Round - including all the newly enacted agreements on the same subjects as the previous side agreements, including agreements on entirely new subjects.[4] It is evident from the recent modifications to the GATT, thus forming the WTO, that the

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[1] See Judith Bello. "International Decisions", (1995) 89 *Am. J. Int'l L* 772, at 775 (discussion on General Agreement on Trade in Services and Agreement on Trade-Related Aspects of Intellectual Property Rights).

[2] See WTO Charter art. XVI (establishing continuity with GATT "decisions, procedures and customary practices"). The old signatories did not find it appropriate nor technically feasible to amend the old GATT, rather they adopted a new "GATT 1994" which incorporates the old GATT with various other texts. See General Agreement on Tariffs and Trade, 1994, GATT, Charter Annex 1A, reprinted in 33 Int'l Legal Materials 1226 (1994).

[3] WTO Charter arts. V-VIII.

[4] WTO Charter art. II.

member signatories have come to the realization that the protectionist isolationism of the past will no longer yield the full extent of trade benefits in a multilateral trading system.

Since the essence of our thesis will be to analyze the effects of antidumping measures both nationally and internationally on trade liberalization within the NAFTA, it is important to further our discussion on the WTO's internal structure. The WTO Antidumping and Subsidies Agreements require members (signatories) to advise the antidumping committee of their relevant laws and regulations. The committee in turn is responsible for providing an exhaustive review or commentary with possible recommendations. The three NAFTA signatories, all being members of the WTO, have an obligation, pursuant to the Antidumping Agreement, to give notification to the committee on all preliminary and final antidumping determinations and to present a semi-annual report summarizing the history and status of outstanding orders or suspension agreements. Suffice it to say that the new legal organization (WTO) possesses a structured legal framework far superior than its predecessor (GATT).

Canada, the United States and Mexico have also entered into a North American free trade agreement[5] providing reciprocal trade benefits on a regional scale. A review of the benefits of liberalized trade will pave the way for a greater appreciation of the analysis of the negative effects of one particular type of trade impediment: the antidumping law and policy.

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[5] North American Free Trade Agreement, (hereinafter NAFTA), (1993) 32 *I.L.M.* 297

1.2 The Benefits of Trade Liberalization

Regional and international trade increases global wealth. This axiom is the basic premise of traditional international economics.[6] The economic theory of the generation of wealth by trade is a concept labeled "comparative advantage". The fundamental underpinnings of this economic theory forward the notion that every nation produces certain goods or services more efficiently than it produces other goods or services.[7] Through international trade, countries are allowed to specialize in the production of goods and services in which they have a comparative advantage and import those goods in which they do not. The increase in wealth which is attributable to trade liberalization is difficult to properly quantify. According to certain studies,[8] the monetary gain, generally to the world economy from the effective implementation of the Uruguay Round of Multinational Trade

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[6] Franklin R. Root, *International Trade & Investment,* seventh edition, 1994; See Richard H. Steinberg, "Antidotes to Regionalism: Responses to Trade Diversion Effects of the North American Free Trade Agreements", (1953), 29 *Stan. J. Int'l L.* 315, 318-19 ("No economic theory of trade has been more accepted the last two centuries than David Ricardo's theory of comparative advantage"). "The underlying principle of the GATT is to pursue the benefits described in the economic theory as "comparative advantage". See John Jackson, "World Trade Rules and Environmental Policies: Congruence or Conflict?" (1992), 49 *Wash. & Lee L. Rev.* 1227, 1231

[7] "What is a prudence in the conduct of every private family can scarce be folly in that of a great kingdom." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations.* 424 (Edwin Cannan ed., Random House, 1937) (1776). This law, articulated by Adam Smith in 1776 and David Ricardo in 1819, remains the standard economic rationale for why nations trade, David Ricardo, *On the Principles of Political Economy and Taxation* 141-142 (Piero Sraffa ed., 1951).

[8] International Monetary Fund, *World Economic Outlook*: May 1994, at 86-87 (1994). Three of the four studies put forward by the IMF were sponsored by the GATT secretariat, the World Bank, and the Organization for Economic Co-operation and Development. (OECD)

Organizations will be from 212 billion U.S. dollars per year to over 274 billion U.S. dollars per year by the end of the year 2002. Empirically, one can observe that a significant portion of global prosperity since the 1940's can be accounted to liberalization of trade rules.[9]

Paul Romer[10] has put forward an impressive economic study of how conventional theory seriously underestimates the importance of easing trade restrictions. He acknowledges the flaw found in the indirect assumption in most economic theory to the effect that different levels of policy interventions do not affect the variety of goods found in one specific economic region. Recent theoretical economic studies indicate that this assumption seriously undermines our comprehension of growth in advanced economies, and of the welfare costs of trade restrictions.[11] Not only does free trade benefit the masses, but the greater variety of goods that result from trade and increased efficiencies bring along a variety of positive effects such as;

1. greater consumer satisfaction due to increase in variety of goods;
2. a decrease in the monopolistic power of domestic firms;

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[9] See Jagdish Bhagwati, *Protectionism*, Cambridge, MIT Press, The Ohlin Lectures, 1988, at 7.

[10] Paul Romer, "New Goods, Old Theory, and the Welfare Costs of Trade Restrictions", (1994).43 *J. Dev. Econ.* 5, 5-6

[11] The International Monetary Fund also agrees that studies underestimate the gains of easing trade restrictions. The reasons for this underestimation are four-fold; the studies concentrate on tariff reductions and do not consider reductions in nontariff barriers; the studies tend to focus on agriculture and aggregate various manufacturing and service sectors, leading to a downward bias; the computable general equilibrium models used by the studies omit important gains such as economies of scale and increased capital flows; and the studies use extant trade conditions as a baseline, which could deteriorate if the Uruguay Round failed. International Monetary Fund, *World Economic Outlook*: May 1994, 84-85.

3. increased technical efficiency due to a decrease in the average production costs; and,

4. a contribution to economic growth through a release of capital resources from the distorted order.[12]

Consequently, the wealth thus generated by undistorted international trade is likely to be translated into advancements for society.[13] Specifically, the three signatories of the NAFTA - Canada, United States and Mexico have seen between the period of the 1960s up to the early 1990s, their exports and imports grow more than 40 percent faster than the generalized overall growth of the Canadian economy during the same period of time. Mexico experienced a 50 percent increase and the United States saw its imports and exports grow twice as fast.[14] Despite the countless bilateral and multilateral agreements, no doubt inspired by the appealing notion of globalization and the achievement of comparative advantage through undistorted trade, policy measures and legal mechanisms are nevertheless, well defined and omnipresent in the form of trade remedy laws affording relief to the domestic market from foreign competition. The chapters of the present thesis that follow will outline

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[12] Junichi Goto, Labor in International Trade Theory: A New Perspective on Japanese - American Issues, John Hopkins University Press, at 82; Robert W. McGee, "An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe", (1993) 26 *Geo. Wash. J. Int'l L. & Econ.* 539, 550

[13] The economic and legal literature is abundant with examples of how inefficiencies in the distribution channels sometimes preclude the translation of wealth into societal advancements. See also Arthur M. Okun, *Equality and Efficiency: the Big Tradeoff, Washington, The Brookings Institution,* (1975); Michael S. Knoll, "Perchance to Dream: the Global Economy and the American Dream", (1993).66 *S. Cal. L.R.* 1599, 1600

[14] International Monetary Fund, International Financial Statistics, April 1995, CD ROM.

in a detailed and analytical form, the necessity of reforming the antidumping law and policy within the NAFTA context in view of the principal factors influencing the evolution of the trade remedy laws. In the present international trade order, there are many compelling factors influencing the eminent evolution of the trade laws. If the economic rationale for the loss of the comparative advantage and inefficiency in trade is not compelling enough, the present state of globalization between trading partners leaves hardly any justification for the state's exercise of protectionism in the form of antidumping law and policy.

1.3 Claims of Unfair Trade; Disguised Protectionism?

The basic and fundamental argument sustaining the antidumping law and policy deals with the concept of "unfairness". Several respected scholars have advanced theories allowing no room for disguised protectionistic trade distortions in the name of "fairness".[15] Even though the success of trade liberalization is attributable to reducing more overt forms of protectionism, much attention must still remain focused on antidumping law and policy.

Historically, the threats to liberalized free trade are deeply rooted in international law since the beginning of the world's trading history. It has been documented, that throughout history various episodes have been responsible for triggering some sort of trade impediment to the free flow of goods. The

[15] Jagdish Bhagwati, *Fair Trade, Reciprocity and Harmonization: The Novel Challenge to the Theory and Policy of Free Trade*, Working Paper, August 1991.

distinguished economist, Jagdish Bhagwati outlines in his paper entitled "Fair Trade, Reciprocity and Harmonization; the Novel Challenge to the Theory and Policy of Free Trade,"[16] seven episodes constituting threats to free trade. The seven episodes outlined, all have a common denominator; they relate to market failure. However, the seventh episode, appropriately named the newly emerging threat, represents new challenges to the theory and practice of trade liberalization. The seven episodes are summarized as follows:

i) 19th century, free trade with some theoretical exceptions;

ii) End of 19th century, reciprocity and fair trade; infant industry protection;

iii) 1930's; macroeconomic failure;

iv) 1930's and thereafter: imperfect competition;

v) 1950's through 1970's: imperfect competition in factor markets and non-economic objectives;

vi) Renewed imperfect competition in product markets; Renewed Diminished Giant Syndrome: Return of Fair Trade and reciprocity;

vii) Late 1980s and 1990s; Fair Trade Harmonization and level playing fields.

The seventh of the above-noted episodes will retain our attention for the purpose of analyzing the soundness of the legal and economic arguments advanced by some in support of managed trade, and in particular the antidumping laws and policies.

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[16] suptra note 15.

As noted by Jagdish Bhagwati,[17] several structural changes in the world economy are responsible for the sudden surge in competitiveness. Any foreign governmental policy conferring an added advantage to one's rivals is attacked as being unfairly prejudicial. This in turn leads to continuous demands for harmonization.[18] If such demands seem impossible or difficult to attain, demands for "managed trade, protection from unfair trade and the absence of level playing fields" shortly follow. This argument constitutes the basis for the legitimization of the antidumping law and policy by those who adamantly support the regime. But what specifically is the concept of unfairness these rules are designed to offset? The commonly given answer to this question is that the domestic industry is trying to offset the foreign competitor's predatory behavior. Ironically enough, in the antidumping policy of the NAFTA signatories, the country imposing the penalty need not show predation. However, dumping is defined as selling below average cost, and depending on the circumstances, such behavior may be appropriate business strategy, particularly when a company has excess capacity or enters a new market. Furthermore, at times, companies may, according to the economic factors influencing such decisions, allow profit margins to fall rather than raise prices when faced with currency fluctuations or other changes in market conditions perceived to be of a temporary nature.

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[17] supra note 16.

[18] Harmonization proposals of trade remedy laws (i.e. antidumping law and practice) is beyond the scope and purview of the present thesis. However, chapter IV (reform proposals) of the present thesis, will briefly outline harmonization proposals for mediating the interphase between competition and trade policy.

Moreover, any firm or company that is defined as a domestic firm is outside the scope and purview of the antidumping regime. A foreign exporter may easily be found "guilty" of practising dumping even though his products are priced identically to those of his domestic competitors. To the extent that domestic and foreign firms share similar cost conditions and are faced with a variable domestic market, one would therefore expect both groups to sell their products at below average cost prices during periods of weak demand. The treatment of these sales on the part of exporters as dumping, and the immediate application of an antidumping duty, when domestic firms are behaving in the same way, is nothing more than a disguised form of protectionism. Where does the element of fairness lie in this situation?[19]

The fairness issue was also elaborated upon quite extensively by Jagdish Bhagwati in his book entitled "Protectionism".[20] He warns against the insidious growth of the "fairness" issue and shows how potentially harmful it may be for free trade. The unwarranted presumption of unfairness aimed at foreign rivals, has led to bilaterally aggressive attempts at securing a particular country's domestic industry without any consideration to the economic concept of attaining competitiveness through each trading nation's comparative advantage. However, even though these efforts are well intentioned, the countries adopting to such practices are wholeheartedly promoting protectionism. Furthermore, Bhagwati poignantly points

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[19] Chapter IV of the present thesis will elaborate fully on the rationales for dumping and the economic theories developed over the years to take into consideration these developments. The present section deals with the most apparent forms of protectionism in a selected form of dumping, i.e. the application of antidumping law to nonpredatory price discrimination.

[20] 1988 MIT.

out that the countervailing duties (CVD) and antidumping (AD) provisions are drafted in such a way as to "capture the mechanisms for maintaining *fair* trade" which in turn illustrates the protectionist influence.[21] In addition, the use of unfair trade complaints as a way of securing protection for a domestic industry, may be a disguised mechanism for the former use of tariffs as trade barriers that were gradually eliminated under the several rounds of the GATT aimed at eliminating multilateral barriers to trade amongst the member countries. Some economists have come to believe in a so-called law of constant protection: "You stop protection in one form and it pops up in some other form elsewhere."[22]

As a concluding remark, the economist at Massachusetts' Institute of Technology (MIT), Paul Krugman, now at Stanford University, wrote about the complex interrelationship between trade liberalization and "fair trade" in the Journal of Economic Perspectives in 1987, in the most adequate fashion;

> "the case for free trade is currently more in doubt than at any time since the 1817 publication of Ricardo's *Principles of Political Economy(...)*. In the last ten years, the traditional constant returns, perfect competition models of international trade have been supplemented and to some extent supplanted by a new breed of models that emphasizes increasing returns and imperfect competition. These new models... open the possibility that government intervention in trade via important restrictions, export subsidies, and so on may under some circumstances be in the national

[21] Id., p. 43.

[22] J. Bhagwati, "Demands to reduce Domestic Diversity among Trading Nations" in J. Bhagwati and R. Hudec, (eds.), *Fair Trade & Harmonization: Prerequisite for Free Trade*? Vol. 1., MIT Press, 1996.
- See the formulation of this law in J. Bhagwati, *Protectionism,* supra at (20) Recent unpublished research by Edward Mansfield of Columbia University, using a mass of cross-country data, provides some support for this law.

> interest after all... free trade is not passé, but it is an idea that has irretrievably lost its innocence. There is still a case for free trade as a good policy, and as a useful target in the world of politics, but it can never again be asserted as the policy that economic theory tells us is always right."

During the course of the last century, even before the WTO entered into force, the practice of antidumping had received international condemnation, "as an abnormal pricing strategy which bodes ill for the importing nation."[23] The successive GATT rounds can chronologically be summarized as follows; (1) The initial drafting of the GATT code in 1947; (2) the coming into force of the Kennedy Round Antidumping Code from 1964-1967; (3) the 1974-1979 negotiations of the Tokyo Round Antidumping Code, and (4) the Uruguay Round Antidumping Code between 1986 and 1994. These periods provided the GATT signatories with ample opportunity to modify and possibly eliminate antidumping in international trade law. Unfortunately, each Round of negotiations only revealed the parties' ambition to preserve the existing system of antidumping. One observer's[24] comments to the effect that the Tokyo Round actually facilitated the filing of antidumping claims is particularly revealing:

> "Since antidumping laws are a protectionist device, the GATT should attempt to eliminate them or restrict their use. Unfortunately, the fact that article VI of the

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[23] See John H. Jackson, *The World Trading System; Law and Policy of International Economic Relations, Cambridge, MIT Press*, (1989) 221; and W. Wares, *The Theory of Dumping and American Commercial Policy*(1977) page 57.

[24] William J. Davey, "Antidumping laws in the GATT and the EC", in John H. Jackson and Edwin Vermulst (eds)., *Antidumping Law and Practice: A Comparative Study*, Ann Arbor, University of Michigan Press, 1989, 296.

> General Agreement explicitly allows their use, has meant that GATT control of dumping has been largely limited to regulation of procedures only. What is needed is a change in emphasis in the GATT [Tokyo Round] Antidumping Code, so that it restricts more tightly than now the permissible scope of antidumping laws. A similar change in attitude is needed in GATT member states. The antidumping laws have been treated by many legislators as inherent rights of their constituents, rights that should be regularly "improved" by making relief more readily available."

The harsh reality is that antidumping law remains a strategic weapon in the protectionist arsenal.[25] As Justice Posner of the United States judicial system writes:

> Of course, the concerns that actually animate anti-dumping, countervailing-duty, and other measures directed against allegedly "unfair" trade practices of foreign producers go far beyond a concern with predatory pricing. The dominant concern is to protect U.S. industry from foreign producers that have genuinely lower costs, whether because they pay lower wages, incur fewer pollution-control and other regulatory costs, are better managed, have better workers, or have more modern plants and equipment. Policies so motivated are called "protectionist..."[26]

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[25] Bernard M. Hoekman and Michael P. Leidy, "Antidumping and Market Disruption: The Incentive Effects of Antidumping Laws", in Robert M. Stern (ed.), *The Multilateral Trading System: Analysis and Options for Change, Ann Arbor, University of Michigan Press, 1993* at p.156, (suggesting that antidumping law is the most common method of "contingent protection").

[26] Richard A. Posner, *Economic Analysis of Law* 310-311 (4th edition 1992).

1.4 Negotiation of the Post-Uruguay Round Antidumping Law and Lingering Conflicts Between Protectionism and the goals of free trade within the antidumping law context

The WTO Antidumping Code, embodied in the "GATT 1994"[27] contains several provisions which bear a striking resemblance to the antidumping legislation of the United States. The WTO Antidumping Code, thus reflects the political influence of the United States, since the latter refused to become party to any agreement that reduced the effectiveness of the existing United States trade practices. Consequently, most of the proposals submitted by the United States were incorporated into the Code. The United States Trade Representative, as well as numerous Congressional leaders, had indicated relentlessly that the Uruguay Round Agreement would not be passed by Congress if it weakened any U.S. trade remedy.[28] It is estimated that the already substantial number of antidumping actions will increase exponentially in the future. Furthermore, all nations adhering to the WTO Agreement will automatically adopt its antidumping code.[29] The GATT

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[27] See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, article 2.1, reprinted in Final Texts of the GATT Uruguay Round Agreements including the Agreement Establishing the World Trade Organization as signed on April 15, 1994, 145, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts, published by the GATT Secretariat, Geneva (1995).

[28] See "U.S. Seen Gaining in Bid to Avert Any Weakening of U.S. Antidumping Rules", 10 *Int'l Trade Rep. (BNA)* No. 48, at 2040 (Dec. 8, 1993).

[29] See F. Amanda DeBusk, "Dumping Laws Still Endanger the Deal", *N.Y. Times*, April 17, 1994, at F13.

Tokyo Round Codes will no longer be optional in nature. As a result of the single undertaking approach adopted by the WTO, nations that previously lacked antidumping legislation will probably be enticed, as signatories to the WTO Agreement, to adopt these protectionist trade measures.

The WTO Agreement, which binds over 100 countries, established the WTO[30] and was ultimately drafted to enhance international trade in goods and services by reducing tariff and nontariff barriers and by providing improved dispute settlement procedures.[31] Encouraging the free circulation of goods in trade is the only the means by which to accomplish the fundamental objectives of the WTO Agreement. The true spirit of the WTO Agreement lies in its attempt to: (1) create additional global wealth; (2) raise global standards of living; (3) encourage the optimal use of resources; and (4) "ensure that developing countries, and especially the least developed among them" share in the benefits resulting from the WTO Agreement.[32] The preliminary estimates of the GATT Secretariat demonstrate that the Uruguay Round Agreement will result in a level of world merchandise trade that

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[30] See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marakesh on April 15, 1994, reprinted in Final Texts of the GATT Uruguay Round Agreements Including the agreement Establishing the World Trade Organization as signed on Apr. 15, 1994 (Office of the U.S. Trade Representative, ed., 1994).

[31] See id.

[32] Agreement Establishing the World Trade Organization, Preambule, reprinted in Final Texts of the GATT Uruguay Round Agreements, including the agreement establishing The World Trade Organization as signed on April 15, 1994, 9 (Office of the U.S. Trade Representative, ed., 1994).

will be approximately twelve percent higher by the year 2005 than it would be in the absence of the agreement.[33]

The elaboration of the goals found in the Preamble of the WTO Agreement, emphasize the apparent link between increasing global economic efficiency and enhancing the social well-being of nations. In this perspective, the Organization for Economic Co-operation and Development ("OECD") has expressed the view, through a ministerial meeting, that "the gradual and successful elimination of poverty, hunger, disease, migration, and uncontrolled population growth is closely linked to the pursuit of sustainable economic development."[34] Consequently, the member countries of OECD have consented to "bear a special responsibility for ensuring that sustainable economic development and social progress are consolidated and "extended" and that "universally shared benefits" are pursued.[35] The success of this approach, however, is dependent on each nation's political willingness to recognize the crucial importance of global specialization and the important benefits that will be accrued once each nation is permitted to exploit its own comparative advantage in a free and open market. This type of exploitation will permit each country, to gradually raise its standard of living. Consequently, the

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[33] See Trade Negotiations Committee, Group of Negotiations on Goods (GATT), GATT Secretariat, An Analysis of the Proposed Uruguay Round Agreement, with Particular Emphasis on Aspects of Interest to Developing Economies 45 (Nov. 29, 1993). These estimates are based upon the implementation of the "Uruguay Round market access offers on the table as of Nov. 19, 1993," Id. at 41 Changes in such offers "could substantially affect estimates." Id. at 46.

[34] See Organisation of Economic Co-operation and Development, Meeting of the OECD Council of Ministerial Level, *Communiqué* 9 (June 8, 1994) [hereinafter the OECD Council Meeting].

[35] Id.

benefits of specialization can only be achieved if nations realize that policies designed to protect the domestic producers will inevitably constitute an obstacle to the fulfillemnt of the goal of total global welfare.[36] This focus would certainly be more consistent with the philosophy of the WTO agreement, and it should concurrently recognize that the success of a domestic economy is dependent in large part on the strength of the international economy.

Nontariff barriers to trade such as antidumping remedies, substantially impede global specialization and threaten to undermine the results of the Uruguay Round. As was previously seen in this chapter, the WTO Agreement does not prohibit or restrict the use of antidumping remedies among the signatories. The new agreement incorporates important aspects of U.S. antidumping practice not previously recognized, thereby making these practices immune from GATT challenge. Overall, the United States managed to successfully achieve modifications in the Antidumping Code that conform to U.S. antidumping law. We believe, however, that this approach will certainly constitute a significant stumbling block in the fulfillment of the general goals and objectives of the WTO Agreement as perviously outlined in the preamble of the agreement. Furthermore, in light of the single undertaking concept of the WTO Agreement, whereby signatories must accept the Agreement "as a whole,"[37] the United States' method in dealing with

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[36] Total welfare is defined as the sum of consumer and producer welfare. See John R. Morris, "International Trade and Antitrust: Comments", (1993).61 *U. Cin. L. Rev*. 945, 946

[37] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiation, p. 4, reprinted in Final Texts, supra note 30, at 7 ("The representatives agree that the WTO Agreement shall be open for acceptance as a whole...").

dumping will be adopted by the remaining signatories. This approach has many constituents which when taken cumulatively, discriminate against foreign producers by, i) failing to provide a more demanding standard of injury to competitors; ii) not providing the same level of defence to foreign producers as that which is available to domestic producers; and iii) measuring legality through the use of differing cost standards.[38] Ironically enough, this approach dismisses the relevance of consumer welfare efficiency in favour of a strengthened protection for the domestic producers.

Such being the case, and considering the fact that our present thesis will concentrate on possibilities for a feasible reform of the antidumping laws of the NAFTA signatories, does the WTO Agreement provide any possibility for future reform of the antidumping regimes? We strongly believe in the affirmative. We should not forget that the NAFTA was negotiated pursuant to article XXIV of the GATT. This article provides for an agreed derogation from the principle of most favoured nation in relation to the flow of exports and imports. This departure from the underlying concept of non-discrimination found in the WTO Agreement is subject to several criteria set out in article XXIV, one of which remains the obligation of the signatories to a free trade area, to eliminate duties and other restrictive regulations of commerce on significantly all of the trade between them.[39] Article VI of the WTO Antidumping Agreement is not included in the list of

[38] A more detailed analysis of the U.S. antidumping laws will be provided in Chapter III of the present thesis, including specific provisions of the WTO Antidumping Code.

[39] Chapter II of the present thesis will fully elaborate on the interaction between articles XXIV and VI of the WTO Antidumping Code and possibilities of reform of the antidumping regime.

excepted articles to this obligation. As Michael Hart, professor of international affairs, states in the introductory part of his book entitled, Finding Middle Ground:[40]

> "There is therefore, a strong presumption that the authors of the GATT intended participants in a free trade area to eliminate the application of antidumping provisions on intra-area trade."

The WTO Agreement has legally provided for the signatories to agree that "the provisions of the (...) Dispute Settlement Understanding may be invoked with respect to any matter arising from the application... of Article XXIV" (para. 12). The Dispute Settlement Understanding[41] of the WTO can and should be used as a more balanced setting for the enforcement of the obligations contained in Article XXIV, particularly now that the current dispute settlement procedures give all members the absolute right to have their cases heard.

The chapter that follows will attempt to provide legal arguments favouring the reduction and elimination of "other restrictive regulations of trade"(antidumping law and policy) particularly in light of article XXIV(8)(b) of the GATT that requires the parties to a regional arrangement(NAFTA) to progressively work at eliminating

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[40] M. Hart, (ed.), *Finding Middle Ground, Reforming the Antidumping Laws in North America*, Ottawa, Center for Trade Policy and Law, 1997.

[41] It is significant to note that the new WTO Dispute Settlement Understanding applies to disputes under all Uruguay Round agreements. While a few of the agreements contain special rules related to dispute settlement, the new integrated system will largely eliminate the problems of having to choose from one forum to another that was present within the old GATT system. It is believed by many that this new change is a shift towards a more adjudicative model, and will consequently restore compliance with rules of the world trading system. Ironically enough, the United States raised controversy over the new WTO dispute settlement system and the U.S. Administration agreed to bring forth legislation ("Dole Bill") providing for a WTO dispute settlement review commission comprised of federal appellant judges. This commission's duty would be to review final WTO dispute settlement panel reports or WTO appellant body reports adverse to the U.S. in disputes were U.S. was responding party. This approach, in our opinion, is another example of the U.S.'s powerful interventionist ability.

'duties and other restrictive regulations of commerce(...) on substantially all the trade between the constituent territories(...).'

CHAPTER II

THE EXISTENCE OF TRADE REMEDY LAWS (ANTIDUMPING) IN REGIONAL INTEGRATION AGREEMENTS

1. POLITICAL, ECONOMIC AND LEGAL ASPECTS OF THE NAFTA AREA WITHIN THE CONTEXT OF A MULTILATERAL TRADING SYSTEM

1.1 The Role of the Regional Integration Agreement (NAFTA) in the Multilateral Trading System

During 1996, regional economic integration expanded geographically with a significant pace. The expansion and intensification of regionalism continued worldwide in Africa, Asia, Europe, the Middle East, North America, the Pacific and South America.[42] Although highly significant economic activity takes place in the European Union ("EU"), the combined economic activity taking place among the signatories of the North American Free Trade Agreement ("NAFTA") is almost as significant as that of the EU. Regional economic integration is rapidly encompassing tariff and nontariff agreements concerning trade in goods.

Historically, a free trade area was something of an anathema in the theory of global trade liberalization. The Havana Conference was the birthplace of the free trade concept; where such a concept was considered a compromise between the countries that were adamant in maintaining tariff preferences and the United States,

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[42] See various articles found in, De Melo and Panagariya(eds.), *New Dimensions in Regional Integration* , Cambridge University Press, (1993). For example, Gary R. Saxonhouse, "Trading Blocs and East Asia"; Stanley Fischer, "Prospects for regional integration in the Middle East"; J. Whalley, "Regional trade arrangements in North America: CUSTA and NAFTA"; J. Nogués and R. Quintanilla, "Latin America's trading system"; L. Alan Winters, "The European Community: a case of successful integration?"; and F. Foroutan, "Regional integration in Sub-Saharan Africa: past experience and future prospects."

equally determined to eliminate such preferences, within the context of an international trade organization. Before the coming into force of the GATT (1947) Agreement, international legal literature defined the 'free-trade area' as an imperfect customs union.[43] Trade among the signatories of a free trade area resembles that of a customs union. However, externally each state retains its own trade policies while trading with non-members. Inevitably, rules of origin must be enacted in order for the signatories to fully take advantage of the benefits accorded to products that form part of the intra-trade sphere of trading.

In the past, regional agreements were politically encouraged in order for states to progressively achieve security and prosperity through trade. Article 21 of the Covenant of the League of Nations specifically authorized such a regional grouping of nations.[44] In addition, article 52[45] of the Charter of the United Nations, specifically provides an undisputed place for regional arrangements in international law. States experiencing difficulties attaining a consensus in a multilateral forum possess a greater chance of achieving consensus within a regional arrangement negotiated in light of trade issues of a specific concern to these countries. The

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[43] El-Agraa and Jones, *The Theory of Customs Union,* Deddington: Philip Allen, 1981, 47; R. Imhoof, *Le GATT et les zones de libre-échange,* Geneva, Georg-Librairie de l'Université, 1979, 41-5; Art. XXIV (8)(a) and (b) of the GATT, now WTO.

[44] Art. 21 states, "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."

[45] Art 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"

negotiations leading to the conclusion of the GATT (1947) were successful in enacting provisions allowing for regional arrangements, [46] and consequently as part of the post war reconstruction era, several regional arrangements were enacted.

Despite the fact that multilateral trade liberalization constitutes the new trade agenda of the international trading community,[47] regional trading agreements, such as the NAFTA of which this thesis will essentially concentrate on, do not impede the progress nor pace of multilateral trade. Specifically, Mexico was politically and economically required to obtain a certain status under the multilateral trading system, before negotiations for its entry into NAFTA were possible.[48] There exists a certain amount of scepticism among economists and academics as to the beneficial effects of regional arrangements.[49] A full range analysis of the advantages and disadvantages of the existing NAFTA is beyond the scope of the present chapter of our thesis. Suffice it to say that in the NAFTA alone, trade between the three countries, United States, Canada and Mexico has seen a significant increase since

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[46] See F. Haight, "The Customs Union and Free Trade Area Exceptions in GATT", (1972) 6 *JWTL* 392.

[47] G. Keketekuty, *The New Trade Agend,* Washington, D.C.: Group of Thirty, 1993.

[48] See Arthur Dunkel, World Trade and Investment: Emerging Blocs and Opportunities for Global Growth (2-3 Apr. 1992) 9. "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."

[49] For example renowned Economist, Jagdish Bhagwati in an article entitled, "Regionalism versus Multilateralism," *World Economy*, 1515 (1992), 535 is of the opinion that free trade arrangements will inevitably be responsible for the creation of a fair amount of trade diversion due to the various mechanisms of protection that can easily be exploited to attain protectionist goals; Additionally, Anne Krueger, states in her article that the formation of a regional integration agreement can reduce the interest of the governments of the member countries regarding the pursue of multilateral trade efforts, A. Krueger, *Trade Creating and Trade-Busting Aspects of NAFTA*, (1995)document prepared for the American Economic Association Meetings.

the coming into force of the NAFTA, on January 1st, 1994.[50] Specifically, *ex ante* studies on the FTA between Canada and the United States revealed that this agreement had significant positive effects on the general quality of life in Canada, but negligeable effects as for the United States.[51]

Returning to our initial concern, how has the GATT traditionally viewed free trade areas and what are the conditions required by article XXIV of the GATT in order for free trade areas to legally compliment the functioning of the multilateral framework of the GATT?

1.2 Article XXIV of the GATT

Article I of the GATT sets forth the fundamental international trade rule among GATT signatories favoring non-discrimination. In legal terms the non-discrimination rule has been interpreted as the most-favoured-nation clause (MFN) and the national treatment clause.[52] In principle, any other form of economic or

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[50] Since the start of the free trade area between Canada and the United States six years ago, Canada's merchandise exports to the United States have increased 77% in value. United States exports to Canada have also increased 72% in value, See John Gero, "The View from North of the Border: a Canadian Perspective on Trade and Competition Views in North America, (1996) 4 *United States-Mexico Law Journal*, 55, Symposium; Studies undertaken by C. Bachrach and L. Mizrahi(1992), The Economic Impact of a Free Trade Agreement Between the United States and Mexico: A CGE Analysis in the addendum to Economy-wide Modeling of the Economic Implications of a FTA with Mexico and a NAFTA with Canada and Mexico, Washington, D.C., USITC Publication, No. 2516, reveal very significant effects on the commercial transactions of nonmember countries. Some studies also indicate a slight net increase in commercial activity.

[51] Refer to studies done by R.G. Harris and D. Cox, *Trade, Industrial Policy, and Canadian Manufacturing*, Toronto: Ontario Economic Council, Research Study, (1984).

[52] The MFN aspect of the GATT has been extensively emphasized and dealt with in the scholarly works of the following authors: John H. Jackson, *World Trade and the Law of the GATT* Indianapolis: Bobbs-Merrill, 1969; Frank Stone, *Canada, the GATT and the International Trade System,* Montreal: The Institute for Research on Public Policy, 1984, and Kenneth W. Dam, *The*

commercial arrangement, constitutes a derogation of the two underlying fundamental principles.[53] However, the history of the GATT reveals that article XXIV was perceived as an indirect approach or second best solution in achieving the goal of multilateral trade liberalization. Many scholars and economists[54] are of the opinion, that economic integration through regional arrangements can, if properly monitored, and do not fall prey to the protectionists' agenda, lead to substantially the same results as multilateral trade liberalization.

Article XXIV of the GATT (1947), being the legal justification for the creation of custom unions and free trade agreements, forms an integral part of the new WTO agreements as evidenced by the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariff and Trade 1994.[55] The Understanding forms part of a series of documents grouped under Annex 1A

GATT: Law and International Economic Organization, Chicago, University of Chicago Press, 1970.

[53] "The very nature of such arrangements (regional) involves a departure from the most-favoured-nation principle." J. Jackson, "Equality and Discrimination in International Economic Law", (1983) 22 *Yearbook of International Law.*

[54] See for example, Les travaux préparatoires, GATT et libre-échange: 9 by Imhoof where he states, "l'intégration économique est 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"; As well as T. Flory, D. Carreau and P. Juillard, *Le droit international économique*, Paris: LGDJ, 1990, 27.

[55] hereinafter the Understanding; Studies undertaken by Blackhurst and Henderson(1993) seem to indicate that the creation of custions union and free trade areas do not constitute an inherent threat to the efforts of promoting sustainable integration in the multilateral context. See also, *Le regionalisme et le système commercial mondial*, OCDE(1995), where on page four of the study the concluding observation is particularly posititve:

> "L'examen effectué la section suivante semble indiquer que les initiatives d'intégration régionale et multilatérale sont, bien plus qu'on ne l'admet en général, complémentaire plutôt que concurrentes dans la poursuite d'une libéralisation et d'une ouverture accrues des échanges"

comprising the Agreement Establishing the World Trade Organization and is specifically part of the 1994 General Agreement on Tariffs and Trade. The Understanding interprets certain aspects of the general language of article XXIV of the 1947 General Agreement on Tariffs and Trade, and purportedly resolves some recurring difficulties. Apparently, the goal was to partially restrict the scope of this exception. As an example, a customs union must submit import statistics representing a past period, determined on a tariff line basis and in values and quantities broken down by the WTO member country of origin. The objective of this procedure is to permit the WTO to determine whether the formation of customs union will be more beneficial for trade and necessarily less restrictive, than prior to the formation of the customs union.[56] This type of approach is consistent with the GATT's obligation to distinguish between trade restricting preferential agreements and regional arrangements which foster economic integration and trade liberalization within a multilateral framework, and also in accordance with the following criteria elaborated in paragraphs four to nine of article XXIV.

Article XXIV(4) of the GATT (WTO) reads as follows;

> "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.
>
> 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

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[56] Article XXIV: See the Uruguay Round Agreements Act, Statement of Administrative Action at 38-39.

> raise barriers to the trade of other Contracting Parties."

Are the requirements elaborated in the above-noted article XXIV(4) the only requirements necessary in order for a regional arrangement to conform to the GATT (WTO) rules? Historically, the United States was a dominant member of the GATT and had actively supported the formation of European integration. Consequently, the United States was in somewhat of an awkward position to criticize the initial agreements of the Treaty of Rome and the Stockholm Convention in 1957 and 1960, respectively. It is apparent that consideration of these initial regional agreements which more or less set the pattern for subsequent regional agreements, was based on initial support by the dominant members of GATT for the achievement of the essentially political agenda to be executed through these regional trade agreements. Significantly enough this political *raison d'être* is understood by the author Kenneth Dam when he states that:[57]

> "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."

Several years later in 1981, the author Huber[58] conducted analytical research which led him to conclude with a similar observation with respect to the consistency of regional agreements with the GATT provisions. These observations inevitably came from the non-committal conclusions reached by the working groups formed for the

[57] Kenneth W. Dam, "Regional Economic Arrangements and the GATT: The Legacy of a Misconception" (1963) 30(4) *U. Chi. L. Rev.* 615.

[58] Huber, Regional Arrangements (1981), 281.

purpose of assessing the compatibility of regional agreements with GATT requirements. The working groups were instrumental, however, in clarifying two of the three significant issues required in assessing whether an agreement is beneficial in creating trade;

> "the issue of whether the new arrangements are on the whole no more restrictive in treatment of third country exports; whether the agreement covers substantially all trade; and whether it applies to all duties and other restrictive regulations of commerce."[59]

Article XXIV(5)b of the GATT (WTO) requires that external tariffs and duties with non-participating countries "shall not on the whole be higher or more restrictive than the general incidence... prior to the formation of such union." This criterion has received a rather lenient interpretation by the GATT working groups.

Article XXIV(8)b requires that, "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 Article XI, XII, XIII, XIV, XV, and XX) are eliminated on substantially all trade between the constituent territories in products originating in such territories" (our emphasis).

Despite the fact that only very few regional agreements have indeed eliminated restrictive regulations of commerce, this does not seem to constitute a stumbling block for the approval of the regional agreement by the GATT. Ironically

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[59] M. Hart, "GATT article XXIV and the Canada-United States Trade Negotiations", (1983) 1 *Review of International Business Law*, 317, at 330.

enough and as observed by Michael Hart, in his previously cited article,[60] "the reason for this lies in the fact that the more restrictive regulations are removed, the more preferential or discriminatory the agreement becomes. Working parties reviewing various agreements, therefore, were not motivated to search for these kinds of deficiencies."

We arrive, therefore, at the crucial issue of the present chapter; that of examining the requirements of Article XXIV with regards to contingency protection (i.e. antidumping) in the NAFTA context. It has been argued by an increasing number of prominent international trade and economic policy analysts,[61] and we are of the same opinion, that a strict construction of GATT article XXIV paragraph 8(b) favors the position that anti-dumping duties are prohibited in free trade areas. This statement is supported firstly, by the economic pillars of the GATT favouring trade liberalization and secondly, by the absence of article VI on antidumping in the list of exceptions mentioned in article XXIV(8)(b) of the GATT (WTO). In a similar vein, the NAFTA's underlying fundamental principle, as stated in article 102 of the agreement, strives for the pursuit of the following objectives;

> "(1) eliminating barriers to trade in, and the facilitation of cross-border movement of goods and services among the three Parties; (2) promoting fair competition within the free trade area; (3) increasing investment opportunities within the three Parties; ... (5) creating effective procedures for implementation

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[60] supra note 58.

[61] See, for example, Murray G. Smith, "The Evolution of Trade Remedies in NAFTA," in Michael Hart, (ed.), *Finding Middle Ground, Reforming the Antidumping laws in North America*, supra note 46, at 19; Michael Hart, "GATT Article XXIV and Canada & United States Trade Negotiations", supra note 59; G. Marceau, *Anti-dumping and Anti-trust issues in Free Trade areas*, Clarendon Press. Oxford, (1994) at 187.

> and application of the Agreement; and (6) establishing a framework for further trilateral, regional and multilateral cooperation to enhance the benefits of NAFTA." (our emphasis)[62]

As will be further analyzed in the next chapter of the present thesis, over the years, an impressive literature has accumulated analyzing whether the existing rules on antidumping favour the economic rationale for an optimal allocation of worldwide resources.[63] It would be fair to generalize that the majority of economic policy analysts, scholars and academics view antidumping as trade distorting. Therefore, on a theoretical basis, maintaining antidumping requirements within the NAFTA context could possibly, in our opinion contravene the GATT (WTO) requirements to "eliminate duties and other regulation restricting trade."[64] Free trade agreements that address only tariff and tariff-related measures are simply ignoring the pragmatic trading environment of which they are an integral part of.

Consequently, given the fact that a free trade agreement is an imperfect customs union, what the member countries should be seeking is a common policy

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[62] North American Free Trade Agreement, article 102, supra note 5

[63] See, for example, R. Dale, Antidumping law in a Liberal Trade Order (1986); R.K.N. Tharakan, "Some Facets of Antidumping Policy," in Policy Implications of Antidumping Measures, North Holland, 1991; J.H. Jackson and E. Vermulst, (eds), *Antidumping Law; and Practice, A Comparative Study*", supra note 24; M. Trebilcock and R. York, (eds), *Fair Exchange: Reforming the Trade Remedy Laws*, C. D. Howe Institute, 1990; M.Boddez and M. Trebilcock, "Unfinished Business: The Case for Liberalizing North American Trade Remedy Laws", (1995) 1 *Minn. J. Global Trade*; and several others. The rationale for imposing antidumping duties will be fully examined in the coming chapter of this thesis. Suffice it to say that even though at rare occasions antidumping duties may be imposed for social justice or to counteract structural differences, the overall result or effect is to increase prices.

[64] Gabrielle Marceau, in her book, *Antidumping and Anti-trust issues in Free Trade Areas*, supra note 60, is also of the opinion that the presence of antidumping regulations in a free trade context also contravene the National Treatment Obligation (GATT article III), see page 187 of her book.

conferring national treatment on each other's products. From this perspective, and as Michael Hart states in his article entitled, Dumping and Free Trade Areas,[65] "the arguments favoring the elimination of antidumping provisions to deal with cross-border price discrimination (antidumping) within a FTA become clearer and would include the following:

- antidumping duties on cross-border trade maintain a barrier to trade at the border;
- antidumping measures inhibit price competition within the free trade area;
- antidumping laws focus on injury and can serve to protect inefficient domestic producers;
- antidumping remedies deal with the symptom rather than the cause of the discriminatory practice and thus possess less of a prophylactic and deterrent effect;
- antidumping investigations often cover all producers of "like goods" from the country of origin rather than being limited to the alleged infringing competitor;
- antidumping investigations make the government a party to what is essentially a complaint between private parties; and
- antidumping investigations differentiate between domestic and foreign products."

The following chapters of the present thesis will outline economically rationale options for reforming antidumping law and policy in a free trade area, specifically in the NAFTA. However, if we are to examine the past commercial practice of the GATT with regards to the review and acceptance of regional agreements under article XXIV of the GATT, we would observe that the requirements of article XXIV of the GATT have not been rigorously applied. As the renowned economist Jagdish Bhagwati stated, the formation of the European Common Market was nothing short of a `watershed' on the application and

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[65] Michael Hart, "Dumping in Free Trade Areas", in Antidumping Law and Practice; a Comparative Study, Edited by John Jackson & Edwin Vermulst, supra note 24 at page 332.

requirements of article XXIV of the GATT.[66] This in turn can be somewhat justified to a certain extent by the fact that the original GATT negotiations pertaining to the formation of free trade areas notified to the GATT were based on a tariff-centred commercial policy. As the presence and effect of the tariff gradually diminished in multilateral trading, the nontariff threat, (i.e. antidumping) consequently intensified. As a result, most industrialized countries have developed an arsenal of multilaterally sanctioned contingency protection (antidumping) measures to deal with politically unacceptable imports that are essentially discriminatory in nature. This, unfortunately is the prevailing trend in the world trading system as administered by the GATT which has, to a significant degree, departed from its liberalizing guidelines by supporting managed trade.[67]

Under the North American Free Trade Agreement, each party reserves the right to apply antidumping duties in accordance with its domestic antidumping law.[68] In order to provide practical solutions to the interaction between competition law and trade policy and for the creation of a set of guidelines for the facilitation of commercial transactions within the NAFTA territories, article 1504 of the NAFTA establishes the creation of a Working Group on Trade and Competition, which

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[66] Jagdish Bhagwati, "Regionalism versus Multilateralism", supra note 49 at 535.

[67] The following authors believe that the GATT bargaining process is approaching more and more a mercantilistic tendency:
See, for example, M. Wolf, “A European Perspective” in Stern, Trezise and Whalley (editors), *Perspectives on a U.S.-Canadian Free Trade Agreement*, Washington, D.C., Brookings Institute, 1987 pp. 65-85, and Bhagwati and Irwin, "The Return of the Reciprocitarians - U.S. Trade Policy Today," (1987) 10 *The World Economy*. 109.

[68] NAFTA article 1902(1).

eventually created a subgroup exclusively on trade remedies. The subgroup's mandate entails the creation on a consensual basis of some sort of harmonized regime in order to diminish the harshly negative effects of each party's antidumping regime. Even though the economic and legal arguments all favour the gradual and complete elimination of antidumping in free trade areas, the political pragmatism takes precedence over any other rationale. Since the WTO agreements presently enshrine all of the elements of the Canadian and United States antidumping regimes,[69] the NAFTA subgroup on trade will have a difficult obstacle to overcome when forwarding antidumping reform proposals, due to the multilateral consensus achieved in maintaining the same antidumping principles.

Nevertheless, it is significant to note that a recent study done by Professor Patrick Messerlin and Dr. Brian Hindley on regional arrangements,[70] concluded that overwhelmingly countries have a tendency to desire regional economic integration in order to achieve, first and foremost, significant market access, which is not readily accessible on a multilateral level. In this perspective, abuse of the application of antidumping provisions, incited countries to negotiate regional trading agreements in the hope that such agreements will reduce the frequency of antidumping law application through closer negotiations. The expanded scope of regionalism seems

[69] A detailed analysis of the Agreement of the Implementation of Article VI of the GATT 1994 ("the antidumping agreement): The Result of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (Geneva: WTO Secretariat,1995) will be forwarded in the following chapter of the present thesis.

[70] B. Hindley and P. Messerlin, "Regionalism and Market Access," in K. Anderson and R. Blackurst (eds.), *Regional Integration and the Global Trading System* (1994). This study was commissioned by the GATT Secretariat.

to be having a positive effect on multilateral trade. At the December 1996, Singapore WTO Ministerial Conference, the participants advanced a positive statement on regional agreements in their Declaration. It read as follows:

> "We note that trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system. In this context, we note the importance of existing regional arrangements involving developing and least-developed countries. The expansion and extent of regional trade agreements make it important to analyse whether the system of WTO rights and obligations as it relates to regional trade agreements needs to be further clarified."

Conclusion

We have seen in this chapter that states have, ever since the GATT was enacted, taken advantage of their right to form regional agreements under article XXIV of the GATT(WTO). The free trade area or custom union resulting from this agreement necessarily implies a certain degree of economic integration. In order to achieve this level of economic integration, contracting parties to regional arrangements must apply the guidelines outlined in article XXIV of the GATT(WTO). We have seen, however, that these guidelines are not rigorously applied, and more politically "significant" concerns take precedence over complete trade liberalization in the free trade area. The gradual phasing out of antidumping

measures within the free trade area, will undoubtfully increase competition and further economic integration. The chapter that follows will analyze in detail, firstly, the improvements and inherent weaknesses of the provisions of the WTO Antidumping Agreement, and secondly, the implementation and specific characteristics of each NAFTA's country antidumping regime and its impediment to trade liberalization within the multilateral trading system.

CHAPTER III

THE REGULATION OF UNFAIR COMMERCIAL PRACTICES

1. UNFAIR COMMERCIAL PRACTICES (ANTIDUMPING) UNDER GATT

1. History of antidumping laws under GATT

As early as 1864, sovereign states were regularly involved in raising their tariffs, and most importantly, the European states abused the practice of subsidizing sugar to gain substantial control over trade. As a result of this activity, the first multilateral convention, the Paris Sugar Convention[71] was negotiated, but was not successful in effectively regulating international trade. The Atlantic Charter discussions between the United States and England gave rise in 1948 to the GATT. At the initial negotiations, the GATT was comprised of twenty-three nations agreeing to enter into the first and "only multilateral instrument" which sets out "agreed rules for international trade."[72]

The General Agreement on Tariffs and Trade was not intended to have a permanent existence nor to give rise to the formation of an international organization. The GATT of 1947 was to remain in force provisionally until the coming into force of the Havana Charter. The essence of the negotiations were

[71] See for its history, J. Viner, *Dumping: A Problem in International Trade*, Chicago, University of Chicago Press, 1923 (reprint 1966), pp. 192-204.

[72] GATT information and Media Relations Division, *General Agreement on Tariffs and Trade: What it is, what it does* 1 (1989).

based on tariff reductions in multilateral trade. The GATT reproduced the entire contents of Chapter IV of the Havana Charter dealing with trade policy. The Havana Charter regulated a much broader range of issues and provided for the creation of the International Trade Organization.[73] Unfortunately, the United States never gave its approval to the Havana Charter and consequently, the GATT continued to remain in force.[74] At the preparatory conferences for the GATT between 1946 and 1947, it seems that all the participating countries[75] generally recognized the necessity for an antidumping law. The United States, at the time, drafted a working document entitled a "Suggested Charter for an International Trade Organization of the United Nations."[76] This particular document contained specific provisions dealing with the regulation of antidumping. In many respects, the proposed antidumping model, closely resembled the United States' antidumping legislation enacted in 1921[77] which condemned all forms of dumping causing injury to domestic producers, without necessarily being predatory in nature.

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[73] Havana Charter for an International Trade Organization, U.N. Doc. E/Conf. 2178 (March 24, 1948)

[74] William A. Brown, Jr., *The United States and the Restoration of World Trade*, Washington: Brookings Institution, 1950 at 362-384.

[75] The meeting of the Preparatory Committee was attended by: Australia, Belgium, Brazil, Canada, China, Cuba, Czechoslovakia, France, India, The Netherlands, New Zealand, Union of South Africa, United Kingdom and the United States. *Official Report of the United States Delegation to the First Meeting of the Preparatory Committee for the International Conference on Trade and Employment* 1 (Oct. 15, 1946).

[76] hereinafter `Suggested Charter' Department of State Publication No. 2598, Commercial Policy Series 93 (1946).

[77] 15 USC 2.72 (1976) (formally enacted as part of the Revenue Act of 1916, ch. 463 S.801, 39 Stat. 798).

The negotiators of the Suggested Charter had realized the significance of defining price discrimination and defining the scope of the antidumping duty to be directly proportional to the margin of dumping. One facet of the antidumping provisions which was left unexplored, was the proposed provisions' potential to serve both antitrust and trade remedy ends. The problematic issue of predation was not, however, adequately addressed. Since the antidumping provisions of the Suggested Charter were modelled after the United States Antidumping legislation of 1921,[78] it is significant to note that some of the Congressional debates at the time managed to identify a pragmatic protectionist potential of the 1921 Act.[79] In the larger context of the Suggested Charter, the provisions in Chapter V dealing with restrictive business practices could have possibly played a complimentary role with the provisions in Chapter IV. Unfortunately, the Suggested Charter never came into force.

Given the national and international concern with the practice of 'dumping', it is not surprising that when the GATT entered into force in the year 1947, the contracting parties had inserted Article VI, entitled "Antidumping and Countervailing Duties." In summary, Article VI gave the parties the right to impose a duty in order to offset the margin of duties if the evidence demonstrated that such

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[78] Supra note 77.

[79] The Minority report of the Senate Finance Committee denounced the bill as not designed to counter predatory dumping, but to `suppress importations'. Senate Report 510 pt. 2, 66th Cong., 2nd Sess. 2.3 (1920). See also 61 *Congressional Record* 328 (1921) (Statement of Rep. Green).

dumping threatened to cause "material injury" to domestic industries competing in the same market.

As time progressed, several GATT signatories began to express discontent with the application of other countries' national antidumping laws. The lack of transparency and uncertainty in procedural calculations of dumping margins and certain applications of the injury test were responsible in bringing about trade distortions. In addition, the presence of a "grandfather clause" in the GATT exempted several countries that had prior antidumping legislation from the application of article VI of the GATT. These concerns were discussed by the GATT contracting parties during their negotiations in the GATT Kennedy Round which began during 1962 and terminated in 1967. The first Antidumping Code,[80] thus resulted, containing a more coherent set of procedural and substantial rules regarding the application of antidumping duties. However, it is significant to note that no injury-to-competition provision was encouraged as a required modification, contrary to the American antidumping law's original anti-predation purpose. The 1967 Antidumping Code was applicable only to the accepting signatories, which in turn undertook to render their domestic legislation compatible with the article VI requirements. Consequently, articles XIII, XIV and VI of the 1967 Antidumping Code formed the basis for a more binding and transparent antidumping regime.

[80] Agreement on the Implementation of Article VI (the "1967 Code") 651 *UNTS* 320, *GATT BISD*, 15 Supp. 24 (1968), hereinafter "the 1967 Antidumping Code."

Unfortunately, only Europe fully implemented the 1967 Code.[81] The United States was faced with an executive-legislative obstacle that prevented full implementation.[82]

The next round of negotiations yielded significantly more results on antidumping regulation under the auspices of the GATT than the previous round. These negotiations were entitled the Tokyo Round and began in 1973 and terminated towards 1979. The GATT parties developed a new Code[83] dealing with antidumping issues which subsequently came into effect in 1979 replacing the previous 1967 Antidumping Code. The significant changes can be summarized in the following manner:

- Weakening of the causation standard, Article 3 of the 1967 Code dealt with dumped imports being "demonstrably the principal cause of material injury," whereas the 1979 Code eliminated such a requirement, by merely requesting, in its article 3(4), the demonstration that injury is being caused by the effects of dumped imports;
- Removal of the requirement to investigate restrictive trade practices.
  The 1967 Code required GATT officials to conduct on investigation seeking to determine the presence of 'restrictive business practices' in the local industry;[84]

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[81] Reglèment (CEE) No. 459/68 du Conseil, *Journal Officiel Des Communautés Europeennes*, April 17, 1968, at I. This regulation covers dumping from non-EEC countries into the community region.

[82] *Trade Act*, 1974 19 U.S.C., S. 160-171;
See also, John H. Jackson, Jean-Victor Louis and Mitsuo Matsushita, *Implementing the Tokyo Round,* Ann Arbor: University of Michigan Press, 1994, generally at 164-5.

[83] Reprinted in *GATT, BISD* 26 S/171.

[84] supra note 80, article 3(b) read as follows: 'The valuation of injury - that is the evaluation of the effects of the dumped imports on the industry in question - shall be based on examination of all

- Greater elaboration of criteria used in assessing injury effects on a domestic industry;
- Expansion of the rules dealing with price undertakings;
- Article 15 of the 1979 Antidumping Code introduced a dispute-settlement mechanism in the Code;
- Article 16(6)b of the 1979 Antidumping Code made it mandatory for the signatories to notify any changes to their domestic antidumping legislation to the Committee on Antidumping Practices;[85]

The principal objectives of the negotiating parties at the Tokyo Round was to gradually enact antidumping provisions that would prevent trade distortions created by non-tariff barriers such as dumping and subsidies. Consequently, the requested desire to find a middle ground between the 1967 Antidumping Code and the recently enacted Subsidies Code, gave rise to the 1979 Antidumping Code.[86] As a result, the latter Code's recent provisions on injury determination, causality analysis, and price undertakings, resemble parallel provisions found in the newly enacted Subsidies Code.

Even though the 1979 Antidumping Code brought many improvements, these modifications according to certain academics, were responsible for enhancing the protectionist nature of the GATT antidumping system.[87] Under the recent changes,

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factors having a bearing on the state of the industry in question, such as: ... market share ... prices ... and restrictive trade practices.'

[85] See generally, J.H. Jackson, "Dumping in International Trade: Its Meaning and Context", 7-10 in J. Jackson and E. Vermulst (eds.) Antidumping law and Practice: A comparative study, supra note 24.

[86] [1980] U.N.T.S., [1980] T.S.Can n° 42
The analysis of subsidies and countervailing duties is beyond the scope of the present thesis.

[87] J.J. Barcelo III, "A History of GATT Unfair Proposed Trade Remedy Law - Confusion of Purposes", (1991) 14 *World Economy*, No. 3, at 311.

in the absence of a principal cause test, antidumping relief would nevertheless be made available if for example, a 'nondumping factor' such as a recession, was the principal cause of injury to domestic producers.

In summary, the basic overall requirements derived from the GATT antidumping rules and their national implementation are as follows:

- a comparison of the export price of a product with its sale price in the import market; and
- the presence of 'material injury' by the exporter's product to the competing domestic import market.

Despite the fact that the 1979 Antidumping Code brought significant changes to the antidumping regime of the GATT in terms of greater transparency, certain provisions, nevertheless required more clarity and precision. Over the years, a committee on Antidumping Practices was established within which parties were able to review their national legislation for purposes of compatibility with GATT provisions. The Committee has been successful in adopting a series of Decisions and Recommendations which were instrumental in clarifying some of the GATT provisions.[88] Since the implementation of the 1979 Antidumping Code, Australia, the European Union, the United States and Canada were responsible for instituting over 90 percent of antidumping and countervailing duty action by GATT members. As an indication of the protectionist use of antidumping actions, applications significantly increased in times of economic recession, and declined during periods of economic growth. The GATT signatories began using the 1979 Antidumping

[88] See *GATT, BISD*, 27 Supp. 16 (1981); 28 Supp. 33 and 52 (1982); 30 Supp. 24 and 28 (1984); 31 Supp. 283 (1985); 32 Supp. 182 (1986).

Code in a widely discriminatory fashion, as well as interpreting it in a liberal manner. In a relatively short period of time, each user modelled its domestic antidumping legislation in such a manner as to "shift" the rules favouring their own domestic industries over to the foreign importing industry. Antidumping rules and regulations were alarmingly being used more and more as an added arsenal against foreign competition, by other countries which had no prior antidumping legislation. In an era approaching trade liberalization at the multilateral level, this type of protectionist use of the 1979 Antidumping Code resulted in political tension manifested in the trading relationship of several countries. Such a general and indeterminate approach to international trade regulation, created conflicting interpretations and empowered countries to use domestic legislation for retaliatory protectionist purposes. The conceptual weaknesses already elaborated upon will inevitably affect the Code's implementation. Additionally, the implementation of multilateral obligations in each signatories domestic law was also a problem, especially with regards to the United States, who had expressly stipulated that domestic law prevailed over international obligations. These are the basic reasons why the 1979 Antidumping Code reform was placed on the agenda of the next round of negotiations; the Uruguay Round. The following analysis will attempt to highlight the strengths and weaknesses of the new antidumping provisions of the WTO.[89]

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[89] supra note 30. For a more detailed description of the legal and historical evolution of the Uruguay Round, see M.J Finger, and A. Olechowski (eds.), *The Uruguay Round: A Handbook on the Multilateral Trade Negotiations*, World Bank, Washington, 1987; Schott (ed.), *Completing the Uruguay Round: A results oriented approach to the GATT Trade Negotiations*, Institute for International Economics, Washington, 1990; J.H., Jackson, *The World Trading System: Law and Policy of International Economic Relations*, MIT Press, Cambridge MA, 1990, and "The New World Trading System: Readings" OECD Documents, *OCDE*, Paris 1994.

2. The WTO Antidumping Code

As previously seen in Chapter one of the present thesis, the agreement which established the World Trade Organization is hailed as a new achievement in the multilateral trading system. This agreement does not contain detailed substantive provisions, but instead lays a foundation of principles outlined in the several annexes.[90] The negotiation of the WTO Antidumping Code, seems to have taken an accelerated pace towards the end of the Uruguay Round negotiations. Canada made proposals for greater transparency, improved dispute settlement mechanisms, a minimum level of industry support required in order to commence proceedings, and forwarded several other proposals on various areas of concern.[91]

The Canadian proposal was comprised of two major parts. The first part advocated greater procedural consistency and uniformity in the application of the antidumping provisions. Specifically, concerns were addressed pertaining to the following issues:

- explicit definition of the term "major proportion" of the domestic industry, and a more stringent verification of "standing";
- a minimal lapse of time after the investigatory period, before the imposition of provisional measures;

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[90] These annexes contain the Multilateral Agreement on Trade in Goods, the General Agreement on Trade in Services, the Agreement on Trade Related Aspects of the Intellectual Property Rights as well as the Understanding on Rules and Procedures Governing the Settlement of Disputes. See the results of the Multilateral Trade Negotiations of the Uruguay Round: the legal texts (Geneva: WTO, Secretariat, 1995). These agreements are beyond the scope of the present thesis.

[91] External Affairs and International Trade Canada, Release 314 "Canada submits Proposals for Reform of International Anti-dumping Rules to GATT" 20 December 1989.
See also Amendments to the Antidumping Code, Submission by Canada, GATT Doc. MTN/GNG/NG8/W/65, December 22, 1989 hereinafter, Canadian Proposal.

- the basic information requirements for the commencement of an investigation should be stated in the form of guidelines; and
- greater transparency in antidumping proceedings, specifically requesting the publication of a statement for each step of the investigation.

Part two was drafted in the form of recommendations, some of which are as follows:

- a public interest test;
- higher level of assessment criteria to be used in determining whether dumped goods are effectively causing injury;
- a clear de minimis margin standard; and
- the insertion of a mandatory five year "sunset clause".

In terms of the actual contents included in the Antidumping Code, the United States opposed the insertion of 'sunset' provisions, and the rules regarding minimum level of industry support in order to commence an investigation. Mexico, on the other hand, along with other developing countries, manifested concern over the minimal U.S. "de minimis" standard and consequently advocated change through the GATT (WTO) channels of negotiations.

It must not be forgotten that in its origin, the GATT was an agreement on tariffs and of their gradual reduction. From the context of article VI of the GATT (WTO), it is clear that a party possesses the right to levy antidumping duties in certain narrowly defined circumstances, against an importer if the imported goods 'cause or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.'

Thus, the WTO Antidumping Code interprets the four main components of the GATT article VI being:

- definition of dumping, material injury suffered by domestic industry, and the link between the two concepts;
- procedural aspects pertaining to the commencement of the investigation;
- nature and duration of antidumping measures, and
- dispute settlement procedures.[92]

The analysis that follows will systematically outline the strengths and weaknesses of the provisions of the WTO Antidumping Code.

2.1 Rights and obligations arising from the WTO Antidumping Agreement

a) Procedural provisions and scope of application

As already seen in the previous chapters of the present thesis, the WTO Antidumping Code is referred to as the "*Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994*",[93] and its first article briefly describes its scope and purview:

> Article one
> "An antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this

[92] See generally, Patrick Messerlin, *La nouvelle organisation mondiale du commerce*, collection Ramses, 1995 at 136.

[93] Id.

> Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under antidumping legislation or regulations."

Article four deals with the elaboration of the criteria required in order for a complainant to be representative of the "domestic industry". The complainant or a group of complainants must represent a "major proportion" of the domestic industry. Even though, the Canadian proposal,[94] advocated for an explicit definition of the term "major proportion", this suggestion was not retained. In essence, the "domestic industry" definition found in the 1979 Antidumping Code is repeated verbatim.

Article five is entitled "Initiation and Subsequent Investigation" and has a basic purpose and intention of rendering the investigation process transparent and more importantly, of protecting against frivolous claims. Specifically, article 5.2 of the WTO Antidumping Agreement requires the existence of "sufficient evidence" of dumping, injury and the causal link between the two. More stringent criteria have been added by the insertion of the phrase, a "simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements." In addition, article 5.2 contains a detailed list of information that must appear on the application before any investigation is to commence. Significantly enough, the new requirement found in article 5.3 provides that "the authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation." Article 5.3 is a positive

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[94] supra note 91.

improvement towards greater transparency and a rule based approach. The absence of an equivalent provision under the 1979 Antidumping Code, resulted in several antidumping panel decisions having been specifically rendered on the required degree of examination.[95] Despite the fact that the GATT panels had ruled against the United States' standing practices, in both the Swedish Steel Panel Report and in the Portland Cement from Mexico, the United States decided to unilaterally block adoption of both Reports. No doubt, this practice was broadly criticized, and hopefully the new modifications will deter this type of trade distorting activity.

Finally, article 5.4 of the WTO Antidumping Agreement states that the investigating authorities must ascertain the level of support or opposition to an antidumping application deemed to have been made "by or on behalf of the domestic industry." The investigation will proceed if support from producers accounting for not less than 25 percent of total production, provided this 25 percent is greater than 50 percent of the production of that part of the industry showing either support or opposition. One possible weakness addressed at this new standard of review, is that the distinction between "foreign" and "domestic" producers is based on geopolitical limits and not on a substantive economic reality. Trading in the multilateral system

[95] See for example Imposition of Antidumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, GATT Doc. ADP/47, 20 August 1990 (hereinafter Swedish Steel Panel Report). The Panel condemned U.S. practices for not sufficiently verifying proper complainant standing. Also, United States: Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico, GATT Doc. ADP/82, 7 September 1992. In this case, the GATT panel ruled that U.S. had not properly determined standing requirements. Finally, in United States: Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, GATT Doc. ADP/87, 30 November 1992 (hereinafter Salmon Report) here ironically enough, the GATT panel ruled that standing requirement had been met in light of withdrawal of support for petition and state opposition by a member of domestic industry.

necessarily implies that several products are manufactured, assembled and exported by different countries. In addition, the globalization of the NAFTA's national economies and the movement of capital by multinationals will add complications in clearly differentiating between domestic and foreign producers. We believe, that the economic reality of multinational firms will pose a potential challenge despite the newly enacted level of investigation review.

Article 5.8 is an important new provision not found in the 1979 Antidumping Code. It states that investigations should be terminated if dumping margins are found to be de minimis, defined as two percent (i.e. de minimis, as a percentage of the export price). However, deterring unwarranted investigations at the margin does not necessarily mean that the complainant will not find alternative means using the other provisions of the WTO Antidumping Agreement to have the investigation continued, and to ensure that larger margins are indeed found in the majority of the cases. In addition, where the volume of dumped imports from a certain source is less than three percent of total imports, unless countries, which individually account for less than 3 percent, collectively account for more than 7 percent, such a volume is considered negligible and the investigation must be terminated.[96] Finally, article 5.10 stipulates a one year delay for the termination of the investigation, "and in no case more than 18 months, after their initiation."

[96] This particular provision, i.e. article 5.8 of the WTO Antidumping Agreement was used to request for the termination of an investigation initiated by the United States against Korean imports. See Polyvinyl Alcohol from China, Japan, Korea, and Taiwan, Inv. Nos. 731-TA-726-729 (Preliminary) USITC Pub. 2883, April 1995.

Finally, article 14 of the WTO Antidumping Agreement allows members to initiate antidumping investigations on behalf of third countries. The necessity of such a provision can only be, in our opinion, politically oriented, since if the consumers are deriving benefits, and the domestic producers are not filing for antidumping investigations, why allow a third party to interfere? Time will reveal the practical utility of such a provision.

b) Substantive Provisions

- Determination of Dumping:

Article 2 is one of the most significant articles of the WTO Antidumping Code, dealing with the fundamental subject: the determination of dumping. Article 2.1 reads as follows:

> "For the purpose of this agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its <u>normal value</u>, if the export price of the product exported from one country to another is less than the <u>comparable price</u>, in the ordinary course of trade, for the <u>like product</u> when destined for consumption in the exporting country." (our emphasis)

The concept of "like product" now defined in article 2.6 of the WTO Antidumping Agreement has presented several interpretation problems. During the sixties and seventies, a comparison of two products based on their physical characteristics was not a daunting task. In the present age of technological sophistication, a comparison

between two electronic products must be made according to specified criteria representative of the economic and commercial reality. This ambiguity was present in the 1979 Antidumping Code and unfortunately the WTO Antidumping Agreement does not provide an explicit definition reflective of the commercial and technological reality. The strain between commercial reality and this specific provision of "like product" of the 1979 Antidumping Code (same term found in the WTO Antidumping Agreement), has prompted the Canadian authorities to adopt a "functional similarity" test that examines not only physical similarities but other criteria such as whether and to what degree the two products compete with each other.[97] As we have already seen, the WTO Antidumping Agreement imposes certain restrictions on the definition of "domestic industry", which up to a certain degree, does not fully take into account the commercial reality of integrated multinationals. The concept of "like product", however, is discretionary enough to allow an analysis based on commercial reality. The extent to which commercial realities will be taken into consideration will be seen within the creation of the North American free trade area and the manner with which the enforcement of national antidumping regimes will be applied.[98]

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[97] The Canadian statutory definition of "like products" is much broader than that found in the 1979 Antidumping Code (and WTO Antidumping Code) in that "like products" may encompass goods that closely resemble the imported products in uses and characteristics, article 2(1) of the Special Import Measures Act (SIMA), S.C. 1984, c. 25; See also, S.A. Baker, "Like Products and Commercial Reality" in J. Jackson and E. Vermulst (eds.) Antidumping Law and Practice, A Comparative Study, supra note 24.

[98] See generally Chapter IV of the present thesis for a complete elaboration and analysis of possible reform proposals;
Stewart Baker in his article, "Like Products and Commercial Reality", supra note 94, is of the opinion that a joint antidumping action in a free trade area is possible under the 1979

Article 2.2.1 further advances some elements that are used in determining whether domestic market sales are "in the ordinary course of trade." This is done through the use of the sales-below-cost element of Article 2. Sales may be disregarded as being below cost:

> "... only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time."

These are new elements which are likely to serve a constructive purpose in the investigatory process.

In the past, the investigators were faced with the daunting task of interpreting several transactions with many different prices. The solution adopted in resolving this dilemma was to calculate the average of these values. Consequently, the average price value in the domestic market of the exporter was compared to the individual price of each transaction occurring in the export market. This method of calculation is likely to find dumping, since the above-noted article 2.2.1 allows the investigatory authorities to disregard certain domestic transactions that are priced below the average total costs during "an extended period of time". Consequently, it is to be feared that a systematic exclusion of domestic low prices, will strengthen the determination of dumping.

Several of the modifications found in the WTO Antidumping Agreement are positive improvements over the past system, however, much of their effectiveness

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Antidumping Code, since it is not expressly prohibited. We are not of this opinion regarding the NAFTA context, due to the level of economic integration in comparison with a customs union.

depends upon the manner with which the investigators will interpret the requirements and consequently the election of the appropriate method of calculation.

Article 2.2.2 states that when there are no domestic-market sales on which to formulate a price comparison, a value is determined from the materials and labour costs of the exported goods, plus an additional account for selling, general and administrative expenses, plus profit. These calculations are now required to "be based on actual data pertaining to production and sales in the ordinary course of trade(...) by the exporter or producer under investigation." Domestic sales at a loss are excluded, as are similarly excluded from the calculation of normal value in the general context of article 2. Practically speaking, the calculation of costs and profits of a specific individualized products may pose some difficulty to the investigators in the case where a firm produces several products on a yearly basis. It remains to be seen how such an investigation will be conducted.

In addition, article 2.2.2 does not provide for a protective mechanism against the practice of using exaggerated profits in order to obtain highly inflated dumping margins. Specifically under the WTO Antidumping Agreement, the investigators are allowed to use selected sales for the calculation of profit margins, instead of respecting generally accepted accounting principles.[99]

Article 2.4.2 provides that:

> "... the existence of margins of dumping(...) shall normally be established on the basis of a comparison

[99] The European Community has been criticized for its consistent use of this method of calculation of profit margins. For further analysis, see Angelika Eymann and Ludger Schuknecht, "Antidumping Enforcement in the European Community" in Michael J. Finger (ed.), Antidumping How It Works and Who Gets Hurt, Ann Arbor, University of Michigan Press (1993).

> of a weighted-average normal value with a weighted-average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis."

This provision introduces a relatively new method of establishing the dumping margins. This new approach will inevitably lead to modifications in several countries' approach which consisted in comparing export prices to weighted-average normal value, a method which, according to Patrick Messerlin and several other economists and lawyers, is inherently biased in favour of finding dumping margins.[100] Demonstrating the existence of dumping necessarily implies an estimate of the 'normal value' of the product, an estimate of the exportation price, and a comparison of these two elements.

The former comparison method is allowed to be applied in the form of an exception to the general principle of article 2.4.2, in the event that,

> "... the authorities find a pattern of export prices which differ significantly among purchasers, regions or time periods and if an explanation is provided why such differences cannot be taken into account appropriately by the use of a weighted-average-to-weighted-average or transaction-to-transaction comparison."

Even though the newly modified section 2.4.2 introduced significant methods in counteracting the inherent bias found in former investigatory practices, we believe that the exception provided in this section may lead to the finding of dumping margins in several cases where prices do vary from purchaser to purchaser or region

[100] op. cit., Patrick Messerlin. *La nouvelle organisation mondiale du commerce*, supra note 92.

to region for reasons inherent in the normal course of competitive trading.[101] It remains to be seen how the investigatory authorities will interpret and apply this article in light of the legitimate concerns which prompted the change in the first place, and whether countries such as the United States, who traditionally retain antidumping laws in their protectionist arsenal, will use the article's ambiguity in their favour.

- Determination of dumping:

In accordance with the following provisions of the WTO Antidumping Code, antidumping duties will be imposed on the exporting country, if and only if material injury has directly resulted to the importing industry.

The general principle for the determination of injury is outlined in article 3.1 which reads as follows:

> "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market of like products, and (b) the consequent impact of these imports on domestic producers of such products." (our emphasis).

[101] For example, differences in prices from region to region may occur for a variety of economic reasons, such as transportation costs, different market conditions, etc. Similarly, price differences from one purchaser to another may also depend on the purchaser's position within the operating market and his desire to meet existing competition, or his strength as a powerful buyer.

Furthermore, article 3.5 states that:

> "It must be demonstrated that the dumped imports are, through the effects of dumping(...) causing injury within the meaning of this agreement. The demonstration of a casual relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." (our emphasis).

One of the most controversial GATT panel report interpreting the former article 3.4 of the Tokyo Round Code (which is similar to the present article 3.5 of the WTO Antidumping Agreement) is, without any doubt, the Salmon from Norway Report.[102]

In the Salmon Report, Norway argued that antidumping duties should not have been imposed because the imported salmon was not the principal cause of injury to the domestic American industry, since the salmon were priced significantly higher than the comparable domestic products and furthermore, greater quantities of other imports from non-investigated countries sold for less in the American market.

Ironically enough, the panel decided that the International Trade Commission (ITC) was not obliged to isolate other factors causing injury to the domestic industry from injury resulting exclusively from the dumped imports. This

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[102] United States Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, 30 November 1992, BISD_S/_. (hereinafter the Salmon Report).

panel report was adopted with strong reservations by many members, towards the end of the year 1994.

Article 3.5 of the WTO Antidumping Code is not suggestive in the use of factors to be considered in injury determinations. The investigatory authorities are obliged to determine that the finding of material injury is in fact attributable to the investigated imports and not to something else. Causation between dumping and material injury must be clearly established as was concluded by the Australian Customs Service in the Frozen Pork from Canada case,[103]

> "It is not sufficient that the local industry be suffering detriment and that there be some dumping and/or subsidization of the imported goods. It is necessary that the dumped or subsidized goods themselves be the cause of the material injury."

Time will reveal the extent to which the WTO authorities will respect the requirements of article 3.5 of the WTO Antidumping Agreement.

The practice of not considering the extent of dumping margins has been regulated against by the enactment of article 3.4. The ITC should re-assess its position particularly now, in the presence of such an explicit requirement.[104] Finally,

> "cumulation of the injurious effects of dumped goods is also contemplated provided that the margins of dumping in respect of goods from each country are not de minimis, the volumes are not negligible and that a cumulative assessment of the effects of the dumped goods is appropriate given the conditions of

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[103] Australia Customs Service, Report and Preliminary Finding No. 92/20, Frozen pork from Canada, para. 9.1, affirmed: Australian Anti-dumping Authority, Review of the Australian Customs Service Negative Preliminary Finding on Frozen Pork from Canada, Report No. 90, January 1993.

[104] For an example of the ITC refusal to consider dumping margins, see Hyundai Pipe Co. Ltd. v. U.S. International Trade Commission, 670 F Supp. 357 (Ct Int'l Trade 1987).

competition between the imported products and the domestically produced like products."[105]

- Evidence and sampling:

Article VI of the WTO Antidumping Agreement sets forth in Annexes I and II of the Agreement the information required and the degree of transparency that the investigatory authorities may rely on in making preliminary and final determinations. Specifically, the procedures for verification visits are outlined in Annex I. Article 6.8 explicitly authorizes the use of "facts available" when a member country refuses to comply to the request for information, or when such a member impedes the normal course of the process. Since this procedure can easily be subject to abuse, Annex II outlines a certain number of limitations, which read as follows:

- all information that is verifiable, appropriately submitted and supplied in a timely fashion should be taken into account by the authorities when making determinations;

- the authorities may not disregard information submitted by interested parties, even though that information may not be ideal in all respects, provided that the interested party has acted to the best of its ability;

- the authorities must notify a party if its information is not going to be accepted and must allow that party a reasonable opportunity to provide further explanation; and

- if the authorities rely on information from a source other than the submitting party, they "should, where practicable, check the information from other independent sources at their disposal".

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[105] supra note 91 at page 4900 (Canada Gazette, Part I).

Each of these requirements reverse an objectionable practice used predominantly by the United States and the European Union.

Article 6.10 introduces the concept of sampling which constitutes an exception to the general rule requiring the calculation of individual dumping margins for each exporter. Article 6.10 requires that "where the number of exporters, producers, importers or types of products involved is so large as to make calculation of individual dumping margins impracticable," a sample of exporters, " statistically valid on the basis of information available to the authorities at the time of the selection" may be used. The "statistically valid" requirement should be a positive improvement over past practices of abusive random sampling.

The newly enacted article 6.12 of the WTO Antidumping Agreement requires that in cases where the product is commonly sold at the retail level, the authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations to provide information which might be pertinent to the investigating authorities with regards to the issues of dumping, injury and causality. As we have previously analyzed, the main objective of the antidumping investigations is to determine whether the *domestic industry* is or will be incurring material damage. Therefore, the problem is not that the investigating authorities refuse to allow users and consumers to make representations, but paradoxically, that the authorities refuse to take into proper consideration the impact of potential antidumping measures on the consumers and users. The reform proposals of several economists and trade law analysts, (of which

we will be discussing in Chapter IV of the present thesis), advocate for a significant place for the consumer in the antidumping process. Unfortunately, article 6.12 does not alter the existing situation regarding the protection of consumer interests. As Patrick Messerlin, so poignantly observed, in his analoguous comparison of article 6.12 with a similar clause found in the EU Anti-Dumping Regulation:

> "Cette mesure est trop modeste, comme le montre l'exemple de la Communauté qui est le seul pays ayant une telle clause (dans sa version complète). Une telle clause est facilement "capturée" par les producteurs domestiques. (...) la notion de "juste" concurrence, la nécessité "stratégique" de maintenir au moins un producteur de la Communauté-tous arguments qui ont pour point commun de justifier des mesures antidumping à des fins protectionnistes"[106]

Another practice which has raised much controversy is the practice of price undertakings. Article 8 provides for the controversial practice of price undertakings which constitutes promises by the exporters to raise their export prices or to limit the quantity of their exported products. In return, the investigation will either be suspended or terminated. This type of practice can in the long run lead to the gradual and artificial distortion of trade liberalization to the economic detriment of the exporting firms subject to undertakings in order to secure access to the importing market. Furthermore, the acceptance of undertakings is limited to a narrow period before the rendering of an injury finding (i.e. after a preliminary determination and before the final determination of dumping).

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[106] supra note 92 at 164

The determination of the actual "amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." Article 9.3 of the WTO Antidumping Agreement calls for a time limit on the determination of final duty liability to be imposed upon the exporter, normally within twelve months and under no circumstances more than eighteen months after the commencement of the review. A significant practical weakness is found in article 9.3.3 which provides that the dumping duties should be treated as a cost to be deducted from the export price of the dumped export. Normal value may, however, be calculated without any deduction for the amount of antidumping duties paid when changes in cost are "duly reflected in subsequent selling prices". Providing evidence of such a nature, may prove to be a practical impediment and perhaps an impossibility in several cases.

Positive improvements to the negative practice of imposing residual antidumping duties, can be found in the newly enacted sections 9.4 and 9.5 of the WTO Antidumping Code. This practice affects firms which are not initially subjected to any antidumping investigation, but because of the similar nature of the product they export, with the dumped export, antidumping measures can also affect their exportations. The economic effect of such a practice is, first and foremost to discourage entry to the importing market of efficiently operating firms and to subsequently create a coalition of weak and inefficient domestic firms.

Under provisions 9.4 and 9.5, an exporter who has not been investigated must demonstrate that he has no relation to the previously investigated exporter, and consequently an expedient review of his exports will be conducted.

The duration and review of antidumping duties and price undertakings are regulated by article 11 of the WTO Antidumping Agreement which provides for a new "sunset review" in virtue of which antidumping duties shall be terminated after a five year period.

> "unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

Another type of significant review found in article 11 is that of any interested party having the right, after a reasonable time has elapsed, to request from the authorities an examination of the necessity of the continued imposition of antidumping duties. The burden of proof lies with the investigating authorities and not with the exporters to determine the necessity of maintaining the imposed antidumping duties.

This provision constitutes a significant modification from the previous 1979 Antidumping Code that gave discretionary latitude to the investigating authorities without imposing any specific time frame for the termination of antidumping duties. It is significant to note, however, that Patrick Messerlin, professor at economics at the Institut d'Etudes politiques de Paris, in his previously cited book, La nouvelle organisation mondiale du commerce,[107] after having concluded from the experience of the European Union's similar automatic expiration provision, warns against some of the potentially negative effects of this type of provision. According to him, positive effects are not observed in cases terminated by the imposition of

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[107] supra note 92 at 168.

antidumping duties coupled with price undertakings. These measures are responsible for ensuring a certain minimal market price up to the end. Consequently, the absence of future antidumping investigation may be due to either one of the following factors: domestic market returning to a normal level of competition or on the contrary, the formation, (under the effect of the initial antidumping action), of a cartelized domestic market. It remains to be seen what effects this new provision will have within the North American context.

The final provisions of the WTO Antidumping Agreement that will be briefly analyzed are articles 12, 13 and 16, 17 and 18.

Article 12 requires a public notice and explanation to be sent to the member country "the products of which are subject to such investigation and other interested parties known to the investigating authorities...." This procedural transparency is significant in ensuring that the investigative process is properly commenced.

Article 13 provides for the existence in national laws of specific provisions dealing with judicial and administrative review by independent agencies of all final antidumping duties determinations. The effectiveness of this provision will depend upon the willingness of each member to practically ensure the implementation and enforcement of judicial review.

The Committee on Antidumping Practices under the Tokyo Round had a much more active role to play than the Antidumping Committee created by article 16 of the WTO Antidumping Agreement. The reason for this change is due to the

fact that the committee no longer has jurisdiction for antidumping dispute settlement procedures.

Article 17 of the WTO Antidumping Agreement outlines the procedure to follow in order to respect the WTO's Dispute Settlement Understanding (DSU). It provides a framework for the filing of different submissions in order to allow panel reviews to be completed within a nine month period. One of the most significant changes is the procedure prohibiting a losing party from blocking the adoption of a panel decision not in its favour, as was frequently done under the 1979 Antidumping Code. An appeal procedure is also provided in front of an appellant's tribunal in order to review issues of law. The standard of review provided for in article 17.6 of the WTO Antidumping Agreement constitutes one of the most controversial provisions of the Agreement and merits further analysis.

Article 17.6 of the WTO Antidumping Agreement reads as follows:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." (our emphasis)

In essence, the above-noted article allows for panel review only on questions of law (as opposed to a factual review). The standard of review found in Article 17.6(ii), advances, in our opinion, a flawed rationale coupled with contradictory terms.[108]

The standard of review to be used by the antidumping review panels was a constant preoccupation for the United States. During August 1990, the United States requested a GATT panel revision in the previously cited case of Swedish Stainless Steel Hollow Products.[109] The position advanced by the United States was that the Panel had two choices. The first was for the panel to engage in de novo review at each request and the second was to "accord some deference to the judgment of the investigating authority." Much to the United States disappointment, the Panel,

> "decided that rather than attempting to formulate general standards of review - it would be more appropriate for the Panel to examine and decide on these arguments and legal issues where they arise in reaction to specific matters in dispute."[110]

This disappointment by the United States led to powerful negotiations which prompted the drafting of article 17.6(i) and (ii), which allows permissible interpretations to exist if they conform with the WTO Antidumping Agreement. This seems to be a contradiction in terms, since article 17.6(ii) first provides that "the panel shall interpret the relevant provisions of the Agreement in accordance with

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[108] For a more detailed analysis, see David Palmeter, "A commentary on the WTO Antidumping Code," *Journal of World Trade*, Index volume 30 (1996) 43.

[109] supra note 95.

[110] Ibid., at paragraph 5.3.

customary rules of interpretation of public international law." In other words, the standard of review for questions of law calls for an interpretation in accordance with the Vienna Convention on the Law of Treaties.[111] Article 31 of the Vienna Convention states the general rule of interpretation of a treaty must be in accordance with the ordinary meaning of the terms in question, taken within their proper context and in light of the objective and purpose of the treaty.

Article 31 reads as follows:

> "... a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

We have difficulty envisaging multiple "permissible" interpretations in the language of article 31.[112] Should ambiguity still persist after the article 31 construction, then all ambiguity should be resolved using article 32 of the Vienna Convention so as to allow the existence of <u>one</u> preferable interpretation. If a proper construction is followed using the Vienna Convention's rules of interpretation, all ambiguity should be resolved through the use of articles 31 and 32, thereby eliminating the emergence of more than one permissible interpretations. This is not, however, the interpretation the United States negotiators were advocating during the Uruguay Round

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[111] Vienna Convention on the Law of Treaties, 23 May 1969, 8 *I.L.M.* 679 (Vienna Convention). It is important to note that despite the fact that the Vienna Convention is treaty law, it is also recognized, even by the United States, as stating existing customary international law; See S. Exec.Doc.L., 92d Cong., 1st Sess. (1971): "although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty and practice."

[112] Similar views expressed by David Palmeter, "A commentary on the WTO Antidumping Code", supra note 104 and G. Horlick and E. Shea, "The World Trade Organization Antidumping Agreement", (1995) 29 *Journal of World* Trade, 1 5.

negotiations. Suffice it to say that the standard of review issue has been quite controversial and, as such, the parties finally reached a Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. The consensus of that Decision can be summarized as follows:

> "The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application."

This explicit standard of review for antidumping could possibly lead to diverging interpretations on similar issues of law. The possible acceptance of any permissible interpretation by the Panel leaves little room for consistency in the WTO's Panel decisions.[113]

In conclusion, some academics have expressed a certain degree of pessimism with regards to the efficient functioning of the Dispute Settlement Mechanism found in article 17 of the WTO Antidumping Agreement. Professor Michael Young has voiced his concern about the WTO's lack of enforcement mechanisms in rendering the panel's decisions binding. His concern is understandable in light of the United States' past reactions to panel findings and recommendations. Even though retaliation for failure to implement the panel's decision will be much more easier under the WTO than it was under the GATT, processor Young believes that

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[113] For a more detailed commentary and critique on the WTO Dispute Settlement Mechanism, see W. Hunter, "WTO Dispute Settlement in Antidumping and Countervailing Duty Cases," *Practising Law Institute*, October 1994.

> "a country like the U.S., the world's largest trader, may still refuse to comply with a panel judgment and simply accept the complaining country's retaliatory measures as a tolerable price for continuing a particular disputed trade practice. Therefore, because of the concern about a supposed loss of sovereignty due to WTO dispute settlement procedures, if the U.S. refuses to endorse and embrace the new system, the very foundation of the multilateral trading system will be in grave jeopardy."[114]

We have seen from the detailed analysis of the WTO Antidumping Agreement that, despite the predominantly positive effect of the new modifications to the former GATT 1979 Antidumping Code, the temptation to allow antidumping measures to serve as a substitute for an alternative form of protection has sharply increased. In addition, the lack of sufficiently detailed rules and guidelines with respect to certain provisions of the WTO Antidumping Agreement will be responsible in permitting antidumping investigations that are void of accuracy. Pursuing an antidumping inquiry without the legal requirement of a clear and unequivocal causality link between injury sustained by the domestic industry and the effect of the export, will eventually lead to a trade distorting effect at the multilateral level. It would be fair to conclude that this failure to provide clear guidelines to various provisions such as dumping, injury, material retardation, etc., is attributable to the diverging views of the negotiators to the WTO Antidumping Agreement.

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[114] See Professor Michael Young's remarks during the Seoul Conference on "International Trade Law: Integration Harmonization, and Globalization", (1996) 10 *Columbia Journal of Asian Law*, 305 at 332; The United States has also raised controversial issues regarding its standard of review of antidumping duty determinations under the NAFTA panels; see S. Powel and E. Seastrum, "Straight Talk about a Complex Issue: The U.S. Standard of Judicial Review of Antidumping and Countervailing Duty Determinations: An Important Challenge for Nafta Panels," (1996) 19 *Fordham International Law Journal* 1451.

The WTO has attempted to regulate unfair commercial practices, in so doing, much is left to the discretion of each country. Such a general and indeterminate approach has the potential to give rise to conflicting interpretations and possibly can and will empower countries to domestically implement the WTO Antidumping Agreement for retaliatory and protectionist purposes. The following section will comparatively analyze the antidumping laws of the member states of the North American Free Trade Agreement for compliance with the WTO Antidumping Agreement and most importantly, for inherent fallacies of each antidumping regime.

3. Antidumping Legislation of the NAFTA Signatories in Light of the 1994 WTO Antidumping Agreement

3.1 The Essence of the Canada-United States Trade Disputes

The application of trade remedy law in North America has often been tumultuous. The United States was adamant in codifying trade remedy relief in the form of an international instrument (during the Kennedy Round negotiations) in order to offset the purported arbitrary imposition of antidumping duties by the Canadian government. Canada's economic relations with the United States have been marked with a fair amount of difficulty since Canada's position fluctuates between Canadian nationalism and the need to secure access to the American export

market.[115] Political tendencies dictated whether Canada would move towards negotiations favouring reciprocity with the United States or not. A significant shift for Canadian trade policy was the refusal of the Canadian government to pursue bilateral negotiations with the United States which led to the insertion of Canada in the multilateral framework of the GATT. The proximity of the United States market, the nature of the Canadian economy and the rhythm with which negotiations were progressing on the international level, precipitated the Canadian government toward bilateral arrangements. Unfortunately, the GATT was no longer seen as a defence framework against growing protectionist pressures, especially when Canada's largest trading partner was and still remains the United States, a country from which the bulk of the protectionist policies are emerging.

Enforceability of trade remedy laws in the United States cast a shadow on market predictability for Canada. As one of Canada's economists, R.J. Wonnacott states:

> "Until fairly recently, the major question has been: what would be the net benefits to Canada of moving from our present position to a freer trading arrangement with the United States? However, another question is now also being asked: what would be the further benefits to Canada of being able to secure our present access to the U.S. market? In other words, our present level of exports to the United States is threatened by a build-up of protectionist pressures in the United States."[116]

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[115] For a complete analysis of the history of Canadian trade policy, see John Whalley, Colleen Hamilton and Roderick Hill, *Canadian Trade Policies and the World Economy* (University of Toronto Press, 1985), table 1-10.

[116] See R.J. Wonnacott, "Canada/United States Free Trade: Problems and Opportunities," Special Research Report, Series on Canadian Trade at a Crossroads. (Ontario: Ontario Economic Council, 1985). See also R. Stern, P. Trezise and J. Whalley (eds.), Perspectives on a U.S.-Canadian Free

The asymmetry between Canada and the United States in their ability to take countermeasures against damaging imports gave Canada a greater incentive to rally for amendments to the trade remedy policies, particularly antidumping and countervailing. Consequently, during the FTA negotiation period, Canada was concerned with the issue of whether the formation of a free trade zone should involve the elimination of tariff and non-tariff barriers but equally the harmonization of competition policies. Canada was optimistically negotiating for change that would allow price strategies to be regulated by the countries' existing domestic competition laws.[117] It is interesting to note that the group of trade and competition officials that analyzed Canada's proposal was optimistic that all existing transitional obstacles could have been overcome with the required degree of coordination and cooperation from both countries. Nevertheless, the Canada-United States negotiations collapsed on several occasions during their final stage over the issue of the application of the antidumping and countervailing duty laws within the free trade area. A compromise was reached in the form of a new binational dispute settlement mechanism to take the place of judicial review by each country's national courts of the administration of the antidumping and countervailing laws. It was also agreed to allow a five to seven year period for both countries in order to create a more effective regime regarding

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Trade Agreement, The Institute for Research on Public Policy, Ottawa and The Brookings Institution, Washington, 1987.

[117] For a more detailed description of the Canadian proposal, see Michael Hart, "Dumping and Free Trade Areas," supra note 64. See also Michael Hart, Bill Dymond and Colin Robertson, *Decision at Midnight: Inside the Canada-U.S. Free Trade Negotiations* (Vancouver: University of British Columbia Press, 1994). This possibility for competition law substitution for the antidumping laws will be analyzed in chapter IV of the present thesis.

cross border price discrimination and subsidies. The multilateral trade negotiations of the Uruguay Round served as a potentially promising arena for the negotiation of antidumping law reform. In view of such an approach, no substantive rules for antidumping and countervailing duty law were included in the NAFTA. The binational panel review of antidumping duty determination acquired a permanent character as chapter 19 of the NAFTA with the extension of such review to Mexico, which was required to perform the necessary procedural modifications to the administration of its antidumping law. Mexico had also manifested support for all three NAFTA countries to seriously review their respective antidumping regime towards possible reform. Responding to concerns of the Canadian government, the three parties to the NAFTA had agreed to establish working groups.[118] The outcome has not yielded significantly enforceable results, but their mandate is still active. Specifically, the NAFTA Working Group on Trade Remedy Laws has proceeded with procedural recommendations but no consensus has been reached on substantive law reform.[119] The difficulty facing the working group with regards to antidumping policy reform among the NAFTA parties is, in the opinion of Lawrence Herman, trade law practitioner, due to the fact that the "WTO agreements now enshrine almost all of the elements of the Canadian and American trade remedy systems. In turn, this militates against the eventual replacement or large-scale

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[118] A Working Group has also been created under Chapter 15 of the NAFTA to promote competition law coordination and harmonization among the signatories. The termination of its mandate is scheduled for January 1st, 1999.

[119] See "U.S. Budget Crisis Thwarts Work of NAFTA Trade Law Work Group," *Inside U.S. Trade* (January 4, 1996). See generally, M. Hart (ed.), *Finding Middle Ground; Reforming the Trade Remedy Laws in North America*, supra note 60.

modification of antidumping duty remedies in the North American context under NAFTA because of the multilateral consensus achieved in maintaining these very same remedies."[120] Nevertheless, we are of the opinion that even though a "whole scale replacement regime" may not be politically nor practically feasible, trade remedy reform can be achieved due to the fact that the NAFTA also contains provisions which permit the three signatories to challenge the domestic trade legislation enacted by another member as being contrary to the NAFTA (regardless if it complies with the WTO or not). The differences and similarities must now be analyzed in order to legally assess the success of the possible reform proposals. Finally, fully comprehending the controversial position taken by the United States with regards to trade remedy law enforcement, necessitates the consideration of the actual nature of the practice of trade remedy law in each of the three NAFTA countries.

3.1.1 Canadian Antidumping Law

(a) General Framework:

Canada has implemented the obligations pursuant to the 1979 Antidumping Codes (Antidumping and Subsidies) by the enactment of the Special Import

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[120] L.M. Herman, *Canadian Trade Remedy Law and Practice,* Emond Montgomery Publications Limited, Toronto, 1997, at 9.

Measures Act (SIMA),[121] which replaced the former legislation[122] under the pre-Tokyo Round. In addition, the Canadian International Trade Tribunal Act forms an integral part of the trade remedies legislation. It is significant to note that SIMA has been amended several times in the past to insert the obligations contained in the Canada-United States Free Trade Agreement (FTA) and the NAFTA. During December 1994, SIMA was further amended in order to implement the various new provisions found in the WTO Antidumping Agreement. In the Canadian Statement of Implementation,[123] the Canadian government recognizes that the SIMA already contains many of the newly enacted provisions of the WTO Antidumping Agreement, nevertheless several changes must be made. In essence, as found in the Canadian Statement, the modifications to the SIMA can be summarized as follows:

- clarification in section 2 of the meaning of 'domestic industry' and 'threat of injury';
- new section 13.2 to include expedited reviews of normal value;

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[121] RSC 1985, c. S-15, as amended. Since the WTO Antidumping Agreement was analyzed in extensive detail, in the present chapter, a generalized analysis of SIMA will be forwarded in order that the similarities and differences of all three NAFTA members may be more apparent. The complete legislation and regulations governing trade remedy law is as follows: Canadian International Trade Tribunal Act, R.S.C. 1985, C.47 (4th Supplement), the Canadian International Trade Tribunal Regulations, SOR/89-35, as amended; and the Canadian International Trade Tribunal Rules, SOR/91-499. Administrative Policy Guidelines are also an integral part of the antidumping duty determination process, they are; SIMA Statement of Administrative Practices, Revenue Canada (Customs & Excise); the SIMA Assessment Programs Manual, Revenue Canada (Customs & Excise); and the Guidelines for Public Interest Investigations, Canadian International Trade Tribunal.

[122] RSC 1970, c. A-15 (the Antidumping Act).

[123] Department of Foreign Affairs and International Trade, Agreement Establishing the World Trade Organization, *Canada Gazette*, Part I, December 31, 1994, Vol. 128, No. 53.
See also Bill C-57, *An Act to Implement the Agreement Establishing the World Trade Organization*, October 25, 1994.

- section 17 must reflect the allowance of domestic prices on a weighted average concept;

- new section 30.1 is enacted to allow for the margin of dumping during the investigation phase;

- new section 30.3 confers the Deputy Minister of National Revenue (DM) the obligation to base an investigation on statistically valid samples;

- changes to section 31 reflect the new definition of injury, the new requirements on standing and certain time frames;

- changes 35 and 41, requires the termination of an investigation, where the margin of dumping is low or insignificant;

- sections 42, 49, 51, 52, 53 and 55 all deal with the practice of undertakings which will receive greater scrutiny under these provisions;

- new section 76.1 gives the Minister of Finance discretion to request a revision of the antidumping decision from either the Deputy Minister or the tribunal in order to reflect the WTO Dispute Settlement Body's recommendations;

- Section 97 confers regulatory authority regarding, among other issues, factors which may be considered as causing injury.[124]

The determination of dumping is done by the Deputy Minister of National Revenue (Customs and Excise) and the determination of material injury is done by a quasi-judicial tribunal, the Canadian International Trade Tribunal.

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[124] The description of the legislative changes was taken from The Canadian Government's Statement supra at note 122, at page 4901 and onwards. It is important to mention that on May 17, 1996 upon the request of the Minister of Finance, the Standing Committees on Finance and on Foreign Affairs and International Trade of the House of Commons joined efforts to review SIMA and to advise the Canadian Government as to the necessity of further amendments. Two different subcommittees were established and carried out an extension review process involving the intervention of academics, business leaders, government officials and legal experts. The Report was tabled in the House of Commons on December 11, 1996. The Government responded positively, and will take steps to implement the Report's recommendations, including the drafting of legislative amendments, and expects to bring forward the proposed legislative changes early in 1998(see Government Response to the Report on the Special Import Measures Act). Some of the Report's recommendations will be discussed in the Comparative analysis section of the present chapter.

b) Initiation and Standing

We have previously seen through the analysis of the WTO Antidumping Agreement that all complaints received by the Canadian industry must be sufficiently documented. In addition, the standing requirements must be met before the complaint can properly be received. Thirdly and most importantly the complainant must indicate to the Deputy Minister a "reasonable indication" of dumping and the correlating injury caused thereby.[125]

It is significant to note that the implementation by Canada of the provisions found in the WTO Antidumping Agreement has resulted in a stricter control over the evidential requirement for determining "indication of injury."[126]

c) Preliminary Determination of Dumping

After having gathered all confidential and nonconfidential documents from the appropriate sources, the Deputy Minister, must make a preliminary

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[125] Articles 31 and 32 of SIMA.

[126] Interestingly enough, the first antidumping case initiated by Canada under the new SIMA provisions incorporating the WTO Antidumping Agreement, in Refined Sugar (The Dumping in Canada of Refined Sugar Originating in or Exported from the United States, Denmark, the Federal Republic of Germany, the Netherlands, the United Kingdom, and the Republic of Korea, and the Subsidizing of Refined Sugar Originating in or Exported from the European Union, NQ-95-002, finding November 6, 1995, statement of reasons, November 21, 1995), required substantial evidentiary requirements from the petitioning domestic industry to forward evidence of past, present and future material injury. Could this be an indication of how the Deputy Minister intends to apply the new "indication of injury" requirement found in section 38(1) SIMA?

determination of antidumping and injury within a specified time limit. The preliminary determination must follow the requirements set out in article 38(1) of the SIMA, which, in essence, reproduce the requirements under the WTO Antidumping Agreement. The calculation of the normal value of the good under question is essential in determining whether it exceeds its export price. Normal value calculations are based on the criteria set out in Articles 15 to 23 of SIMA and Articles 3 to 19 of the SIMA Regulations. Under the provisions of the WTO Antidumping Agreement, Revenue Canada must also determine whether injury is continuing at the time of the preliminary determination. The Deputy Minister has the authority to impose provisional duties on goods, which have been found to be "dumped" on a preliminary determination basis. The Deputy Minister is also authorized to accept written undertaking from foreign exporters aiming at increasing the price of exported goods to Canada.[127] As we have previously seen under the WTO Antidumping Agreement, (i.e. article 2.4.2 and onwards), Canada has implemented various provisions allowing for the determination of the dumping margin on factors other than normal value and export price of goods.

Under certain circumstances, an antidumping investigation must be terminated during the 90-day period of investigation before a preliminary

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[127] Articles 49 through 50 of the SIMA. For a complete review of the ions that must be considered by the Deputy Minister in accepting such undertaking, see Hanging File Folders in Sizes Commonly Known as Letter Size and Legal Size, But Not Including Box Bottom Hanging Folders, Originating in or Exported from the United States of America, statement of reasons file no. 4235-229, November 27,1995. Renewal of undertakings will be done as many times as deemed necessary, see Certain Oil and Gas Well Casing from Japan, statement of reasons, file no. 4258-59, AD/717, November 15, 1995.

determination is made. Articles 35 and 36 of the SIMA outlines specific factors that the Deputy Minister must take into consideration is so doing.

Final determination of dumping must be made within 90 days after a preliminary determination by the Deputy Minister. The investigation will be terminated if no dumping is revealed upon the evidence submitted, the margin of dumping is insignificant or the volume of dumped goods is insignificant. Insufficient evidence of injury cannot be a factor upon which the Deputy Minister will decide to terminate an investigation. Once the preliminary determination made, the CITT commences an injury investigation.[128]

d) Determination of Injury by the CITT

The third and final step performed by the CITT entails the finding that such unfair trade practice is responsible for causing or threatening to cause material injury or retardation to the domestic production of like goods. Even in the presence of a determination of dumping, no final relief can be afforded to the complainant unless a "material injury" determination is found. Where a negative injury finding is conclusive, all provisional duties paid must be refunded. As previously seen under the WTO Antidumping Agreement analysis,[129] in order to be successful, a complainant must demonstrate, material injury, direct causal link, other intervening

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[128] See *Statement of Administrative Practices for the Special Import Measures Act*, p. 19.

[129] Article 3.1 and onwards of the WTO Antidumping Agreement.

factors not responsible for the injury and practices in question legitimately threaten future production in Canada of like goods.[130] The injury determination process in front of the CITT resembles a civil proceeding. Due to the fact that the CITT is a court of record and possesses much of the powers of a superior court in Canada, it may hold public hearings, and hear evidence. Evidence is gathered from both public and confidential sources. Even though dumping is determined by the Deputy Minister, it is up to the complainant to prove injury in front of the CITT. There is extensive jurisprudence establishing the required criteria in order to constitute material injury.[131]

In the *Machine Tufted Carpeting Case*, the CITT held that despite the presence of tariff reductions resulting from the FTA and from the recession these factors were responsible in contributing to the domestic producers' injury. As a result, the tribunal determined that the causation test was adequately fulfilled and stated that, "dumped imports do not have to be the cause of injury, as long as they are a cause." This is an indication of the tribunal's perception with respect to determining whether the dumped imports are the cause of injury.

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[130] The Special Import Measures Regulations, at article 37.1 and onwards prescribe detailed factors to be taken into consideration when analyzing the "material injury factor."

[131] For cases dealing with the notion of material injury, see Cars Produced by Hyundai, Korea CIT-13-87, finding March 23, 1988 and statement of reasons, April 7, 1988; Subsidized Grain Corn from the United States, CIT-7-86, finding, March 6, 1987 and statement of reasons, March 20, 1987. See also National Corn Growers' Association v. Canadian Import Tribunal, et al., [1990] 2 SCR 1324 (this case will be analyzed in the comparative analysis section of the present chapter); the recent flat rolled cases: Hot Rolled Steel Plat NQ-92-007 finding, May 6, 1993 and statement of reasons, May 21, 1993, and Corrosion-Resistant Steel Sheet Products, NQ-93-007, finding July 29, 1994 and statement of reasons, August 15, 1994; and Machine Tufted Carpeting from the United States, NQ-92-004, finding, January 20, 1993; statement of reasons, May 21, 1993.

The WTO Antidumping Agreement, as we have seen requires a causal link between dumping and the material injury sustained by the domestic producers due to the dumping. However, there is no specification as to the required degree of harm necessary in order for the injury to be qualified as "material". Unfortunately, SIMA does not define the word "material". However, the material injury test is more demanding than under the analogous United States legislation.[132] The CITT has not established a clear and unequivocal framework within which the concept of "materiality" shall be analyzed. For example, in Stainless Steel Butt Weld Pipe Fittings Originating in or Exported from Japan,[133] the CITT determined that the cumulative effect of various injury factors were sufficient in determining the required degree of materiality. The CITT held:

> "that the injury is material in view of the size of the orders lost, the market share lost, the squeeze on margins and the magnitude of the financial losses suffered by the complainant. The deterioration of the final condition of the complainant was so serious as to put its continued survival in jeopardy. The causality link of material injury as found by the Tribunal due to the dumping by the Japanese exporter is clearly established by the sales lost on price considerations alone.

The Canadian International Trade Tribunal Rules,[134] enacted pursuant to the CITT Act,[135] enables the Tribunal to gather evidence of injury in a number of

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[132] This aspect will be fully elaborated upon in the next section of the present chapter on the comparative analysis.

[133] Inquiry No. CIT-1-88, statement of reasons, August 18, 1988, at 9.

[134] PC 1991-1446, SOR/91-499, August 14, 1991.

[135] supra note 120.

different ways. The relevant factors in the form of guidelines are now codified in article 37.1 of the SIMA, which in turn respects the new modifications enacted by the WTO Antidumping Agreement. With respect to the likelihood of future material injury, article 3.7 of the WTO Antidumping Agreement stresses that the material injury must be "clearly foreseen and imminent."

Public interest representations are allowed pursuant to article 45 of the SIMA. The Tribunal may consider circumstances relating to an affirmative injury determination. In accordance with Section 41(e) of the SIMA Regulations, any person representing consumer interests has standing to make the appropriate representations. Interestingly enough, section 125 of the Competition Act[136] equally enables the Director of Investigation and Research to make appropriate submissions to the Tribunal with respect to the public interest aspect of antidumping cases.

In addition, non-dumping factors must also be taken into consideration when assessing the causal link. One such factor is the intra-industry competition.[137]

Before ending this particular section, it is crucial to mention a recent case which dealt with the determination of a threat of material injury and the consequent imposition of antidumping duties on future imports. In the case of *Caps, Lids and*

[136] R.S.C. 1985, c. C-34, as amended. Article 41(e) of the SIMA reflects the concern that `concentration on producer interests alone is too narrow a focus and the consumer interests must be considered'. House of Commons Sub-Committee on Import Relief; Report on SIMA, #31, 9 June 1982. In practice only three public interest hearings have been convened since the enactment of the provision in 1985, and consumer groups did not participate at any of them (i.e. Special Adhesive Tapes, CIT-8-85; Grain Corn, CIT-7-86; and Fresh Whole Yellow Onions, CIT-1-87).

[137] See Certain Waterproof Footwear Originating in or exported from the Czech and Slovak Federal Republic, the People's Republic of China, the Republic of Korea, and Taiwan, NQ-92-005, statement as reasons February 19, 1993.

Jars Suitable for Home Canning,[138] the CITT held that due to the recent amendments under section 42 of the SIMA, it is not necessary to prove threat of material injury in order for a finding to apply to future imports. Specifically, the CITT stated that it was only required to find that dumping was a cause of past injury to domestic producers in order to apply antidumping duties on all future imports.

d) Review Procedures[139]

Administrative determinations of antidumping duties by the CITT are reviewed in the following manner:

- Administrative review by the CITT Article 76(2) of the SIMA enables the CITT, on its own initiative or at the Deputy Minister's request, or any other person to review the order.

- Judicial review by the Federal Court pursuant to articles 76 and 96.1 of the SIMA An application for judicial review of certain determinations of the Deputy Minister and the CITT may be lodged with the Federal Court of Appeal.[140]

- Binational review by a NAFTA panel:

[138] NQ-95-001, statement of reasons, November 6, 1995; The potential consequences on the Canadian trade remedy law of the above-noted decision in Caps, Lids & Jars will be further discussed in the comparative analysis section of the present chapter. Additionally, the CITT released, during the month of November 1996, a revised inquiry schedule for the section 42 process. This new schedule alters the CITT's information gathering process and hearing. Essentially, the changes are aimed at reducing the time periods and imposing a more formalized exchange of written interrogatories.

[139] This section is based on the article by J.C. Thomas and als.,"Canadian Antidumping and Countervailing Duty Law and Procedure", in B. Leycegui, W. Robson and D. Stein (eds.), *Trading Punches: Trade Remedy* Law and Disputes, ITAM, C.D. Howe and NPA, 1995 at 93.

[140] Grounds of Review are set out in articles 18.1(4) of the Federal Court Act, R.S.C. 1985, c. F-7, and Section 96.1(2) of SIMA.

If goods from a NAFTA country have been affected by a determination of antidumping, then in virtue of article 77.011 of the SIMA, such "definitive decision" may be subject to a binational review procedure. This request for review can only be made on the grounds set forth in article 18.1(4) of the Federal Court Act.[141]

- Review of Normal Value and Export Price, when Affected Exporters are not notified.

  If affected exporters had not been notified of the initiation of an investigation, article 13.2 of the SIMA grants them the possibility to request for a review.

- Review upon recommendation or Ruling of the WTO Dispute-Settlement Body.

  The Minister of Finance has the discretion to request a review of any decision or determination once the WTO Dispute Settlement Body has issued a recommendation.[142]

In conclusion, we have seen that Canada was successful in implementing the provisions of the WTO Antidumping Agreement. The aspects of the Canadian antidumping law analyzed in this section were explicitly chosen in order to adequately address certain comparative provisions in the American antidumping law. It is imperative that these differences be identified and analyzed in order to ensure the efficacy of potential reform proposals, whether it be with competition law as a substitute or any other alternative mode of reform.

[141]supra note 139 and in accordance with article 1904 of Chapter 19 of the NAFTA.

[142] The standard of review jurisprudential analysis will be included in the comparative analysis of the present chapter.

3.1.2 United States Antidumping Duty Law

a) The Statutory Framework

The principal American statute between 1921 and 1979 directed against the practice of dumping was the Antidumping Act of 1921.[143] As an effort to implement in the United States the obligations that resulted from the 1979 Tokyo Round of Multilateral Trade Negotiations, Congress enacted the Trade Agreements Act of 1979,[144] which was a revision of the laws regulating dumping. The U.S. Antidumping law was again revised in 1984, by the Trade and Tariff Act of 1984, and in 1988 by the Omnibus Trade and Competitiveness Act; these modifications were much less significant than those of the 1979 Act. Therefore, as set out in Title VII of the Tariff Act of 1930 (as amended), the antidumping law of the U.S. is codified in Title 19 of the United States Code (USC), Sections 1673 to 1677k.

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[143] Pub. L. No. 67-1, ch. 14, title II, 42 Stat. 11 (1921), codified as 19 U.S.C. ss. 160-171 (1976) (repealed 1979).

[144] Pub. L. No. 96-39, 93 Stat. 144, 147-48 (codified as 19 U.S.C. s. 2503 (1982)), which eventually became known as the Tariff Act of 1930 (as amended) 19 U.S.C.

b) Procedures[145]

The United States Department of Commerce (DOC) has the responsibility to determine whether goods are being dumped and the International trade Commission (ITC) - a quasi-judicial body initiates an investigation in order to determine whether the dumped goods are causing or threatening to cause material injury to the domestic U.S. industry. The Antidumping proceeding can be initiated by the DOC or by a petition filed by an interested party on behalf of a domestic industry.[146] Whether or not the DOC will initiate an investigation is based on a review of the petition and publicly available information. If the petition lacks the required level of support (as required from the WTO Antidumping Agreement), then the DOC must obtain the viewpoint from members of the U.S. industry.

The ITC is responsible for conducting a preliminary injury investigation to determine whether a "reasonable indication" of injury exists. This is usually done within 45 days after the initial filing of petition. Submissions in the form of representations are accepted and determinations are rendered 2 to 3 weeks later.

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[145] For a complete analysis of the U.S. antidumping system, see *Antidumping: A Comparative Analysis*, supra note 64 at page 99; K. Steele (ed.), *Antidumping Under the WTO: A Comparative Review*, Kluwer Law and International Bar Association, 1996; and J. Winston, "An Introduction to U.S. Antidumping and Countervailing Duty Laws," in *Trading Punches: Trade Remedy Law & Dispute under NAFTA*, supra note 138, at 104.

[146] 19 U.S.C. s.1673a. The petition must allege the elements necessary for the imposition of an antidumping type duty. These have been set for by the International Trade Administration of the DOC, 19 C.F.R. s. 535.12.

The practical consequences of an affirmative preliminary determination by the DOC is the mandatory posting of a bond for each import subsequent to the publishing of the DOC's determination.

Subsequently, and after 75 days from the preliminary determination, the DOC must issue a final determination of dumping if it finds dumping above the *de minimis* levels. In such an event, the case is automatically transferred to the ITC for the final injury proceeding.[147]. The affirmative final determination by the DOC will set the new rate for bonds based on the newly determined margin of dumping.

Returning to the final injury determination of the ITC, this procedure is conducted with more detail than its previous preliminary determination. A hearing is held, in front of the ITC's commissioners allowing the parties (petitioners and respondents), to submit their evidence. If the ITC's final determination is affirmative, the DOC will issue an antidumping order which, in turn, will be enforced by the Customs Service.[148] There exists circumstances where an antidumping investigation can be voluntarily terminated or suspended. If a petitioner decides to withdraw his complaint, the DOC must generally terminate the investigation, unless the termination of such an investigation would be contrary to public interest.[149]

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[147] See s.1673d(b).

[148] See s.1673e(a).

[149] A private restriction of foreign imports is likely to violate U.S. antitrust laws, as will be seen in the following chapter of the thesis. Thus a foreign government must decide to unilaterally restrict imports to the domestic market in order to avoid antidumping duties, and this is where the public interest concept comes into play.

In addition, the DOC may suspend investigations and not impose antidumping duties indefinitely in virtue of a suspension agreement if the foreign exporter voluntarily agrees:

- to cease exports of the dumped good;
- to eliminate dumping margin through price adjustments; and
- to revise its prices as to eliminate any injuries effect on U.S. domestic industry.

An antidumping order is subject to annual review by the Department of Commerce and may be revoked or modified.[150] The recent amendments to U.S. trade remedy law, forced the DOC and the ITC to conduct "sunset reviews" no later than five years after the issuance of an order and in various other circumstances.[151] The Court of International Trade (CIT), has the authority to judicially review the DOC and ITC decisions,[152] with subsequent appeals to the Court of Appeals for the Federal Circuit (CAFC) and the United States Supreme Court.[153] In turn, all decisions emanating from the DOC and ITC, that are final in nature may be reviewed by the CIT. An "arbitrary and capricious" standard is used to review agency decisions including the DOC's decision not to initiate an investigation.[154] Final determinations

[150] See 19 U.S.C. s.1675(a).

[151] 19 U.S.C. s.1675(c).

[152] 19 U.S.C. s.1516 2 (1994).

[153] See 28 U.S.C. s.2645 (1994) & 19 U.S.C. s.1516a(a)(4). Under the NAFTA, an aggrieved party may take advantage of NAFTA's binational panel review. Under U.S. law binational panel review has the same effect as judicial review. As we have seen, private parties do not have standing before the WTO and unfortunately the outcome of state WTO dispute settlement is not automatically enforceable under U.S. domestic legislation.

[154] See s.1516a(b)(1)(A).

of dumping or injury could also be subject to review under the "unsupported by substantial evidence in the record" standard.[155] Antidumping orders expire after five years unless an interested party requests an administrative review during that period.

c) Substantive Methodology

- Methodologies for calculating dumping margins:

The determination of sales of a product in the U.S. at less than fair value is done by comparing the U.S. price of the product with the normal value. When the DOC determines that the U.S. price is less than the normal value, it concludes that dumping has occurred. In order to respect the WTO Antidumping Agreement requirements, the DOC must calculate a generalized percentage dumping margin based on the weighted average dumping margin for all U.S. sales.

The actual calculation methodologies can be complicated. Suffice it to say that for any U.S. sales transactions, the U.S. price is determined by using the value of the first sale to a U.S. entity that is not affiliated to the exporter. The methodology may, however, vary depending on whether the sales price is classified as "export price" or "constructed export price". Certain adjustments to normal values are made if the expenses are "directly related selling expenses." In constructed export price situations, the DOC is required to make the same adjustments as with the export price cases, included some additional adjustments.

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[155] Sees.1516a(b)(1)(B).

The imports' "normal value" is usually derived from home market sales. Home-market sales will not be used when they are found to be very low. In this case and in conformity with the WTO Antidumping Agreement, normal values will be determined by sales to third countries or constructed values. Adjustments to normal values are also made to account for differences in selling expenses, physical characteristics and quantities.

Finally, the DOC is now obligated, in its determination of dumping margins, to compare the weighted average U.S. price for each product with the weighted normal value for the comparable product.

- Injury Determinations:

Once the DOC's determination of dumping is affirmative, the ITC is vested with the authority to determine whether:

> "(A) An industry in the United States -
> (i) is materially injured, or
> (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation...."[156]

Without an ITC determination of material injury, threat of material injury, or material retardation of establishment, no antidumping duty may be imposed. The definition of material injury is found in the statute as 'harm which is not inconsequential, immaterial, or unimportant.'[157] The existence of injury is

[156] 19 U.S.C. s.1673(2) (1982 & Supp. IV 1986).

[157] 19 U.S.C. s.1677(7)

determined by considering factors relating to the U.S. industry. In addition, when the ITC analyzes whether the foreign imports in question have caused the injury, it considers factors such as level of import penetration and evidence of price suppression. The ITC may also consider other factors, if it identifies them and explains their relevance. Finally, the ITC evaluates whether imports will have an adverse impact on the U.S. industry in the future.

For cases involving a threat of material injury, a separate list of nine additional factors was added to the statute in 1984 and 1988. This list contains indicia of injury to the domestic industry in the future, when normal values are indicating the lack of injury.

Generally speaking, the ITC does not experience difficulty in identifying distress in domestic industries. The controversy arises over the issue of whether causation has or has not been demonstrated. The U.S. legislation requires only that injury be by reason of' dumping. The U.S. Court of International Trade declared that the ITC must make a positive finding of injury if dumped imports contribute 'even minimally' to depressed conditions of domestic industry.[158] The ITC's position, therefore, is that 'the injury caused by dumping need not be the "principal" or a "major" or "substantial" cause of overall injury to an industry.'[159] It is certainly to be presumed that the more detailed requirements of the WTO Antidumping Agreement will have a different effect on the ITC's decision making authority.

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[158] See *British Steel Corp.* v. *United States*, 593 F. Supp. 405 (Ct. Int'l Trade 1984).

[159] H. Doc. 96-153, Part II, 434-5. (United States Congress House Report)

In essence, the U.S. antidumping laws afford petitioners a reasonably important weapon for keeping low cost imports out of the U.S. market, without requiring petitioner to establish whether the low priced imports are harmful for competition.

Our main focus has been up until this point, on the elaboration of the antidumping laws of two of the NAFTA members, Canada and the United States. However, a proposal for reform cannot be presented without thoroughly addressing the specific and unique characteristics of Mexico in the free trade area under the NAFTA.

3.1.3 Mexican Antidumping Laws

a) Preliminary Remarks[160] and Statutory Framework

Mexico' economy has been marked, for the most part of the twentieth century by strong imperialist forces. Thus the role of government and the perception of economic trade have not parallel the Canadian and American experience. Until 1986, the year in which Mexico acceded to the GATT, no compelling reason existed for the Mexican Congress to question the necessity of an antidumping or countervailing duty law. Mexico's government, for the past sixty years, pursued an economic policy based on the practice of import substitution, making the need for

[160]It is beyond the scope of this thesis to provide a comprehensive study on the Mexican economy

import relief unnecessary. After having enacted its first trade remedy law, Mexico created an administrative agency (SECOFI) responsible for administering the newly enacted antidumping law. At the beginning, the SECOFI was highly criticized for a lack of adequate and effective procedural safeguards or administrative due process. By 1993, Mexico had supplanted Canada "as the fourth most active user of unfair trade laws."[161] It was thus imperative for the Mexican government, at the closing of the NAFTA negotiations to overhaul and reform Mexico's antidumping and countervailing duty system.

With respect to the GATT, certain aspects of Mexico's first unfair trade regime, such as the application of the injury test by the SECOFI and the double collection of antidumping and countervailing duties, were not compatible with Article VI of the GATT. Additionally, with respect to the NAFTA, the government of Mexico expressly agreed to review and legislatively reform its antidumping regime in accordance with Chapter nineteen of the trilateral trade accord.[162] The Mexican government also agreed, again in accordance with Chapter 19 of the NAFTA, to create the "right to immediate access to review final determinations by binational panels for interested parties, without the need to exhaust first the administrative appeal" process, to establish "explicit and adequate timetables for

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[161] See *Resolucion, Secretaria de Comercio y Fomento Industrial*, D.O., Oct. 28, 1993 (describing initiation of antidumping and countervailing duty investigations against exports of U.S. cold-rolled sheet steel).

[162] NAFTA Chapter 19, Annex 19.04.15, Schedule of Mexico, I.L.M. at 689-90.

determinations of the competent investigating authority and for the submission of questionnaires, evidence, and comments by interested parties."[163]

The influence of all of these domestic and international policy considerations culminated in the legislative enactment of Mexico's new Foreign Trade Law on July 27, 1993.[164] Consequently, the SECOFI issued the new antidumping and countervailing duty implementing regulations, entitled the Foreign Trade Law Regulations[165] in an effort to bring the new regulatory system into complete harmony with Mexico's NAFTA obligations. What follows constitutes a brief description of Mexico's newly enacted antidumping regime.

B) Substantive Framework

i) Determination of Dumping

In accordance with the WTO Antidumping Agreement to which Mexico has adhered through its GATT obligations, article 30 of the Foreign Trade Law forwards a definition of price discrimination as "the introduction of merchandise into national territory at a price below its normal value." Consequently, two values are

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[163] Id.

[164] *Decreto que reforma, adiciona y deroga disposiciones de diversas leyes relacionadas con el Tratado de Libre Comercio de America de Norte*, D.O., Decemb. 22, 1993.

[165] *Reglèmento de la Ley de Comercio Exterior*, D.O., Dec. 30,1993.

required in order to effectuate the comparative analysis, normal value and export price.[166]

- Normal value:

Normal value is understood to be "the comparable price of identical or similar merchandise intended for the domestic or home market of the country of origin in the ordinary course of trade."[167]

- Export price:

There is no statutory definition of the term export price. It is, however, presumed to be "net price paid or to be paid by the Mexican independent importer for the merchandise that are presumably the object of dumping."[168]

- Dumping margin:

Dumping margin is determined in accordance with the international practice described in the WTO Antidumping Agreement. In addition, the normal and export values are subject to certain adjustments in accordance with differences in sales terms and conditions.[169]

It should also be noted that SECOFI is authorized to make additional adjustments not required by statute, to take into consideration factors such as the

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[166] supra note 164, article 38.

[167] *Foreign Trade Law*, articles 31 and 32. It is significant to note that the three methodologies used to determine normal value are the methods proscribed by the WTO Antidumping Agreement and also implemented by Canada and the United States in their antidumping laws. Consequently, the description of the three methodologies will not be repeated.

[168] See Vazquez Tercero, *Sistema Mexicano*, page 22:1.

[169] *Foreign Trade Law Regulations*, articles 53 and 54, supra note 165.

inflationary aspect of the economy as well as an adequate currency conversion. At the final stage, SECOFI usually calculates a weighted average normal value and a weighted average export value during the duration of the period of investigation.[170]

ii) Determination of injury

In accordance with articles 39 and 40 of the Foreign Trade Law, local producers must prove that they have suffered material injury or that there is a threat of material injury as a result of the dumping practice. In addition, these legislative provisions define injury and causation in accordance with Mexico's international obligations under the WTO Antidumping Agreement.[171]

The causal link between dumping and injury is essential, and the SECOFI is becoming increasingly rigorous on this point. SECOFI also has the obligation to take into consideration other factors which may be responsible for the material injury, other than the dumped imports.

Article 42 of the Foreign Trade Act contains the definition of threat of material injury. It is the imminent and clearly foreseeable danger of injury to the domestic Mexican industry. Based on articles 39 and 42 of the Foreign Trade Law, three elements must be proven during an injury investigation. They are as follows:

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[170] *Foreign Trade Law*, articles 40 and 41, and Article 76 of the *Foreign Trade Law Regulations*, allows the SECOFI to extend the normal period of investigation, at its own discretion, to include imports made subsequent to the commencement of the investigation.

[171] Before the amendments to Mexico's *Foreign Trade Law*, the SECOFI was not required to prove economic injury in every unfair trade investigation in order to impose antidumping duties.

1st Element:

- "the existence of a domestic industry affected by an unfair trade practice, or a project for the establishment of a new industry that could be hampered by the unfair trade practice;"[172]

According to article 63 of the Foreign Trade Law Regulations, the SECOFI is also required to assess the effect of the imports investigated on total domestic production, or on certain domestic producers whose output constitute a major proportion of domestic production of like products. Significantly enough, the concept of "major proportion" is not defined in the Regulations, which leaves a certain degree of discretionary power to the SECOFI.

In addition, under certain circumstances, domestic producers are excluded from the definition of "domestic industry", when they are linked to the exporters or importers of the goods in question. Another important exception, worth mentioning is injury occurring to a specific region of the national industry. An affirmative injury determination will be rendered despite the fact that the national industry has not been injured.

2nd Element:

- Whether the industry is actually facing injury or threat of injury.

In keeping with Mexico's obligation under article 4.1 of the WTO Antidumping Agreement, in order to determine injury or threat of injury, SECOFI is

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[172] For a more detailed analysis of this element, refer to articles 59, 60, 61, 62,I, 62,II and 95 of the *Foreign Trade Law Regulations*, supra note 165 and article 44 of the *Foreign Trade Law*, supra note 164.

obligated to analyze financial and commercial data pertaining to the Mexican domestic industry.

3rd Element:

- Whether the injury or threat of injury to the domestic industry is a direct consequence of the dumped imports into the Mexican market.

SECOFI is also required to examine other factors that caused the material injury, other than the dumped imports such as:

- contraction in demand;
- trade restrictive practices of local competitors;
- developments in technology affecting export performance.

If upon the conclusion of the investigation, the SECOFI determines a causal link between the dumped imports and the injury or threat of injury sustained by the domestic industry, antidumping duties will be imposed.

C) Procedural Framework

Unlike the Canadian and American system of antidumping investigations, the SECOFI is responsible for conducting dumping and injury investigations. Once the final determination of injury is made by SECOFI, it must be submitted to the opinion of an interagency group, the Foreign Trade Commission.[173] In addition, the General Customs Office of the Ministry of Finance and Public Credit is responsible for collecting provisional and final duties.

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[173] *Foreign Trade Law*, articles 6 and 58; and *Foreign Trade Law Regulations*,Title II, supra note 165.

i) Preliminary determinations

At the preliminary determination stage, provisional antidumping duties may be imposed; they may not be imposed until the final hearing or the investigation may be terminated at this stage. This decision must be submitted within 130 days after the initiation becomes public. At this point, interested parties prepare their submissions for the final determination of antidumping.[174]

ii) Final determination

At this stage, SECOFI is authorized to arrive at one of the three conclusions, impose a final antidumping duty, revoke the existing provisional antidumping duty, or put an end to the investigation without imposing a duty.

The duration of the antidumping duties is affected by the existence of a sunset clause. Before the final determination, public hearings are held in order to provide interested parties the opportunity to submit their position.

[174] *Foreign Trade Law*, article 57.

d) Review of SECOFI's Determinations

- Administrative review:

An appeal for reversal of an antidumping determination is presented before the investigating administrative authority (the International Commercial Practices Section of SECOFI), 45 days after the determination has taken place. This step must be exhausted before the judicial appeal to proceed before the Upper Division of the Federal Taxation Court (TFF) can be undertaken.[175] There is much that can be said about an administrative agency reviewing its own decisions. Suffice it to say, that the perception of effective and unbiased review is somewhat altered with this type of review procedure.

- Judicial review:

SECOFI's decision can be contested through judicial review before the Upper Division of the TFF. The Court either upholds administrative decisions; declares them totally or partially nullified; remands them; orders the restitution of the administrative procedure; or dismisses the appeal.[176]

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[175] See *Foreign Trade Law*, Articles 94 and 95; *Federal Tax Code*, Article 121.

[176] *Federal Tax Code*, article 239.

Article 238 of the Federal Tax Code outlines the standard of review to be used by the Court. The administrative determination will be declared illegal if one of the following circumstances is found:

- lack of competence of the authority;
- legal requirement not fulfilled;
- procedural errors affecting the defense of interested parties;
- consideration of non-existing facts.

As of 1996, only four antidumping and countervailing final determinations have been challenged before the Court. None have been resolved.[177] Unfortunately, this judicial review does not seem to be very efficient, since some decisions may be rendered two or even three years after the initial judicial review.

- Constitutional Extraordinary Procedure of Judicial Review - Juicio de Amparo

Final decisions of the TFF can be appealed through the Juicio de Ampara Directo. Procedural errors and substantive flaws are reasons for appeal. As in the appeal process of courts, only questions of law are reviewed.[178]

- Binational panel review:

Any one of SECOFI's final determinations may be contested by resorting to Chapter 19 binational review panels pursuant to Mexico's rights and obligations under the NAFTA.[179]

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[177] Recursos, Juicios de Nulidad y Juicios de Amparo.

[178] For a detailed review of the Writ of Amparo, see Héctor Fix Zamudio, "A Brief Introduction to the Mexican Writ of Amparo", (1979) 9324 *California Western International Law Journal.*

[179] *Foreign Trade Law*, articles 94 and 97. See also Federal Tax Code, article 202.

In conclusion, it is to be noted that the differences in Mexico's legal system and traditions were factors that allowed Mexico to function without an antidumping law regime in the past. Mexico has implemented its obligations under the WTO Antidumping Agreement, however, there is still room for discretion in the exercise of the administrative authority's responsibilities.

Any proposal for reform of the NAFTA members antidumping regimes must be proceeded by a comparative analysis of the similarities and differences that exist between the antidumping regimes of the NAFTA members. The next section will do just that.

4. Comparative Analysis of The Antidumping Laws of the Member States of the NAFTA

A comparison of the national domestic antidumping laws of the NAFTA members will permit the similarities and differences of each country to surface, for the subsequent use of this assessment in the latter part of the present thesis dealing with the formulation and implementation of proposals aimed at reforming the antidumping regime. This comparative exercise will also reveal an uneven application of these remedies by the NAFTA members, who are also contracting parties to the WTO Antidumping Agreement. It was believed that standardization of rules and procedures pertaining to trade remedy laws in a multilateral trading context, would have reduced some of the discrepancies in the application and enforcement of the antidumping regimes. Ironically, due to the discretion allowed in the drafting of several provision of the WTO Antidumping Agreement, each NAFTA member has exercised this discretion in a manner reflecting its specific trade policy concerns and approach.

The three NAFTA members do not share the same economic background. In view of the frequent use by the United States of unfair trade remedies during the 1980's, Canada's export dependent economy sought to secure its access to the United States market during the FTA negotiations. Originally, Canada's optional position was to be excluded from the application of the U.S. trade remedy laws. The unsuccessful negotiation by Canada of its prime request, led to the acceptance by both Canada and the United States of a compromise which consisted of an

interim dispute settlement mechanism based on binational panel review of antidumping and countervailing actions. These binational panel reviews were to replace judicial review by domestic counts of final antidumping and countervailing duty determinations by national agencies. The standard of review used by the panels consists of an analysis based on the domestic criteria of the country involved and the panels must decide whether or not the domestic antidumping law has been properly applied.

The manner in which Canada and Mexico approached the issue of regulating antidumping duties in a free trade context is an indication as to the complexity of the antidumping issue in the context of a trilateral trading relationship. Being aware of the fact that the application and use of the United States antidumping laws will arguably amount to an increased degree of protectionism, the American and Mexican negotiating experience revealed that it is in the interest of most trading nations to have antidumping and countervailing actions conform to high standards of due process even more so because of the political reality that antidumping law and policy cannot be totally eliminated as an unfair trade remedy practice.

As we have seen in the previous sections of this chapter, the WTO Antidumping Agreement authorizes signatory countries to impose antidumping duties on dumped goods that cause or threaten to cause material injury, or materially retard the establishment of a domestic industry in the imported country. The issue of material injury has dominated the discussions right from the Tokyo Round of negotiations. Many participants were of the opinion that the definition of material

injury required explicit strengthening.[180] Other participants manifested a desire to have the causal link between the injury and the dumping strengthened. The current material injury criteria found in the WTO Antidumping Agreement is drafted in such a manner that the implementation in the United States, Canada and Mexico of the material injury test has resulted in different national rules. Specifically, SIMA does not provide a definition for the term "material". The United States Tariff Act of 1930, however, defines material injury as "harm which is not inconsequential, immaterial or unimportant."[181] Even though, this definition will not solve all interpretation problems, it does provide, in our opinion, a benchmark from which injury can be measured until it reaches the material stage. The difference in the material injury test under Canadian and United States law is quite important. Some authors believe that "any" injury caused by reason of the dumped products will be sufficient cause for an injury determination[182] under the WTO Antidumping Agreement antidumping law. It is equally believed by the same authors that a thorough analysis of the CITT's precedents determined under the SIMA, reveal the existence of a higher threshold for material injury.

As we have seen through the study of article 3.4 of the WTO Antidumping Agreement, the CITT should use the factors outlined in this article in order to properly determine whether the domestic industry has been materially injured.

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[180] See *GATT article 6 and the Tokyo Round of Multilateral Trade Negotiation*: Report by the Director General of GATT, (April, 1979).

[181] *Tariff Act* of 1930, Section 771(7)(A), 19 USC Section 1677(7)(A), supra note 144.

[182] See J.R. Holbein, N. Ranieri, and E. Grebasch, "Comparative Analysis of Specific Elements in United States and Canadian Unfair Trade Law" (1992) 26 *International Lawyer*, 873, at 886-87.

Discretion is granted, however, to the CITT and all other administrative agencies to determine, if under the circumstances, the degree of damage has passed from injurious to materially injurious.

An important Canadian decision was rendered by the Supreme Court of Canada, on the CITT's permissible latitude in injury determinations, in the case of *National Corn Growers' Association* v. *Canadian Import Tribunal.*[183] The principal issue submitted to the Supreme Court of Canada was whether the CITT's determination of material injury was so flagrantly unreasonable as to require the intervention of judicial review. In the statement that follows the Court refers to an American decisions rendered by the American Court of International Trade, in *British Steel Corp.* case.[184] In a significant passage reflective of the interpretation adopted by the Court, it concluded as follows:

> "Having regard to the broad wording of the GATT provisions, it was not unreasonable and was therefore open to the tribunal to make a finding of material injury even in the absence of an increase in the amount of imports."[185]

Consequently, it was clearly established that the GATT and therefore the WTO Agreements can serve as a primary source of interpretation of the SIMA, even where the legislation is silent on the matter, and in the absence of ambiguity.

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[183] supra note 131 (hereinafter National Corn Growers case).

[184] *British Steel Corp.* v. *United States*, supra note 158.

[185] supra note 131

In light of the Supreme Court of Canada's ruling in the *National Corn Growers* case, it now appears that the CITT possesses a broad range of discretion to vary the standard required to determine material injury. In assessing the causal requisite link between the dumped products and the alleged injury, the CITT has set, in the past, a particularly high onus for domestic producers to overcome. Factors such as declining markets, limited production ranges, production difficulties all have been cited as significant factors causing the injury in cases where domestic producers filed antidumping complaints.[186]

Another area where a significant difference in American and Canadian law can be seen is with regards to the threat of material injury concept. Due to the fact that the WTO Antidumping Agreement allows for the imposition of antidumping duties on future imports in cases where the dumped imports "threaten material injury", article 3.8 of the Agreement clearly requires that the "antidumping measures shall be considered and decided with special care." Subsections 37.1(2) and (3) of the *SIMA* incorporate these requirements in Canadian antidumping law. As previously discussed in this chapter, the *Refined Sugar* case,[187] was one of the first cases rendered after the implementation of the WTO Antidumping Agreement. The CITT decided that the Canadian domestic producers had sustained injury that not enough to reach the material injury threshold. The CITT did, however, conclude

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[186] See, for example, Sporting Ammunition case (ADT-8-80) 1980; Plywood Concrete Forming Panels (CIT-17-84) 1985; and Chelating Agents (ADT-5-81) 1981; See also L. Herman, "Injury Findings by the Canadian Import Tribunal: The Decisive Elements", (1987) 1 *Rev. Int'l Bus. L.* 373, 395

[187] supra note 126.

that considering the particular circumstances surrounded this case, if antidumping and countervailing duties were not applied in the near future, the dumped imports presented a threat of material injury to future production of Canadian similar products. It is significant to note that before 1995, the CITT's interpretation of articles 3 to 8 of SIMA rested on the preliminary condition that antidumping duties could not be imposed on future imports unless a separate "threat of material injury" to future productions determination is made by the CITT pursuant to section 42 of SIMA.[188] Subsequent to the *Caps, Lids, and Jars* case,[189] the CITT seems to have taken a different approach with regards to the "threat of material injury" to future productions. There is a difference between mere injury and threat of injury, and consequently the CITT is no longer obligated to consider "past, present and future" injury all at once. It must consider whether the domestic industry has suffered material injury <u>or</u> is threatened with material injury. This trend seems to have incited some concern as to the predictability of the application of article 42 of SIMA. Trade law practitioner, Lawrence Herman makes the following comment:

> "These technical WTO changes to section 42 of SIMA thus will have a major impact on Canadian trade policy and the trade remedy system in this country. Under the previous and longstanding regime, Canadian complainants knew that the success of their cases hinged on their being able to prove the likelihood of future injury, without which no duties would be applied to post-finding imports.

[188] Before the legislative amendment to section 42 of *SIMA*, the article 42(1)(a) required the CITT to inquire "whether the dumping has caused, is causing or is likely to cause "material injury to Canadian production. As of today, article 42(1)(a) now reads "has caused injury... or is threatening to cause injury".

[189] supra note 138.

> Considerable attention was therefore paid to leading evidence on the threat factor. Under the Caps, Lids and Jars decision, however, antidumping duties will be collected on future imports without such a determination, making it significantly easier to achieve success."[190]

The author also believes that the decision in the *Caps, Lids and Jars* case will probably be challenged in front of a NAFTA binational panel review. If the CITT's decision is reaffirmed by the NAFTA binational panel review, "it will represent an important shift in the respective burdens facing producers and importers/exporters. It will also bring Canadian law and practice more in line with that of the United States and the European Union, where there is no need for a separate finding of threat of material injury for antidumping duties to apply to future injury."[191]

It is comprehensible that Canadian producers must have felt a sense of ease and predictability in the CITT's past tendency of requesting a separate "future injury" finding pursuant to section 42 of the *SIMA*, before imposing future antidumping duties. However, this new trend does not, in our opinion, by any means, approach the discretionary determination of threat of material injury under the United States antidumping law. The *New Steel Rail from Canada*,[192] and *Fresh, Chilled or Frozen Pork from Canada*[193] cases are instructive in that they

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[190] supra note 116 at 96-97.

[191] Id.

[192] USITC Pub. 2217, INV. Nos. 701-TA-297 & 731-TA-422 (Sept. 1989).

[193] USITC Pub. 2230, Inv. No. 701-TA-798 (Oct. 1990) (hereinafter Pork from Canada). See also the opinion of Panelist Whalley describing the inaccuracies in the fundamental data and "incompleteness in the analytical logic" linking cause and effect in the *Pork from Canada* case.

demonstrate the existence of disagreement in the context of threat of material injury determinations, which are practically entirely based on predictions. The *New Steel Rail from Canada* case was instructive in that the ITC was divided 3-3 in the determination of an affirmative finding of threat of material injury. This is deemed to be an affirmative decision under United States law.[194] The binational panel review under FTA reaffirmed the ITC's threat of material injury finding. However, Vice Chairman Ronald Cass, in a lengthy and poignant dissent, pointed an accusatory finger at his colleagues who failed to correctly interpret American trade remedy law in accordance with the GATT, by "ignoring the requirement that the injury be caused by the effects of the subsidy or sale at less than fair value."[195]

The lack of consensus was also apparent in the *Pork from Canada case*, where the binational panel review resulted in the reversal of the ITC's threat of future injury finding and subsequently the United States Government lost an extraordinary challenge proceeding.

The most important stage of the antidumping investigation remains the determination of the causal link between the dumped imports and the material injury caused to the domestic producers by these imports. The causality provisions under *SIMA* do not provide an explicit injury assessment framework, however, the WTO Antidumping Agreement has provided for a more stringent examination of the causal link and of all other relevant and known factors affecting domestic

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[194] 19 U.S.C. s.1677(11)(1988).

[195] See J. Holbein et als. "Comparative Analysis of Specific Elements in U.S. and Canadian Unfair Trade Law" , supra note 182.

production. The result therefore, in terms of the Canadian causation test, is that if one were to remove the effects of all other factors, the remaining injury - due exclusively to the effect of dumping - must be significant enough to be considered "material", and not necessarily "the" cause of injury. This recent trend was confirmed by the CITT in the case of *Fresh, Whole, Delicious, Red Delicious and Golden Delicious Apples*,[196] the tribunal stated:

> "As SIMA provides little guidance concerning the standard to be applied by the Tribunal in determining whether a causal relationship exists between dumping and material injury or what factors should be considered in performing a causal analysis, the Tribunal finds it instructive to refer to paragraph 4 of Article 3 of the GATT Antidumping Code. In the Tribunal's view, paragraph 4 of Article 3 contemplates that dumping need only be a cause of material injury..." (our emphasis)

This interpretation of paragraph 4 of Article 3 of the WTO Antidumping Agreement has been criticized by trade law practitioner, Lawrence Herman, as being too lax, and of falling short of "establishing a clear causality test, applicable in all circumstances, and one is left with the impression that causation is subject to panel-specific variations in standards and is still based on impression and "feel" by the tribunal".[197] In the United States, pursuant to their antidumping regime, the ITC does not weigh alternative causes. Any injury arising out of the dumped imports will provide grounds for an injury determination. As the three previously cited authors[198]

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[196] NQ-94-001, statement of reasons, February 24, 1995, at 21.

[197] Lawrence Herman, *Canadian Trade Remedy Law and Practice*, supra note 120 at 83.

[198] See J. Holbein et als *Comparative Analysis of Specific Elements in U.S. and Canadian Unfair Trade Law*, supra note 182 at 887.

have observed, this trend in the ITC allows "each commissioner to pursue levels and trends in attempting to determine whether a domestic industry is suffering or threatened by material injury caused by unfairly traded imports. These determinations of causation, especially in the area of threat of material injury, are, therefore, based upon an elusive standard that permits the potential application of inconsistent standards." Additionally, the ITC has been criticized for not analyzing causality in a significant manner.[199] One of the ITC commissioners, Ronald Cass, is one of the few that advocates an improved use of economic analysis in the causality analysis of antidumping duty determinations. Additionally, the ITC's administrative reviews have been fiercely criticized by the Canadian Government, since the ITC does not apply the more favourable averaging rules outlined by the previously seen WTO Antidumping Agreement. This remains an important point of contention between the Canadian and American Antidumping regime. Finally, in our opinion, this type of difference in the implementation of the causal link requirement will most likely lead to transborder trade discrepancies, despite the fact that both Canada and the United States are implementing the same WTO Antidumping Agreement and are also parties to the same free trade agreement.

As for the case of Mexico, we cannot expect a drastic change in the manner in which the SECOFI determines the imposition of antidumping and countervailing

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[199] See A. Rugman & A. Anderson, *Administered Protection in America, Croom Helm, London,* 1987, at page 62 (where the authors comment on the ITC's analysis of the causality aspect in their study of the *Goundfish* case, and conclude that "at no point in the case was such a linkage established.")

duties, since only recently did Mexico begin to fully implement an unfair trade remedy regime.

Another area in which United States, Canadian and Mexican antidumping law systems differ, involves the identification of a public or consumer interest factor in the unfair trade proceedings. As previously seen, article 45 of the *SIMA* allows the CITT, following a material injury determination, to give interested persons the opportunity to make oral or written submissions, "if the imposition of such a duty in the full amount... would not or might not be in the public interest." Canada alone has understood the importance of including the consumer interests in unfair trade remedy law. Ideally, this in turn could alleviate, to some degree, claims of protectionism inherent in unfair trade proceedings. Many academics believe that section 45 of the *SIMA* has not fully achieved its objectives, because it hasn't been utilized to a meaningful degree.[200]

The public interest hearing outlined in section 45 of *SIMA* can be used only after a determination of material injury has been rendered by the CITT. In the context of a section 45 hearing, the CITT is vested with only enough authority so as to simply report to the Minister of Finance, if in its discretionary opinion, sufficient evidence is presented to warrant a departure from the imposition of antidumping

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[200] See Report on Public Interest, Grain Corn, Canadian Import Tribunal, October 20, 1987, and generally the *Grain Corn* case, supra note 130 demonstrates the extent to which the CITT will attempt to limit section 45 of the SIMA to exceptional circumstances. In addition, section 45 is not clearly articulated. See also A. Rugman and S. Porteous, "Canadian and U.S. Unfair Trade Laws: A Comparison of Their Legal and Administrative Structures", (1990) 15 *North Carolina International Law and Commercial Regulator*.67 at page 78. In addition, in the United States pressures are mounting to take greater account of the interests of industrial users, see for example, *General Motor's submissions to the U.S. Administration on WTO Implementation and rule-making*.

duties in order to protect domestic producers. A typical argument from retailers in a section 45 hearing, is that they will suffer prejudice from the lack of low-priced products affected by the antidumping orders. These arguments usually lead to unsuccessful attempts by interested parties, since the CITT does not respond positively, as was demonstrated in the *Preformed Fibreglass Pipe Insulation* case.[201] In this particular case, the Director of investigation and research under the *Competition Act*, intervened in order to advance arguments favoring the need to maintain economic welfare and competition in Canada, and consequently not to impose duties on imports. It seems that only serious and compelling factors will permit the CITT to derogate from applying the public policy objective of providing import relief to the domestic producers. To date only two cases have resulted in reports being submitted to the Minister of Finance recommending a diminution of the antidumping duty, these are the *Grain Corn* case and the *Beer case.*[202] Finally, the major public interest case that accumulated representations from various parties, is that of *Refined Sugar.*[203] The Director of investigations and research also intervened to request a reduction of antidumping duties. After extensive hearings, the CITT stressed the extreme importance of remaining respectful to the primary objective of *SIMA*; that of protecting domestic producers, and the exception of

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[201] See *Preformed Fibreglass Pipe Insulation with a Vapour Barrier Originating in or Exported from the United States*, tribunal's consideration of the public-interest question, opinion no. PB-93-001, January 28, 1994, at 3.

[202] See *Malt Beverages, Commonly Known as Beer, etc., for Use or Consumption in the Province of British Columbia*, CITT opinion no. P1-91-001, November 25, 1991.

[203] supra note 126.

elimination or reduction of duties will apply only if the public-interest issue is sufficiently compelling.

Significantly enough, several of the recommendations found in the *Report on the Special Measures Act*, drafted by the Sub-Committees and tabled in the House of Commons on December 11, 1996 recognized the potential for reform of section 45 of the *SIMA*.[204]

Specifically, the Sub-Committees recommended that "a non-exclusive list of factors be included in section 45 of *SIMA* that would guide the CITT respecting whether and how to conduct a public interest injury." The Canadian Government recognizes that section 45 of *SIMA* has been seldom used due to the apparent lack of both an articulate definition of the term "public interest", and of clear guidance criteria allowing the CITT to properly interpret the term "public interest".

Additionally, further on in the report, the Sub-Committees realized the discretionary potential contained in the CITT's decisionary process not to impose an antidumping duty as being contrary to public interest. Consequently, the Sub-Committees recommendation to this effect, was formulated in the following terms:

> "The Sub-Committees recommend that the CITT's decision, that an antidumping or countervailing duty might not be in the public interest, should be a formal decision reviewable by a Federal Court. The level of any duty reduction should continue as, at present, in section 45 of SIMA to be a report to the Minister of Finance."

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[204]supra note 124, these changes were formulated as recommendation number 13, 14, 15 and 16. See also *Government Response to the Report on the Special Import Measures Act*.

The Canadian Government was, however, reluctant to support the recommendation allowing for the CITT's public interest decisions to be reviewed by the Federal Court of Canada. The Government's main rationale for opposing this recommendation was the fact that the legislative provisions of *SIMA* allow for judicial review by the Federal Court of Appeal or by a NAFTA Chapter 19 binational panel review, of a CITT's decision, if and only if such a decision is final in nature. In the Government's perception, the information submitted to the CITT during a public interest hearing forms nothing more than an "opinion", which in turn is submitted to the Minister of Finance" who has discretion to act upon the Report by making a recommendation to the Governor in Council." In essence, the Government is reluctant to alter the underlying policy of section 45 of *SIMA* in that such a recommended change "would severely limit the Minister of Finance's discretion to act in the public broader interest". In addition, some scepticism was expressed on whether CITT public interest determinations form the required material susceptible for judicial review, given the economic nature of the issues submitted and analyzed.

The last recommendation from the Subcommitte's Report, which received the Government's approval, was that the imposition of an antidumping duty at a lower level than the determined margin of dumping as provided in article 9.1 of the *WTO Antidumping Agreement*, be integrated within section 45 of *SIMA*. Incorporating the lesser duty concept in the context of public interest findings, is in our opinion, an illustration of the Canadian government's desire to reach an

economic and political equilibrium between the protection of domestic producers and consumer interests.

In the United States, however, the FTC can intercede in trade matters in order to raise a public interest component.[205] The representation of such interests remains undisciplined and subject to the discretionary use by the administrative agencies. It would be fair to conclude that in all three countries, the influence of commercial interests far outweigh that of the consumer interests. In Mexico's case, not only is Mexico's antidumping legislation void of any public interest clause, but the SECOFI has been reported on three occasions to have self-initiated investigations.[206] Arguably, this is an indication of the tremendous government influence in unfair trade remedy proceedings and the politicized nature of the state's intervention. Finally, the insertion of rigorous public interest advocacy in unfair trade proceedings, may, in the NAFTA countries' perception, deviate from the core objective of the antidumping regimes: the protection of domestic producers.

Procedural and administrative differences also account for transborder discrepancies in the administration of unfair trade remedy proceedings.
Certain deviations in the manner in which the administering agencies conduct their investigations deserve mentioning. The first deals with the manner in which the ITC and the CITT vote on particular issues. The ITC's voting methodology entails that

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[205] See *Certain Softwood Lumber Products*, 51 Fed. Reg. 37, 453 (Dept. of Commerce 1986) (preliminary affirmation), where the Federal Trade Commission made representations concerning the effects of duties.

[206] These investigations were against the European Union (Steel), U.S. (pork productions), and China (wheels, cameras, bicycles, textiles, appareil, organic chemicals, tools, electronic equipment, and toys)

all six of the votes obtained from its permanent members shall be recorded.[207] The CITT, on the other hand, votes in the form of three member panels, drawing from its pool of nine members. According to the American legislative provision, when the ITC is evenly divided, its decision is automatically deemed to be affirmative, resulting in a victory for the domestic complainant.[208] This is certainly an added advantage for the American petitioner, since no such equivalent provision exists under Canadian law in the case of an equally divided affirmative injury determination by the CITT.

Due process and administrative transparency are crucial elements demonstrating the independence of the administrative agency from the governmental influence. The ITC and the CITT are independent bodies responsible for the determination of material injury. It is important to note, as we have seen, that in Canada, preliminary injury determinations are made by Revenue Canada, whereas in the United States, both preliminary and final injury determinations are made by the ITC. Additionally, it is important to note that according to the *Report on the Special Import Measures Act* prepared by the subcommittees,[209] it was recommended that the CITT be given the responsibility for making the preliminary determination of injury. The Canadian government supported this recommendation in a written statement entitled *Government Response to the Report on the Special Import*

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[207] It is significant to note that the ITC may proceed notwithstanding a vacancy. See 19 U.S.C. s.1330(c)(6), (d)(3)(1988).

[208] See 19 U.S.C. s.1677(11)(1988).

[209] supra note 124.

Measurement Act (hereninafter, *Government Response Report).* The Canadian Government recognizes that at the initial phase, it is preferable to allow the CITT to evaluate the reasonable indication of resulting injury, since this is in fact the CITT's expertise, and Revenue Canada will simultaneously conduct, as usual, the preliminary investigation of dumping. In addition, according to the *Government Response Report,*

> "adoption of this recommendation would inter alia: i) eliminate the current institutional duplication of responsibilities between Revenue Canada and the CITT in respect to injury determinations; ii) allow Revenue Canada and the CITT to focus on their respective areas of expertise, iii) promote an earlier and more thorough examination of injury; iv) allow the CITT to settle basic investigatory framework issues, such as "like goods", "classes of goods" and "domestic industry", early in the investigation; v) allow for repeal of cumbersome provisions where the CITT gives "advice" on injury to Revenue Canada during preliminary investigations; and vi) allow for streamlined procedures for certain horticultural products to ensure early implementation of provisional duties...."

This recommended change would by no means alter the actual standard for a preliminary determination of injury which is conducted according to the WTO Antidumping Agreement, but rather will allow Revenue Canada and the CITT to remain focused in their own areas of expertise.

In Mexico, the SECOFI is responsible for dumping as well as injury determinations. Being a branch of the Mexican Department of Commerce, some academics believe that the SECOFI's "determinations are influenced by the Comision

de Aranceles y Controles al Comercio Exterior (CACCE), an interagency working group consisting of officials from SECOFI and other executive agencies."[210] Furthermore, the same authors conclude that SECOFI's determinations are neither independent nor semi-independent from governmental influence, since it is common practice in Mexico for the SECOFI to receive instructions from the CACCE on the margin of duty to be levied as well as on the outcome of SECOFI's final determinations affecting the imported goods. As previously seen, the specific provisions found in Annex 1904.15 of the NAFTA requiring Mexico to undergo certain trade law amendments in order to benefit from the Chapter 19 NAFTA binational panel review, do not ironically, require Mexico to adopt a similar administrative structure to that of its other two contracting parties, Canada and the United States.

High standards of due process and transparency in proceedings of the administrative agencies are crucial elements that allow the judicial review process to attain efficient results. Under the relevant Canadian legislative provisions, the CITT's inquiry is comprised of a formal hearing allowing interested individuals to submit their written arguments, present and cross-examine witnesses, and finally argue their case orally. This particular procedure involving the presentation of oral evidence, argumentation, and the crossexamination of witness, distinguishes the Canadian inquiry from the procedure before both of the administrative agencies of the United States (ITC) and Mexico (SECOFI). The decisions rendered by these

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[210] See G. Winham and H. Grant, "Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA and beyond", (1994) 3 *Minn. J. Global Trade* 1 at 30.

administrative agencies are judicially reviewed using slightly different standards under Canadian and United States law.

The Canadian judicial review standard of the determinations rendered by Revenue Canada and the CITT is elaborated in subsection 18.1(4) of the *Federal Court Act.*[211] The administrative agency's and tribunal's decision may be reviewed on one of the following grounds:

- lack of jurisdiction;
- principle of natural justice not respected;
- error in law;
- based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it;
- acted or failed to act by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.

The Canadian courts have had several opportunities to outline and reaffirm their position with respect to the required standard of review of the administrative determinations under appeal. As previously seen, Section 28 of the *Federal Court Act*[212] grants the Federal Court of Appeal appropriate jurisdiction to review a decision rendered by the CITT based on any one of the grounds previously outlined in section 18.1(4) of the Act. Recently four unreported decisions of the Federal Court of Appeal[213] have confirmed that the injury determinations rendered by the CITT can only be reviewed under exceptional circumstances. These cases, better

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[211] supra note 140.

[212] supra note 140, article 28.

[213] These four cases are: *Steko Inc.* v. *CITT*, et al., A-360-93, judgment rendered May 23, 1995; *AG der Dillinger Hüttenwerke, et al.*, v. *CITT*, A-375-93, judgment rendered May 23, 1995; *Stelco Inc.* v. *CITT*, A-410-93, judgment rendered May 24, 1995, and *Canadian Klockner* v. *Stelco Inc.*, A-294-94, judgment rendered June 19, 1995.

known as the *Canadian steel-dumping* cases, began as any other antidumping investigation, with Revenue Canada's investigation of imports of carbon steel and high-strength, low-alloy plate steel from various countries. All of the four section 28 applications, were dismissed by the Federal Court of Canada, and in turn reaffirmed the applicability of the test of "patent unreasonability" as elaborated by Justice Dickson of the Supreme Court of Canada in the *Canadian Union of Public Employees, Local 963* case.[214] In the *CUPE* case, it was decided that an administrative agency's decision is susceptible of judicial review only in rare circumstances where the decision is devoid of any legislatively required rationality.[215] In essence, the *CUPE* rationale was diligently followed by the Supreme Court in subsequent decisions,[216] where the Court established that judicial deference must be exercised when an administrative tribunal possesses a clear mandate from its appropriate legislation, is specialized, and it cannot be demonstrated that its decision or determination is unsupported rationally by any reasonable factual or legal interpretation. However, there was a divergence of opinions among the justices as to the effect of a privative clause on the review standard. The case of *Pezim* v. *British Columbia (Superintendent of Brokers)*[217] finally allowed the Supreme Court of Canada to articulate its review standard in a

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[214] See *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corp.*, [1979] 2 SCR 227 (hereinafter the CUPE case).

[215] Id. at 236.

[216] See for example, *Dayco(Canada) Ltd.* v. *CAW Canada*, (1993) 2 SCR 230; *Attorney General of Canada* v. *Public Service Alliance of Canada*, (1993) 1 SCR 941

[217] [1994] 2 SCR 557.

harmonized fashion. Justice Iacobucci, writing for the majority, announced that the review standard to be used in attacking the administrative agency's decision falls within a specified spectrum. If the legislature establishes a highly expert body to perform specified tasks, judicial deference should be at its highest. However, in cases of *ad hoc* organisms, judicial deference should be at the lowest level. Justice Iacobucci thus wrote:

> "The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in this analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved."[218]

The Canadian courts have over the years moved towards the granting of judicial revision only upon exceptional circumstances, particularly in highly specialized administrative areas.

The United States standard of judicial review is set by section 1516 a) of the *Tariff Act* of 1930 which requires that "the court shall hold unlawful any determination, finding, or conclusion, found (...) to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[219] The term substantial evidence has been interpreted by the American case law to mean that,

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[218] Pezim supra note 216 at 589-90.

[219] *Tariff Act* of 1930 (codified as amended at 19 U.S.C. s. 516a(b)(1)(B)(1993)).

> "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[220]

It has been determined through an extensive array of cases dealing with the standard of review of the Court of International Trade, that the Court need not conclude that the agency's interpretation was reasonable, but that it was derived through a factual and legal analysis supported by substantial evidence.[221] Even though in principle, the American judicial system has demonstrated a fair amount of judicial deference to agency's determinations, the Courts will not hesitate to use the broad scope of review inferred from the legislative language, in order to review determinations rendered with disregard to the legislative objective and intent.[222] The United States Supreme Court's decision in *Chevron*[223] demonstrates the extent to which the reviewing Court will defer to an agency determination. The review analysis, should be conducted in a two part stage. First, the Court must determine whether congressional intent is clear. If it is, the Court should refrain from analyzing the issue further. If not, then the court must proceed to examine whether the determination is based on a permissible construction of the statute. Specifically, the review standard of the Court of International Trade with regards to the ITC

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[220] This passage came from the case, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951) which was quoted in *Penntech Papers* Inc. v. *NLRB*, L.Ed. 2d 228 (1983).

[221] See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council Inc.* 467 U.S. 837 (1984).

[222] See *Cabot Corp.* v. *United States*, 694 F. Supp. 949 (Ct. Int'l Trade 1988) at 953.

[223] See supra note 221.

decisions was recently summarized through an analysis of the most prominent United States cases. In contrast with the general appellant function of the Canadian Federal Court of Appeal, the American Court of International Trade is a specialized tribunal responsible for hearing applications contesting ITC's determinations. This was done within the context of a NAFTA panel reviewing an ITC determination in the matter of *Certain Flat-Rolled Carbon Steel Products from Canada.*[224]

The common denominator with the majority of the United States cases under review seems to suggest that while it is clear that the Court of International Trade must exercise judicial deference, it must also decide whether the determinations are supported by the record as a whole. In contrast, the Canadian judicial review standard under section 28 of the *Federal Court Act*, requires the elements of "unreasonability" or "patent unreasonability", in order to successfully challenge the agency's determinations. In our opinion, this standard will not easily allow the Federal Court of Canada to examine the evidence and the rationale of the conclusions. This is likely to lead to some sort of insulation of the Canadian "injury determinations from review than is the case in the United States."[225] In addition, the philosophical and institutional differences between Canada and the United States also account for the differing extent to which the administering agencies will be able

[224] USA-93-1904-05, November 4, 1994, at 11-14.

[225] See L. Herman, *Canadian Trade Remedy Law and Practice*, supra note 120, at 135.

to achieve and sustain a high level of quality and objectivity in the decisions they are called to render in individual cases.[226]

The different review standard can also be seen in the FTA/NAFTA chapter 19 panel decisions. Recently, the *Softwood Number case from Canada*,[227] where the panel found that the Canadian lumber imports to the United States market did not affect the U.S. prices in that "the evidence cited by the Commission does not rise to the level of substantial evidence needed to support that finding."[228] As we have previously seen, article 1904(3) of the NAFTA requires the panels to apply the same standard of review - that is, the same threshold for a reviewable error of jurisdiction, of fact, or of law under section 28 of the *Federal Court Act* - as would the Federal Court of Canada. Even though the earlier tendency of the FTA panels was directed towards law-making determinations,[229] it should be noted that the recent tendency, and correctly so in our opinion, is one that does not authorize the reviewing court to reconsider and re-evaluate the merits of the evidence. However, more recent FTA and NAFTA panel determinations seem to demonstrate somewhat of a reluctance in re-considering all the evidence already examined by the CITT. Their review seems

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[226] It is significant to note that the U.S. Court of International Trade has not been reluctant in remanding CIT decisions for failing to provide a rational basis for its decision. See for example, *British Steel* v. *United States*, 879 F. supp. 1254 (CIT 1995); Timken Co. v. United States, 862 F. Supp. 413 (CIT 1994).

[227] USA-92-1904-02, decision of the panel reviewing the final determination of the USITC, July 26, 1993.

[228] Ibid., at 19-20.

[229] One of the most significant panel determinations was in the *Machine Tufted Carpeting Exported from or Originating in the United States* CDA-92-1904-02, opinion and order of the panel, April 7, 1993, where the majority decided to take a more progressive approach on the basis that the past case law " seem to have broadened the scope of review," at 10.

to be restricted to finding evidence sufficient to support the finding.[230] Therefore, the same type of judicial deference exercised by the Federal Court of Appeal, is being exercised by the panels. As noted by the trade law practitioner, L. Herman,

> "the result of the 1994 and 1995 NAFTA panels and the Federal Court of Appeal cases is to make judicial review of Canadian International Tribunal decisions a decidedly uphill battle. [...] Only where counsel can point to a conclusion that is more than a mere error of fact or of law and that crosses the line into the realm of the "grossly irrational" or "utterly nonsensical" is a section 28 application under the Federal Court Act likely to succeed."[231]

The Mexican reviewing court, in accordance with the language of Article 238 of the *Federal Tax Code*, should overturn a final antidumping or countervailing duty determination rendered by SECOFI when (1) evidentiary defects exist in the relevant final determination, such as the absence of a justifiable explanation based upon sufficient evidence derived from the administrative record; (2) contradiction in the facts of the case presented by the competent Mexican investigating authority (or the facts were otherwise irrelevant or inapplicable to the legal standard); or (3) the final SECOFI determination lacks congruence and the presence of a weak link between the arguments of the parties and the final determination. Accordingly, SECOFI can no longer simply maintain its position, as it had done on several

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[230] Some of these cases are *Certain Flat Hot-Rolled Steel Sheet Products from the United States* (Injury), CDA-93-1904-07, opinion and panel decision, May 21, 1994; *Certain Cold-Rolled Steel Sheet from the United States* (Injury), CDA-93-1904-09, opinion and panel decision, July 13, 1994 and *Certain Solder Joint Pressure Fittings, etc., from the United States* (Injury), CDA-93-1904-11, opinion and panel decision, February 13, 1995.

[231] supra note 225 at 140.

occasions in the past, pursuant to the aforementioned statutory and regulatory scheme, that the evidence presented by a foreign exporter was weak or insufficient, without forwarding a legal or economic rationale to support its conclusion. It remains to be seen whether judicial review by the Upper Division of the Federal Tax Court will apply in a diligent manner article 238 of the *Federal Tax Code,* thus requiring SECOFI to be more rule abiding..

Finally, the different review standards between Canada and the United States are not desirable since the binational NAFTA panels are expected to apply the review standard appropriate to the domestic reviewing agency. Inevitably, although harmonization of the review standard would be ideal within a free trade zone, the binational panels are not legally empowered to do so. It is fortunate to see, however, that the implementation of the *WTO Antidumping Agreement* has managed to eliminate and encourage harmonization of several other regulations.

The response of the United States administering agencies to decisions of binational panels under the FTA does not provide an altogether encouraging review. In several cases, the United States agencies openly refused to respect legally binding decisions of binational panels.[232] Although the substantive issues raised in these

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[232] See for example *Fresh Chilled and Frozen Pork from Canada*, Panel No. USA-89-1904-06, at 20; *Live Swine from Canada, Final Results of Re-Determination Pursuant to Panel Remand,* USA-91-1904-03, 19 November 1992, stating that Commerce "rejects the Panel's substitution of its interpretation of United States countervailing duty law for that of the Department... and intends to continue applying its reasonable policy for determining *de facto* specificity in future reviews of this case and other countervailing duty cases;" at 3. Furthermore, the Department of Justice, further stated that "the Panel's incorrect conclusion" and affirmed its intention to continue applying "the practice the Panel held legally erroneous". Alarmingly, the ITC dismissed the Panel's decision notwithstanding that "the United States is bound as a matter of international and domestic law to abide by and implement the decisions of the binational panel system contained in the Agreement" *United States-Canada Free Trade Agreement, Statement of Administrative Action*, H.R. Doc. 216, 100th Cong., 2d Sess. 267 (1988).

cases will undoubtedly return in future cases, this behaviour is reflective of a larger more serious problem: that is the politicized nature of enforcement of binational panel reviews - and eventually of future WTO decisions. The significance of this problem has been raised and discussed in a study prepared for the Department of Finance, and entitled *A Comparison of the Antidumping Systems of Canada and the USA*.[233] Significantly, Peter Clark, the author of the study, concludes among other things that enforcement remains an important problem and a very significant difference between Canada and the United States administrative practice, to the point that "the enforcement system in the USA generates considerable uncertainty, and may discourage or frustrate continuing trade, including undumped trade." Other general commentary derived from Peter Clark's comparative analysis report revealed that:

- the retrospective enforcement mechanisms used by the DOC, i.e. the retrospective collection of duties, remain more trade-restrictive than Revenue Canada's prospective approach. Revenue Canada determines prospective normal values that permit exporters to raise prices to eliminate dumping, resulting in the unrequired payment of antidumping duties;

- Under Revenue Canada methodology, importer of the dumped product are in a position to know their costs and liabilities before importation. Under the U.S. retrospective system, however, actual liability remains unknown until the administrative review has been completed which could be as long as two years;

[233] The 400 page study was prepared by trade consultant Peter Clark of Grey, Clark, Shih and Associates. This study is a very detailed comparative analysis of the Canadian and U.S. antidumping laws and practice including the newly enacted provisions to reflect the WTO Antidumping Agreement.

While Canadian CITT decisions have stood up well to Binational Panel reviews under the FTA and NAFTA, certain aspects of the determinations by both the CITT and Revenue Canada have also been reprimanded. In the United States, however, Congress is exercising an ever more dominant role in international trade matters. In recent years, principles of international trade law have received minimal attention in United States court decisions in trade cases, notwithstanding that the United States is bound by the international agreements it has adhered to.[234]

The source of Congress' politically driven interventionism resides in the fact that it holds the constitutional authority to regulate foreign commerce and possesses the legislative authority to override or go against international trade agreements to which the United States has become a legally binding party. On a more general note, having accepted the WTO Agreements (including the *WTO Antidumping Agreement*), Congress retains various methods and opportunities to act in ways that could directly affect the WTO Agreements as well as the WTO panel decisions. Such being the case, Congress has the authority to yield to the demands of special interest groups and adopt legislation inconsistent with the United States trade obligations and more importantly with the WTO Agreements. It is significant to note that the United States has managed to depart from the contents of the WTO Agreements on a number of key points indicated in the Uruguay Round

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[234] An extensive research in the *Lexis-Nexis* database of decisions of both the Court of Appeals for the Federal Circuit and the Court of International Trade found no cases referring to a WTO Antidumping Agreement panel decision as a relevant authority. Only one case cited a GATT panel decision as being authoritative, and that was the case in *British Steel P.L.C.* v. *United States*, supra note 225.

implementing legislation itself.[235] In past instances, the fulfillment of Congress' political goal went as far as seeking direct intervention in pending trade proceedings. In a certain trade matter between Canada and the United States, a chairman of an important Senate trade subcommittee sent a letter directly to the ITC attacking its investigation and implying monetary recriminations.[236] Another intervention initiated by Congress and involving Canadian interests was the self-initiation of a trade case by the DOC, after sixty-six members of Congress expressed their written "opinion" that the President must take "swift and strong action."[237] It remains flagrantly apparent from the aforementioned cases that a successful trade policy within a multilateral trading context requires the exercise of congressional restraint in order to depoliticize the administrative mechanisms mandated to implement the international trade agreements, and specifically the WTO Antidumping Agreement. Despite the fact that trade disputes often involve conflicts of significant economic interests, it becomes all too crucial a goal for the NAFTA countries to strive to maintain a rule-based administrative and dispute settlement process.

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[235] Some experts believe that the United States Uruguay Round implementing legislation's language derogates from the WTO Agreements in several specific ways, see Gary Horlick's *Panel Presentation at the Uruguay Round Program Series, Antidumping and Subsidies Agreements and U.S. AD/CVD Laws*, presented by the American Bar Association Section of International Law and Practice, 31 January 1995, stating that the implementing legislation departs from the text of the Agreements in at least thirty-eight instances.

[236] On March 8, 1994, Senator Max Baucus wrote to ITC Chairman Don Newquist to "express [his] strong displeasure" with the ITC's investigation and to actually request from the ITC not to come to Canada in the near future: *Canada Wheat Dispute Heats Up*, Associated Press Online, 21, March 1994.

[237] See Scott Sonner, *Senators Urge Trade Retaliation Against Canada Over Lumber Tax*, Associated Press, 20 September 1991. Thirty-three days later, on October 23, 1991, the Department of Commerce self-initiated the third countervailing duty investigation of Canadian lumber within a decade; *U.S.-Canada Dispute - Extent of Injury to U.S. Industry in Softwood Lumber Case*, Daily Report for Executives, A-5, 22 November 1991.

In conclusion, we have seen throughout the beginning of the present chapter that the successful implementation of the WTO Antidumping Agreement by the NAFTA signatories has managed to eliminate some of the substantive and procedural differences and encourage, up to a certain degree, harmonization of regulation and practice. Differences do, however, remain and are mainly due to the economic reality, philosophical and institutional differences in the implementation of unfair trade remedy law. Significantly enough, the Canadian market will tend to be more vulnerable to American antidumping investigations than the reverse, due mainly to Canada's smaller domestic market. At the same time, since a respectable portion of Canadian manufacturing industries are export dependent, they will more seriously feel the impact of the uncertainties created by the U.S. antidumping investigations. This economic disproportionality is very difficult to eliminate, even if, for arguments sake, both NAFTA countries did manage to negotiate identical antidumping laws.

Finally, although the United States', Canada's and recently Mexico's unfair trade laws all implement the WTO Antidumping Agreement, their administration results in procedural biases favouring the domestic producer. Although there exist notable differences in such areas as material injury, public interest, judicial review and enforcement, the United States and Canadian antidumping regimes are essentially similar in structure. Canada's greater concern about potential misuse of the antidumping administrative process by the United States is an indication of the significant impact of U.S. antidumping investigation on Canadian domestic

producers. Consequently, Canada's insistence translated in the creation of the binational panel reviews initially in the FTA and now in the NAFTA.

Mexico, on the other hand, has seen significant improvements and amendments incorporated in its unfair international trade practice, but due to the degree of liberalism found in some of the provisions of the WTO Antidumping Agreement, there still exists room for discretion by the administrative authority, especially with respect to the calculation of normal value through the constructed value method or in the determination of injury. Unfortunately, this is true in each of the NAFTA countries, despite the major improvements and stricter disciplines negotiated on a multilateral level in the context of the 1994 WTO Antidumping Agreement.

5. Perceived Inadequacies of the Antidumping Laws as a Means of Effectively Addressing Anticompetitive Cross Border Price Discrimination

In this chapter of the thesis, we began by analyzing the origins of GATT article VI, pertaining essentially to the regulation of antidumping in international trade. The 1994 WTO Antidumping Agreement contains, to some degree, substantial improvements over the texts of its predecessor. The *WTO Antidumping Agreement*, however, fails unequivocally to resolve the problem of the presence of protectionist abuse of antidumping law by a petitioner that has lost its comparative advantage relative to a foreign exporter. This weakness of the WTO Antidumping Agreement is evident in three different contexts. Firstly, as we have already seen in this chapter, the *WTO Antidumping Agreement* expands opportunities for filing a petition. Secondly, the petitioner can easily manipulate a dumping margin calculation to exaggerate or inflate that margin. The lower than normal value in antidumping actions allows domestic producers to successfully shield themselves from price competition arising from foreign imports. The normal value standard does not take into proper consideration the effects of consumer demand in the exporter's home market and the import market. An exporter with, for example, stronger consumer demand in its market of origin will have the capability of requesting higher prices. Ironically, the capability of charging higher prices at the importers home market will probably result in a condemnation of its efforts to compete in the more competitive foreign export market, since any differential between home prices and foreign export prices constitutes grounds for a determination of dumping. The lower than normal

value standard fails to distinguish between dumping with a predatory intent of inflicting serious injury on the importing country's domestic producers and dumping that is a result of legitimate business activities. There is no recognition of the normal business practice of retaining competitive prices as a necessary lever in order to attain market share. In addition, there is no recognition of short-term dumping as a legally justifiable response to unexpected market developments, such as currency fluctuations, or variations in consumer demands.[238] Even though these practices may eventually have a negative impact on the sales of less competitive domestic producers, domestic producers operate their own businesses using the same business tactics the antidumping laws condemn. As will be seen in the next chapter, the *Canadian Competition Act,* and its American counterpart, the *Sherman Act,* contain provisions that allow price discrimination in cases where a competitor is simply interested in meeting competition in a specified market, is not predatory in nature (as specifically defined by statute) and does not include acts destined to cause injury or eliminate competition. Once, however, this type of trading activity transcends borders, it is subjected to the discriminating reach of the antidumping statutes, consequently rendering it illegal.

Furthermore, the imposition of a duty to raise the price of imported goods to the equivalent of the importer's home market unjustly punishes consumers. We have seen that under the WTO Antidumping Agreement, representative consumer bodies must, for the first time be consulted during a dumping investigation. Only evidence

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[238] See John J. Barcelo, "Antidumping Laws as Barriers to Trade - The United States and the International Antidumping Code", (1971-72) 57 *Cornell Law Review*, 491 at 510.

on dumping, causality and injury elements is permitted. The general and more widespread consequences of dumping on domestic social dislocation, and on the economic welfare of the domestic industry are areas for which evidence is or is not permitted to be presented. This has prompted Phillip Evans, economic affairs officer of the *International Organization for Consumers Unions,* to characterize this victory as a hollow one since, "consumer interests are only going to be allowed to speak on issues defined by the investigatory body"[237] The consumer movement will thus be superficially adding some form of credibility to the antidumping process without really benefiting from this input, since their intervention is not instrumental in influencing the course of the investigation. At the end of the spectrum, the consumers in the importing firm's domestic market are the losers since they are obligated by their governments' protectionist policies to pay the higher prices in order to sustain a noncompetitive domestic market. Consequently, this price imposed by the duty can hardly be considered fair to the consumers from the domestic market who are now forced to pay artificially high prices for the imported goods, simply because of market inefficiencies.

Thirdly, a petitioner can also exploit standards for demonstrating injury and consequently claim that the foreign imports are the source for the lack of efficient production in his business activities. In effect, when a slightly efficient producer loses sales as a consequence of price competition from the dumped imports, this can result in a finding of de minimis injury. This low threshold of injury allows for all

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[237] See P. Evans, *Unpacking the GATT: A Step by Step Guide to the Uruguay Round*, IOCU Publication, 1994.

claims to pass except those that are flagrantly frivolous and inconsequential.[238] Proponents of the antidumping law and policy traditionally forward arguments of an economic nature in order to gain support and characterize the antidumping regime as an efficient trade remedy against unfair international price discrimination causing prejudice to domestic producers. The following will attempt to analyze and expose the inherent weakness and fallacies of the several antidumping rationales

5.1 FALLACIES OF THE ECONOMIC RATIONALES FOR PROHIBITING DUMPING

Unfamiliarity with basic economic theory allows one to actually believe in the misconception that an entire country can be made to suffer by the penetration of cheap imports. If economic circumstances are such as to allow foreign producers to sell their products at a lower rate than in their domestic market, consumers in the importing country should view this activity as beneficial and wealth enhancing. A clear distinction must be drawn between the alleged negative effects suffered by the importing country and an absolute necessity to maintain antidumping in order to nourish the misconception used by politicians to comfort their citizens by assuring them immediate import relief measures based on the concept of "fairness". However,

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[238] The weaknesses and fallacies of the WTO Antidumping Agreement have been fully analyzed in section 1.2 of the present chapter entitled, "Right and Obligations arising from the WTO Antidumping Agreement."

any serious discussion and analysis on the merits of the antidumping regime and future prospects of reform must be based on economically sound principles.

5.1.1 International price discrimination as a reason for prohibiting dumping

The existence of two distinct markets is observed when various factors such as tariffs, import restrictions, non-tariff barriers and possibly transportation costs, are grouped together. The ability of the exporter to charge two different prices in two separate markets presupposes that it has a fair amount of control over its domestic market. Price discrimination also requires a significant different in the elasticity of demand, in both import and export markets. Consequently, any social costs associated with the exporter's presumed monopoly profits will be felt by his own market. It is thus logical to assume that efficiency loses, (which will inevitably exist according to the antidumping proponents) are absorbed exclusively by the dumper's home market. What then, is the concern voiced by domestic producers over misallocation of resources felt in the dumper's separate market? Professors Michael Trebilcock and John Quinn's remarks on this point are worthy of appreciation when they express the view that

> "although equality of exploitation has a certain egalitarian ring to it, it seems a little difficult to see any other virtue in replacing other people's miseries, particularly when in so doing we in no way ameliorate the lot of our fellow sufferers."[239]

[239] See M. Trebilcock, and M. Quinn, "The Canadian Antidumping Act: A Reaction to Professor Slayton", (1979) 2 *Can.-U.S. Law Journal* 101, at 104

Whenever a profit maximizing firm finds itself in a position where all of the requirements for price discrimination are present, it will necessarily engage in the price discriminating activity, in order to maximize its profits. This is not uncompetitive behaviour. On the contrary, a firm is behaving competitively as it would have done so in a domestic context against another rival firm. As a concluding remark, price discrimination cannot be retained as a normative rationale for maintaining antidumping law and practice.[240] Professor Richard Posner so eloquently summarizes the inefficiency of this economic rationale in the following terms:

> "An effectively enforced across-the-border prohibition of price discrimination would have a serious - perhaps disastrous - impact on the ability of industries to adapt efficiency to changing circumstances, and in particular on the natural tendency of Cartels to collapse through cheating that typically begins with discriminatory reductions."[241]

Efficiency arguments will be put forward in the last part of the thesis (reform proposals) in favour of substituting the competition (antitrust) provisions of the NAFTA members legislation, on price discrimination to offset the negative effects of antidumping.

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[240] See J. Robinson, *The Economics of Imperfect Competition*, 2d ed. MacMillan Publications,London, 1969; and R.D Boltuck, *An Economic Analysis of Dumping,* where the authors are of the opinion that it is hardly inconceivable that what is desirable in domestic trade should be prohibited in the international context.

[241] R. Posner, *The Robinson - Patman Act: Federal Regulation of Price Differences* 15 (1976).

5.1.2 Distortion of the rules on comparative advantage as a reason for prohibiting dumping

This argument advances the notion that the exporter or dumper has the ability to offer lower prices for his products in the import market not because of his competitively advantageous situation, but rather due to the fact that the dumper or exporter is enjoying a protected monopolistic position in his home market. This situation therefore provides the dumper with an artificial advantage over the importer's market. Under the relevant American and Canadian antidumping legislation, we have seen that sales below cost in the dumper's home market are not taken into consideration in the determination of the foreign market value. Consequently, antidumping duties may even be imposed when the value of sales above cost in the importing country balances the sales below cost in the dumper's home market.

If indeed one of the rationales behind the antidumping legislation is to effectively regulate and prevent "cross-subsidization", would it not be more economically logical to analyze the dumper's home market in order to determine what position it holds as a proportion of his total sales, which would perhaps permit cross-subsidization?

More importantly using antidumping measures to force down the presumably artificial barriers or protection enjoyed by the exporting country presupposes that an

individual country's unilateral trade action will be sufficient to enforce social welfare on a global or regional level.

One should be skeptical of such reasoning, as professor Alan Deardoff so critically observes by stating his concern in the following way:

> "On the face of it, however, this is hardly what those who seek protection under the antidumping statutes have in mind. They almost surely are looking for a higher price with which to compete, and would be dismayed if the only effect of their actions were to open up foreign markets to greater competition. Nonetheless, as a matter of global policy, this might be defended as moving the world closer to a global optimum. I regard this as a questionable justification for national policies, however, given especially that firms can acquire domestic monopoly power through so many other means than trade barriers."[242]

Additionally, if antidumping laws were designed to promote comparative advantage, they would necessarily have to compare the level of advantage in both the importing and home market of the dumper in order to establish the claim that sales below cost should be subject to antidumping duties. This particular commercial activity is frequently seen in the domestic context, when a profitable firm often sells its products at price below unit cost without realistically jeopardizing its existence. It remains debatable whether such practices should be condemned when practised on an international level, although the same activity is not considered reprehensible in the domestic market. In conclusion, the initial argument fails to provide a sound

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[242] See A. V. Deardorff, "Economic Perspectives on Antidumping Law", in J. Jackson and E. A. Vermulst (eds), *Antidumping Law and Practice: A Comparative Study*, supra note 24 at page 28.

reasoning behind the assumption that dumping will normally involve sales at prices below cost.[243]

If a nation's objective is to effectively liberalize the economies of its trading partners, would it not be more appropriate to attempt to use the multilateral trading context of the WTO in order to achieve such a result, or the NAFTA context? The history of trade relations between nations demonstrates that one nation's imposition of antidumping duties on the imports of another will only result in retaliatory action from the exporting nation. Finally, laws such as antidumping are fundamentally created to protect domestic competition and have no inherent mechanisms favoring the pursuit of global economic welfare. Without hesitation, we can easily conclude as to the economic weakness of this argument.

A corollary to the aforementioned argument favouring the continued application of antidumping laws in order to restore normal comparative advantage, is that intermittent dumping should be condemned because it causes injury to domestic producers.

This argument was initially elaborated by the economist Jacob Viner, who advanced the theory that dumping is responsible for creating an atmosphere of uncertainty for domestic products due to its short-term or intermittent character.[244]

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[243] See W. Wares, *The Theory of Dumping and American Commercial Policy* (1977), where he has illustrated that it is not likely that dumpers operating in decreasing cost industries will price their exports at a price below the average total cost of producing the exports. It is thus economically illogical for a firm to offer prices that recoup less than the costs of production.

[244] See J. Viner, *Dumping: A Problem in International Trade*, supra note 71 at 141; See also C. Kent, "The Unsettled business: Should Antidumping Laws be Replaced by Competition (Antitrust) Laws under Free Trade?", (1994) 4 *Alberta Law Review*, Vol. XXXII, where the author is of the opinion that, "if antidumping laws were to be maintained, the scope of activity prohibited by these

In essence, Viner puts forward the theory that temporary cheap imports cause domestic producers to shift their resources from one kind of production to another. He also sees harm in these needless shifts in that resources are used for a long duration and for unproductive purposes. Additionally, he states that benefits for consumers usually do not outweigh the losses that the domestic producers will inevitably incur under the scenario. The validity of this theory lies in the assumption that the welfare balance does indeed favour the domestic producers, but this estimation, however, has never been proven. Thus, every time, the preliminary conditions for price discrimination are fulfilled, a competitor will be tempted to "dump" in order to gain a maximum return on its profits. Consequently, it is the market that dictates the frequency of dumped sales, and not necessarily a transitory policy decision of a corporation.

When intermittent dumping arises out of a necessity to maintain high capacity utilization and keep employment rates high, there is a certain adjustment that must be made by the domestic producers. It is inevitable that there will be a shift of resources from one area (such as research and development, for example) in order to allow a corporation to produce a lower priced product. However, the degree of adjustment costs sustained by domestic producers does not affect the global welfare of a nation as a whole.[245]

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laws would need to be reduced to recognize that only one form of non-predatory price discrimination, intermittent dumping, warrants, prohibition in the market created by the NAFTA."

[245] See supra note 240, M. Trebilcock and M. Quinn, "The Canadian Antidumping Act: A reaction to professor Slayton," at p. 109.

However, when the producer is faced with a higher cost of capital, which may increase the price charged in the future, consumer welfare may be affected. This depends on "whether the gains to consumers from lower prices are offset by the losses to consumers as a result of higher prices during periods when dumping does not occur."[246] Unfortunately, the higher cost of capital may sometimes translate into a decline of consumer welfare.

However, studies undertaken by Michael Trebilcock and Thomas Boddez, demonstrate that from the period of October 30, 1984 up until February 3, 1989, only four of the 30 Canadian antidumping cases, showed any sign of intermittent dumping. The issue of maintaining capacity utilization was irrelevant for these firms. These were agricultural firms seeking to reduce conditions of oversupply.[247] Some harm may possibly result from this scenario, if one considers that the adjustment costs of the industry (contraction and expansion) may be transferred onto the consumer during periods when imports are no longer on the market. Due to the nature of the agricultural market, however, there will come a time when Canadian producers will have to deal with the reality of low prices. The best solution for this would be some sort of price stabilization strategy to be efficiently implemented.

However, it is important to realize that if during times of domestic depression a corporation uses this market to maintain capacity utilization, the general welfare of

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[246] See T.M Boddez and M.J Trebilcock, *Unfinished Business, Reforming Trade Remedy Laws in North America*, C.D. Howe Institute, Toronto, 1993.

[247] See S. Hutton and M.J. Trebilcock, "An Empirical Study of the Application of Canadian Antidumping Laws: A Search for Normative Rationales," (1990) 24 *Journal of World Trade.*

the importing nation will probably be affected and the domestic industry hurt. As prerequisites, the amount of dumped imports and the duration must be significant enough to actually realize a shift in resources. The antidumping laws are not equipped to differentiate between intermittent and permanent dumping. This rationale of economic theory along with a general review of the average duration of the imposition of American antidumping duties[248] clearly indicate that dumping usually involves permanent lower priced imports, and therefore, antidumping has no economic foundation.

5.1.3 Predatory pricing as a reason for prohibiting dumping

An analysis of the literature reveals that historically one of the most prominent arguments against dumping is that this type of activity facilitates predatory practices allowing a producer to gain monopolistic power in a foreign market.[249] Empirical studies conducted at different levels seem to indicate that predatory pricing strategies at the international trading level are rare, if not

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[248] The United States has been notorious in the past for the extended duration of the imposition of its antidumping duties. Additionally, when dumping occurs in the form of transitory exportation under abnormal demand conditions, it should be prohibited, however, this is an exception rather than the rule in international trade.

[249] See J. Viner, *Dumping: A Problem in International Trade,* supra note 71; Y. Mastel, *American Trade Laws after the Uruguay Round*, Economic Strategy, Institute, M.E. Sharpe Inc., 1996, where the author is of the opinion "that U.S. antidumping laws act too slowly in response to aggressive, predatory dumping (...). Predatory dumping is not the norm in dumping cases, but it is an eventuality that U.S. trade law must be prepared to recognize and address." page 86.

impossible to document.[250] The reason for this lies in the requirement of a combination of economically unrealistic conditions. The predatory pricing strategy on the international level presupposes that in order for a predator to be successful, it must have the ability to sell its products in the foreign market at a significantly lower price than the domestic products to drive out all its rivals (domestic producers) from the market. Economic theory suggests that this type of pricing strategy is irrational unless certain structurally required conditions are met. When the predator engages in predatory pricing, it is inevitable that its pricing strategies will attract new customers, thus increasing demand for its products. Operating below cost will cause the predator to sustain operating losses which it optimistically hopes to recoup once the competitors are completely eliminated. We should not forget that we are dealing with internationally predatory pricing, and as such, at this level, this presumes that the predator must have the ability to eliminate the domestic producers as well as to prevent new competitors from entering on the international level. This is a theoretically possible scenario, but excessively difficult to achieve. Additionally, this situation is capable of creating new entry points for new competitors who acquire at very low prices the installations from some of the domestic producers who may have gone bankrupt. These new competitors (domestic and/or international) may also pose a threat to the predator's monopolistic position, since

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[250] See for the U.S. market, R. Koller, "The Myth of Predatory Pricing: An Empirical Study," (1971) 4 *Antitrust L. & Econ. Rev.* 105; In the international market, R. Corey, *Track Policy and the System of Contingency Protection in the Perspective of Competition Policies* (Paris OECD 1986); S. Semeraro, "Distinguishing International From Domestic Predation: A New Approach to Predating Dumping," (1987) 23 *Stanford J. Int'l. L.* 621

they are incurring lower fixed costs.[251] The high costs and risks of uncertainty are factors that a predator carefully analyses and is wiling to incur only if it is relatively certain of gaining the required market power. Predatory pricing allegations are difficult to assess, because as we have seen in the previous chapters, the antidumping statutes of the NAFTA countries are not intended to detect and prosecute cross-border trading activity involving predatory intent. In both Canada and the United States, as will be seen in the next chapter, the competition (antitrust) provisions on predatory pricing consider prices below the seller's marginal cost or average variable cost as being predatory, on a *prima facie* basis. Significantly enough, mere below-cost pricing is not reprehensible under the competition (antitrust) statutes. This is a significant difference between the competition (antitrust) statutes and the antidumping statutes with regards to the treatment of domestic predatory pricing and international predatory pricing. The selling below cost practice is an economically justified reaction to preexisting conditions in a given market, towards which the competition (antitrust) statutes are equipped to recognize and legitimize, so long as the seller prices its production above its variable costs. Under current laws, antidumping duties are imposed when fully-allocated costs exceed export market prices, thus penalizing below cost pricing. This type of pricing strategy does not necessarily reflect predatory intent. Below-marginal-cost pricing is a common strategy used by new entrants to a specific market. This pricing strategy is effective in attracting customers in order to buy and eventually remain loyal to a given product. Once the new entrant has managed to gain a portion of the

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[251] See J.S. McGee, "Predatory Pricing Revisited," (1980) 23 *Journal of Law & Economics*, 289

market, prices are raised to a competitive level. They (new entrants) do not necessarily require generating a monopoly in order to recoup their costs. Finally, in support of the statement that antidumping laws in their present state are ill-equipped to identify and sanction true predatory pricing strategies, we refer to the results of the previously cited empirical studies conducted by professors Trebilcock and Hutton indicating that out of thirty Canadian antidumping cases studied since 1984, none would be justified on the basis of concern over predatory pricing.[252]

5.2 Conclusion on Economic Rationales for Prohibiting Dumping

Upon a careful examination of the efficiency rationales of the Canadian, American and Mexican antidumping regimes, we are of the opinion that there is no economic justification for these laws. Global consumer welfare is enhanced by international price discrimination. Intermittent antidumping can be expected to occur rarely and the net welfare effects are yet to be determined.

As author James Bovard so poignantly outlines, while the fear of predatory dumping dominates the antidumping debate, there are no known cases in the last century where a corporation has dumped its products on the American market, caused American producers to go out of business, and then raised prices and affected consumers for a substantial period of time.[253] Unfortunately, much of the

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[252] See supra note 248.

[253] See J. Bovard, *The Fair Trade Fraud* , New York, St. Martin's Press, 1991 at 157.

theory upon which antidumping policy rests uses the erroneous premise that predatory pricing both exists and is common practice. The economic theory underlying the prohibitions against predatory pricing is that a strong corporation can price its product below cost in order to eliminate competitors from the market. It can then raise its prices to recuperate its losses since no competitors will be around to deter it from capturing the remaining market shares. The success of this strategy will be evident, if and only if, the predatory pricer stands to gain more after completing its strategy than it lost in its attempts to drive competitors out. The fallacy with this type of strategy is that the corporation will inevitably lose money on every below cost sale it makes. Additionally, in almost no situation are the barriers to entry so high so as to prevent new competitors from entering the market, unless of course government interfers in the form of a licence prohibition or in any other form of legal obstacle. As a result, we can easily see that the true legitimate threat to consumers, and to the national economy as a whole, is not predation from a foreign firm, but the existence of an inefficient firm assisted by government, weakening the competitive process, and capturing a market share that would have been impossible to attain under normal business practices. It would certainly be unfortunate for an importing country to deprive itself of low cost products simply on the basis of a fear of predation, when regulatory and legislative (competition and antitrust laws) means exist to deal with this issue at a subsequent stage, when the predatory intent has already and unequivocally been established through the use of this legislation specifically enacted to promote efficient competition.

More could be written, but the entire chapter and particularly the present section is sufficient to demonstrate the necessity of rendering antidumping laws and procedures less arbitrary and less trade-distorting. Upon reviewing the underlying principles comprising the four major pillars upon which the GATT/WTO system has been based, it is not impossible to see why we may be tempted to conclude that the *WTO Antidumping Agreement* possibly permits the use of antidumping actions as a way of discouraging distortions of competition, through the use of price discrimination. Unfortunately, the current antidumping system cannot differentiate between positive (in rare cases used to exploit a monopoly) and negative cases of price discrimination. This is consistent with the procedural problems we outlined earlier in this chapter, where we concluded that political concerns were inherent in the system disregarding legitimate economic efficiency concerns.

At this point in our analysis, we can affirm that there is a case to be made for exploring possible alternative solutions in the competition (antitrust) regimes of the NAFTA countries. When competition laws are analyzed in the context of the existing antidumping laws of the NAFTA countries, it is significant to focus on the areas of price discrimination, predatory pricing and abuse of dominant position, as they are often viewed as areas of overlap in both competition(antitrust) laws and antidumping laws.[254] In the next chapter, we will set out to analyze the substantive provisions and the practical application of the competition(antitrust) laws of the

[254] See Y. Feltham, S. Salem et als., *Competition (Antitrust) and Antidumping Laws in the Context of the Canada-United States Free Trade Agreement,* A Study for the Committee on Canada-United States Relations of the Canadian Chamber of Commerce and the Chamber of Commerce of the United States, (1991) at 21.

NAFTA members with regard to transborder trade in view of determining their effectiveness in dealing with pricing activity that affects competition in the NAFTA context. It therefore follows that in such a case, the degree of consistency between the three different bodies of laws will be a factor in reducing the trade-distorting effects created by differences in law and practice.

CHAPTER IV

COMPETITION/ANTITRUST POLICIES VIEWED IN AN INTERNATIONAL TRADING CONTEXT

Introduction

When the *Free Trade Agreement* ("FTA") came into force on January 1st, 1989, new principles of strengthening "the competitiveness of Canadian and United States firms in global markets", promoting "productivity, full employment, and a steady improvement of living standards in their respective countries", and reducing "government-created trade distortions while preserving the parties' flexibility to safeguard the public welfare",[255] among others, were supposed to become the principal foundations of the trading relationship between Canada and the United States. In other words, according to the wording of the FTA, the initiative taken by Canada and the United States to create a free trade zone was based on the concept of economic efficiency rather than preserving protectionism. In essence, the NAFTA[256] reiterates the crucial components of this guiding philosophy at article 102 while stating and identifying the following goals; "i) eliminating barriers to trade in, and the facilitation of cross-border movement of goods and services among the three parties; ii) promoting fair competition within the free trade area; iii) increasing investment opportunities within the territory of the three parties; iv) providing

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[255] 22 December 1987, Can. T.S. 1989 No. 3, 27 I.L.M., preamble; Part A, Schedule to the Canada -United States Free Trade Agreement Implementation Act, S.C. 1988, c. C-65

[256] 32 I.L.M. 297 (1993), preamble article 102, see supra note 5

adequate and effective protection and enforcement of intellectual property rights in each territory; v) creating effective procedures for implementation and application of the Agreement; and vi) establishing a framework for further trilateral, regional and multilateral cooperation to enhance the benefits of NAFTA." Therefore, Chapter XV has been designed to implement the goal of promoting fair competition within the free trade area[257]. Eventhough, the parties had in the past implicitly recognized through their commercial transactions, the ever-present effect competition policy had on the success of their trading relationship, it is only now, within NAFTA that each party commits itself to full enforcement and compliance. It is only logical then to elaborate upon the reason why competition policy is and remains an important area for study in the context of the NAFTA, particularly with respect to proposing a replacement regime for antidumping law and policy using the predatory pricing and price discrimination provisions of competition law to discipline anticompetitive cross border price discrimination analogous to dumping.

Firstly, competition policy and trade policy serve as complementary blocks in the building of a trading zone unfettered by obstacles of a private and public nature. Just as free trade measures attempt to lift public government obstacles to trade through the elimination of tariffs, competition law's primary objective is the reduction and elimination of obstacles created by private parties through their market restrictive and exclusionary behaviour aimed at undermining the principles of free trade. Secondly, it is futile to engage in a complex discussion of the mechanisms for achieving free trade without having dealt with the practical concern

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[257] See NAFTA, supra note 256, at Chapter XV

that a NAFTA party may and will eventually attempt to protect its national interests. As more trade becomes unfettered, private and national incentives to block trade and conserve traditional domestic products may become stronger. A competition policy aiming at diminishing or eliminating anticompetitive restraints becomes mandatory. Thirdly, the principle of state sovereignty allows each NAFTA party to apply its own domestic competition law and policy to activities taking place on its territory. However, since the NAFTA transcends borders, any discrepancies between national competition laws of the parties may become more and more apparent and may indeed result in the slowing down of trade. In general terms, the overwhelming interest in studying competition law and policy can be easily understood if we consider the presumption that competition laws should not distinguish between domestic and foreign competition in seeking to ensure a competitive process, and this in turn is consistent with the fundamental goals and objectives of the NAFTA.

Turning now to the relevant chapter in question, Chapter XV of the NAFTA entitled, "Competition Policy, Monopolies and State Enterprises", we initially encounter disciplines on the activities of monopolies and state enterprises based on the principle of non-discrimination in the purchase and sale of goods where a NAFTA party has a monopoly. Article 1501(1) of Chapter XV and upon which the present chapter will evolve, requires each party to "adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto recognizing that such measures will enhance the fulfillment of the objectives

of this Agreement". The paragraph also provides that the "parties shall consult from time to time about the effectiveness of measures undertaken by each party." *The Canadian Statement of Implementation of the NAFTA* originating from the Department of External Affairs[258] clearly defines the obligation imposed on governments and affirms that Canadian, American and Mexican competition legislation has fulfilled this obligation. This affirmation will in turn, be analyzed in the present chapter of our thesis, while taking into consideration relevant factors such as accessibility, effectiveness and enforceability of the present competition law regimes within a free trade zone. The relevant excerpt from the above-noted Statement of Implementation reads as follows:

> "The main obligation on government in article 1501 is to adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto, i.e., to enforce an adequate competition law. Canadian, U.S. and (recently enacted) Mexican legislation meet this obligation".[259]

Article 1502 affirms the right of a party to designate a monopoly or establish a monopoly only in the future. In the event that a party seeks to designate a monopoly and where there is a possibility that the designation "may affect" the rights of another NAFTA party, then such designation must be done in such a way as to "minimize or eliminate any nullification or impairment of the benefits" of the NAFTA as provided for in Annex 2004 of NAFTA (Nullification and Impairment).

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[258] *Canadian Statement of Implementation*, NAFTA, Department of External Affairs, Extract Canadian Gazette, Part I , January 1st, 1994 (hereinafter, *Statement of Implementation*)
[259]Id. at page181

In addition, this monopolistic entity cannot be allowed to operate without any control or supervision. All governmental authority must be exercised by these monopolies in such a manner as to ensure that:

> a) the obligations under the NAFTA are respected;
> b) their behaviour is in accordance with commercial considerations and non-discrimination is used in dealing with investors, goods, and service providers of another party;
> c) their monopolistic position is not used in engaging in anti-competitive 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"

Article 1503 of the NAFTA expressly allows the formation of state enterprises. However, when and if a party decides to take advantage of this provision, it must do so in a manner that ensures that the state enterprise will act consistently with the NAFTA obligations in exercising governmental power such as expropriation, granting of licenses, approving commercial transactions, or imposing quotas, fees or other charges. Finally, article 1504 provides that the Free Trade Commission will set forth a Working Group on Trade and Competition, comprised of representatives of the three parties. A deadline of five years from January 1st, 1994 (the coming into effect of the NAFTA) has been established in order for this Working Group to present to the NAFTA Commission its recommendations and

proposals "on relevant issues concerning the relationship between competition law and policies and trade in the free trade area."

The insertion of Chapter XV of the NAFTA comes as a long awaited relief in light of growing economic integration of the North American economy which can easily be observed at the intensity of strategic corporate investment decisions being made by multinational corporations[260]. While Canada and the United States have not received a significant share of Mexican foreign investment, the level of Canadian foreign direct investment in the United States has been growing three times as fast as US direct investment in Canada[261]. As a matter of fact, during the year 1991, Canada was the fourth largest source of foreign direct investment in the United States, ranking behind the United Kingdom, Japan and the Netherlands, respectively.[262] Consequently, in the previously mentioned *Statement of Implementation*,[263] the Canadian government has recognized the role Canada will have to assume in the new competitive global trade environment:

> "Rapid changes in the organization and technology of production are resulting in a much more integrated and competitive global environment for trade and investment. Through alliances and other forms of intercorporate cooperation, firms in Canada, the United States and Mexico are finding new ways to expand opportunities within North America as well as across the Atlantic and Pacific. (...) In order to ensure that Canadians will benefit from these developments to the greatest extent possible, the

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[260] See Alan M. Rugman and Michael Gestrin, "NAFTA's Treatment of Foreign Investment," in *Foreign Investment and NAFTA*, 1994, at 47.

[261] Id. Table 3.2, at page 50

[262] See K.J. Borghese, "Developments and Trends in Foreign Direct Investment in the United States", *Foreign Direct Investment in the US; An Update,* US Dept. of Commerce 1993, at 18.
[263] supra note 258, at page 183

> Government intends to make full use of the provisions in this chapter(referring to Chapter XV) to explore the best ways to ensure that competition policies and cooperation among competition authorities enhance and strengthen competition within North America".

It is no doubt the influence of such commercial activity that has prompted the drafters of the NAFTA to insert Chapter XV, particularly article 1501 of the Agreement, that if we recall, imposes an obligation upon the NAFTA parties to "adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate actions with respect thereto". Let us now examine to what extent the Canadian government has, through appropriate legislation, fulfilled this commitment. It is important to note that the analysis that follows is by no means a comprehensive look at all of the provisions of the competition (antitrust) provisions of the NAFTA members. It only aims at providing a competition efficient substitute for the antidumping dilemma. Consequently, practices such as refusal to deal, secondary and tertiary line price discrimination, and others, even though regulated by the competition legislations, will not be analyzed, due to the fact that these practices do not directly relate to dumping.

1. COMPARATIVE ANALYSIS OF SELECTED PROVISIONS OF THE COMPETITION/ANTITRUST REGIMES OF THE NAFTA SIGNATORIES WITH RESPECT TO ANTICOMPETITIVE CROSS BORDER PRICE DISCRIMINATION ANALOGOUS TO DUMPING

1.1 CANADIAN COMPETITION LAW

While the history of Canadian competition legislation has undergone many changes, it has not been without enforcement and constitutional difficulties[264]. Much of this was due mainly to what were thought to be limitations on the federal government's constitutional power to enact competition legislation on any basis other than criminal law. Thus, a significant part of the provisions of the legislation was of criminal nature, requesting an elevated level of burden of proof, and consequently ineffective in reprehending a variety of business practices which had anticompetitive effects. The process of legislative revision brought about major amendments in 1976[265] and 1986, with the result that the present legislation, the *Canadian Competition Act*[266] now covers both criminal and civil cases and represents a significant evolution over its predecessor, the *Combines Investigation*

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[264] For a complete history of the legislation's evolution, see generally G. Kaiser, "Competition Law of Canada," in J. Von Kalinowski (ed.), *World Law of Competition*, New York, M. Bender Publications, 1992 and R. Nozick et al., *The Annotated Competition Act 1992,* Scarborough, Ontario, Carswell, 1991.

[265] See Canada, *Economic Council of Canada, Interim Report on Competition Policy*, Ottawa; Queen's Printer, 1969

[266] R.S.C., 1985, c. C-34

Act.[267] Incidentally, all ambiguities concerning the constitutionality of the *Canadian Competition Act* were finally dealt with by the Supreme Court of Canada in the landmark case of *General Motors of Canada* v. *City National Leasing*,[268] when it affirmed the constitutional validity of the Act. The chief Justice's characterization of the Act was as follows:

> "The Act is geared to eliminating activities that reduce competition in the marketplace and embodies a complex, well-integrated scheme of economic regulation to achieve that end. It identifies and defines anti-competitive conduct, establishes and investigatory mechanism for revealing prohibited activities, and provides an extensive range of criminal and administrative remedies(...). The regulation of competition falls within federal jurisdiction..."

Before we attempt to examine the international implications of the *Canadian Competition Act*, it is imperative, to expose the provisions of the Act pertaining to its application and enforcement.

The general purpose clause of the Act, as set out in section 1.1, is to maintain and encourage competition in order to achieve greater participation of the Canadian economy in world markets, and to promote other economic objectives. Section 1.1 provides as follows:

> "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,

[267] S.C.R. 1970, c. C-23
[268] (1989) 1 S.C.R. 641

> in order to expand opportunities for Canadian participation in 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" (our emphasis).

Therefore, Canada's competition regime is primarily based on a law enforcement regime that emphasizes the independence of the various actors involved in the administration of the Act. For example, the Director of Investigation and Research, or the "Director," has the responsibility of carrying out the investigation process. Depending on the outcome of this process, the Director will refer the matter to the independent administrative tribunal (the Competition Tribunal which possesses quasi-judicial powers), or to the courts depending on the criminal or civil nature of the provision that has not been respected.

The principal changes put forward by the Act and the relevant *Competition Tribunal Act*,[269] include the creation of the new Competition Tribunal, ("Tribunal"), to adjudicate non-criminal cases, the enactment of civil provisions to deal with mergers and monopolistic behaviour as well as significant changes to the investigatory powers of the Director. In general terms, the Act applies to commercial activities carried on in competition with others in all sectors of the Canadian economy, including crown corporations.[270] The general scope of the Act

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[269] R.S.C. 1985, c. C-19 (2nd Supp.)
[270] Canadian Competition Act, supra note 269, section 2.1

contains only a few exemptions. Exemptions include such activities as collective bargaining[271], amateur sports[272], as well as a more restrictive exemption from the conspiracy and price maintenance provisions concerning agreements in relation to the underwriting of securities[273]. In addition, Canadian jurisprudence has also developed an exemption called the regulated conduct doctrine[274] in the context of the criminal law provisions of the former *Combines Investigation Act*. We cannot affirm with certainty whether this doctrine is applicable to the reviewable practices provisions (civil provisions) of the new *Canadian Competition Act*, it remains to be seen.

What follows will constitute a brief summary of the relevant criminal provisions of the Act.

1.1.1 Criminal Provisions

a) Conspiracy, section 45

The most significant of the criminal provisions is undoubtfully, section 45 that deals with conspiracies, combinations, agreements or arrangements which

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[271] Id. section 4
[272] supra note 269 at section 6
[273] supra note 269 at section 5
[274] See The Competition Act as it Relates to the Regulated Sector, *Notes for an Address by C.S. Goldman, Director of Investigation and Research, to the Canadian Association of Members of Public Utility Tribunals*, September 10, 1986

unduly lessen competition. Even though this section does not specifically relate to anticompetitive cross border trading equivalent to dumping, it is important to elaborate upon, due to its international aspect. As we will see further on, this provision could be invoked when a group of foreign producers conspire outside of Canada, to maintain, for example, their export prices below a certain level for sale in the Canadian market.

Section 45 has been in existence in various forms since 1889. As drafted, section 45 prohibits conspiracies, combinations or arrangements that;

> .limit unduly the facilities for transporting, producing, manufacturing, supplying storing or dealing in any product:
>
> .prevent or lessen, unduly, competition in the production, manufacture, purchase and sale of a product;
>
> .prevent or lessen, unduly competition in the production, manufacture, purchase, and sale of a product;
>
> .otherwise pose gestures restraining or limiting competition unduly.

In order to obtain a conviction under this section, the Attorney General must be able to prove first, the existence of a conspiracy from circumstantial evidence, with or without direct evidence of communication among the parties, although existence of the agreement must be proven beyond a reasonable doubt; secondly, the existence of an agreement (*actus reus*) between two or more parties having the effect of restricting or lessening competition unduly in the manner proscribed by the provision.

The most recent judicial interpretation of the significance and scope of the term "unduly" was put forward by the Supreme Court of Canada in the case of *R* v. *Nova Scotia Pharmaceutical Society.*[275] An accusation was brought by the Crown against conduct involving the sale and offering for sale of prescription drugs and pharmacists' dispensing services. In this case the accused a pharmaceutical society, pharmacy operators and associations of pharmacists were charged on two counts of conspiracy. The NS Pharmaceutical Society was responsible for negotiating agreements for the benefit of its members. As part of the negotiations, the Society was granted assurances from insurers on province-wide maximum dispensing fees that could be charged to individual pharmacies. Justice Gonthier of the Supreme Court of Canada defined the term "undueness" as an activity or conduct bearing a significant effect on competition. The Court determined that the accused need not possess an overwhelming market share; a moderate degree of market power will satisfy the application criteria of section 45. Market power is used to determine the extent to which the parties' agreement can harm competition. However, the Supreme Court has also determined that "particularly injurious behaviour may also trigger liability even if market power is not so considerable."[276]

As we have seen up to this point, the "undueness" criterion does not permit the section 45 offence to be categorized as a *per se* offence, as is its American counterpart, section 1 of the *Sherman Act*[277], (to be examined in the upcoming section). As a matter of fact, the Supreme Court ruled that section 45 does not

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[275] (1992) 2 S.C.R. 606, hereinafter NS Pharmaceutical Society
[276] Id at page 657
[277] 15 U.S.C. s.1

permit an analysis of the economic benefits of the conspiracy agreement, but does permit an analysis of the effect on competition, therefore qualifying section 45 as a hybrid or "partial rule of reason" offence[278]. The Supreme Court ultimately ordered that the accused, Pharmaceutical Association of Nova Scotia, be re-tried on the conspiracy charge so that the trial judge could take into account the Court's guidance in the interpretation of section 45. At the trial on the merits, the Nova Scotia Supreme Court Trial Division[279] acquitted the accused. The trial judge determined that the accused were party to an agreement that resulted in an undue lessening of competition, but that the Crown had failed to prove the accused would or should have known that their agreement might lessen competition unduly. The judge found that the case was not one where he could "routinely infer" merely from the proof of the *actus reus* that the accused would or should have known the likely effect of the agreement[280]. The ultimate acquittal of the accused in this case demonstrates the uncertainties surrounding the elements of proof concerning the requisite intent to "lessen competition unduly". Therefore, this landmark case has proven to be of less predictive value contrary to what the Director of Investigation and Research had predicted.[281]

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[278] supra note 275 at page 650

[279] 49 C.P.R. (3d) 289 (N.S. Sup. Ct., Trial Division 1993)

[280] supra note 279 at page 333

[281] Following the appeal decisions, the then Director Wetson stated that the "analytical framework developed by the Supreme Court in the Pharmaceutical Association of Nova Scotia decision supports and legitimizes to a great extent the screening criteria" put in place by the Director for conspiracy cases and this case made it possible to "identify types of collusive behaviour that may be contrary to section 45 even if market power is not so considerable" Howard I. Wetston, "Developments & Emerging Challenges in Canadian Competition Law", in Barry Hawk (ed.), *Fordham Corp.L. Inst.* ,1993.

Subsection 45(3) elaborates several exemptions regarding restrictions that relate to certain specified subject matter: the exchange of statistics or credit information: defining product standards or terminology used in a trade, industry: cooperation in research: standards to protect environment, etc. The broad application of these exemptions are restricted by section 45(4) of the Act, in the event that such agreements should have the effect of lessening competition unduly in respect of prices, quality of production, markets etc. It remains significant to note that subsection 45(5) of the Act relates to agreements that pertain only to the export of products from Canada. These agreements are exempt from the general scope of section 45 provided that they do not reduce or limit the real value of exports, restrict any person from entering into or expanding the business of exporting, or lessen competition unduly in the supply of services facilitating exports. Particularly significant within the NAFTA context is section 46 of the Act. While non-Canadians who enter into a conspiracy outside of Canada may be subject to prosecution under section 45 of the Act, an offence may be committed under section 46 as well.

The revised *Competition Act* successfully anticipated the challenges arising from globalization and trade liberalization. Section 46 of the *Competition Act* creates a criminal offence applicable to corporations, wherever incorporated, that carry on business in Canada if they implement a directive or order from a person outside of Canada for the purpose of giving effect in Canada to a conspiracy entered into outside of Canada. An offence is committed if the Canadian corporation is in a

position to be "influenced" by the non-Canadian. The first conviction for foreign-directed conspiracy was entered in 1993. The accused, *Chemagro Limited* and *Sumitomo Canada Limited*, pleaded guilty to implementing in Canada a market sharing/price-fixing agreement in the insecticide business. The conspiracy was entered into outside of Canada by Bayer AG, Germany, and Sumitomo Chemical Co. Ltd., Japan. The Canadian accused were each fined 1.25 million dollars[282]. The presence of such a provision affecting activity originating outside of Canada should be particularly effective in curbing anti-competitive behaviour in Canada, leaving aside for the moment arguments of state sovereignty and jurisdiction. Incidentally, some may argue that the provision of an export cartel exemption under competition laws for export activities within the free trade zone may also be at odds with the purposes of the NAFTA. In the final analysis, suffice to say that the ultimate effective enforcement mechanism still remains, in our opinion, adequate cooperation and information sharing from all the NAFTA parties involved.

b) Price Discrimination

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[282] *R.* v. *Chemagro Limited*, Que. Sup. Court, File No. 200-01-012459-925 (June 11th, 1993) (unreported); *R.* v. *Sumitomo Canada Limited*, Fed. Court Trial Division, File No. T-2687-93 (Nov.25, 1993), (unreported)

Price discrimination is addressed by paragraph 50(1)a) of the *Competition Act*. This paragraph expressly prohibits discrimination by a seller towards a purchaser of articles of the same quality and quantity. Under this subsection 50(2) of the Act, the price concession or advantage must be granted as part of an ongoing practice of discriminating. This offence is punishable by a fine in the discretion of the court and /or up to two years imprisonment. The Director has referred only three cases for conviction pursuant to guilty pleas[283]. Consequently, principles of interpretation cannot be easily formulated from such limited jurisprudential activity, thus the Director issued the *Price Discrimination Enforcement Guidelines* which elaborate the generally accepted enforcement policy of the Bureau of Competition Policy regarding this provision[284]. This offence does not require the "proof of injury to competition test" if all the required elements of the offence are present. In addition, it should be noted for the purposes of further development that in the context of the NAFTA, there might well be a situation in which, for example, a US seller would have customers in Canada and customers in the United States who are in competition with each other and thus one would be disadvantaged in relation to the other by discriminating pricing in the circumstances contemplated by this section. If the disadvantaged party was in Canada, the logic of the provision would

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[283] *Commodore Business Machines Ltd.* v. *Director of Investigation and Research* (1988), 63 O.R. (2nd) 737; *R.* v. *Neptune Meters Ltd.* (Ont. Dist. Ct., June 2nd, 1986, unreported)

[284] *Price Discrimination Enforcement Guidelines*, Director of Investigation and Research, Supply & Services Canada, 1992

appear to support his having a remedy against his seller in respect of the consequences of the disadvantage imposed upon him by the discriminatory pricing.

c) Regional Price Discrimination

The Competition Act also has a section often described as the "regional price discrimination" provision. Section 50(1)b deals specifically with substantially lessening competition or eliminating a competitor in a part of Canada, or being designed to have such effect and is in effect a predatory pricing section parallel to paragraph 50(1)c of the *Competition Act* discussed above. The provision involves the same issues with regard to policy, intent and effect of a pricing policy . In our view, there is nothing in paragraph b) of section 50 that would limit its application to a person who engages in such a policy being a seller in Canada as compared with a seller selling into Canada from the United States or any other source outside of Canada. However, what is necessarily implied in the area of statutory interpretation and international law, is that the purpose of the *Competition Act* is to protect the competitive environment in Canada. As we have previously seen, the issue of extraterritoriality of the application of the statute will not be discussed in this chapter, but in a subsequent chapter of the thesis.

d)- Predatory Pricing

Paragraph 50(1)c) of the *Competition Act* makes it an offence to engage in a policy of selling products at prices unreasonably low that have the effect or tendency of substantially lessening competition or eliminating a competitor, or are designed to have that effect. As with the discrimination provisions, there is very little jurisprudence[285] to guide us in determining firm interpretation principles. The paragraph uses the word "policy" in contrast to the use of the word "practice" in the previously examined provision prohibiting a practice of price discrimination. The concept of "policy" and "unreasonably low" prices may be interdependent. In any particular circumstances, to constitute a policy, it may be necessary to show that setting unreasonably low prices was designed to have the effect of substantially lessening competition or eliminating a competitor. A practice of setting low prices would not constitute a policy designed to achieve such an effect if it were shown that this conduct was a reasonable response to aggressive competition pricing. The Competition Bureau has recently circulated interpretation guidelines ("guidelines") that set out its enforcement criteria with regard to the predatory pricing section[286]. The guidelines draw attention to the statement of purpose in section 1.1 of the *Competition Act* (previously seen and which is consistent with the general principles of free trade) and emphasize that the purpose of the *Competition Act* is to protect

[285] *R* v. *Producer Dairy Ltd.* (1966), 50 C.P.R. (2d) 265; *R* v. *Carnation Co.* (Alta. S.C., December 15, 1966, unreported), affirmed 67 D.L.R. (3d) 133; *R* v. *Consumers Glass Co.* (1981), 28 O.R. (2d) 164; and *R* v *Hoffman-LaRoche* (1980),28 O.R. (2d) 164, affirmed (1981), 33 O.R. (2d)694

[286] *Predatory Pricing Enforcement Guidelines*, Director of Investigation and Research, Supply & Services Canada, 1992

competition and not competitors unless the two are consistent. Under the two-stage approach, the Bureau first examines the market power of the alleged predator to be successful in creating a situation in which it can achieve supra-competitive prices and therefore profits. Product and geographic market definition are obviously critical factors. Only if the first stage analysis leads to the conclusion that substantial market power is held by the predator can the Bureau successfully proceed to the second stage involving an evaluation of price/cost relationships. In summary, it is sufficient for this study to note that there is in the *Competition Act* a remedy enforceable by both governmental and private action to deal with pricing that substantially harms the state of competition in a given market. Although, the Competition Bureau focuses on the protection of competition, the *Competition Act* does leave open the possibility that a plaintiff might be able to recover compensation on the basis that a particularly low pricing policy was designed to eliminate that competitor.

1.1.2 Reviewable Practices

This part of the present chapter will briefly outline some of the most significant provisions of Part VIII of the *Competition Act*. The Director of Investigation and Research is the only official authorized to present an application before the Tribunal. This is the only civil enforcement mechanism available to the

Director concerning the reviewable practices provisions. Private parties may intervene in front of the Tribunal once the process has been commenced by the Director. They are however, barred from commencing proceedings. The nature of the order that the Tribunal can make depends on the specific provision invoked. In addition, a private party that has suffered injury from the reviewable practices provisions, cannot claim personal damages from the Tribunal. However, if that person suffers damages from the violation of a pre-existing order issued by the Tribunal, that person has a civil recourse for damages.[287] What follows is a review of the abuse of dominant position as it relates to anticompetitive cross border trading analogous to dumping.

a)- Abuse Of Dominant Position

In 1986, a new reviewable trade practice provision relating to the abuse of dominant position was included in the legislation, replacing the criminal provisions of the Act relating to monopolies. The enforcement difficulties encountered in the past ultimately led to the enactment of sections 78 and 79 dealing with abuse of dominant position as a reviewable trade practice. The civil provision demands the requirement, not only that the party against whom remedy is sought, to have control of the business in question (dominant position), but also that there be evidence of engaging in a practice of anticompetitive acts. The Tribunal has authority to prohibit the party in such a dominant position from continuing to engage in a

[287] Section 36 of the *Canadian Competition Act,* supra note 269.

practice of anticompetitive acts. The section also contains a specific directive to the Tribunal to consider whether the practice in question is a result of superior competitive performance, and if so, the Tribunal must allow such a practice to exist. Recognizing the crucial importance of superior efficiency allocation of resources, this provision seems to permit the expansion of the corporate entities which will develop in the free trade zone as a result of superior market efficiency.

A company will be considered "to control a class or species of business" if it has sufficient market power to set prices above competitive levels for a considerable period of time.[288] The Tribunal has stated that the determination of a firm's market power will be determined by the use of indicators such as market share and entry barriers.[289] It is interesting for the purpose of our study, to analyze in further detail the *Nutrasweet Company* decision cited above. On the complaint of a competitor of the Nutrasweet Company ("NSC") in the Canadian market for the sale of aspartame (there is no competition in the US because the product benefits from patent protection), the Director reviewed certain restrictive arrangements between NSC and its customers. The case is particularly important in the free trade context because it involves a US corporation's activities in Canada from the US, as well as elsewhere. Following the expiration of the Canadian patent in 1987, the company maintained a 95% share of sales in Canada for aspartame. Under the circumstances, Canada was held to be a separate geographic market for the purposes of evaluating the effects of NSC's marketing practices. Entry barriers were reviewed as a

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[288] *Director of Investigation and Research* v. *The Nutrasweet Company*, (1990), 32 C.P.R. (3d) 1 at 28

[289] Id.

separate issue and it has concluded that "there are very serious barriers to the entry of new manufacturers of aspartame other than NSC" (i.e. anywhere in the world).[290] Another interesting aspect of the case was the Tribunal's order to confine NSC's dealings with its "Canadian customers" who were defined to include "any person or corporation entering into agreements whether inside or outside of Canada for the sale of aspartame, in respect of any aspartame to be delivered in Canada for use as a food ingredient"[291]. The Tribunal thus, appears to be saying to NSC, as a company operating in Canada, that it is prohibited from certain practices with regard to its contracts as to their effects in Canada. This is an interesting concept in light of the volume of transborder transactions involving firms from the NAFTA countries and the relevant definition of market in order to assess the significance of the barriers.

1.2 UNITED STATES ANTITRUST LAWS

The United States antitrust laws have long recognized competition as an essential element of the American economy. After the Civil War, large trusts began to form along with capitalistic enterprises. *The Sherman Antitrust Act* of 1890[292] came into existence as a result of public outrage aimed at monopolies and threatened competition. Much like its Canadian counterpart, the categorization (*per se* or rule

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[290] supra note 288 at 44
[291] supra note 288 at 132
[292] 15 U.S.C. ss. 1-7 (1890)

of reason) of the antitrust violation determines the analysis to be applied by the appropriate enforcement authorities and the courts.

1.2.1 Current Antitrust Laws Pertaining To Restraint Of Trade And Monopolies

The Sherman Act

Section 1 of the *Sherman Act* states the following:

> "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal"[293]

Section 2 of the *Sherman Act* reads as follows:

> "Every person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"[294]

Since the *Sherman Act* does not have an explicit purpose clause, judicial interpretation was required in order to elaborate on its scope and purpose. The

[293] Id. section 1
[294] supra note 292, section 2

United States Supreme Court Chief Justice White distinguished the above-noted provisions in *Standard Oil Co.* v. *United States.*[295] His comments were to the following effect:

> "Having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is restraints of trade, by any attempt to monopolize, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section."

Returning to Section 1 of the *Sherman Act*, the analysis as to what type of commercial behaviour restrains trade is done in the following manner. Firstly, market definition must be determined by considering both geographical and product specifications, in which the company under scrutiny engages in.[296] Secondly, similar to its Canadian counterpart, the issue of power retention within the determined market is of extreme importance. The assessment of these two factors will allow the court to analyze the case under "the rule of reason" approach.[297] Under this rule, the ultimate validity of the action in question will depend on whether or not the plaintiff has demonstrated an anticompetitive effect that is not offset by a need to achieve a pro-competitive benefit or justification. The *per se* rule of illegality is

[295] 221 US 1 (1911) at 61
[296] *Graphic Prod. Distribution* v. *Itek Corp.* 717 F. 2d 1560, 1566 (11th Cir. 1983)
[297] *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47(1977)

appropriate only when it relates to conduct that is manifestly anticompetitive.[298] Consequently, the company's actions must be assessed in an overall fashion in order to determine the existence of an overall anticompetitive effect. If such effect exists, the company has violated the *Sherman Act* under the rule of reason test. Initially, however, the plaintiff must overcome an important obstacle in the inquiry; he must establish the defendant's market power.[299] The next step, therefore, is to determine whether the company possesses market power in the relevant market.

In the case of *Valley Liquors Inc.* v. *Renfield Importers Ltd.*,[300]the definition of market power that was given seems to be "the ability to raise prices significantly above the competitive level without losing all of one's business". Two basic criteria are used to measure market power, they are: market share and product differentiation.[301] Once the plaintiff has established that the defendant has the power to restrain trade, then the inquiry proceeds to verify whether the behaviour is likely to help rather than hurt competition.[302]Therefore, in the final analysis, the plaintiff must bring forth evidence to demonstrate that considering the defendant's business and purposes, unreasonable effects will outweigh such practice.

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[298] *Abrams* v. *Anheuser-Busch, Inc.*, 811 F. Supp. 848, 869 (E.D.N.Y. 1993) "A *per se* rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output"
[299] supra note 296 at 1568
[300] 678 F.2d 742, 745 (7th Cir. 1982)
[301] Id.
[302] *General Leaseways Inc.* v *National Truck Leasing Association*, 744 F. 2d 588, 596(7th Cir. 1984)

Anticompetitive cross border price discrimination analogous to dumping can be closely compared to the antitrust provision that prohibits predatory pricing, under Section 2 of the *Sherman Act* and Section 2(a) of the *Robinson-Patman Act.*[303] It is important to mention that the Supreme Court of the United States rendered a decision detailling what criteria are required in determining whether predation in pricing strategies has taken place. In the *Brooke Group Ltd* v. *Brown & Williamson Tobacco Corp.*[304] case, the court ruled to the following effect:

> "whether the claim alleges predatory pricing under s.2 of the Sherman Act or primary-line discrimination under the Robinson-Patman Act, the two prerequisites for recovery remain the same. First, a plaintiff seeking to establish competitive injury from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's cost."

Most importantly, the Court went on to say that whether predatory pricing arising out of the *Sherman Act* or the *Robinson-Patman Act,* it is crucial that the plaintiff demonstrate that the competitor had a reasonable prospect of eventually recouping its investment in below-cost prices. The court also recognized the importance of consumer welfare. This is quite a positive and competition enhancing approach in dealing with the antidumping regime reform.[305]

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[303] 15 USC s 13(a)

[304] 113 S Ct. 2578b (1993)

[305] This aspect will be fully elaborated in the chapter on reform proposals of the present thesis.

Another way with which predatoy pricing behaviour can be exercised, is through a monopoly. As stated above, the term "monopoly" found in section 2 of the *Sherman Act* has been defined by the Supreme Court of the United States as "the power to control market prices or exclude competition"[306]. According to the courts[307], two basic elements are required in order to constitute the offence under section 2, they are: i) the possession of monopoly power in the relevant market and ii) the willful acquisition or maintenance of the power as opposed to normal business growth. As a basic rule, the enforcement of section 2 of the *Sherman Act*, is not done with the presumption that all monopolies are harmful (*per se* rule), but monopolies that attain such a monopolistic stature through illegitimate means will fall under the scrutiny of the law.

1.2.2 Price Discrimination Laws

The elements of this type of offence are similar to its Canadian counterpart found at section 50(1)a of the *Canadian Competition Act*. This type of activity can be analyzed either under section 2(a) of the *Clayton Act*, (also referred to as the *Robinson-Patman Act* ("RPA")).[308]or under section 2 of the *Sherman Act*.[309] Whether one chooses to elect one or the other statute, "improper" price must be determined as a preliminary step of any analysis. Unlike section 50(1)a) of the

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[306] *U.S.* v. *E.I du Pont De Nemours & Co.*, 351 U.S. 377, 391 (1966)
[307] *U.S.* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)
[308] 15 U.S.C.
[309] supra note 292

Canadian Competition Act, the *RPA* applies to primary line competition as well as secondary line competition. Evidence of injury to competition is a mandatory element towards succeeding under section 2a) of the *RPA*. The cost justification defence which is permissible under US law is also to some extent available under the Canadian provision upon evidence that different prices were charged based solely on the quantity and quality of goods purchased without the necessity of justifying cost efficiencies as is required under US law. Furthermore, a seller is permitted to discriminate against purchasers of a similar product, if he can prove that his conduct does not amount to a practice. Consequently, if a seller does act sporadically, in order to remain competitive, the Canadian provision, in our opinion affords sufficient protection to competition as a general rule, while at the same time allowing the seller to engage in an activity required in order to remain competitive.

The appropriate remedy available to the plaintiff remains the injunctive relief only upon the successful demonstration of injury to competition.[310] In addition, monetary relief is also available to the plaintiff.

In summary, it is noteworthy to observe that, according to our analysis of the relevant provisions on price discrimination, a Canadian exporter who sells to two different purchasers in the US that have primary line anticompetitive effects may be open for a lawsuit by his competitor under the *RPA*, while a US exporter would face such exposure under Canadian law only if he engaging in geographic price discrimination. However, significantly enough, and respecting the conceptual line of thinking initially presented at the beginning of the present chapter, the

[310] *Fall City Industry Inc.* v. *Vanco Beverage*, 103 S.Ct. 1282, 1288-89 (1983)

creation of the free trade zone amongst the NAFTA parties will eventually eliminate geographic barriers, eliminating market segmentation and turning potentially closed markets into possibilities for trade opportunities.

The next section of this chapter will deal with the competition law of the third NAFTA party, Mexico.

1.3 MEXICO'S NEW ECONOMIC COMPETITION LAW

As we have seen in the previous two sections, Canada's and the United States' competition/antitrust law history is rich and dates back almost one hundred years. However, Mexico's competition law is relatively new and represents major attempts at deviating from its traditional protectionist and inward-looking regime.[311] Mexico's government, although expressly prohibited by the Mexican Constitution (article 28)[312], welcomed monopolies as a means of protecting the Mexican economy from international competition. The new Economic Competition Law or *Ley Federal de Competicia Economica*, ("LFCE")[313], is a significant step in an ongoing process of market liberalization and exposure of the domestic economy to other trade opportunities. The affirmation in the LFCE to the effect that its purpose is to protect competition rather than competitors is an extremely important step due

[311] Terry Wu & Neil Longley, "A U.S. Mexico Free Trade Agreement; US Perspectives", (1990) *J. World Trade*, at 5-6
[312] the 1934 Monopolies law, *Ley Organica del Articulo 28 Constitucional en Material de Monopolia*, (D.O. Aug. 31, 1934)
[313] Federal law of Economic Competition, D.O., Dec. 24, 1992

to the principle's incorporation in the statute itself. Similar to the purpose clause of section 1.1 of the *Canadian Competition Law*, this statement will give an orientation to the whole body of the legislation towards an interpretation that will favour international efficiency in the competitive analysis of the commercial transactions of the parties.

The enforcement of this new law will remain the responsibility of a newly created administrative body called the Federal Competition Commission[314] analogous to the Federal Trade Commission in the United States and the Competition Law Tribunal in Canada.

1.3.1 Substantive Competition Law Prohibitions

In the context of the Canadian Competition law and the analogous American system of antitrust, there exists two categories of practices or violations. "Per se" violations and the second category of anticompetitive practices that are analyzed under the "rule of reason" approach. Similarly, the Mexican competition law contains "absolute" and "relative" anticompetitive business practices.

Article 2 of the LFCE provides that the purpose of the law is "to protect the process of competition and free market participation, through the prevention and elimination of monopolies, monopolistic practices and other restraints on the

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[314] article 23 of the LFCE creates the Commission, supra note 313.

efficient operation of goods and services markets"[315]. The absolute practices of the law, which are to be considered as being void of any legal consequences and furthermore subjecting the individuals to penalties, include the following: agreements among competitors to fix the price of goods or services, to restrict quantities, to rig public bids, or to allocate markets.[316]

Article 10 of the LFCE on the other hand, elaborates the "relative" monopolistic practices which will be punished only if evidence is forwarded to establish the retention of significant power in the relative market where the business practice is being carried out. The monopolistic practices referred to in article 11 are as follows; resale price maintenance, vertical non-price restraints as applied to distribution of goods or services, tying agreements, and refusal to sell. Furthermore, the essence of the former Mexican President's (Carlos Salinas de Gotari) message[317] indicates that the Commission will be more or less under political pressure to examine additional factors such as market shares, barriers to entry, capacity of firm to set prices, etc. when scrutinizing relevant practices under the LFCE. This is a commendable effort on the part of the Mexican Government to enact the proper legislative mechanisms in order to promote efficient trade in a trilateral free trade zone.

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[315] supra note 314

[316] supra note 314, article 9

[317] President's Message to the Congress of Mexico Transmitting the Federal Act Governing Economic Competition, at iv (Nov. 18, 1992)

a) Predatory Pricing

The Mexican Competion Act (LFCE) does not explicitly contain a provision prohibiting predatory pricing. Article 10 of the LFCE may be used when a firm with substantial market power uses its power to "unduly displace other agents from the market, impede substantially their access(to the market), or establish exclusive advantages in favor of one or more persons(...)."

1.3.2. Statutory Limitations And Exemptions

A careful perusal of the LFCE will demonstrate the absence of criminalization of competition law violations. The drafters must have based the Mexican model of competition on the European Community competition law. [318] This train of thinking is consistent with the contemporary view of competition law and policy as reflected by recent proposals for amendments to the *Canadian Competition Act*.[319] Furthermore, a provision dealing with price discrimination is no where to be found in the LFCE. Interestingly enough, this situation is also present in the European Community's Competition law framework.

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[318] See Hans B. Thorelli, "Antitrust in Europe: National Policies After 1945", (1959) 26 *U. CHI. L. Rev*. 222, at 227-28, 232-34

[319] *Director of Investigation and Research, Competition Law Amendment Proposals*, 1995, Canadian Bureau of Competition Policy. Essentially, and for the purposes of the present discussion, the Proposal includes the decriminalization of the price discrimination provision of the Act.

Statutory exemptions are also found within the framework of the LFCE. Specifically, labour unions are partially exempt from the application of the Mexican statute, as well as certain types of cooperative export associations and finally a last exemption for "functions in strategic areas reserved exclusively to the State", i.e. government monopolies.[320]

1.3.3 Outstanding Issues For Consideration

As we have seen, the newly enacted statutory regime holds many promises for future competition enforcement in the free trade area. However, we shouldn't lose sight of the particular nature of the Mexican economy and its extremely high degree of industry concentration. These are crucial assessment factors which will affect the enforcement of the new regime. Traditionally, the presence of strong governmental support for monopolies has strengthened in every sense the industrial concentration. However, despite the fact that monopolies are presently specifically prohibited in the LFCE, there exists no explicit definition as to what constitutes a monopoly. As for the existing monopolies, how will they be dealt with? This will certainly pose an interesting challenge for the Federal Competition Commission. As insight into the matter, we can deduct from Mr. Santiago Levy's (Chairman of the Federal Competition Commission) remarks that all activity emanating from the existing monopolies' anticompetitive conduct will be monitored;

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[320] supra note 314 at chapter I, article 4,5,6

> "in assessing monopolies, (...) the main criteria is not so much the size of the firms involved, as the impact that it might have on competition"[321]

The second issue worth noting at this stage of the final analysis remains the significance of the absence of any statutory mechanisms for judicial enforcement of the decisions rendered by the Federal Competition Commission. Ironically enough, the only provision that grants the right of revision of the Commission's decisions provides that the Commission itself may revise its own decision.[322] It is however, difficult not to predict the eventual judicial intervention and interpretation of the statute over the passing of the years. Judging from the American antitrust regime, it has taken several years for the courts to set forth interpretation principles and establish the state of the law. The Mexican statute, will have to bare the inconvenience of time before it can be firmly defined as a fully operational competition law regime.[323]

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[321] Santiago Levy, "Mexican Regulators Humming the Deregulation Rap", *Wall St. J.*, July 30, 1993 at A9

[322] supra note 314 at chapter VII, article 39

[323] J.A. Newberg, "Mexico's New Economic Competition Law; Toward the Development of a Mexican Law of Antitrust", (1994) *C. J. of Tran. Law*, 587

Conclusion

At the beginning of the present chapter, we set out to ascertain whether or not the three parties to the NAFTA had successfully fulfilled their obligation pursuant to section 1501 of the NAFTA and to what degree of development the predatory price provisions had reached. While the NAFTA does not set out detailed provisions or a distinct competition law regime to secure the competition envisaged by the agreement, the text nonetheless contains a significant commitment by the parties to the effective enforcement of their national competition laws and hence to the protection of free trade. We have affirmed that the purpose or underlying objectives of the NAFTA and the purpose of competition laws are in large measure similar. If the objectives are to be fully achieved, the result will be the creation of a single market in which goods and services are freely available and may be freely offered by all participants in the market. Thus, the NAFTA will promote efficiency and global competitiveness. However, in our analysis, it was necessary to consider whether the NAFTA parties' competition/antitrust policies and laws could possibly act as barriers to the efficient business activities within the free trade zone. One way that this could occur would be through nonenforcement of the competition laws of the three countries and their respective competition enforcement policies.

Regarding the *Canadian Competition Act*, we have already seen that the objectives of the NAFTA bear a remarkable similarity to the stated purpose clause

of the *Canadian Competition Act.* Furthermore, other qualitative elements such as the factor of foreign competition, actual or likely, the presence of the merger law providing for the consideration of not only the negative effects on competition but also the gains in efficiency which will exceed and offset the above-mentioned negative effects. The analysis of the efficiency gains are also crucial components in assessing the provisions relating to specialization agreements which are indispensable in a free trade zone. Several substantive provisions are designed to respond to global developments. The American antitrust statutes, although devoid of any explicit purpose clause, do to a certain extent afford the necessary importance to efficiency cost analysis. Although not expressly addressed in the present chapter, the extraterritoriality of the American antitrust statutes may potentially pose certain difficulties in the absence of cooperation and coordination by the enforcement agencies of the respective NAFTA countries. Finally, another issue which was raised and is being presently studied and addressed by the Director of Investigation and Research of the Canadian Competition Bureau, is the decriminalization of certain provisions of the Canadian Competition Act, notably, the provisions dealing with price discrimination and promotional allowances.[324]

As for the Mexican law of Competition, it is a newly enacted statute that has been drafted more on the European Community model than on the models of the other two nations. It has maintained as its fundamental objective, the pursuit of

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[324] *Canadian Bureau of Competition Policy Discussion Paper on Canadian Competition Act Amendments*, 1995

competition as a whole mainly through its efficiency-based analysis. The effectiveness and success of the proposed competition regime for Mexico will depend largely on the ability of the Mexican government to dissolve the significant industrial concentration of market power due to interest group rent-seeking. Incidentally, trade liberalization for countries like Mexico give rise to significant state-sponsored non-tariff barriers, against which competition law is powerless. Hopefully, the will of all three parties for cooperation and coordination of their respective antitrust/competition regimes will help overcome such intrinsic trade obstacles.

Returning to the question of trade distortion through discrepancies in the NAFTA parties' competition/antitrust laws, we may safely conclude that many aspects of their laws are harmonious, although differences run throughout. The differences were raised and fully commented upon under the relevant sections of the present chapter; thus this exercise will not be repeated here. Convergence and harmonization should be considered where significant discrepancies in substantive law exist and in cases where conduct considered legal in one NAFTA country becomes illegal in another NAFTA country. This scenario constitutes a major impediment to trade liberalization and to the efficient allocation of goods in a free trade zone. The degree of harmonization will vary in accordance with the level of economic integration. We believe however, that the NAFTA has not achieved the degree of economic integration found in the European Community. Proposals for competition law harmonization must take into consideration crucial factors such as

the respect of national policies without undermining the true benefits of free trade. An integrated uniform competition policy is not, in our opinion, warranted, based on the principles and objectives of the NAFTA. The present analysis of the objectives and underlying principles of the competition/antitrust regimes of the NAFTA countries has allowed us to determine specific aspects of this regime that can be used as an inspiration for workable and politically feasible proposals aimed at reforming the trade distorting effects of the antidumping laws and policies of the NAFTA signatories. Finally, we may conclude that the Canadian and American competition(antitrust) provisions dealing with predatory pricing could be used to regulate anticompetitive cross border price discrimination analogous to dumping due to their extensive elaboration and development by the respective courts. Under the Canadian and American competition(antitrust) laws, clear and unequivocal criteria exist to determine whether the alleged predator's activity will have a significant effect on the competitive process. These effects will be analyzed in the upcoming section.

2. Interrelationship between antidumping policy and competition (antitrust) policy

2.1 Trade Remedy(antidumping) and Competition(antitrust) policies: A comparison of their objectives

It should not be disputed at this stage of the present thesis, that the divergence between competition (antitrust) policy and trade remedy law(antidumping) policy lies in their fundamentally different underlying objectives. Antidumping and competition laws differ in both their purpose and application methodologies. Although, in theory both sets of laws purportedly focus on the concept of "unfairness" in prices, antidumping laws protect the domestic industry whereas competition laws seek to ensure workable levels of competition in order to attain productive, allocative and distributive efficiencies in a given economy.

Violation of the antidumping laws will result in the imposition of discriminatory antidumping duties in the NAFTA context despite the absence of predation. The condemnation of non-predatory transborder price discrimination unjustly interrupts efficient, competitive firms from actively engaging in an efficiency enhancing trading atmosphere in direct violation of the trade enhancing goals of the NAFTA.

Antidumping is a public and political mechanism used to regulate private restrictions of trade and serve private interests. Competition (antitrust) of the NAFTA countries is an instrument that defends public interest. The success or failure of reform proposals under the NAFTA trading context will depend on an

economically realistic assessment of the structural features of each country's economy, and past performance on the political arena. Nevertheless, the nature of the trilateral trading relationship to which Canada, the United States and Mexico have adhered to, imposes three fundamental international obligations. Firstly, the reduction of barriers (tariff or non-tariff) in an integrated free trade area implies a decreased amount of protection for the domestic industries, in clear contrast with the underlying objective of antidumping legislation. Secondly, the national treatment principle should not allow for discriminatory treatment of goods from one NAFTA country to another. By definition, dumping is a discriminatory pricing strategy which is legal within a domestic market, but becomes illegal once the pricing strategy crosses borders. Due to the conclusion we have reached in the previous chapter of the present thesis, the competition laws in both countries have attained a relatively similar process of development, it is feasible on an economic basis to advance proposals aiming at addressing undesirable private cross-border pricing practices using the price discrimination and predatory pricing laws of the competition (antitrust) legislation of each NAFTA country. The previous section of the present thesis extensively elaborated some of the competition (antitrust) provisions of the NAFTA countries that could possibly be used as a feasible substitute for antidumping. The similarities resided in the fact that each set of laws requires injury to competition requiring objectively assessed evidence of both below cost pricing and market structure and in some cases proof of subjective predatory intent. Having, therefore, demonstrated that the purpose and objective of the

respective competition (antitrust) legislation of the NAFTA countries is to promote efficient competition, and global competitiveness, which in turn are goals that are more compatible with the general underlying principles of the NAFTA, than with the objectives of the antidumping legislation.

Having arrived at the conclusion that competition (antitrust) law is better equipped to provide an alternative framework, we will now analyze, whether in their present form, the substantive and procedural competition provisions are effective enough in regulating cross border "price discrimination". Finally, if we are to presume that in a free trade area, all government restraints must be eliminated or reduced, if the market continues to remain distorted due to private anticompetitive behaviour, this could effectively be attacked directly under competition laws.

2.2 OPTION I - Replacement of the Antidumping regime with a competition (antitrust) regime

2.2.1 Substantive Competition law provisions (Predatory pricing and price discrimination)

Our analysis of the fallacies of the efficiency and economic rationales for antidumping led us to conclude that the only slightly possible economic rationale to the continued existence of the antidumping regimes worthy of some sort of economic policy reaction is the predatory pricing argument.

The Canadian predatory pricing provision found in section 50(1)(c) of the *Canadian Competition Act* as we have seen, does not address the predatory pricing

strategies of two sellers from distinct countries. An amendment is required that would allow the relevant provision's scope to deal with the anticompetitive cross border pricing strategies of an American or Mexican producer of goods in Canada that presumably causes harm to Canadian producers. This would imply a modification of the term market to include the American market. On the procedural level, however, significant adjustments must be made in order to grant jurisdiction to the Director of Investigation and Research over the activities of a "foreigner".[325]

In contrast, section 2 of the *Sherman Act* which prohibits predatory pricing is already equipped with an adequate mechanism since it renders illegal predatory pricing by foreign sellers through the direct prohibition of attempted monopolization. This is the reason why several antidumping reform proponents view the *Sherman Act* as the optimal replacement for the antidumping laws of the NAFTA countries.[326]

Additionally, as we have seen the Canadian price discrimination law, as it now stands (section 50(1)(a) of the Canadian *Competition Act*) is not effective in regulating anticompetitive crossborder pricing strategies analogous to dumping of a seller vis- -vis two purchasers competing in the same domestic market. Additionally, section 50(1)(b) is also restricted to primary line price discrimination within regions

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[325] This issue will be discussed in detail further on.

[326] See John J. Barcelo III, "The Antidumping Law: Repeal It or Revise it?" (1979) 1 *Mich. Y. B. Int'l Leg. Stud.* 53, and others, see supra note 62. Even though the *Clayton Act* as amended by the *Robinson-Patman Act* and the *Federal Trade Commission Act* may also be used to challenge predatory pricing, our analysis is restricted to the *Sherman Act*. In addition, this issue will be discussed further on, using the *Australian-New Zealand Free Trade Agreement* ("CERTA") as an example.

of the Canadian market. This limitation is also present with respect to section 2(a) of the *Clayton Act* requiring the comparison of two sales in the United States. It is also important to note that under the present state of the American and Canadian price discrimination laws, a Canadian exporter who sells in the American market to two competing purchasers producing primary line price discrimination, may be held accountable by his American competitor under the *Robinson-Patman Act*, which requires proof of "meeting the competition" and cost justification defenses. The same situation would apply to an American exporter only if he price discriminates on a regional basis towards two competing purchasers in the Canadian market. As drafted, these provisions are not relevant to the effective regulation of anticompetitive transborder pricing similar to dumping, because they direct their scope towards the implications for competition among downstream purchasers, or secondary line injury to competition.[327] Additionally, sections 78 and 79 of the Canadian *Competition Act*, dealing with abuse of dominant position requiring predatory intent could also apply to cross border price discrimination strategies analogous to dumping. As we have seen, the Mexican Competition Act does not

[327] Primary line and secondary line injury are terms found in the American antitrust statutes; see Richard Wegener, "Business across borders: Current American-Canadian Competition Law Issues," *FTC: Watch* 452 (March 11, 1996), at 7, where the author notably raises the following differences between the Canadian (*Competition Act*) and American (*Robinson-Patman Act*) price discrimination provisions:

- only a "practice" of price discrimination is actionable under Canadian law,
- volume discounts do not have to be cost-justified,
- performance bonuses are permissible,
- there is no meeting of competition defense,
- competition injury not required, and
- only suppliers can be directly liable for price discrimination.

explicitly prescribe price discrimination, but instead regulates anticompetitive behavior of firms who have substantial market power.

Most of the discussion of the competition laws of the NAFTA parties has focused on the aforementioned competition (antitrust) provisions, that hopefully will provide an efficiency enhancing alternative to the trade distorting effect of the present antidumping regime. On a purely conceptual level, the "replacement" of antidumping with the appropriate competition law provisions regulating transborder price discrimination analogous to dumping would be consistent with the NAFTA's goal of enhancing North American economic efficiency and global competitiveness. Competition law can provide a workable framework within which trilateral trading can be managed. In light of the above, and considering the initial assumption that the only economic rationale for sustaining antidumping could possibly be to prevent predatory pricing, we are of the opinion that in the North American trading context, minor legislative amendments to the predatory pricing provisions of the NAFTA countries are required in order to render actionable the producers of goods originating in the other country's market that might acting anticompetitively pursuant to the competition law criteria. This legislative amendment does not in essence pose a great deal of difficulty. However, legislative reform on a substantive level cannot be effectively accomplished without a complimentary set of rules and regulations pertaining to the poignant procedural issues of investigation and discovery, effective enforcement and the effect of private remedies.

2.2.2 Procedural aspects of the proposed substantive law amendments

In order to properly predict potential procedural problems with respect to the public enforcement of the new amendments to the predatory pricing provisions of the competition (antitrust) legislation of the NAFTA members, we must briefly highlight the differences in public enforcement as found in the present state of the law, for purposes of assessing the effectiveness of the proposed changes.

As previously seen, public enforcement provisions bear remarkable similarities under both Canadian and American competition (antitrust) legislation. The United States Department of Justice and the Canadian Bureau of Competition Policy are the principal enforcement agencies for violations under the *Sherman Act* and sections 50(1)(b) and (c) of the *Competition Act.* Both offenses are criminal and each element of the offense must be proven beyond a reasonable doubt. Upon the recommendation of the Director of Investigation and Research, the Canadian Competition Tribunal has the legislative authority to grant appropriate restraining orders.[328] Similarly, the Federal Trade Commission also has the legislative authority to issue cease and desist orders in the presence of a defendant who has engaged in unfair trade practices.[329]

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[328] See *Canadian Competition Act*, section 39(2), supra note 269.

[329] See 15 U.S.C. s 45(c)(1988).

In light of the present state of operation, how can procedural changes be made in order to effectively implement the substantive law amendments? For the present purpose, we are proposing the use of the Australian-New Zealand model of reform for addressing the antidumping dilemma with competition based substitutes. In 1988, a protocol to the *Australian-New Zealand Closer Economic Relations Trade Agreement*("CERTA") was executed, having as a primary objective the undertaking of both countries to eliminate antidumping duties with respect to goods originating in the other country.[330] It is important to note that the Australian-New Zealand trading relationship does not take the form of a customs union, but is instead, a free trade area. The successful substitution of antidumping law by competition law to replace the trade distorting effects of the former was made possible through the amendment of Section 46 of the *Australian Trade Practices Act* 1974[331] and section 36 of the *New Zealand Commerce Act of 1986*,[332] with the expansion of the definition of *market* to include, the "trans-Tasman market". This modification can easily be transposed to our North American trading context in order to effectively regulate crossborder anticompetitive pricing analogous to dumping. However, the procedural modifications allowing a court found in one country to hear its citizen's (producer A) grievance against the conduct of a citizen (producer B) from the other country affecting the interests of producer A, were by

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[330] *Protocol to the Australian New Zealand Closer Economic Relations Trade Agreement on Acceleration of Free Trade in Goods*, Aug. 18, 1988, art. 4, 1988. Austl. T.S. No. 18.

[331] Austl. C. Acts No.51, art. 46 (1974).

[332] N.Z. Stat. No. 5, art. 36 (1986).

far the most significant and trade enhancing of all changes. Under these conditions, the appropriate agreements were reached allowing the appropriate court in producer A's country to adopt the necessary measures allowing it to gather evidence in producer B's country. Additionally, and as a necessary complement to discovery and investigation orders, legislative amendments permitted efficient enforcement throughout the affected country.[333] Even though, theoretically, this type of procedural and remedial mechanism can be implemented to address the dumping dilemma in the North American context, there exist a certain number of crucial differences between the American and Canadian legal systems with respect to particularly treble damages, attorneys fees and contingent fees, which are so highly valued by the American legal system.

2.2.3 Accessibility and Enforcement Issues

- Private enforcement

The *Canadian Competition Act* under section 36 allows an individual who has suffered damage as a result of the exercise of an anticompetitive practice (for our purposes price discrimination and predatory pricing) in violation of certain provisions of the Act, to recover full compensation. In addition, a remedy can be provided for claimants from their respective provincial courts.

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[333] See supra note 63, M. Trebilcock and T.M. Boddez, *The Case for Liberalizing North American Trade Remedy Laws.*

Similarly, private litigation under sections 4 and 16 of the American *Clayton Act*, specifically section 4 of the Act provides "that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue (...) and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fee." Injunction relief is also available under section 16 of the *Clayton Act*, which under Canadian law, injunctive relief remains ambiguous.[334] The American provision seems to be broader in scope than its Canadian counterpart.

-treble damages

Under the *Sherman Act*, American complainants have at their disposal treble damages; a very interesting private remedy to invoke in order to claim compensation. In contrast, under the relevant section 36(1) of the *Competition Act*, United States sellers using predatory pricing strategies can be challenged by Canadian sellers, who in turn may claim only single damages. Completely eliminating the treble damage suit from the *Sherman Act* will be practically impossible, since it forms an integral part of the antitrust tradition, since 1890. However, certain American legislative efforts to exempt certain activities from the scope of tremble damage suits, such as companies that register under the *National*

[334] See s 33(5) of the *Competition Act*, supra note 269. In addition. Even though the Supreme Court of United States, has defined clear criteria as to the conditions required for standing, this standard applies to deny only those who are indirectly injured. See *Arco* v. *U.S. Petroleum*, 110 S. Ct. 1884 (1990).

Cooperative Research Act of 1984 and who demonstrate anticompetitive conduct will be subjected to actual damages. Concern has also been voiced that with the elimination of antidumping, United States complainants would have an added incentive to frequently abuse this remedy. In our opinion, this is not entirely accurate, since under the competition regimes, there is a general presumption that there will be a significant reduction in the number of actionable injury cases than before, due to the difference in injury assessment criteria of the two regimes.

-contingent and attorney fees

Contingent fees are an integral part of litigation in the United States. It is seen less often in Canada. In light of our presumption that former antidumping users will have a lesser chance of success under the relevant antitrust provisions, we have difficulty comprehending why a law firm would be willing to work on such a high risk basis. The fear of increased legal activity through this arrangement is therefore unjustified.

In contrast, the Canadian court system awards costs against an unsuccessful litigant. The litigant must also assume his own attorney's fees. Under United States law, parties are responsible for their own costs and fees.

Finally, the authors of the antidumping replacement study,[335] raise an interesting point when they state that the American aggrieved producer always had the possibility under the *Sherman Act* "to file an antitrust suit against a Canadian

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[335] See supra note 256.

firm engaged in predatory pricing. If the nature of the United States antitrust doctrine(e.g. treble damages, costs and attorneys' fees, contingent fees (...)) is as powerful an inducement to file, then one would have expected this substitution to have occurred regardless of the availability of an antidumping remedy."

- jurisdictional issues:

The issue of jurisdiction over person and subject matter has been the topic of debate for several years within the Canadian-American trading context. The extraterritorial reach of the United States antitrust law was the main reason for the enactment of the *Foreign Extraterritorial Measures Act* in 1984.[336] The Attorney General of Canada, at his discretion may restrict or disallow the production of certain documents required by a foreign tribunal when Canadian interests will be adversely effected.[337] The extraterritoriality of the antitrust provisions is accepted and recognized by the American courts and agencies, as indicated by the Department of Justice in its Antitrust Enforcement Guidelines for International

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[336] RSC 1985, chapter F-29.

[337] It is beyond the purview and scope of the present thesis to provide an extensive review of the caselaw and authorities in support of the development of this practice. See J.P. Griffin, "The Impact on Canada of the Extraterritorial Application of U.S. Antitrust Law," (1988) 57 *Antitrust Law Journal* 435, pp. 435-436, where the author provides a statistical account during the year 1988 of the number of cases in front of American courts implicating Canadian jurisdictional issues. Of the total number of sixteen law suits (American), only two implicated Canadian corporate plaintiffs seeking relief under American legislation. For a comprehensive analysis on the issue, see D.E. Rosenthal, "Antitrust Implication of the Canada-United States Free Trade Agreement," (1988) 57 *Antitrust Law Journal* 399; J.S. Shin, "Extraterritorial Application of U.S. Antitrust Law" (1990) 25 *Land and Water Law Review,* 177.

Operations.[338] Due to the fact that Submissions under the Foreign Extraterritorial Measures Act and the Competition Act are discretionary in their present state, they should not represent any serious impediment to the enforcement of the predatory price provisions of the competition (antitrust) in accordance with the interests of the two countries in ensuring effective competition (antitrust) regulation of anticompetitive cross border pricing analogous to dumping.

Finally, it is possible and probable that advocates of the antidumping regimes will oppose the extra-territorial application of foreign competition laws to domestic industries. The weakness of such an argument resides in the absence of the realization that this reform is simply substituting one domestic regime for another.[339]

2.2.4 Certain Issues of Specific Concern

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[338] See *U.S. Department of Justice & Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations*, s. 4.1 (1995) reprinted in 4 Trade Reg. Rep. (CCH) 1995. It is important to note that the *Sherman Act* may be invoked to challenge the activity of private foreign certels, and restraints on trade that affect access of U.S. exports . In Accordance with the Guidelines, the United States may take action, if the conduct has a direct and foreseeable effect on U.S. exports(examples: the *KODAK* and *Matsushita* cases will be discussed further on.)

[339] See supra note 63, M.J. Trebilcock and M. Boddez, *Unfinished Business*

We have seen from the analysis and assessment of the first option, that the elimination of antidumping and replacement by each NAFTA country's respective competition (antitrust) regime is a legally attainable objective. The legal and administrative mechanisms are already in existence, exception made for slight legislative modifications and certain enactments of agreements and understandings that will enable one country to effectively obtain the required information and documents from a foreign country in support of its action in a domestic court. Similarly, due to the fact that the implementation of this whole scale elimination of antidumping reform model is being discussed between the members of a free trade agreement, the poignant and debatable issues of treble damages, contingency fees and private actions, constitute workable differences. In addition, certain concerns have been expressed over the possibility, once antidumping law is fully eliminated, of the abusive use of competition law by a few import protectionists, particularly in the United States market, in order to harass their opponents with costly antitrust law suits. Keith Christie, former Director of the Economic and Trade Policy Division of the Canadian Department of Foreign Affairs, provides an interesting solution to this potential dilemma, by stating the following:

> "While antidumping reform could draw on certain lessons from modern competition policy with regard to market behavior and pricing practices, there is no internationally binding discipline to prevent import protectionists from attempting to pollute competition policy as antidumping reform progresses. Of course, agreement based on the application of national treatment would go some way to address this issue. <u>Under national treatment, for example, the U.S.</u>

> would not be able to apply a market share focus in one case involving a Canadian firm, while using a more balanced, dynamic economic analysis with regard to a U.S. firm in a similar case."[340] (Our emphasis)

Keith Christie also recognizes the limited potential of the national treatment principle in situations where, for example, certain strategic cross-border market activity is involved. He gives the example of a firm in country A who is "presumed" to enjoy extraordinary profits in its home market, which eventually allows it to finance "anti-competitive" behavior in the import market (country B). If a firm in country B does not have the presumed "barrier" protection, it might use the national treatment argument to apply the "presumed distortion/low market share" approach in order that the firm will escape scrutiny, due to the absence of the alleged "distortion" in its market.

Finally, a direct demonstration of the weakness of the argument warning against increased antitrust suits, is forwarded by Harvey Applebaum, American trade law attorney, when he states that "an antidumping case would still have almost no prospect for success under current antitrust predatory-pricing criteria."[341] This is a clear indication that competition(antitrust) laws manifestly have a much higher standard of injury and causation assessment, whereby rendering actionable only commercial activity that is not competitive and trade distorting. Additionally, the

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[340] K.H. Christie, *Damned If We Don't: Some Reflections on Antidumping and Competition* Policy, Policy Staff Paper No. 94/15, July 1994, Economic and Trade Policy Division. Foreign Affairs and International Trade.

[341] H.M. Applebaum, "The Interface of the Trade Laws and the Antitrust Laws," (1998) 6 *George Mason Law Review*, 479.

Supreme Court of the United States in the *Brooke Group case*,[342] as previously seen, held that where below cost selling is established, this alone will not be sufficient to prosecute unless evidence is given to the effect that the defendant was eventually capable of recoupment of its lost profits.

Furthermore, in the presence of a clear asymmetry in market strengths between the three NAFTA countries, the complete elimination of the antidumping regime will most probably force the protectionist interests to resort to alternative pressure methods. This is already becoming more and more apparent in the United States market, where antitrust relief is now being instituted on a parallel basis with antidumping relief for the same import activity. A recent illustration of this phenomenon is the American *KODAK-FUJI* dispute.[343] The Eastman Kodak Company's complaint revolved around lack of access to the Japanese film market due to, in Kodak's opinion, the establishment of an exclusive wholesale and retail distribution system in Japan, from which Kodak was excluded. Fuji was able to gain the exclusivity through a variety of anticompetitive arrangements (price maintenance, horizontal price fixing agreements, etc.) going against Japan's *Antimonopoly Act*. Unlike the *Matshushita* v. *Zenith* case,[344] where the American television corporation attempted unsuccessfully to use antitrust laws as a shelter from competition, the Kodak complainant, however, even though it invoked antitrust interference by a foreign country on U.S. exports, chose section 301 of the

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[342] See supra note 304

[343] For a complete analysis of the issues, see the WTO panel report, Doc WT/DS44/R.

[344] *Matshushita Electrical Industry* v. *Zenith Radio Corporation*, 475, U.S. 574 (1986)

Trade Act.[345] This statute is enforced by the United States Trade Representative (hereinafter USTR). In June 1996, the USTR found that "certain acts, policies and practices of the Government of Japan (...) are unreasonable and burden or restrict U.S. commerce."[346] The USTR decided to invoke the dispute resolution mechanism of the GATT(WTO) on the grounds that "Japan's obligations under the GATT had been violated by Japanese Government liberalization countermeasures". Recently, the panel decision of the WTO was rendered against the United States, stating that the actual test in such cases is unequivocal evidence that the measure under scrutiny produces disrupting effects in the competitive relationship between imports and domestic goods. Basically, the panel found significant weakness in the United States' position, due to the fact that it relied heavily on past history and did not forward strong evidence as to the alleged current trade restrictions in Japan.[347] This illustration of the exercise of unilateralism in trade relations used by the United States is an indication of that country's desire to use the WTO Dispute Resolution mechanisms to deal with private restraints of trade. It is significant to note that a

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[345] Section 301 *Trade Act* 1974, 19 U.S.C. s 2411. See also Office of the USTR (Docket No. 301-99), Initiation of Investigation pursuant to Section 302 Concerning Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper; Request for Public Comment, 60 Fed. Reg. 35, 447 (1995).

[346] Id., section 301 determination.

[347] See C. Barfield, "A system America Wanted," *Journal of Commerce*, Feb. 27, 1998, 6A. Ironically enough, Kodak's attorney, Alan Wolff stated, "that the WTO panel failed miserably to deal with Japan's highly protective distribution system, and undermined the credibility of the institution that is to monitor whether multilateral trade agreements are being complied with." The United States has made good use of the WTO dispute resolution, of the eight cases decided to date, all have been favorable to the United States. Additionally, on June 26, 1998, Japan's Fair Trade Commission, after a two year study decided that the country's photo film industry did not use unfair trade practices which deter foreign access to the market. These "findings are in line with the report released in April by the WTO panel, which rejected U.S. complaints that Japan rigged

1960 GATT report issued by a group of experts recommended that countries concerned with private restraints should enter into direct consultations over these restrictive business practices "with a view to reaching mutually satisfactory conclusions,"[348] instead of attempting to unilaterally control these practices.

-mutual agreements and understandings(Canada-United States)

Significantly enough, the only method of preventing similar disputes in the North American context would be through a series of mutual agreements and understandings on procedure and enforcement. Ideally, an effort to seek trilateral implementation of the substituted competition regime, would be to limit the immediate potential for accelerated cooperation with Mexico, since that country is a relatively new entrant in the competition law arena. After being loyal to a closed state dominating model of economic development for over forty-five years, Mexico can only be expected to progress relatively slow towards its market-oriented economic path. Mexico does not have as we have previously seen, a long history and tradition of competition law enforcement. Some economic analysts have suggested that the degree of enforcement of the Mexican competition regime should be carefully regulated, so as not to deter possible Mexican entrants from the

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its film market to shield Tokyo-based Fuji from foreign competition.", see, "Japan Photo Probe Says It's Fair", *Press Journal*, June 27, 1998, at D1.

[348] See Basic Instruments and Selected Documents 9th Supplement (BISD 95), GATT 1961, pp. 170-171.

Mexican market.[349] It is specifically for this reason why a bilateral (Canada-United States) approach to the substitution of the antidumping regime should be initially undertaken without attempting on a preliminary basis to negotiate all of the terms and conditions of the reform with the Mexican government.

Canada is already an active member of several executive agreements or memorandums of understanding. With respect to the 1984 *Canada-U.S. Memorandum of Understanding* ("MOU"),[350] modifications should be made to include additional provisions on enforcement in the competition area, particularly with respect to information gathering for trials and agency investigations. Additionally, Canada is a signatory to the 1986 *OECD Recommendations on Restrictive Business Practices Affecting International Trade*.[351] Evidence in criminal matters can also be obtained through the use of the *Canada-U.S. Mutual Legal Assistance Treaty*[352] (the "MLAT"). The MLAT has been successfully used on several occasions to obtain convictions on criminal antitrust matters.

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[349] See specifically G.C. Gallardo, "Antitrust Enforcement in Mexico 1993-1995 and its Prospects," 4 (1996) *U.S.-Mexican L. J.*, 19; M.J. Trebilcock and M. Boddez, *Unfinished Business*, supra note 63.

[350] *Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws*, dated March 9, 1984, as supplemented by a minute dated April 27, 1985.

[351] *OECD Council* May 21, 1986.

[352] *Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, in force January 14, 1990, Canada Treaty Series 1990, no. 19.

Additionally, the current *Canada-U.S. Extradition Treaty*[353] has been responsible for prosecuting certain corporations who committed offences under the conspiracy and bid-rigging provisions. Pursuant to the *Canada-United States Agreement Regarding the Application of the Competitive and Deceptive Marketing Practices*,[354] notification must be given to the other country in the cases where enforcement activities might affect the other party's interests. Additionally, and in light of the obligation contained in section 1501 of the NAFTA, we should not lose sight of the crucial importance of striving to achieve effective competition (antitrust) enforcement in the NAFTA particularly with respect to our present situation where competition (antitrust) will be substituting anticompetitive transborder pricing analogous to dumping.

Finally, Canada and the United States should follow the example set by Australia, when it passed legislation permitting the sharing of confidential evidence in economic law matters with foreign authorities.[355]

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[353] *Extradition Treaty Between Canada and the United States of America*, Canada Treaty Series 1976, No. 3, as amended by a Protocol dated January 11th, 1988 in force November 22, 1991, Canada Treaty Series 1991, No. 37.

[354] 35 I.L.M. 309; (1996).

[355] See the *Mutual Assistance in Business Regulation Act*, Australia Acts P. (1992)

-managing third party dumping under the reform regime

This issue may possibly present a problem in the trade relations of the NAFTA countries with respect to third party dumping. The authors John Ragosta and John Magnus[356] provide a solution by referring to the possible application of actions by national authorities as permitted under article 14 of the WTO Antidumping Agreement. This provision allows country A to request from country B that the latter impose antidumping duties on a third country(not part of NAFTA) for its alleged injury to producers in country A. This provision has almost never been applied at the GATT(WTO) level. We are of the opinion that this particular issue should be resolved through political negotiations imposing the appropriate trade restrictions on the third country who engages in anticompetitive conduct.

-compatability of GATT(WTO) rules with the elimination of antidumping within NAFTA.

The WTO Antidumping Agreement does not imply that member countries are obliged to maintain antidumping laws and regulations. Certain countries that have formed regional integration arrangements whether customs union or free trade areas, (EU and CERTA) have already progressed towards antidumping elimination.

[356] See supra note 63, J.A Ragosta and J.R. Magnus, *Antidumping and Antitrust Reform in the NAFTA: Beyond Rhetoric and Mischief*, in Finding Middle Ground.

Additionally, article XXIV of the GATT(1994) also applies to the Antidumping Agreement and due to the fact that it does not form part of the listed exceptions under article VI of the GATT, elimination is legally permissible and to some degree required.[357]

The following part will elaborate a second policy option with respect to antidumping law proposals that do not completely eliminate the antidumping regime from the NAFTA trading area. The option that follows is comprised of a competition based approach to the determination of dumping. We have already seen that due to significant differences in the market structure of the NAFTA member countries, the preservation of certain protectionist interests is an issue that will certainly challenge and perhaps defeat the total antidumping elimination reform proposal.

The long and troubled history of antidumping reform between Canada and the United States reveals that proposals for antidumping reform within the NAFTA stand a reasonable chance of being implemented if and only if they are politically feasible. Even though the economic logic behind a full scale elimination of antidumping is more than compelling, we intend to propose reform recommendations that will eventually, through good faith and political willingness, achieve politically attainable results. Specifically, during the FTA negotiations, the

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[357] Refer to chapter 2 of the present thesis for a comprehensive review of the legal implications of article VI and XXIV of the GATT and their interaction.

proposal put forward by Canada had as its main objective the complete elimination and replacement of antidumping laws with a compatible competition policy applicable to Canada and the United States. Unfortunately, and not surprisingly, this proposal was rejected by the United States. An assessment of the reasons for rejection will assist us in determining the extent of the existing scope for a greater emphasis on competition-based principles in the analysis of a feasible reform model for dealing with the "unfairness" of the antidumping policy. As previously seen, due to the economic asymmetry present in the American-Canadian trading environment, Canada relies heavily on exporting to the United States than the latter to Canada. Therefore, it is understandable why Canada was aiming at obtaining some protection for its exported products to the American market. During the FTA negotiations, Canada questioned whether the elimination of tariffs in a free trade zone also entailed the elimination of antidumping and its replacement by a coordinated competition policy.[358] The pricing strategies of firms involved in bilateral trade was to be regulated by competition laws, due to the fact that in both countries the competition(antitrust) regime had reached an acceptable level of development. In addition, opponents of the proposed Canadian reform perceived the total elimination of antidumping as an opportunity for American firms to abusively initiate antitrust actions at least as often as the reduction in the number of corresponding

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[358] See summary of the issues involved and the outcome of the negotiations in, Hart, M. "Dumping and Free Trade Areas," in J.H. Jackson and E.A. Vermulst, (eds.). *Antidumping Law and Practice* (1989) supra note 24.

antidumping actions.[359] After having examined the Canadian proposal, the United States rejected it, given the overwhelming political pressure to maintain and preserve the existing antidumping regime. Therefore, one may reasonably conclude, that the increasingly high levels of protection enjoyed by a few relatively well protected industries, and the administrative discretion in the calculation methodology of dumping, has resulted in an increase in the number of affirmative antidumping rulings despite the fact that similar cases would not have been considered actionable under the relevant competition laws.

According to Sylvia Ostry, the problems with reforming antidumping practices are deeply rooted in the institutional and administrative mechanisms used to go against dumping and the flawed public perception many nations have of the extent and need for change:

> "The trade remedy laws are triggered by industry and administered by the government bureaucracy(...). They are extremely complex and technical; (...) A built-in momentum drives their rising frequency, as learning by doing generates more procedural expertise on the part of lawyers and more information by business on the opportunities the regulations afford. The countervalence, which might be provided by consumers or users, is largely absent, not only from the administrative process, but also in political terms, since the procedures are often so tortuously technical as to be virtually incomprehensible to most of the news media.[360]

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[359] Specifically, concerns were voiced at the differences that appear in provisions dealing with (1) class actions, (2) contingent fees, (3) costs and attorneys fees for plaintiff only, and (4) treble damages. However, the study for the committee on Canada-United States Relations of the joint chambers of commerce (supra note 254) concluded that at the technical levels these concerns should not be responsible for an increased number of competitive/antitrust lawsuits.

[360] Sylvia Ostry, *Governments and Corporations in a Shrinking World: Trade and Innovative Policies in the United States, Europe and Japan* (New York: Council on Foreign Relations, 1990) at 41.

Based on past trade relations between the NAFTA members, particularly with respect to the Canada-United States trading context, a full scale replacement of antidumping by competition policy is not a realistically feasible alternative, since the NAFTA governments will be unwilling to allow firms in strategic sectors of the economy to remain unprotected against competing imports.

Given the rather delicate state of affairs, it is not surprising that no provisions dealing with substantive rules for the use of antidumping were negotiated in the NAFTA. Instead, working groups were formed to discuss the interrelationship between trade and competition in the free trade zone. Unfortunately, no concrete, implementing results were reached, thus forcing the NAFTA countries to concentrate their efforts on negotiating antidumping reform within the multilateral Uruguay Round of GATT negotiations. In the meantime, any disputes arising out of the application of antidumping law would be reviewed by a binational panel under Chapter 19 of the NAFTA. Binational panels, however, cannot contribute towards any possible basic policy framework reform, since they are obligated to apply judicial review strictly in accordance with the national laws of the NAFTA members.

Significantly enough, the contrast in attitudes and perceptions between Canada and the United States is crucial in assessing the probability of success of any antidumping reform policy. The classical Softwood Lumber case,[361]is a typical

[361] It is beyond the scope of this thesis to review the Softwood Lumber Cases(I-IV). For a comprehensive study, see C.M. Gastle and J.G. Castel, "Should the North American Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases be Reformed in Light of Softwood Lumber III?" *Law and Policy in International Business*, (1995) 821

illustration of the tremendous influence powerful interests groups and the United States Congress possess over international trade issues. Americans are presently questioning the legitimacy and constitutionality of the present NAFTA (chapter 19) binational panel review. Specifically, the American Coalition for Competitive Trade has filed a law suit in January 1997 in front of the United States Court of Appeals, requesting a ruling declaring the chapter 19 binational review process *ultra vires* of the constitution of the United States. [362] This should be an indication of the political improbability of successfully creating binational panels to review competition(antitrust) decisions involving anticompetitive pricing strategies analogous to dumping under the reform proposals.

Finally, it is likely that any future reform of antidumping will not be dealt with as a unique negotiating issue by the NAFTA countries. It will probably be on the agenda with other issues such as the expansion of NAFTA or its deeper integration. The authors John Ragusta and John Magnus,[363] who, in their discussion of the effects of replacing antidumping with antitrust, were critical of such a full

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[362] Complaint and Petition for Declaratory Judgment, Civil Action No. 97-1036, filed January 16, 1997, the United States Court of Appeal disallowed the Coalition's Challenge during November 1997(*American Coalition for American Trade* v. *William J. Clinton & the United States of America* (1997), 138 F. 3d. 761). The basic reasoning given by the Court revolves around the lack of standing to bring such a challenge, since none of the plaintiffs had ever sustained damages from the NAFTA Chapter 19 procedure. Consequently, once a company establishes standing, according to this decision; the Court will be obligated to rule on the constitutionality of said procedure. This, in our opinion, has the potential to undermine the basic foundations of the NAFTA as a whole.; See also L.H. Herman, "NAFTA: The Broad Strokes: A Canadian Lawyer's Perspective," (1997) 23 *Can.-U.S. Law Journal.*

[363] John Ragosta and John Magnus "Antidumping and Antitrust Reform in the NAFTA: Beyond Rhetoric and Mischief," in M. Hart (ed.). *Finding Middle Ground, Reforming the Antidumping Laws in North America*, supra note 63.

scale replacement by stating that the following minimal requirements must be present, before contemplating such reform:

- fully open markets,
- effective antitrust remedies, with accommodations on comity and blocking statutes,
- antitrust remedies that appropriately address legitimate concerns about injury to competitors, and
- accommodations with respect to third-country trade policy, including third-country dumping.

The degree of integration found in the context of the NAFTA is quite a significant factor, since the success and extent of antidumping reform directly depend on this factor. It is significant to note the presence of several derogations and sectorial exclusions from NAFTA obligations. One does not need to look far to find, specifically in the agricultural sector, important trade restrictions, subsidies and other trade inhibiting policies. Furthermore, the residual investment screening and cultural exceptions in Canada, along with exchange rate fluctuations, are all factors that are likely to be considered as part of the broader political dynamics of the evolution of NAFTA.[364] However, we are of the opinion that specific country differences may continue to exist without necessarily jeopardizing the opportunity of successfully eliminating the NAFTA countries' respective antidumping regimes.[365]

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[364] It is significant to note that in the Canada-United States Joint Chamber of Commerce report, the authors Y. Feltham and als. are of the opinion that "there is nothing in the free trade scenario that exerts a compelling force toward perfect harmonization. It is often asked, how can there be different pricing laws in a free trade area? The answer in our view is simple: "sellers adjust to market requirements, whether business or legal, that differ from place to place", supra note 254 at 161.

[365] As we have previously seen, the competition provisions of the NAFTA(chapter 15) provide that the NAFTA countries shall have and enforce national competition law. As Richard Boltuck and Ronald Cass state, "The "level playing field" analogy that producers have so freely invoked is inapposite. And equitable international competition is a mirage. We cannot begin to make the conditions of production equivalent across nations" In our opinion, even though this is true to a

Additionally, presuming that the NAFTA countries manage to harmonize their respective competition(antitrust) policies, allowing antidumping to exist will seriously undermine the harmonization process, yielding very insignificant results, due mainly to the fact that weak domestic producers will continue to make use of the antidumping regime.

This increased economic rigour that characterizes the competition(antitrust) regime, should in theory be a welcome addition to the efficiency enhancing effects of trade in a free trade zone. However, the full elimination of a trade regime (i.e. antidumping) that protects competitors will for the immediate future be practically an impossibility. Other nations' competition policies with respect to producer interests, do not resemble the NAFTA members' competition legislation, due in part to the presence of certain provisions maintaining some emphasis on the protection of the competitor within a competition law analysis framework. European competition law and that of New Zealand and Australia have broad concepts dealing with injury to competitors. The existence of such a requirement in the competition policy of these countries facilitated potential reform aimed at eliminating antidumping, and therefore presented a higher success rate on a political level than in the North American context.[366]

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lesser degree in a free trade area, differences will continue to exist. See J. Bhagwati and R. Hudec (eds.) *Fair Trade and Harmonization: Prerequisite for Free Trade?*, supra note 22 ; S.W. Waller, "The Internationalization of Antitrust Enforcement," (1997).77 *B.U.L.R.* 343

[366] For European Law, see Eleanor Fox, "Antitrust, Trade and the Twenty-First Century - Rounding the Circle," Association of the Bar of the City of New York, (June 1993) *The Record* 48, 535, at 547.

As previously discussed, a full scale replacement of antidumping by competition/antitrust will necessarily entail the development of an effective competition enforcement regime, even in the presence of border elimination of trade and investment barriers within the NAFTA. At the multilateral level, insignificant progress has been made in attempting to coordinate and formulate a competition law policy that will harmoniously interact with the antidumping regime in order to reduce the latter's trade-distorting effects. There is no consensus among economists about the desired level of competition and the basic concepts or degree of interaction between trade and competition. This is reflected at the international level, where no substantial nor binding set of rules on competition has been developed. The *United Nations Conference on Trade and Development* (UNCTAD) has made efforts in producing a non-binding document entitled, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*,[367] and more recently held conferences during the past two years "to review all aspects" of the competition rules and practices. The OECD, has for the greater portion of the 1990's engaged its trade and competition committees to join forces so as to lay the fundamental basis, through workshops and conferences, for future multilateral agreements in this area. As previously seen, the *OECD Agreement on Restrictive Practices Affecting International Trade* of 1986 was endorsed by all OECD Members but imposes only modest obligations.[368] As for the

[367] UN Document TD/RBP/CONF/10 (adopted by the UN General Assembly in 1980).

[368] Member states commit themselves to notifying other members where endorsement action is contemplated that may affect important interests of the latter; and to providing opportunity for consultations.

United States, the president in his 1994 Economic Report explicitly recognized the necessity of effective procedural and enforcement policies in the existing competition/antitrust system by stating:

> "if sound competition policies were present and effectively enforced in more nations, and if such laws were more easily enforceable against foreign misconduct, they could serve as the first line of defense against restrictive business practices by both domestic and foreign firms."[369] (our emphasis)

The politically charged debate over the replacement of the antidumping regime and the practical difficulties it presents has been most accurately summarized by Canadian lawyer, John A. Kazanjian, to the following effect:

> "Although Canadians are now somewhat insulated from the full discovery and investigative procedures, injunctions, fines and private treble damage actions of the US antitrust laws, we cannot expect this to remain the case if the antitrust carrot is to be sufficiently meaningful to get the Americans to relieve us from their antidumping laws. Could the US politically accept antitrust as the only remedy without being assured that US plaintiffs and investigative agencies would have essentially the same procedural and remedial rights with respect to Canadians as they enjoy with proceedings involving Americans?"[370]

Further on, the author raises the poignant issue of how the Canadian business community will be willing to accept changes to legislation passed with the specific

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[369] See "US See Strong Antitrust Rule as Alternatives to AD Actions," in *Inside US Trade* (February 18, 1994).

[370] John A. Kazanjian, "Competition Law and Trade Policy: Honk if you love Competition Policy," (September 1993) *Canadian Competition Record*, 71, at 74.

purpose of impeding the extra-territorial application of US antitrust laws. Additionally, why should the Canadian economy accept modifications to its existing competition law regime, when a couple of years earlier it explicitly resisted similar antitrust provisions in its legislation? The past holds very valuable lessons for those who are willing to observe and learn from past performance. In light of the proposal to place the relationship between competition policy and international trade policy on future GATT negotiating agendas, and the commitment to constitute Working Groups under NAFTA to review the relationship between competition and trade, the next section will propose models of reform taking into consideration the political pragmatism of the North American economy.

2.3 OPTION II- Preliminary Observations For The Competition Law-Based Approach To Antidumping Reform

There is a strong economic case for reforming antidumping laws in the NAFTA. The constant evolution of the integration process is a compelling reason to advance reform proposals that are politically and economically sound. The following will analyze whether eventual engagement on competition policy over the long term in order to address the trade distorting effects of the antidumping regime, is the appropriate reform. In other words, after having assessed the current situation, the

question that remains is how could antidumping rules be constrained by national competition rules, rather than being replaced.

Any reform proposal of this order will have a far better chance to reach its full potential only if a certain number of preconditions are met. The first dimension is economic: there must be effective competition within and across the North American borders. The second is political: the existence of such trade enhancing competition must be recognized and valued as potentially valuable in creating strong political constituencies to support antidumping reform. Finally, the legal dimension: effective rules must be negotiated and be legally binding. In our opinion, the economic dynamics will be responsible for determining the required amount of political support for certain types of competition/antidumping reform, that will in turn have a major influence on the legal dimension of the process. Therefore, if markets are effectively integrated and economically competitive, in the sense that businesses are unable to obtain national advantages, then the economic and political preconditions for effective negotiations on integrating trade and competition policy rules will have been already dictated.

As previously analyzed, predatory pricing principles in competition law have a questionable justification and appear to be narrowly construed,[371] so as to practically eliminate the imposition of antidumping duties in unwarranted cases. This should be welcomed with much more enthusiasm from the Canadian viewpoint,

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[371] See *The Interpretation Bulletin on Predatory Pricing* from the Canadian Bureau of Competition Policy in Jack Roberts, *Competition Antitrust: Canada and the United States*, 165 (2d ed. 1992), Toronto, Butterworths 1992, at page 165 and the previous section on predatory pricing under Canadian and United States law.

than from the United States, due to the asymmetry in the respective markets. Within the same perspective, the NAFTA Task Force of the Antitrust Section of the American Bar Association, drafted a report on the issue of competition dimension of NAFTA which was released on July 20th, 1994.[372] Essentially, the Report stated that the relationship between competition law and antidumping law is based upon three areas in which antidumping objectives are affected by the implementation of a free trade area, being:

- artificial barriers to trade are reduced, thus less protection for domestic competitors;
- national treatment concept calls for equal treatment of foreign and domestic products; and
- tariff elimination cannot sustain high prices for a prolonged period of time.

In light of these conceptual factors, the ABA Task Force sets forth four recommendations for reform of antidumping law which are:

(a) making procedural changes in antidumping laws in order to change the de minimis thresholds;
(b) expanding or adjusting use of safeguard/escape clause remedies;
(c) including of antitrust/competition principles in antidumping analysis; and
(d) replacing antidumping laws with antitrust/competition laws.

The fourth option was retained by the ABA Task Force Report as being more clearly consistent with the concept of a free trade area and because it applies the principle of national treatment. For the reasons fully exposed in the previous

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[372] Eleanor M. Fox et al., *Report of the Task Force of the Antitrust Section of the American Bar Association on the Competition Dimension of the North American Free Trade Agreement*, hereinafter ABA Task Force Report July 20, 1994. It is beyond the scope of this section to outline in detail the conclusions of the Report. The National Competition Law Section of the Canadian Bar Association also issued on March 1995, a *Commentary on the ABA Task Force Report* basically supported the major of the recommendations. However, it never issued a commentary on the antidumping aspect of the report.

sections of the present chapter, we do not believe that this is a politically feasible option, although it is legally feasible. Our subsequent reform model will focus on specific areas of divergence between competition policy and antidumping policy. These divergencies can be placed under three headings: market definition, market participants, and market practices.[373] Professor Diane Wood's antidumping reform model addresses these three crucial components in a very adequate fashion.[374] After having made the observation that "nothing in the trade statutes requires the assumption that injury must always be measured against the *status quo*," she further states that her approach is comprised of three different inquiries involving mixed questions of injury and causation. The first step identifies the group of like products. The second step involves identifying all the firms dealing with the identified product. Once this has been done, two "evaluations of market structure can be taken: (1) How concentrated is the market as a whole? and (2) Does the U.S. industry portion of the market have the ability to exercise market power? Using the information thus acquired, the ITC can then assess whether or not the U.S. industry has sustained injury warranting tariff relief or whether the "unfair" trade practice has forced the U.S. industry with market power to behave competitively." This

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[373] See Patrick Messerlin "Should Antidumping Rules be Replaced by National or International Competition Rules?" *World Competition Law and Economics Review*, (March 1995) 18, No. 3 and several other authors that have analyzed antidumping reform in light of potential competition based concepts and principles, see for example, supra note 62, and D. Wood, "How to Make Antidumping Laws more Competition-Friendly", presented at a conference, *Antidumping and Competition Policy: Complements or Substitutes*? Center for Applied Studies in International Negotiations, (Geneva 11-12 July); B. Hoekman and P. Messerlin, "Dumping, Antidumping and Antitrust," (1996) *Journal of World Trade*, 30.

[374] See D.P. Wood, "Unfair Trade Injury: A Competition Based Approach," (1989) 41 *Stan. L. Rev.* 1153

approach has the added political advantage of accommodating to a limited degree, the domestic industry in question, and at the same time, does not use an arbitrarily discretionary method as the one used by the antidumping regimes. What follows is step by step redefinition of crucial terms that will form the foundations of our reform model.

2.3.1 Market definition:

As previously seen in the present thesis, both competition and antidumping rules begin by defining the concept of market. Competition laws provide guidelines as to the method with which markets under investigation should be defined. One example of this could be seen from the elaborated provisions found in the *Canadian Merger Guidelines* issued by the Competition Bureau as well as the 1992 U.S. Merger Guidelines. In general, competition rules tend to define much larger markets, in geographic terms, but much narrower markets in terms of the investigated product. In other words, antidumping enforcement allows the complainant (domestic producer) to define the relevant market to be investigated. Complainants are also responsible for indicating in their applications the geographical boundaries of antidumping, even though the antidumping authorities do not consider the foreign market aspect in their investigations. In summary, markets are broadly defined in geographical terms under competition rules, in contrast with antidumping rules. However, antidumping rules tend to define a larger

market in terms of goods than competition rules. This fundamental difference is crucial because it is exclusively at this stage where consumer demand factors are analyzed. The weakness in the antidumping regime lies in the fact, that it focuses exclusively on the supply side or the needs of the domestic, import-competing producer.

The affirmation that antidumping laws tend to define "like products" and "relevant market" under a broader scope is a problem that is increasingly growing with the complexity of transborder transactions and the increased activities of the multinationals in the NAFTA trading environment. One illustration of the challenges of the "like product" issue can be seen in the *1982 Subway Cars from Canada* case. Bombardier was responsible for manufacturing the exterior shells for subway cars in Canada and shipping them to an assembly factory situated in Vermont. The complainant, Budd (Thyssen) had a manufacturing plant in Brazil and assembled the shells in his American plant. Ultimately the petition was withdrawn, but at the preliminary stages, many ITC Commissioners had serious doubts as to the determination of "like product" in the United States. Globalization is responsible for bringing global sourcing and multinational investment, which will in turn render increasingly difficult the task of the antidumping authorities.

2.3.2 Market participants

As previously analyzed, competition authorities in Canada and the United States engage in a process which adequately enables them to define market

participants by examining affiliated and allied firms. They also analyze the effects of potential market participants. The underlying objective of this exercise by the competition authorities, is to determine to what extent firms are capable of economically surviving in the relevant low cost market. This exercise is totally foreign to the antidumping regime. Domestic industry is defined by the domestic import-competing petitioners. The consequences of such a procedure often leads to economically unjustifiable cases, such as the Photocopieurs case in the EC, where two firms (Xerox and Canon) - both with EC plants having roughly the same capacity and with overseas plants exporting to EC - have been classified as petitioner (Xerox) and defendant (Canon).

2.3.3 Market practices

A proper analysis of the existing market forces is a sound and required prerequisite in determining whether the market practice under investigation can potentially produce anti-competitive effects. Competition rules examine the cost-price relations of the firm as well as the specific relationship between the minimal viable level and the potential sales opportunity available. As we have already seen in the majority of antidumping cases, total costs are generally derived from estimates based on a "constructed value" methodology. The intention to harm is an economically sound analysis of determining whether a specific market practice is anticompetitive or not. Effective and actual market power is determined under competition-based analysis, whereas in antidumping cases foreign exporters are

subject to price discrimination, even in cases where they are simply attempting to align their prices with those of the importing market.

The protectionist biases that are inherent in the application of antidumping are well known. Unfortunately, the proponents of antidumping that use economic rationale to demonstrate the anticompetitive and trade-distorting effects of antidumping have not had much impact on weakening its political support. Unfortunately, relatively little was achieved in the Uruguay Round in this area.

2.4 Further Recommendations As To The Practical Implementation Of Competition Law Principles In The Antidumping Law Reform.

The introduction of a competition-based approach is appropriate in reforming certain areas of the North American antidumping regime that cannot be permitted to persist in a trade enhancing free trade context. Due to the fact that current antidumping practice is based on faulty theoretical underpinnings of protectionism, a strong case for reform is easily understandable. However, reform that focuses on certain aspects of the competitive process, remains the most pragmatic option. Two additional components that will accelerate our substantive antidumping reform proposal are: i) intensifying the public interest provision while replacing the standard of injury to competitor with a standard of injury to

competition, without questioning motive;[375] ii) implication of competition agencies in the antidumping process;

2.4.1 Consideration of broader economic interests:

The use of market definition and injury analysis adopted from competition/antitrust laws to determine actionable injury, will gradually alleviate the protectionist effects of the antidumping regime. In addition, this approach preserves the goal of the antidumping laws of protecting domestic producers, regardless of consumer impact, if in fact the "unfair" commercial activity complained of is really anticompetitive. However, it has the potential of restricting the group of activities subject to antidumping challenge within the NAFTA trading area. This goal is attained by raising the standard of proof of antidumping cases and bridging the tremendous gap that exists between the competition(antitrust) and antidumping approaches with respect to market definition, causation and the standard of actionable injury. The mobilization of other interests in the economy in order to combat the devastating effects on the total national welfare that will inevitably arise from antidumping duty imposition is a crucial step towards positive reform. As previously seen, United States trade laws do not require an evaluation of broader economic interests, but on rare occasions they may do so, if an equally powerful interest group makes use of the products under investigation. The antidumping

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[375] This proposal was initially advanced by Michael J. Finger in "Reform" J. Michael Finger, *Antidumping, How It Works and Who Gets Hurt*, J. Michael Finger (ed.) (1993), supra note 99.

investigation can take into consideration only injuries to the petitioner's sales, profits, and so on. This lack of transparency in the antidumping system arises from the fact that the system is designed in a such way as to ignore the broader economic interests at stake. The Canadian mechanism provided in section 45 of the *Canadian Special Import Measures Act*, provides an opportunity for other industries and consumers to manifest their opposition under "exceptional circumstances" and only after an order regarding injury has been made. As Michael Finger suggests, the broader public interest element should be taken into consideration before the determination of injury.

The procedure involving the determination of injury in the antidumping investigation can also be ameliorated by reforming the preliminary injury standard. Establishing a higher standard for an affirmative finding of injury allows the removal of vexatious applications at the preliminary stage. The present standard is very low. In the United States, from December 1991 to December 1995, only thirteen percent of the petitions filed were terminated at the preliminary injury stage.[376] Canada, unfortunately appears to apply an even lower standard of injury.

Another method with which broader economic interests may be served is through the implementation of a "meeting the competition" defense at the injury analysis stage. As we have seen, under the existing antidumping statutes, a competing importer can easily be found to be dumping in the domestic market, if the imported product is priced below the cost in his export market, regardless if

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[376] Based on data obtained from the U.S. International Trade Commission.

importer and domestic competitor both sell their products at the same price. Under such a defense, imports would not be found to cause injury through their pricing if they were priced at the same level as domestic producers charge in the importing country's market. This approach is certainly in conformity with article 3.5 of the WTO Antidumping Agreement, requiring that dumped imports must be shown to be causing material injury.[377] Indeed, one of the factors that the CITT is obliged, by statute, to consider in determining whether the imports are causing material injury, is price. Goods that are priced to meet domestic competition, will not "alter the price of like goods or depress the price of like goods" under relevant SIMA provision. Unfortunately, this approach does not promote the theory of comparative advantage, because the point of comparison remains the domestic industries, which may in certain cases continue to remain protected, even though they may have lost their ability to compete in international transborder markets.

2.4.2 Implication of competition agencies in the antidumping process

Involving specific American and Canadian antitrust(competition) institutions which represent broader, national economic interests in injury determinations will undoubtedly lessen the negative trade distorting impact of antidumping duty imposition on the specific domestic economy. The Director of Investigation and

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[377] This particular defence is suggested by the ABA Task Force Report, supra note 372, and the Department of Justice has been a proponent of this reform and has advocated for its recognition by the ITC; see also Harvey Applebaum, "The Interface of Trade/Competition Law and Policy: An Antitrust Perspective ," (1987) 56 *Antitrust Law Journal*, no. 2 at 409.

Research under the *Canadian Competition Act* is concerned with the negative impact of mechanisms resulting in higher domestic prices. Under statutory authority, the Director is permitted to intervene before any Federal Board or panel. Even though the lack of statutory requirement for the consideration of broader economic interests in the antidumping laws is deplorable, the Director has the potential to make appropriate representations and counterbalance the appropriate economic interests.[378] This is particularly true in the recent intervention of the Director of Investigation and Research in the *Gerber Products Co.* v. *Heinz of Canada* case. In this matter the CITT imposed a 69 per cent antidumping duty on the Gerber company for allegedly dumping baby food products from its American based factory in Michigan to Canada. The CITT ruled that the product was not only dumped, but the only domestic competitor, Heinz Canada Inc. was being injured. Fearing the creation of a strong monopoly in the Canadian economy by Heinz Canada Inc., the Director intervened to submit representations as to the detrimental effect of the CITT's decision on the Canadian consumer and on the competitive process as a whole. The bureau's assistant deputy director of civil matters, Robert Lancop, stated that, "this will raise serious concerns about nutritional and health risks of babies." In addition, many interest groups have made representations of the detrimental effect of the ruling. On July 3, 1998, the CITT decided to reconsider "whether there are commercially available alternatives to Heinz and Gerber

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[378] See the following press releases, H. Scoffield, "Gerber ruling deemed a health risk, 69% duty on firm's baby food will hurt babies, result in monopoly": Competition Bureau, *The Globe and Mail*, June 12, 1998 B4;S. McCarthy, "Tribunal to re-examine baby food duty, trade panel to hold hearings on whether public interest served by anti-dumping levy," July 4, 1998, *The Globe and Mail*, B4.

products, and the impact of the duty on the concerned industry." Under the same case, the Bureau has decided to file a complaint under the NAFTA requesting a bilateral panel review of the CITT's decision, invoking allegations of excess of jurisdiction. This case is a clear demonstration that, when used to its full potential, the *Canadian Competition Act*, with its administrative mechanisms can adequately fulfill its primary objective of restoring competition.

The long-term prospects for reform of antidumping in the presence of the proliferation of antidumping laws around the world could be a possible source of friction in the multilateral trading context. Although there will undoubtedly remain immediate domestic pressures to broaden the application of these laws as tariffs are removed, the removal of tariff and non-tariff barriers in the NAFTA reduces greatly the scope for discriminatory activity. In addition, the ever-growing presence and expansion of multinational enterprises and the growing interdependence of national economies by trade and investment links, represent interesting challenges for the antidumping authorities in the NAFTA region. Expansion of trade and investment that is occurring due to the integration of the NAFTA economies may also incite firms to institute antidumping cases in one particular NAFTA territory, hoping to provide protection to production in the other NAFTA parties. The proposed competition-law approach to reforming the present antidumping regimes seems less ambitious, and possesses a realistically attainable objective. At the WTO level, discussions have already commenced as to the importance of competition policy in

the new trade order. The 1995 EC Expert Group Report on *Competition Policy in the New Trade Order: Strengthening International Cooperation Rules*, emphasizes the reasons why worldwide trade liberalization and globalization of business, calls for a synthesis with domestic competition laws. It remains to be seen how powerful political will can really be.

CONCLUSION

Despite the commonly held assumption that antidumping laws have as their underlying objective the regulation of unfair trade, this statement is contrary to the notion of equitable competition implicit in the level-playing-field analogy, in that a set of rules exists that allows the international competitive process to be based on skill, determination, and permissible "natural" advantages. Under these rules, as competitors differ, the more efficient competitors will prevail. As seen throughout the present section, making antidumping more sensitive to competition concerns is something that is in the interest of any administering country. The problem is one of political economy, with which the powerful lobbyist fuel their debate by supporting a restrictive injury-to-industry perception. Canada, United States and Mexico have all agreed through their respective NAFTA commitments to foster and maintain a competitive trading environment favoring the free circulation of their products in the absence of tariff and nontariff barriers. The competition(antitrust) legislation of Canada and the United States, particularly with respect to provisions dealing with

price discrimination and predatory pricing are appropriate in forming the substantive basis for antidumping law reform. Both countries possess a long history of competition(antitrust) enforcement that enables the administrative authorities to identify conduct detrimental to competition. As demonstrated, a whole scale replacement of the antidumping regime is legally and administratively feasible. Poignant issues proper to Canada and the United States may be dealt with by the use of executive agreements and memorandums of understanding.

Unfortunately, the *Softwood Lumber* cases demonstrate that the United States is resorting to an anticompetitive degree of trade unilateralism and as a result, advances arguments based on state sovereignty in order not to abide by the decisions rendered by binational review panels. In light of the nature of such attitudes and perceptions, it would be politically sound to propose less aggressive antidumping reform proposals. Our second option involved the implementation of a competition based approach in the already existing antidumping mechanism. Consideration of broader economic interests through a more trade enhancing approach to the concepts of market definition, market participants and market practices, will allow the competitive process to be critically analyzed within the existing antidumping regime and without totally disregarding the influential industry player: the domestic producer.

CONCLUSION

Under the General Agreement on Tariffs and Trade (GATT), the major trading nations have agreed to eliminate nontariff barriers to trade, and through several rounds of negotiations have, to a significant degree managed to reduce tariffs. It has been said therefore, that the Uruguay Round of multilateral trade negotiations, once fully implemented, will inevitably lead to substantial liberalization of global trade flows. As the Uruguay Round also includes a prohibition on the further use of voluntary export restraint agreements, the resulting lobbying for protection can be expected to increasingly focus on antidumping measures. Legally, and within regional trading arrangements, such as the NAFTA, antidumping measures are a flagrant contradiction to the underlying guidelines of article XXIV 8 (b) of the GATT(WTO). At the same time, we have seen that economists cannot find an economic rationale to sustain the ongoing practice of antidumping measures. Given the lack of documented attempts at successful international predatory behavior, as that prohibited by the antidumping statutes, antidumping measures can only be aimed at protecting the welfare of domestic ill-efficient producers.

In the initial chapter of our thesis, we analyzed the assertion that governments cannot justify their use of antidumping measures solely on the concept of "unfairness." What is meant by "unfair" is ambiguous. Even if we were to accept the "unfairness" argument, reacting against price discrimination through the

imposition of antidumping duties is ill-conceived because antidumping is not an adequate instrument, it only adds additional distortions.

Article VI of the GATT recognizes the right of contracting parties to take unilateral action under domestic trade laws where domestic industries are being materially injured because of "unfair" foreign trading practices, specifically referring to dumping. As we were able to conclude, through an exhaustive analysis of the provisions of the WTO Antidumping Agreement, the drafting of several provisions is vague, containing many ill-defined concepts. This vagueness is used in a discretionary manner by the three NAFTA signatories in implementing their domestic antidumping law and policies. As a result, current practices are imprecise with respect to key issues, such as the methodology used to calculate dumping margins, the determination of "relevant" market (i.e. how to define like-products), and how to ascertain whether dumped imports have caused material injury.

NAFTA specifically grants the right to each party to apply its domestic antidumping regime subject to an appeal to a system of panel review under the treaty instead of to the courts. Unfortunately, the NAFTA Working Group on Trade and Competition created pursuant to section 1504 of the NAFTA has not been able to reach any consensus, largely due to the fact that the WTO Antidumping Agreement now enshrines almost all of the elements of the Canadian and American trade remedy systems.

Analyzing the prospects for replacing antidumping with competition/antitrust provisions in the NAFTA context revealed that a preliminary consideration of what

the NAFTA is, how it fits into the multilateral (WTO) framework, how trade remedies are regulated internationally, and most importantly, the underlying purposes of the antidumping and competition regimes, will render full scale antidumping reform quite difficult, if not impossible.

Competition law is a major element in the legal framework for business activity in both countries, Canada and the United States. Canada and the United States share common roots in this field which go back to the enactment of the first Canadian competition law in 1889, the year before the enactment of the Sherman Act. Even though the purpose and basic principles of competition law are common to both countries, differences in procedural and substantive issues are apparent, but are not so significant to constitute major impediments. Due to the fact that the underlying objective of competition/antitrust laws involve the analysis of injury to competition, making antidumping measures more sensitive to competition concerns is something that is in the interest of all NAFTA signatories. It has been assumed in the body of the thesis that political realities will require that the antidumping option be maintained for the immediate future.

The use of market definition and injury analysis in a competition based approach, will aid in strengthening the trade enhancing goals of NAFTA . It has been seen through our antidumping analysis, that it is crucial for efficient trade to re-define the restraints on available state actions against dumping in order to keep abuses of permissible trade relief to a minimum and to achieve pro-competitive effects.

It has been demonstrated in a conclusive manner that the multilateral trading system and the WTO are being threatened, and the execution of sensible trade policies by its member governments impeded. The United States has begun to constitutionally challenge, with more force and vigour than ever before, the NAFTA Chapter 19 panel review process. Could this be the indication of excessive trade unilateralism threatening to compromise the benefits of the NAFTA? Bringing antidumping under control, requires the WTO members to focus on the real issues. Economic efficiency and the concept of trade liberalization both favour reforms aimed at preventing the application of antidumping cases that display some similar symptoms, but are produced by behaviour that is innocent and offensive.

In an overview, the present thesis presented the economics and politics of antidumping and competition laws in North America. The substantive and analytical considerations, while not unimportant, are not at the heart of the difficulty the three governments are experiencing in finding a common solution. Rather, it is the continuing political appeal of antidumping, especially in the United States. Change can only be achieved through political will and understanding. Hopefully, the NAFTA Working Groups will be able to reach such a result.

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