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Antidumping and Antitrust Reform in the NAFTA: Beyond Rhetoric and Mischief

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I. Overview

Remedies against injurious dumping have become a trade policy "whipping boy" as a bevy of academic economists and analysts call for their dismemberment, particularly in the context of a free trade agreement and even more particularly in the context of the North American Free Trade Agreement (NAFTA). At a very theoretical level, they may be right. In principle, in an appropriately open economy, antidumping ("AD") remedies on goods traded between NAFTA parties could be eliminated in favor of antitrust remedies aimed at underlying anticompetitive conduct that might continue even under wholly free trade.

Yet, agreeing that AD might be eliminated is the easy part. The real question is what conditions would be required to ensure that the legitimate goals of AD are not simply abandoned. Addressing that question makes evident that, while there might be some scope for progress on AD/antitrust reform, the path is nowhere near as clear as advocates of reform typically suggest. Replacing AD with antitrust would require, at minimum:

- 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
- possible accommodations with respect to third-country trade policy, including third-country dumping.

These elements are not seriously considered by most would-be trade remedy reformers. Much of the reform literature appears to be based on a blithe ignorance of the technical and political hurdles (as well as the likely distributional consequences) of reform proposals. Indeed, the lack of focus on the real world changes that would be needed to eliminate AD

without undermining legitimate trade policy goals suggests that many proposals are ill-informed rhetoric or, worse, a mischievous attempt to protect unfair trade at the expense of the national interest of all three NAFTA parties and the individual interests of millions of companies and workers.

Further, even if the political will to eliminate the causes of injurious dumping existed, relevant multilateral rules and institutions may call into question the wisdom of -- and limit the legal options for -- region-specific AD reform under a free trade agreement. Moreover, as a free trade agreement that falls far short of the level of integration implied by a customs union, and given the low percentage of intra-NAFTA trade affected by AD disputes, the NAFTA does not depend for its success on the achievement of an agreement on AD that goes beyond multilateral rules.

Finally, other events may blunt, to some extent, pressure for trade remedy reform in North America. Mexican officials, as a domestic political matter, reportedly cannot agree to eliminate or substantially reform AD remedies on intra-NAFTA trade at this time.[2/] Meanwhile, implementation of the new AD rules negotiated in the Uruguay Round may ameliorate some of the problems that have been cited by the reform movement. Certainly, it would be ill-advised to take precipitous action without fully evaluating the impact of the Uruguay Round changes.

2/ Remarks of several participants in Ottawa conference (Feb. 6, 1996) and Mexico City conference (March 18, 1996) sponsored by Centre for Trade Policy and Law, Collegio de Mexico and Institute for International Economics.

Given all of these considerations, as a practical matter, the likelihood of the requirements for "replacement" being met soon in North America is very low.[3/]

II. Background Principles

Analyzing the prospects for replacing AD with antitrust in the NAFTA context requires a preliminary consideration of what the NAFTA is and how it fits into the multilateral (WTO) framework, how trade remedies are regulated internationally, and, most importantly, what the underlying purposes of AD and antitrust are.

A. NAFTA and the WTO Backdrop

A free trade agreement, at the most basic level, is an agreement to eliminate official, government-imposed, tariff and non-tariff barriers to trade in goods. Yet, free trade agreements, and certainly the NAFTA is a case in point, rarely result in truly barrier-free trade. The NAFTA is typical:

3/ Other related proposals falling somewhat short of AD "replacement" include: (1) *harmonizing* national AD remedies, at the level of substantive rules or investigatory procedures; and (2) *weakening* national AD remedies through such mechanisms as "lesser duty" rules or heightened initiation standards.

The first proposal, harmonization, is worth pursuing. Yet, it should be understood that it need not result in any weakening of U.S. AD and CVD remedies (as Canadian and Mexican remedies are, in many instances, more effective against unfair trade than U.S. remedies). As a matter of efficiency, however, this is a potentially fertile area for progress among the NAFTA parties. Further discussion of this topic is, however, beyond the purview of this paper.

The second proposal simply reflects general antipathy toward trade remedies and sympathy for dumpers. It is essentially a proposal to neuter trade remedies without making any compensatory adjustments to account for their underlying and legitimate purposes. Legitimate problems were, by and large, addressed in the Uruguay Round negotiations. (Several specific proposals are addressed in the Annex to this paper.)

- It provides generally for liberalization of cross-border investment but is subject to substantial derogations, including investment screening.

- It applies to some services but here again is subject to substantial derogations affecting, for example, communication, transportation and financial services.

- Even in the area of trade in goods, it is subject to significant sectoral derogations and other limitations, with the result that free trade does not exist in energy, agricultural products, automobiles, textiles, cultural products, logs, etc.[4/]

- Finally, it does not address private restraints of trade. It contains merely hortatory provisions, in Chapter 15, stating that the NAFTA parties ought to have and enforce competition laws.[5/]

Recognizing the limitations on the breadth of the agreement, the NAFTA expressly provides for continued application of national AD and CVD laws to intra-NAFTA trade. At the same time, the Canadian Government obtained a "side agreement" to hold trilateral discussions in this area which were to terminate -- with or without substantive results -- at year-end 1995. Significantly, that side agreement, and a related NAFTA provision (Art. 1907), did not call for negotiations on putting an end to trade remedies. Rather, they were carefully crafted to focus on both trade remedies and the underlying "unfair" trade practices (subsidization and

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4/ The NAFTA also applies restrictive rules of origin, especially for autos and textiles. One economic analysis noted that because of these rules alone, "about 18 percent of U.S. imports from Canada will not benefit from the [free trade agreement]." Hufbauer and Schott, *NAFTA: An Assessment* 5 (Institute for International Economics 1993).

5/ Professor Andreas Lowenfeld of New York University, speaking in Monterrey last year in favor of eliminating AD remedies in North America, also chided that he could not understand why the NAFTA was 1,500 pages long when it should have only taken 2 or 3 pages to mandate free trade. The difficulty, of course, is that in many respects the NAFTA is 1,500 pages of exceptions to free trade -- for "cultural" industries, energy industries, agriculture, textiles, government procurement, standards, investments, selected services, etc.

The intention here is not to be critical. The NAFTA, with a few notable exceptions, is a remarkable achievement. Yet, no one who seeks to analyze the situation seriously should make the mistake of believing that the NAFTA created free trade and investment in North America.

dumping) which have always made trade remedies necessary. The side agreement was a political move, allegedly necessary to NAFTA ratification in Canada, but it in no way presaged specific results (or indeed any results).[6/]

Moreover, the NAFTA exists within the multilateral framework of the WTO and the WTO agreements. The WTO agreements more comprehensively regulate trade remedies and establish institutional structures (the SCM and AD Committees) created to monitor exercises of each Member's trade remedy authority and to provide a forum for further elaboration of existing international rules. As a framework issue, one should at least be cautious not to seek NAFTA reform that may be inconsistent with WTO obligations. Moreover, the question of whether (or to what extent) the WTO agreements remove the impetus for NAFTA reforms should be considered before major reform is undertaken. After all, the ink on the new multilateral rules is hardly dry, and -- whatever one may think of them -- they were achieved only after extraordinarily difficult negotiations and must be given a chance to work. Indeed, much of the legitimate concern for AD reform may be, if not eliminated, certainly muted by implementation of the Uruguay Round agreements.[7/]

6/ To date, the discussions do not appear to have yielded anything substantive. Of course, any NAFTA party may invoke Art. 1907 at any time. It has also been suggested -- improperly -- that these issues be taken up by the working group established under Art. 1504. That group has no mandate to consider AD/CVD issues; rather, it exists to consider how the parties' enforcement of competition law -- i.e., *antitrust* law -- affects trade within the free trade area.

7/ See Jorge Miranda, "Should Anti-Dumping Laws be Dumped?", presented at "Anti-Dumping and Competition Policy: Complementary or Supplementary," Centre for Applied Studies in International Negotiations, 21-22 (July 11-12, 1996). Miranda points out that problems will be minimized not only by improved substantive standards but by improved procedural standards domestically (judicial review) and internationally (dispute settlement).

B. Antidumping and Its Alleged Evils

The purpose of this paper is not to defend nor to attack AD as a general matter but rather to discuss the prospects for replacing AD with antitrust in the specific context of the NAFTA. Nevertheless, several general points and an overview discussion on AD are appropriate.

First adopted by Canada, the AD remedy has been recognized internationally for the better part of a century as an appropriate response to international price discrimination in those sectors where imports cause or threaten injury to local competitors.[8/] Yet, today there is a growing clamor that AD has become merely a protectionist tool. Generally, the clamorers' strategy has been to cite particular infirmities in the application of AD laws -- or misleading statistics[9/] -- in an effort to damn the entire system.

8/ *See, e.g.*, Patrick Messerlin, "Should Antidumping Rules be Replaced by National or International Competition Rules?," 18 World Comp. L. and Econ. Rev. 37, 39 (1995) (brief discussion of early AD laws and their rationales). *Cf.* Alexander Hamilton, *Report on Manufactures* (1791) (concern over low export prices cross-subsidized by high profits gained in exporters' home markets), *cited in* Peter Clark, "Reforming Antidumping" (this volume).

9/ One of the worst canards is that petitioners win over 90% of U.S. antidumping cases. In actuality, U.S. AD petitioners succeed in having duties imposed -- that is, in obtaining affirmative decisions from both the Commerce Department and the International Trade Commission -- less than 40% of the time. *See* U.S. International Trade Commission, *The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements*, USITC Pub. 2900 at 3-1 (1995) (39.4% success rate for AD cases over the period 1980-93). Whether the Commerce Department alone renders affirmative decisions in more than 90% of AD cases is, for several reasons, irrelevant: (1) Unless the petitioner also wins at the International Trade Commission, no antidumping duties are applied. (2) "Winning" at Commerce is defined as anything above *de minimis*, which until recently meant .5% dumping margins. Thus, if a foreign producer were dumping by 25% and Commerce found 2.5% margins, that would qualify as a "win" for these unfair trade statisticians. (3) Looking at the success rate of cases filed ignores cases not filed and the self-selection away from non-meritorious cases. Further, numerous U.S. producers forego reasonable cases based on costs,

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As a preliminary matter, engaging in the "unfair" act of dumping does not automatically entitle a competitor to a remedy. Rather, as in domestic antitrust law, cognizable injury is a prerequisite to any remedy.

Beyond injury, two questions might be asked: Is there a justification for a remedy against injurious dumping in the first instance? Second, is the AD margin properly calculated under current rules?

Is Action Against Anti-Dumping Generally Justified?

With respect to the first question, one must distinguish between dumping that falls into two principal categories: (1) price discrimination: selling in a foreign market at below the (transportation-adjusted) price in the home market, and (2) sales below cost of production: sales in a foreign market at below average cost of production.

Price discrimination: In theory, this type of dumping would largely be impossible -- arbitrage would wipe out the price differential -- if the dumper's home market were not somehow protected by trade barriers. The classic example has been the Japanese market, where study after study has demonstrated that prices are maintained at artificially high levels and that arbitrage has not been effective in eliminating the differential.[10/]

9/(...continued)
customer concerns, or other political considerations. This is not to say, of course, that the laws are not effective -- only that those who cite a 90% success rate without qualification are misinformed or seeking to mislead. If the success rate were any lower, some of the so-called reformers would, no doubt, cite the low success rate as evidence of the harassing nature of the remedy.

10/ *See, e.g.*, International Trade Administration, Staff Papers, "Methodology and Results," *The Joint DOC/MITI Price Survey* at viii (Dep't Comm. 1989) (average differential 39%); "MITI Survey on Domestic, Overseas Price Differential of 100 Consumer Products and Consumer Services," *cited in Nihon Kezai Shimbun* 5 (July 6, 1996) (prices in Tokyo 1.46 times U.S. prices and 1.19 times European prices for a group of consumer products and services).

In the case of a protected home market, producers in the importing country must compete against the dumped goods in their own markets while not having a fair opportunity to compete in the home market of the dumper (protected by trade barriers).[11/] This type of dumping is broadly and rightly condemned, in part because of "game theory" (discussed further *infra*). While AD laws focus on the price discrimination, they are animated in part by a desire to eliminate the home-market barriers to which such price discrimination may be connected. AD serves the private function of providing a remedy for injured producers and the public function of discouraging the continued closure of foreign markets. Yet, action against price discrimination made possible by foreign market barriers is virtually ignored by AD reformers.

Nor should anyone be fooled into thinking that home market barriers have been abolished in North America. The NAFTA carves out numerous important sectors from liberalization and, in those sectors, leaves major barriers intact. Sugar -- the "subject merchandise" in a major recent Canadian AD investigation -- is but one example.[12/]

11/ *See, e.g.*, Kerrin Vautier, "Trans-Tasman Trade and Competition Law," in *CER and Business Competition: Australia and New Zealand in a Global Economy*, 73, 110 n.56 (Kerrin Vautier, James Farmer, Robert Baxt, eds., 1990), quoting J.H. Beseler and A.N. Williams, *Anti-Dumping and Anti-Subsidy Law: The European Communities*, 50-51 (1986) (emphasis added):

> Three reasons are given as to why dumping constitutes "unfair competition": first, that it results from a "contrived" rather than a true comparative advantage . . . [Secondly] uncertainty of the dumping due to the fact that it is generally intermittent or short term. . . . [Thirdly] it stems from market isolation [which] *prevents the producers in the importing country from competing with the foreign supplier on his own ground while allowing him to attack their domestic market.*

12/ *See Dumping of Refined Sugar Refined from Sugar Cane or Sugar Beets in Granulated, Liquid and Powdered Form Originating in or Exported From the United States of* (continued...)

Sales below COP. The greater controversy erupts when a petitioning industry seeks to offset the dumping that occurs when a foreign producer sells at prices below its fully allocated cost of production ("COP") in its home market.[13/]

Many reformers note, correctly, that selling at below fully allocated COP is a common business practice (for example, in recessions) and would not necessarily be considered unfair if done by, for example, a New York-based firm selling in California.[14/] At the same time,

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America, Denmark, the Federal Republic of Germany, the Netherlands and the United Kingdom; and Subsidizing of Refined Sugar Refined from Sugar Cane or Sugar Beets in Granulated, Liquid and Powdered Form Originating in or Exported From the European Union, NQ-95-002 (Nov. 6, 1995). Revenue Canada's dumping analysis compared export prices to both actual home market prices and constructed home market values, depending on the respondent.

13/ U.S. law sets out a single standard for dumping -- a "less than normal value" standard based mainly on price discrimination. COP comes into play because below-COP sales may, in appropriate circumstances, be disregarded for purposes of calculating the "foreign market value" used in price comparisons. *See* 19 U.S.C. § 1677b(b). If the remaining home market sales are deemed inadequate as an indicator of foreign market value, third-country export prices or "constructed value" may be used for the comparisons. *Id.* Thus, there are three different possible types of dumping analysis, only the third -- constructed value -- is directly a below fully allocated cost methodology.

For simplicity's sake, the following analysis treats exclusion of below cost home-market sales or use of constructed value as the equivalent of imposing a below cost standard on foreign sales. In fact, exclusion of below cost sales results in a hybrid standard.

14/ Even this assertion, however, must be caveated. Setting aside predatory pricing within the meaning of the federal antitrust laws, discussed further below, state laws have some potential application and might find such action unfair. *See American Drugs, Inc. v. Wal-Mart Stores, Inc.*, No. E-92-1158 (Chancery Court, Faulkner County, Arkansas, First Division 1993) (Reynolds, J.), (retailer liable under Arkansas law for selling items in "pharmaceutical and health and beauty aids" product lines below acquisition cost), *reversed*, 319 Ark. 214, 891 S.W. 2d 30 (Ark. 1995) (lower court erred in inferring intent to destroy competition). *See also* "Wal-Mart Admits Selling Below Cost, But Denies Predatory Pricing Charge," *The Wall Street Journal* (Aug. 24, 1993) ("Wal-Mart has lost at least one other case of predatory pricing, in an Oklahoma state court in 1986.").

for scores of years, export sales at below fully allocated costs have been considered unfair by trade negotiators and the international community.

In fact, there are a series of reasons for applying, as the GATT allows, different rules to foreign suppliers. To take the U.S.-centered example set out above:

- It can be safely assumed that the New York-based firm is not balancing below-COP prices in California with supra-competitive prices, made possible by trade barriers, in its home market of New York.[15/] Nor should it be assumed that such barriers will result in readily observable price-to-price dumping.

  Moreover, such barriers might affect a separate, but related, product, leading to the cross-subsidization of the product under investigation. Such cross-subsidization could effectively permit an exporter to sell below fully allocated cost both domestically and internationally in a manner which competitors in the importing country cannot match without suffering devastating losses.

- In the New York-California scenario, a federal authority can intervene if anticompetitive home market restrictions are found to exist. Internationally, that is not the case.

- In the New York-California scenario, one can be reasonably confident that a supplier who disrupts the market by selling below fully allocated COP will eventually exhaust its resources and go out of business. In the international setting, given the demonstrated willingness of many foreign governments to prop up national producers after the fact (when an action against subsidies may come too late for competing domestic producers), there is no basis for such confidence.[16/]

- In the New York-California scenario, U.S. persons or firms will not encounter serious structural obstacles -- such as discovery problems, blocking statutes, and inability to enforce judgments or court orders -- should they conclude that anticompetitive conduct underlies the price disparity and seek to enforce whatever rights they may have under the antitrust laws.

15/ This may not hold true in Canada, where provincial borders are more meaningful economically than are state borders in the United States.

16/ In the steel industry, certainly, during the 1980s many producers were able to dump massively and persistently in foreign markets, secure in the knowledge that their national governments would keep them afloat. *See generally* Thomas Howell, William Noellert, Jesse Kreier and Alan Wolff, *Steel and the State: Government Intervention and Steel's Structural Crisis* (Westview Press 1988).

- In the New York/California context, competitors face relatively similar market circumstances -- capital costs, securities laws, investment regulations, etc. Internationally, this is not true. A dumper's home market may be affected by government action which (at least compared to the U.S. market) reduces the necessity of obtaining a significant return on investment -- as a result of lower costs of capital, inter-locking directorates, a non-fluid equity market, or other government-created structural differences. As a result, absent AD, an otherwise competitive U.S. firm might be driven out of business by the dumping of a foreign competitor which would not be commercially feasible for an equally competitive domestic producer. Similar problems may exist for other importing countries. Indeed, this "clash of economies" is a common justification for trade action.[17/]

- Finally, as discussed further below, other, non-economic interests might justify a different response in the international context. For example, in those limited instances where national strategic concerns are implicated, the New York-California analogy is inapposite.

In any case, since a producer cannot sell in all markets at below COP over time and remain in business, below-COP export sales are likely either (1) to be balanced by above-COP sales (either in the same or a related product market, possible only with the aid of trade barriers) at home, (2) to constitute predatory pricing, or (3) to be short-term phenomena which should not elicit successful trade complaints.[18/]

17/ Professor Jackson refers to this as the "interface question." John Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 218 (1989) ("some 'interface mechanism' may be necessary to allow different economic systems to trade together harmoniously"). A simple analogy might be the difficulty that U.S. amateur athletes formerly faced in competing in the Olympics against "amateurs" from the Soviet Union and East Bloc nations -- different systems created different competitive circumstances.

18/ There is a difficult question as to the length of time over which such sales should have to continue to be considered unfair. Certainly, below-COP sales throughout a business cycle would qualify, but AD laws generally use shorter periods. There are several possible reasons for this. First, shorter-lived below-COP sales that are coincident with a recession can raise serious questions of international distribution of the consequences of recession. A useful discussion of this issue appears in Jorge Miranda, "Should Anti-dumping Laws Be Dumped?" *supra* n. 7, at 5-6 (problem of "exporting recessions"). Second, dumping which only occurs during a relatively small portion of a cycle is unlikely, at least in the United States (which applies antidumping duties

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This is not to say that every anti-dumping case necessarily fits one of the listed rationales for differential treatment of imports. Rather, there are a series of reasons that justify action against foreign pricing behavior that would not necessarily trigger a remedy domestically (or both might be actionable).[19/] Moreover, these rationales are likely to be

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18/(...continued)
retroactively rather than prospectively), to lead to actual duties as margins would be eliminated in annual reviews if the dumping were not continuing over an extended period.

19/ Empirical analysis in this is very thin and often based on grossly inaccurate and narrow assumptions. For example, one analyst claims, based upon a flawed theoretical analysis, that closed markets and legitimate competition concerns are rarely involved in antidumping cases. Patrick A. Messerlin, "Competition Policy and Antidumping Reform," at "The World Trading System: Challenges Ahead," Institute for International Economics (June 24-25, 1996). Messerlin concludes that for closed foreign markets to account for dumping, what he terms "strategic dumping," domestic firms must be at a disadvantage in terms of economies of scale or size of markets. *Id.* at 3. This is a non-sequitur. While domestic economies of scale limit the damage that can be done as a result of dumping, the closed foreign markets (and "strategic dumping") still reduce the size and profitability of the domestic firms compared to what they would be absent the closed foreign markets -- i.e. impair comparative advantage. (Messerlin also ignores the issue of cumulation.)

Equally troubling, Messerlin uses questionable theoretical constructs to conclude that anticompetitive activities rarely contribute to dumping. *See, e.g., id.* at 21. Yet, detailed industry-specific information often shows extensive collusive behavior on the part of dumpers. *See, e.g.*, Alan Wm. Wolff, "The Problems of Market Access in the Global Economy: Trade and Competition Policy," in *New Dimensions of Market Access in a Globalising World Economy*, OECD, 195 (1995) (steel cartel). *See also* Epstein, "The Illusory Conflict Between Antidumping and Antitrust," XVIII The Antitrust Bulletin 1, 15-16 (1973) (discussing examples of anticompetitive behavior in steel, power transformers and color televisions). *Cf.* Miranda, "Should Anti-dumping Laws Be Dumped?" *supra* n. 7, at 19.

> {S}ince the inception of the European Community, the European Commission has conducted 44 cartel investigations; most of these cartels affected goods typically involved in anti-dumping investigations, such as chemicals, steel and cement.

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particularly powerful in markets with high barriers to entry -- precisely the type of highly capital-intensive, high-throughput industries in which dumping is likely to occur and antidumping margins are likely to be highest. In any case, a full discussion of the existence of closed markets and foreign anticompetitive activities is beyond the scope of this paper. For the purpose of this paper only two elements are crucial -- such practices can often contribute to dumping and there is no reason, absent fully open markets and effective competition laws, to assume that such practices will not exist in the NAFTA.

Setting aside these justifications for differential treatment of foreign dumping, in the United States, the main substantive difference between pricing rules for foreign and domestic producers is that foreign suppliers can be subject to a remedy even if the complaining U.S. party does not show "predation."[20/] The theory being, in part, that predation cannot be demonstrated in many cases in which harmful business practices, justifying a remedy, may nevertheless be occurring. For this reason the Antidumping Act of 1916, which made preda-

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In at least one instance where Messerlin does rely on case-specific information to seek to show the anticompetitive nature of AD, it is inaccurate. *See* Messerlin, "Competition Policy" at 4 (stating that only Micron supported the 64K DRAM antidumping case and that it was opposed by Texas Instrument). *Compare 64K Dynamic Random Access Memory Components from Japan*, ITC Publ. 1862 (June 1986) (imposition of duties supported by Motorola, Texas Instrument, Intel and Micron). Contrariwise, Messerlin argues that any case in which petitioners represent too great a share of the domestic market (ignoring the conditions of competition in that market) suggests anticompetitive results. *See* Messerlin, "Competition Policy" at 14.

20/ Similarly, the pricing standard applied to predation may vary. While a complete analysis of the different pricing standards applied by U.S. courts is beyond the purview of this paper, the authors refer readers to Jorge Miranda, "Should Anti-dumping Laws Be Dumped?" *supra* n. 7, at 16-17 (tests run the gamut from a presumption in the case of prices below variable cost to the possibility of predation below total cost).

Interestingly, Miranda points out that the European practice appears to favor a total cost pricing standard. *Id.* at 14-16.

tion a condition of relief, quickly gave way to the Antidumping Act of 1921 (now known as Section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673).[21/] Other differences are mostly procedural (albeit quite important in the eyes of some respondents); they include, for example, the way evidence is collected and inferences are drawn.

Is Dumping Generally Properly Calculated?

The second question -- whether the dumping margin has been fairly calculated -- has perhaps been the main focus of the criticism of the U.S. antidumping regime but is, from a theoretical point of view, largely irrelevant. After all, if AD is a legitimate response to unfair foreign practices, the precise level of antidumping duties matters little in a debate about whether antidumping should be replaced by antitrust. Thus, this paper will not attempt a thorough defense of calculation methodology (nor would its authors suggest that the methodology is beyond improvement).

21/ There is no way of knowing how many AD cases might have satisfied a predation standard, or in which predation occurred but could not have been proven. Contrary to the claims of many reformers, however, there have certainly been AD cases in which predation might have been shown had it been necessary to do so. In one perhaps extreme example, Hitachi, a Japanese producer of EPROMs (memory devices subject to investigation under the U.S. antidumping law), sent a notice to its distributors announcing a "10% Rule":

> Quote 10% Below Competition
> If They Requote
> Bid 10% Under Again
> The Bidding Stops When Hitachi Wins . . .
> Find AMD and Intel Sockets
> Quote 10% Below Their Price
> If They Requote
> Go 10% *Again*
> Don't Quit Till You *Win*
> 25% DIST Profit Guaranteed

Quoted in Semiconductor Industry Association, *Japanese Market Barriers in Microelectronics* 7-8 (June 14, 1985) (copy of original notice on file with authors).

Nonetheless, some perspective on calculation issues is helpful. Complaints have focused on, *inter alia*, exchange rate shifts, use of mandatory profit (8%) and overhead (10%) costs in constructed value cases, and averaging. These issues have been addressed exhaustively elsewhere and require only a few comments here.[22/] First, while some adjustments (or non-adjustments) may have a tendency to overstate the extent of dumping, others have a tendency to understate it. Exchange rate shifts, for example, are as likely to result in understating dumping as they are to lead to overstating it.[23/] Second, the impact of many of these adjustments on the final results in antidumping cases is commonly overstated. For example, in the recent flat-rolled steel cases, the dumping was so extensive that even a change in all of these factors would not have eliminated significant margins. Third, infirmities (particularly a lack of transparency and due process) in other countries' antidumping regimes loom far larger in terms of the potential damage to fair trade.[24/]

At the same time, if the problems in other nations' trade remedy regimes are also addressed, there is no reason why the United States should not support reform on some of these

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22/ Giving continuing interest in the topic at the conference proceedings, several calculation issues are addressed briefly in an Annex to this paper.

23/ Of course, this effect is difficult to measure, as cases do not tend to be brought at times when exchange rate fluctuations would be likely to reduce or wipe out margins.

24/ EU antidumping procedures have been notorious for their lack of transparency and opportunities for effective participation by interested foreign parties. Mexican procedures have been similarly criticized; under Mexico's pre-Uruguay Round law, it was possible to impose duties on the date of initiation and without prior notice to alleged dumpers. The problems faced by exporters to these markets may be ameliorated by adherence to the new Antidumping Code's provisions on transparency and due process, and in the case of Mexico, by compliance with the Code and the numerous obligations in NAFTA Chapter 19.

The United States, by comparison, provide extensive procedural protections and transparency.

calculation issues and remove the "whipping boy" often used to attack the entire ability of the United States to respond to unfair trade. Some such technical reforms were, in fact, agreed to in the Uruguay Round. While the significance of those reforms is disputed,[25/] and will depend in part on Members' effective use of WTO dispute settlement, there is no doubt that they remove some of the legitimate interest in reform and should be fully plumbed before undertaking additional efforts.

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In sum, while AD regimes may have some infirmities, they also serve an important function in permitting indirect action against foreign market barriers that result in dumping and direct action against practices that can be in themselves anticompetitive. These issues must be kept in mind when considering replacement of AD with antitrust, even in the context of a free trade agreement.

C. Policy Goals: Efficiency and Fairness, Competition and Competitors

Finally, before turning to the specific conditions for replacing AD with antitrust, it is crucial to consider what goals we hope to serve. Trade policy and competition policy address somewhat distinct problems and pursue somewhat distinct objectives.[26/] In considering the prospects for "replacement," it will not do to simply define one set of objectives as legitimate and the other as wrongheaded, and then to craft a reform program accordingly. Yet, the initial goals set out, and the priority assigned to them, largely determine where one comes out

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25/ *See* Clark, *supra* n. 8, at 5-6.

26/ *See* Vautier, *supra* n. 11, at 91 ("The fact that anti-dumping and competition rules are designed to target different problems is something that, to date, has been neither universally recognized nor universally accepted.").

in the reform debate. Short-term efficiency cuts one way, fairness and strategic national trade interests often another.

Several broad goals that might be useful guides in the reform debate are set out below. These goals animate -- and, with varying degrees of success, are now being achieved by -- national AD regimes. All are legitimate concerns of national governments and will have to be at least considered in any reform effort.

1. Wealth Maximization

Wealth maximization is a very important goal of both trade policy and competition policy.[27/] Yet, contrary to much of the recent trade policy literature -- particularly that generated by economists and other AD reformers -- it is not the only legitimate goal of trade policy, in the United States or elsewhere. To be sure, for antitrust, wealth maximization has come to be recognized as the only legitimate goal -- but only in the United States (and not even universally there) and only in relatively recent times.[28/] National policies, much less trade policies, have never been purely efficiency-based. The debate over AD is atypical in that people actually discuss seriously the idea that wealth maximization should be the only value recognized.[29/] Certainly, in the United States, it is fair to say that Congress -- with

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27/ While wealth maximization may be a poor substitute for utility maximization (the true goal of economic efficiency), this paper will utilize the limited concept of wealth maximization in order to parallel the analysis of AD critics. The distinction should not, however, be forgotten.

28/ *See* pp. 20-23, *infra.*

29/ The recent debate in the United States over tax reform provides a useful example. The U.S. tax system creates innumerable distortions and is hardly a model of efficiency and wealth maximization. At the same time, the distortions alter the market -- in favor of home ownership, for example -- in ways that comfortable majorities of U.S. citizens approve. Most people would not take seriously the suggestion that overall wealth

(continued...)

crucial constitutional prerogatives over trade policy -- is not motivated exclusively (or even primarily) by short-term efficiency. In fact, Congress is far more likely to be motivated by some of the other goals discussed below.

In any case, one can certainly question the standard critique of AD -- that it is inconsistent with wealth maximization in the country that applies AD measures:[30/]

- **Combatting predation.** AD can respond to truly predatory conduct by foreign producers which, unchecked, is likely to lead to long-term impediments to wealth maximization. No one argues that combatting predation is a bad thing; the argument is over how often predation really happens.

- **Opening closed markets (game theory).** Long-term, antidumping actions can assist (and have assisted) in discouraging market barriers which are, themselves, impediments to wealth maximization. It is closed markets, after all, that often permit price discrimination. In other words, the issue may not be whether to have free trade, but how to achieve it. While some might object that a "game theory" rationale does not apply

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29/(...continued)
maximization -- without regard to other considerations -- should be the *only* value recognized in tax policy formulation.

Indeed, it is hard to conceive of any other area of the law in which wealth maximization alone, uninformed by other social and legal concerns, would be viewed as controlling. In this vein, Robert Lucas, winner of the 1995 Nobel Prize for economics, has urged

> humility on colleagues in their forays into economic policy. "As an advice-giving profession, *we are in way over our heads*," he has said.

"Chicago Economist Awarded Nobel Prize," *The Washington Post* (Oct. 11, 1995) (emphasis added).

30/ The perspective of world wealth maximization is different still.

> From the viewpoint of *world* welfare, however, there is a case for an antidumping duty that equals the difference between the import price and the overseas price, simply because such price discrimination is itself generally inefficient economically.

Richard E. Caves & Ronald W. Jones, *World Trade and Payments: An Introduction* 251 (4th ed. 1985).

within a free trade area that has no barriers, the NAFTA creates a free trade area with many remaining barriers.[31/]

- **Market barriers to entry.** It has been suggested that in some circumstances when free entry is restricted, antidumping can be efficiency-enhancing by eliminating the value of reciprocal dumping which results in "pure waste in the form of unnecessary transport costs."[32/]

But even if the majority of academic economists were correct, and an inconsistency between AD regimes and importing-country or global wealth maximization could be conclusively established,[33/] it would not be fatal to AD because AD has other valid purposes. While it is certainly important to evaluate the impact of AD on wealth maximization, efficiency-based critiques -- even when accurately presented -- are not dispositive.

2. Fair Trade/Economic Justice

A second goal is ensuring that domestic producers and workers can compete on a level playing field with foreign competitors who may be getting a boost from their own governments. This point is easiest to appreciate in the context of subsidies and CVD, but it applies equally to AD (given that dumping can occur where there are government-imposed home market trade barriers, government-tolerated anticompetitive activities or government-induced structural differences permitting foreign producers to "lose more" or "earn less" over time).

31/ In the analogous area of subsidies and countervailing duties, Professor Jackson and others have noted that the U.S. CVD regime has actually discouraged subsidies (thereby increasing world wealth) over the long term. *See, e.g.*, John Jackson, "Perspectives on Countervailing Duties," 21 L. & Pol'y Int'l Bus. 739, 755 (1990).

32/ *See* Brander & Krugman, "A 'Reciprocal Dumping' Model of International Trade," 15 Journal of Int'l Econ. 313-14 (1983).

33/ For an interesting and balanced discussion of the underlying issues, the authors recommend Jorge Miranda, "Should Anti-dumping Laws Be Dumped?" *supra* n.7 (concluding, among other things, that economic analysis has not yet been developed to answer the question of whether dumping or AD are efficiency maximizing for either the world as a whole or the importing country).

There are certain things, including foreign government policies, that, as a matter of equity, domestic firms and workers simply should not have to compete against. Governments have a legitimate interest in ensuring that their citizens are not injured by foreign government mercantilist practices.[34/] Importers would seem to lack a similar interest in being able to obtain imports at dumped prices which result from market barriers -- as opposed to receiving imports at a price that would exist absent the foreign government interference (and antidumping duties) in the first place.[35/]

This is an AD goal with no real antitrust analogue, dealing with the introduction of government influence in the international marketplace over which domestic producers have no democratic controls. Trade law, like most areas of the law, has normative content with a value independent of its contribution to wealth or efficiency.

3. Opportunity to Compete

The goal of ensuring that firms or individuals, particularly smaller companies and new market entrants, stand a real chance of competing successfully also animates AD regimes, but

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34/ In one sense, this is a libertarian concept: empowering individuals to bring trade cases against foreign government action which those individuals cannot influence by voting. Compared to wealth maximization -- a collective concept -- economic justice is based on concepts of individual rights. *Cf.* Ragosta, "Natural Resource Subsidies and the Free Trade Agreement: Economic Justice and the Need for Subsidy Discipline," 24 G. Wash. J. Int'l L. 255, 262-66 (1991).

35/ *Compare* Miranda, "Should Anti-Dumping Laws be Dumped?" *supra* n. 7, at 4 (footnote omitted):

> {T}his worship of low prices in-and-of themselves is unsound. If low prices were good *per se*, economists would have long advocated the use of measures such as price controls and export restrictions that have the effect of keeping prices down. From an economist's perspective, prices, whatever their level, are appropriate only if they result from a market outcome.

its roots are in antitrust. While antitrust in the United States today focuses narrowly on protecting consumers from lack of competition and the resulting exposure to high prices,[36] it was not always so focused. At the turn of the century, protecting competitors from the "trusts" -- and from "ruinous competition" with each other -- was also viewed as an important goal. A U.S. industrialist could hardly have defended a trust successfully in 1905 by simply arguing that it was "efficient." Collusive behavior that drove out of business competitors that would otherwise have continued to operate, even if detrimental effects on consumers could not be shown, was considered actionable.[37] The law did not require of courts complete obeisance to the almighty dollar, to wealth maximization or to efficiency.

Even as late as

> the 1960s and early 1970s, antitrust was associated with civil rights and the underdog. Apart from cartel enforcement, which has always been considerable, the main thrust of the antitrust law was preservation of freedom, autonomy, economic opportunity of small business and diversity in the marketplace. . . . The mid to late 1970s brought economic changes. . . . {T}he country no longer had the luxury to support morality and opportunity for the little business person at the expense of efficiency. . . . In the 1980s, under the influence of the Chicago School, U.S. antitrust took a major turn. . . . Antitrust informed by any value other than efficiency, such as fairness or a political preference for diversity, was viewed as perverse.[38]

36/ *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

37/ *See, e.g., United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897). A more recent echo can be found in *Brown Shoe Co. v. United States*, 370 U.S. 294, 333-4 (1961). *See also* Robert H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged," 34 Hastings L.J. 65, 67 (1982) (original concern of antitrust laws was with distributive issues -- the transfer of wealth from consumers to large firms exercising monopoly power).

38/ Eleanor Fox, "Antitrust, Trade and the Twenty-First Century -- Rounding the Circle," Association of the Bar of the City of New York, 48 The Record 535, 540-542 (June 1993). To put the concept in historic (and artistic) perspective, even the statues outside the Federal Trade Commission -- rearing horses being brought to bay -- represent regulators restraining unbridled competition.

This is not to say, of course, that increased economic rigor in antitrust was not needed. Rather, other legitimate interests exist and, in recent U.S. jurisprudence, the antitrust pendulum has swung too far to one side. Moreover, such other concerns are particularly serious in markets which have high barriers to entry, exactly the type of capital-intensive markets in which antidumping is often a feature.

Other nations' competition laws have not followed the U.S. path and have maintained some focus on opportunity and fairness; European officials and those in New Zealand and Australia have broad antitrust concepts dealing with injury to competitors, making AD elimination easier in those contexts.[39/] Even in the United States, debate over a normative, non-efficiency-based component of antitrust analysis continues.[40/] Whatever one may think of the U.S. Supreme Court's current resting point in this area, it seems clear that by compari-

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39/ On EU law, *see, e.g., id.* at 547-549 (footnote omitted):

> The European law protects market actors -- competitors and consumers -- exploitation and unjust foreclosure. . . . {T}hey worry whether a merger has exclusionary effects on small competitors, and proof of output reduction is not their guiding star.

On Eastern Europe, *see id.* at 535-536 (footnote omitted):

> The antimonopoly laws of Eastern Europe are not laws narrowly focused on squeezing efficiency from resources. They are not essentially efficiency laws, except to the extent that competition tends to produce efficiency. More properly they could be called 'legitimacy' laws. They legitimate freedom of enterprise and the right to pursue profits by providing for fair and open competition with a lid on exploitation, coercion and undue foreclosure of entrepreneurs and small business competitors.

40/ *See* Lee Goldman, "The Politically Correct Corporation and the Antitrust Laws: The Proper Treatment of Noneconomic or Social Welfare Justifications Under Section 1 of the Sherman Act," 13 Yale Law & Policy Review 137 (1995).

son the trade remedy laws are, at best, ambivalent toward consumers.[41/] Protecting competitors is a legitimate goal in the trade policy arena.

This concept of making sure that multiple market entrants have a chance to compete and succeed is not unknown in other nation's trade and commercial policies. It was apparent, for example, in Investment Canada's recent decision to deny the bid of Borders, Inc. to launch large-scale book retailing operations in Canada which might have posed a competitive threat to smaller Canadian retailers.[42/] In fact, this concept arguably animates much of Canadian culture policy, and can also be detected behind Canada's recent actions in the dispute with Spain over fishing trawlers. Its U.S. lineage goes back at least as far as Jefferson, with his model of an atomized and agrarian economy.

Of course, to say that protecting competitors has a legitimate value is not to suggest that it should in all (or even most) cases outweigh the goal of wealth maximization. Rather, it is a legitimate part of AD and of antitrust which has been essentially lost in much recent U.S. antitrust jurisprudence. One should not assume that policy makers, in merging the two, will (or should) automatically choose to subvert this goal rather than including some concept of injury to competitors in a merged AD/antitrust regime.[43/]

41/ For example, while consumer testimony is becoming increasingly a fixture in injury inquiries by the International Trade Commission, consumer interests *per se* are legally irrelevant. The question is whether unfairly traded imports injure U.S. manufacturers of like products.

42/ *See, e.g.*, "Culture Clash Looms Over Borders," *The Globe and Mail* (Feb. 10, 1996).

43/ *See* pp. 38-41, *infra*.

4. Safety Valve

A fourth goal, even in the absence of any trade or structural barriers, is to have an orderly (and at least somewhat predictable) mechanism for handling the inevitable disputes that occur when differently-organized economies interface through trade in goods. Targeted trade action has long been recognized as a means of adjustment[44/] and a necessary price paid to sustain the overall consensus in favor of an open trading system. Indeed, it is becoming evident that the necessity of having an effective AD remedy increases as a country liberalizes -- both as a matter of political necessity and because the prospect of injurious dumping becomes real.[45/]

44/ In the United States, Trade Adjustment Assistance ("TAA") has been the primary formal response to the concern that even if eliminating trade barriers makes the country as a whole better off economically, it creates losers as well as winners domestically. Holding aside TAA's effectiveness over time in performing its appointed redistributive function (and very real budgetary constraints), it does not address the separate concern of those who would prefer to continue working in the affected industries -- and would be able to do so absent foreign market barriers and subsidies. Moreover, even if adequate trade adjustment assistance were available, the non-economic impact of adjustment costs should not be overlooked.

> The real world effects of unfair trade practices affect not hypothetical households, but real firms and real workers, with particular skill levels, who work in particular geographic regions of the country. The opportunities for those firms and workers to engage in other productive pursuits in the absence of trade remedies are a function of the state of the economy in their region, their mobility, and the transferability of their skills. Put another way, the social costs of unfair trade are more severe when jobs are tight due to recessions or when a company put out of business by the unfair trade is the principal employer in town.

Views of Vice Chairman Janet Nuzum and Commissioner David Rohr, *The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements*, USITC Pub. 2900 at VIII (June 1995).

45/ *See, e.g.*, "Brazil Dumping Probes Grow," *American Metal Market* (Oct. 15, 1992):

(continued...)

This is not to say that AD is "pure protection" or can be justified only as such. Rather, AD depoliticizes disputes which, after all, in the NAFTA context affect only less than 5% of internal trade. AD proceedings, with due process for interested parties and relatively clear rules for what will and will not lead to imposition of protective measures, are certainly preferable to a purely political model in which industries injured by imports simply lobby their national legislatures for border measures that will stem the tide.[46/]

45/(...continued)

> Until 1990, Brazilian industry virtually never had to worry about foreigners dumping goods . . . because import duties were too high. That's why there had been only one dumping complaint filed here in the past decade. But one of former President Fernando Collor de Mello's first acts after taking office in March 1990 was to reverse four decades of protectionist trade policy by abolishing or phasing out tariff and non-tariff barriers. . . . Now, little more than two years after Collar decreed his trade policy, Brazilian companies have filed 15 trade complaints, mostly dumping charges, against imported products that now enjoy the lower- or no-tariff benefits of a freer market. "It's only natural that when you open up the country to trade the way Collar did in 1990, local industries become vulnerable and, through trade complaints, ask the government to neutralize the injuries imported goods are causing," said Liane Naiden, acting head of the dumping and subsidy investigation division of the Conselho Tecnico de Tarifas (CTT).

46/ This is arguably what occurred in the Canada-U.S. dispute over wheat trade which led to the imposition of quotas. It has been suggested that the wheat dispute could have been handled under the U.S. CVD law, and would have been but for the perception -- certainly legitimate in light of the *Softwood Lumber* decision -- that the CVD law's effectiveness was impaired by the existence of NAFTA Chapter 19.

Ironically, the very openness and procedural fairness of U.S. trade remedy proceedings may account for some of the opposition they engender. Perhaps a less transparent mechanism, or the "brute force" approach of seeking specifically-legislated protection, might occasion less of an outcry. We are reminded of a passage in Thucydides' account of the Peloponnesian War, setting out the Athenian response to complaints that were raised as a pretext, according to the Athenians, for starting the Peloponnesian War:

(continued...)

One question raised in this regard is whether AD effectively aims trade relief where relief is most useful politically (in sustaining the consensus in favor of generally open trade). This is a legitimate question, but we are aware of no evidence that AD is consistently overinclusive or wide of the mark. Certainly it is as accurate as the safeguard remedy.[47/]

Again, the safety valve goal is only one goal -- not necessarily as important as others, but not to be forgotten in any well-designed reform package.

5. Strategic Sectoral Interests

46/(...continued)

> {E}ven our equity has very unreasonably subjected us to condemnation instead of approval. Our abatement of our rights in the contract trials with our allies, and our causing them to be decided by impartial laws at Athens, have gained us the character of being litigious. And none care to inquire why this reproach is not brought against other imperial powers, who treat their subjects with less moderation than we do; the secret being that where force can be used, law is not needed. . . . Men's indignation, it seems, is more excited by legal wrong than by violent wrong. . . .

Thucydides, *The History of the Peloponnesian War* 50-51 (tr. Richard Crawley) (Ed. Ernest Rhys) (reprinted 1936).

47/ Although AD may at times serve (and is sometimes defended by analysts) as a safety valve, it is important that AD measures not be confused with safeguards. AD reaches only conduct that is known and widely recognized to be "unfair": injurious dumping. Safeguards by definition apply to fairly traded goods (which nevertheless cause major disruption). Moreover, safeguard mechanisms are overly broad and more intrusive than AD. Thus, there is no basis for subjecting AD measures to the limitations applied to safeguard measures, nor for suggesting safeguards as a replacement for AD (not to mention the trade adjustment costs that might follow from such an approach). *See* Miranda, "Should Anti-dumping Laws Be Dumped?" *supra* n. 7, at 7-9, provides an excellent discussion of why safeguards are a poor substitute for AD. Among other things, safeguards cannot focus on the country (or countries) causing the problem. Nor is it accurate to simply conclude, *see* Messerlin, "Competition Policy," *supra* n. 19, at 16, that safeguards permit the improvement of the efficiency of the domestic industry whereas AD discourages it. Certainly the cases of steel and semiconductors would tend to disprove the point. Given new sunset requirements, the bare assertion is even more suspect.

AD cases can occur in sectors which are viewed, from a national perspective, as strategic -- either for defense reasons or because of the enormous cross-sectoral leverage that market power in a particular related sector can create. In the semiconductor cases, for example, there were allegations that, having driven U.S. producers from key markets, Japanese producers utilized market power to deny state-of-the-art chips to some downstream U.S. firms.[48/] Similarly, integration between Japanese consumers electronic firms and semiconductor producers (after the U.S. consumer electronic industry had been driven out of business) permitted extended periods of dumping. This is another legitimate concern of trade policy which, by and large, is irrelevant to antitrust.[49/]

48/ *See, e.g.*, Thomas Howell, Brent Bartlett and Warren Davis, *Creating Advantage: Semiconductors and Government Industrial Policy in the 1990s* 34-35 (1992), *citing*, Charles Ferguson, *DRAMs, Component Suppliers, and the World Electronic Industry: An International Strategic Analysis* (Aug. 1989).

49/ *See* discussion of "strategic dumping to gain market share" in Schoenbaum "The International Trade Laws and the New Protectionism: The Need for a Synthesis With Antitrust," 19 N. Car. J. Int'l L. & Commercial Regulation 393, 401 n.30 (1994), *citing*, Steven Benz, "Low Cost Sales nd the Buying of Market Share," 42 Stan. L. Rev. 695 (1990). *See also* Thomas Howell, William Noellert, Janet MacLaughlin and Alan Wolff, *The Microelectronics Race: The Impact of Government Policy on International Competition* 103 (Westview Press 1988) (discussing persistent dumping by a group of Japanese companies in related electronics industries).

Caution is appropriate in this area as "strategic" concerns have often been used to attempt to justify foreign market barriers and subsidies -- for example, in the steel sector. Yet, there can be little doubt that there are some sectors in which the United States (and, for that matter, Canada and Mexico) have a legitimate interest in maintaining an effective national presence. While that interest may not, alone, justify restrictions, it can and should be weighed in the balance.

III. Replacing the Antidumping Remedy With Antitrust in NAFTA

With these thoughts in mind, the prospects for replacing AD with antitrust in the NAFTA can be more appropriately considered. Our discussion focuses, as noted above, on full replacement and not on piecemeal reform, which would be unsound:

- As a legal matter, it is not clear how much flexibility members of a regional grouping have under GATT rules to engage in tinkering with (as opposed to wholesale replacement of) trade remedy laws.[50/]

- As a political matter, some observers have noted that NAFTA tinkering limited to trade remedies is unrealistic and that a broad package with other substantial Canadian and Mexican concessions on the table would be necessary to win U.S. (and potentially Mexican) assent to AD reform. Some of the items mentioned in this connection are among those that would be the most difficult for Canada and Mexico to put on the table -- e.g., the NAFTA's "cultural industries" exception at Annex 2106.

  An additional political problem is that some of the reforms suggested -- e.g., exempting NAFTA partners from cumulation -- would, because of the relative size of the economies, impair access to AD remedies much more severely in Canada and Mexico than in the United States.

- As a matter of policy, no matter how desirable an AD-free NAFTA might look from the perspective of 1996, it is not clear that the NAFTA parties would be at all happy with partial reforms.[51/]

At least four categories of issues need to be addressed in order to consider seriously the replacement of the antidumping remedy with an antitrust remedy to be used in cases of

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50/ Canada recently raised the issue of GATT Art. XXIV's limits in its challenge to certain aspects of the EU/EFTA relationship. The GATT and GATS "regional integration" rules are now being comprehensively reviewed by a WTO working party. *See* "WTO Establishes Permanent Committee on Regional Agreements," *Inside U.S. Trade* 18 (Feb. 16, 1996). Some questions are already being raised about the legitimacy of the NAFTA. *See* "Countries Question Whether NAFTA Conforms with Global Regulation," *The Journal of Commerce* 3A (July 31, 1996).

51/ This is an application of the "theory of the second-best." One can liken the NAFTA parties to three shipwrecked survivors on an island with nothing but Brussels sprouts to eat who can see a much nicer island, with fruit-bearing trees, one mile away across some treacherous waters. No matter how much nicer life would be on the other island, being half-way there would be much worse than staying put.

injurious cross-border pricing. Discussed in turn below, these issues have not been adequately considered by most would-be AD reformers: (1) real economic integration; (2) effective anti-trust enforcement; (3) appropriate injury standard; and (4) coordinated third-country trade policies. This list reflects to some extent the experiences of New Zealand/Australia and the EU. In both instances, the parties to the relevant agreements found, as suggested here, that truly open markets and effective antitrust enforcement (either supra-national in the case of the EU or extra-territorial in the case of NZ/Australia) were initial requirements for AD replacement.[52/] Further, both jurisdictions recognize addressing injury to competitors as a legitimate competition policy goal.

A. Open and Integrated Economies

There seems to be a consensus among serious analysts that as both a practical and a theoretical matter, AD should only be removed on trade between countries with fully open, integrated and contestable markets (e.g. no price controls) permitting true competition.[53/] By

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52/ In fact, in the EU context, internal use of antidumping was largely non-existent (and unnecessary) when integration occurred as a result of a broad group of other restrictions. By analogy, with respect to subsidies, NZ/Australia kept countervailing duty remedies in place, and the EU applies supra-national controls.

53/ *See, e.g.*, Douglas Rosenthal, "The Legal Perspective: Anti-Dumping Remedies and Competition Regimes, Similarities and Differences," 17 Canada - U.S. L.J. 167 (1991). Even the most vehement advocates of AD elimination in the NAFTA rely on the supposed openness of the North American market as a justification. *E.g.*, "NAFTA and Dumping," *The Journal of Commerce* (Editorial, Feb. 21, 1996):

> The original rationale for the antidumping laws was to guard against companies that use a protected home market as a launching pad for cut-rate, predatory pricing. But in a free trade zone there are no protected home markets.

Accord, Ivan Feltham, Stuart Salem, Robert Mathieson & Ronald Wonnacott, "Competition (Antitrust) and Antidumping Laws in the Context of the CFTA," 17 Canada - (continued...)

definition, such conditions should eliminate the ability to engage in price discrimination (injurious or otherwise). Yet, even with enormous progress in market opening, the "free trade area" in North America is riddled with barriers that might limit the ability to replace anti-dumping.[54/]

As U.S. experience over the last two centuries -- and Europe's experience since World War II -- demonstrate, establishing truly open and competitive markets on a continental scale depends on several factors. Unfortunately, these factors are difficult to quantify and to prioritize, and their relative importance varies from sector to sector. At the macro level, one important element is exchange rates. Whenever two jurisdictions do not share a single currency, the terms of trade faced by businesses can be influenced by the unilateral actions of one government. While a single currency may not be essential to AD reform, floating exchange rates are surely necessary. Floating rates exist between the United States and Canada; where Mexico is concerned, rates are allowed to float within a stabilization band.

53/(...continued)

U.S. L.J. 71 (1991). *See also* Guy de Jonquieres, "Call for Worldwide Rules on Competition," *Financial Times* (June 18, 1996):

> The EU paper [calling for WTO rules on competition policy] says closer global co-operation on competition should not supersede trade defenses, such as antidumping laws, which should remain in effect until national economies are much more fully integrated.

Other advocates for replacement suggest naively that the solution -- fully opening markets -- is easy. One, having spent pages detailing AD's alleged infirmities, simply declared that "{t}he best solution would be to open the foreign producers' home market to eliminate the monopoly profits and the economic segregation of the two markets." *See* Schoenbaum, *supra* n.49, at 401 n.30. This is an example of the simplistic analysis that is used to condemn the AD laws without a sense of the real world problems faced by market competitors.

54/ *See* pp. 3-5, *supra*.

A second element is freedom from investment restrictions, where there remain potential cross-sectoral barriers (e.g., investment screening in Canada) as well as major sectoral carve-outs from CFTA/NAFTA investment liberalization.[55/] The other side of this coin is "forced" investment, where one trading partner's liberalization of border measures is conditioned on cross-border investment as effectively occurred in the 1966 Canada-U.S. auto pact. The NAFTA leaves this arrangement untouched and, if anything, adds an additional level of distortion via rules of origin. Similarly, relatively equivalent structural elements -- the cost of capital, securities regulation, etc. -- would be appropriate.

A third element is comprehensive liberalization, as opposed to a piecemeal approach focusing only on the "easiest" sectors.[56/] In the NAFTA, many sectors are excluded from liberalization of border measures. Most obvious are agriculture,[57/] which (perhaps not incidentally) has accounted for many of the AD cases affecting North American trade, and culture. A particularly apt example is the sugar sector, where the Canadian industry recently

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55/ Canada's investment screening recently led to the rejection of a bid by U.S.-based Borders Inc. to commence book retail operations in Canada. *See* n. 42, *supra*. Canada's action underscores the absence of full North American integration in this sector. So long as this remains true, books -- along with other "cultural" products, not to mention wheat, forest products, energy, autos and auto parts, beer, sugar, and numerous other products in which fully open markets do not exist -- would have to be excluded from AD reform.

56/ In Europe, for example, AD remedies on internal trade were not eliminated with the formation of the initial "community," the European Coal and Steel Community (ECSC). AD elimination did not occur until several years into the implementation of the Treaty of Rome, which established comprehensive liberalization in the form of a customs union -- the European Economic Community.

57/ Under the recent NAFTA Chapter 20 panel decision involving Canada's supply management programs for dairy and poultry, Canada may -- consistently with the NAFTA -- continue to apply tariffs in excess of 300% on relevant imports from the United States.

brought a successful AD case against U.S. and other foreign producers.[58/] It is hard to argue that U.S. Government action does not restrict access to the U.S. market, does not artificially increase U.S. prices, and does not facilitate the (possibly injurious) dumping of excess production in the markets of our trading partners -- all of this without, apparently, violating any obligation of the NAFTA. To be sure, U.S. sugar manufacturers may have their own defenses to an AD action, as well as legitimate complaints against other sugar manufacturers,[59/] but that does not change these facts. And it seems unlikely that the Canadian producers who brought the AD case would have been able to obtain a remedy under Canadian (or U.S.) antitrust law.

Other factors, perhaps less significant at a theoretical or macroeconomic level, are nevertheless quite important in particular sectors. For example, where technical standards differ, or otherwise impose additional costs on imports, it is important that the differences not be exploited as non-tariff barriers to trade -- as has happened, where Canada and the United States are concerned, in the case of plywood.[60/] As one Canadian commentator explained:

58/ *Refined Sugar*, *supra* n. 12.

59/ The dissent in the CITT's "public interest" review of *Refined Sugar* raises some interesting questions about injury and the propriety of the underlying investigation. *See The Dumping in Canada of Refined Sugar Originating in or Exported from the United States of America, 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*, RD-95-001, 18-19 (Canadian International Trade Tribunal, July 26, 1996) (Member Coates, dissenting) (raising questions of potentially important exculpatory evidence being withheld intentionally in violation of the Tribunal's rules).

60/ *See* CFTA Art. 2008 ("Plywood Standards"), making the U.S. commitment to phase out plywood tariffs contingent on resolution of Canada's standards-related barriers to importation of U.S. plywood. Absent resolution, the removal of high tariffs on both sides of the border would have left Canadian plywood free to enter the U.S. market (continued...)

> Many measures which appear to be purely domestic and unrelated to international trade (eg. local building codes have trade policy implications (eg. on imports of building products).[61/]

This is not to say, of course, that complete socio-political integration is required, yet clearly much greater integration and liberalization than now exists in North America will be needed if AD is to be replaced.[62/]

B. Effective Antitrust Enforcement

60/(...continued)

> while U.S. plywood would have been effectively kept out of Canada. The U.S. industry (which one of the authors represented) saw this as not only a market access problem but also a dumping problem. Plywood is an industry in which high throughput is very important.

61/ John Kazanjian, "Competition Law and Trade Policy: Honk if You Love Competition Policy," *Canadian Competition Record* 71, 72 (1993). A similar problem appears to exist in the case of autos, where Canadian authorities, beginning in April 1995, reportedly have imposed inspection requirements on autos imported by individuals into Canada. *See* "Vehicle Import Fee," *The Globe & Mail* B-2 (Mar. 24, 1995) (additional cost on imported cars totalling $195).

62/ *Cf.* Kazanjian, "Honk if You Love Competition Policy," *supra* n. 61, at 73:

> > It is curious that the more religious competition policy theorists take a broad brush libertarian approach to eliminating such impediments to international trade such as anti-dumping, yet do not as strongly resist other domestic measures driven by social and political concerns which clearly interfere with economic efficiency and open competition. The very long list of such measures would include Sunday shopping laws, minimum wage laws, government procurement preferences, investment screening measures, licensing statutes, environmental standards, health and safety laws, and municipal zoning laws. The message for the religious is that tradeoffs and balancing real or perceived social and economic interests are the political reality, both domestically and internationally.
>
> Significantly, much greater levels of economic integration, along the lines of that suggested by Kazanjian, exist in the EU (significant integration in, for example, investment, services, capital, social policies, labor) and even in New Zealand/Australia. *See generally* Gabrielle Marceau, *Antidumping and Anti-Trust Issues in Free-trade Areas*, 209-11 (1994).

Even with deeper and broader elimination of trade/investment barriers at the border, replacing AD with antitrust within the NAFTA will require major efforts to ensure truly effective antitrust enforcement to prevent unfair advantages from inuring through anticompetitive activities.[63/] This problem could be addressed to some extent through seeking greater uniformity in the NAFTA parties' antitrust laws and enforcement practices.[64/] If actors in

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63/ Indeed, some analysts have defended the U.S. antidumping regime generally as the lesser of evils -- since fully open and free competition is unlikely any time soon, the United States is better off with a system of trade protection than if it were to maintain unregulated markets in the face of foreign mercantilist practices. For example, National Economic Council Chairman Laura D'Andrea Tyson wrote, in *Who's Bashing Whom? Trade Conflict in High Technology Industries*, 268 (1992), that AD is a buffer mechanism between economies organized under different rules, "a poor but necessary substitute for enforceable multilateral competition policies."

64/ One recent account, focusing on the United States and Canada, concluded that:

> There are enough significant differences between America's Robinson-Patman Act and Canadian price discrimination law to warrant caution when sales trend north. For example, in Canada:
>
> • Only a "practice" of price discrimination is an offense. Temporary transaction are not covered;
>
> • Different "brands" may, in some circumstances, support a separate price;
>
> • Volume discounts do not have to be cost-justified;
>
> • Growth or "performance" bonuses are permissible;
>
> • There is no meeting competition defense;
>
> • Competitive injury is not required; and
>
> • Only suppliers can be directly liable for price discrimination.

Richard Wegener, "Business Across Borders: Current American-Canadian Competition Law Issues," 452 *FTC:Watch* 7, 8 (Mar. 11, 1996).

one NAFTA economy are subject to treble damages or particular discovery rules, then actors in all three should be subject to those same rules.[65/]

With or without harmonization, some fairly extensive procedural accommodations will be required to ensure effective antitrust enforcement throughout North America.[66/] While the United States and Canada have a new bilateral antitrust treaty, it deals mostly with procedural cooperation by enforcement authorities.[67/] Significant impediments to cross-border (public and private) cases remain.

65/ At the multilateral level, nations have been unable to reach even basic understandings on this subject. The original ITO charter contained a chapter on restrictive business practices but was rejected. Shortly thereafter, a GATT working group looked into the possibility of developing global rules on such practices but made little headway. *See* General Agreement on Tariffs and Trade, *Restrictive Business Practices* (Geneva 1959) (majority report endorsed by Ministerial decision the following year). The United Nations Conference on Trade and Development ("UNCTAD") has made efforts as well, producing "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices," UN Doc TD/RBP/CONF/10 (adopted by the U.N. General Assembly in 1980) and, more recently, holding conferences "to review all aspects" of those rules and principles. During the 1990s, in the OECD, there have been joint exercises of the trade and competition committees aimed at laying the informational groundwork for future multilateral agreements in this area. Proposals to address the issue under WTO auspices are plentiful but formative. *See, e.g.*, "U.S. Criticizes EU Proposal for WTO Competition Policy Working Party," *Inside U.S. Trade* (July 12, 1996).

66/ This is recognized even in analyses that are largely critical of AD remedies. *See, e.g.*, "U.S. Sees Strong Antitrust Rules as Alternative to AD Actions," *Inside U.S. Trade* (Feb. 18, 1994), quoting Economic Report of the President:

> *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 (emphasis added).

67/ *Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws* (1995).

Efforts to enforce antitrust laws against foreign anticompetitive activities often meet resistance based upon procedural protections in the foreign country or concepts of international "comity."[68/] There would be no place for such obstacles in an "antidumpingless" free trade area; the current notion of comity would require significant revision if it were retained at all. Similarly, application of blocking measures would have to cease and a regime of judicial and prosecutorial cooperation be installed so that, for example, there could be no recurrence of the kind of anomaly noted in the "phantom freight" cases.[69/]

These are politically troublesome requirements for those who advocate AD elimination:

> Although Canadians are now somewhat insulated from the full discovery and investigative procedures, injunctions, fines and private treble damage actions of the U.S. 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

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68/ *See, e.g.*, Gary Born and David Westin, *International Civil Litigation in United States Courts* 278-83; "Comity Leads U.S. Court to Decline to Consider Canadian Price Fixing Case," 64 Antitrust & Trade Reg. Rep. (BNA) 125 (Feb. 4, 1993) ("phantom freight" case against lumber dismissed). The phantom freight case is particularly significant because a similar complaint against U.S. wood products producers resulted in a consent decree. U.S. producers subject to antitrust restrictions compete in the same market as the unconstrained Canadian producers. While a recent Supreme Court decision, *Hartford Fire Ins. v. California*, 506 U.S. 1031 (1993), held that comity did not preclude consideration of particular claims, and may have had the effect of narrowing the doctrine somewhat on a multilateral basis, a more substantial accommodation will be necessary among the United States, Canada and Mexico if antitrust remedies are to replace AD remedies within North America.

69/ *See* R. Edward Price, "Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad," 28 Geo. Wash. J. Int'l L. & Econ. 315, 328 (1995):

> The [U.S. Justice Department's Antitrust] Division currently suffers "a terrible handicap" in prosecuting extraterritorial antitrust violations. Although there is a "shocking" number of cartels, largely in Europe and including one or two American firms, that disrupt competition and world markets, the Division is precluded from discovering relevant documents of foreign firms because of blocking statutes in those countries.

their anti-dumping laws. Could the U.S. politically accept antitrust as the only remedy without being assured that U.S. plaintiffs and investigative agencies would have essentially the same procedural and remedial rights with respect to Canadians as they enjoy in proceedings involving Americans?

Someone will also have to have a fairly good explanation for the Canadian business community as to why, after spending 50 years passing laws designed to impede the extraterritorial application of U.S. antitrust laws, Canada should suddenly change its mind. It is also hard to imagine why the Canadian business community would be willing to expose itself to U.S. procedures and remedies, when a few years earlier it strenuously resisted the inclusion of similar provisions in Canada's domestic competition laws. . . . As these questions indicate, introducing the antitrust substitution argument may do more to create antitrust problems for Canadian companies than it does to solve their trade problems.[70/]

Troublesome or not, however, without these reforms the underlying premise of AD "replacement" -- that antitrust can be used to achieve the legitimate goals of antidumping -- fails.[71/]

Consider other instances in which regional economic groups have suspended or modified application of their trade remedies:

- Australia and New Zealand have a "trans-Tasman" free trade agreement and have opted to suspend AD remedies on their bilateral trade but have substituted an antitrust regime wherein one country's courts can exercise jurisdiction -- over people, evidence, etc. -- within the territory of the other country.[72/]

70/ Kazanjian, "Honk if You Love Competition Policy," *supra* n. 61, at 74-75.

71/ *See generally* Epstein, "The Illusory Conflict between Antidumping and Antitrust," XVIII The Antitrust Bulletin 1, 1 (1973) ("The antidumping provisions thus are required to offset the limitations [limits on extraterritorial effectiveness] of existing antitrust legislation.")

A recent Canadian speaker on the topic, Calvin Goldman of the law firm Davies, Ward & Beck, suggested at a February 8, 1996 D.C. Bar Association luncheon that Canada is moving to lessen such procedural restrictions, but they have by no means been eliminated.

72/ *See* Vautier, *supra* n. 11, at 88 (emphasis added; footnotes omitted):

(continued...)

- The EU -- a customs union that has achieved a level of political integration vastly greater than what exists in North America -- has, in place of trade remedies, fully enforceable subsidy rules and antitrust rules administered by DG-IV.[73/] While these remedies are in some cases judicially enforceable and in other cases negotiated through the European Commission, the point remains that a central authority exists with legal competence to address the problem.

C. Injury Issues

Some conduct or outcomes which are actionable under the AD injury standard would not be actionable under the antitrust injury standard currently applied (at least in U.S. courts) in similar circumstances. To simplify somewhat, the AD injury concept concerns "injury to competitors," while antitrust injury is interpreted to mean "injury to competition."[74/]

72/(...continued)

> The joint government obligation to apply competition law to "relevant anticompetitive conduct affecting Trans-Tasman trade in goods," is found in Article 4 of the Protocol on Acceleration of Free Trade in Goods. (Article 4 does not require uniformity.) Invariably this obligation has been linked with the removal of anti-dumping measures affecting trans-Tasman trade in goods that originate in either of the member countries. . . . These measures were considered "not appropriate" *once full free trade in goods was achieved and once (enforceable) competition law applied* to the "relevant anti-competitive conduct."

73/ At the February 8, 1996 DC Bar Association luncheon program discussed *supra*, Bernd Langeheine, Trade Counselor at the European Commission's Delegation in Washington, D.C., discussed (1) the retention of trade remedies on EU-EFTA trade and (2) the importance, in terms of eliminating AD remedies on intra-EU trade, of strong internal EU antitrust enforcement pursuant to the Treaty of Rome. This goes beyond the procedural protections discussed in this section. As noted *supra*, EU antitrust law addresses injury to competitors.

74/ As discussed *supra*, the AD law's notion of injury reflects not only the belief that injury to competitors often causes injury to competition, but also an even more basic belief -- clearly evident in U.S. antitrust decisions from the early part of this century -- that trade can be "unfair," justifying relief for injured competitors, and that for social reasons the United States wanted to maintain an economy where small and start-up operations had an opportunity for entry and a chance of success.

There is no reason to assume that, in a redesigned NAFTA regime, the antitrust injury standard will, or should, simply replace that of the AD law. Defenders of the AD standard have several forceful arguments:

- Injury to competitors does ultimately leave consumers exposed.[75/] A useful example is the semiconductor case.[76/] Antitrust provides a number of useful concepts in this regard; for example, injury to consumers is far more likely when significant barriers to entry exist, again, precisely the types of markets which are most prone to dumping.

- Among the reasons why trade law sides with producers ("competitors" in the antitrust lexicon) is the fact that, by the time authorities get around to reviewing the status of competitors, it has already been established that an "unfair" practice has taken

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75/ Vautier notes that certain provisions of the 1990 Trans-Tasman agreement, which address misuse of market power and which allowed New Zealand and Australia to suspend antidumping remedies on their bilateral trade,

> can be interpreted as being concerned with the protection of individual producers. . . . Thus, while it would be inappropriate to assert that promotion of individual competitor interests is necessarily a surrogate for promotion of competition, it seems reasonable to expect in this context that the prohibitions will tend -- at least with the dominance threshold -- to be *consistent with promotion of competition and, ultimately, with consumers' interests.*

Vautier, *supra* n. 11, at 90 (emphasis added).

76/ In semiconductors, most U.S. producers were driven from the D-RAM memory chip business by especially severe Japanese dumping in the early and mid-1980s, leaving users in the United States exposed to high prices and foreign producers' attempts to "tie" the purchase of unrelated items to needed chips. In EPROM memory chips, the decline of the industry was arrested by an antidumping action before irreparable harm was done. Once the U.S. industry had recovered as a result of effective trade policy measures (including AD enforcement) by the U.S. Government, it went on to achieve a highly competitive position while global prices for memory devices declined to the benefit of chip users. *See, e.g.*, Howell, Bartlett and Davis, *supra* n. 48, at 29-38.

place.[77] Injury analysis has the narrow purpose of determining whether a particular misallocation is actionable.

- Other countries apparently have seen this as a necessity. The new trans-Tasman regime allows courts to address injury to competitors rather than merely to competition.[78] EU antitrust law, which allowed AD remedies to be eliminated, also includes an injury to competitors concept.

- As noted above, there is an "opportunity" rationale for favoring a broad group of producers, even at some expense in efficiency.

- Finally, if a producer, whether an owner or a worker, would have a job absent foreign government subsidies or closed foreign markets which lead to dumping, then that person has a right to the job (or at least to remedial countervailing or antidumping duties, respectively) regardless of the cost to consumers -- i.e., that the trade is "unfair" and should be remedied.[79]

AD reformers typically assume the opposite -- that consumers have a right to low prices made possible by foreign government subsidies or market barriers, regardless of the

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77/ In a purely economic sense, it is the misallocation or otherwise inefficient allocation of resources -- resulting in a net loss of world wealth -- that lies at the heart of the laws. In countervailing duty cases the misallocation results from government subsidies. In AD cases the governmental misallocation may not be less than fair value prices *per se* but rather the home market trade barriers or toleration of anticompetitive practices which generally accompany such exports.

78/ *See* Vautier, *supra* n. 11, at 90 (noting that the relevant sections of the agreement "can be interpreted as being concerned with the protection of individual producers") and 73 (provisions reach conduct whose "purpose . . . is to inflict harm in one of the proscribed ways on an *existing or potential competitor* in the other country (emphasis added).").

79/ *See, e.g.*, Senator Hubert Humphrey, *Congressional Record* -- Senate, 9537 (May 27, 1963):

> {A}s I indicated earlier, a properly conceived and administered antidumping statute does not stand in the way of freer international trade. Rather, it is fundamentally a recognition that international trade cannot be conducted without certain ground rules to protect those countries and manufacturers from their more predatory and unscrupulous competitors.

cost to competing U.S. producers. Defenders of AD would urge that the causes of the low prices cannot be ignored.

Perhaps these views cannot be reconciled. Yet, there is no reason why, absent political consensus, merging the two remedies (AD and antitrust) should be seen as on occasion for altering the existing balance between the legitimate goals pursued by each.[80/] Thus, if the antidumping remedy is to be replaced by antitrust, it will be necessary that antitrust again be able to address injury to competitors.

Crafting an injury concept that does justice to both laws and both sets of goals will be difficult. This is, perhaps, where the real debate should and will take place. Two general requirements, at least, are clear: the synthesis injury standard should account for injury to competitors, and it should be objective (i.e., no requirement that a "predatory" intent be demonstrated). Beyond that, it may not be possible to evaluate potential injury standards in isolation from the specific pricing rules that determine, in each case, whether an injury analysis is necessary. For example, one could explore the possibility of different, but economically defensible, injury standards for price-to-price discrimination and cost-based dumping in a synthesized AD/antitrust regime. A full analysis of such issues, much less resolution, is beyond the scope of this paper.

80/ Eleanor Fox has made perhaps the most eloquent effort to grapple with these issues:

> There are . . . drawbacks and obstacles to a global competition regime. . . . Sovereignty would be diminished. Nations' rights to control their own economies would be compromised. Nations make their own trade-offs in accordance with the interests of their people. They may strike delicate balances between efficiency and fairness, between producers' benefits and workers' benefits and between short-run efficiency and long-run efficiency.

Fox, *supra* n. 38, at 564-65.

D. Third-Country Trade Policies

For the NAFTA parties to eliminate antidumping remedies on intra-NAFTA trade based upon an integrated market, industries in each country will need confidence that their interests will not be undercut by a NAFTA government's failure to respond to unfair trade practices originating outside North America. While the idea has not been extensively developed, common third-country trade policies -- now only partially realized in North America -- are likely to be far more important in an antidumpingless continent.[81/] As others have observed, this step would make the free trade area more like a customs union.[82/] It would also require some potentially controversial adjustments by all three NAFTA parties.

One example is third-country dumping. Unaddressed dumping by, for example, European producers in the U.S. market could pose very real problems for Canadian manufacturers competing for the same sales and, potentially, for downstream Canadian producers. While "upstream" dumping is not per se actionable now, NAFTA AD elimination would remove one tool to respond, even if imperfectly, to such practices. Somehow, dumping from outside the free trade area might have to become more easily reachable based upon injury to a "third-country" (whether U.S., Mexican or Canadian) industry. To address this concern, a

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81/ The extent to which the NAFTA parties do not have, or currently desire, common third-country trade policies has been highlighted in recent discussions on hemispheric trade integration through an FTAA. In those discussions, representatives of Mercosur and its member governments have suggested a negotiating format in which "the NAFTA" would be represented, like "the Mercosur," by a single delegation. U.S., Canadian and Mexican officials have properly rejected this suggestion. The same dynamic has long plagued the EU's participation in the multilateral (GATT/WTO) system -- even though the EU is a full customs union.

82/ *See* Clark, *supra* n. 8, at 14.

third-country dumping agreement would have to be stronger than those included in the Antidumping Code and the NAFTA.[83/]

Applicable multilateral rules, however, do not allow much flexibility in this area. For example, it would not be possible to impose duties based on injury to the "North American" industry. According to Art. 4.3 of the AD Code, such an analysis can only occur when the countries concerned have formed a customs union under GATT Art. XXIV:8(a). The NAFTA qualifies not under Art. XXIV:8(a), but under Art. XXIV:8(b) as a free trade area. Further, revising Art. 4.3 of the AD Code would not be a simple solution. Art. 4.3 provides that, for customs unions, "the industry in the entire area of integration *shall* be taken to be the domestic industry . . ." (emphasis added). If Art. 4.3 were extended to cover free trade areas, then parties to FTAs would have no choice but to examine injury on an FTA-wide basis in all AD cases.[84/]

What *could* the NAFTA governments do? In theory, they could agree always to investigate, following a request by a NAFTA party, alleged dumping by third-country

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83/ NAFTA Article 317 sets out, in non-binding terms, an endorsement of "cooperation" with respect to third-country dumping actions brought under Article 12 of the GATT Antidumping Code (now Article 14 of the new GATT/WTO Antidumping Code). *Compare* Marceau, *supra* n. 62, at 210 n. 81 (in Australia/New Zealand agreement, the possibility of taking action against third-country dumping, consistent with international obligations, must be considered upon request).

84/ In other words, Canada could not investigate dumping into Canada of goods from a third country, without regard to dumping into the United States and the effect on U.S. producers. The implications for Canadian and Mexican producers seeking relief from dumping would likely be far more severe than for their U.S. counterparts. Further, if injury investigations had to be joint, they might arguably have to be performed by a unified investigatory authority. It is difficult to imagine that Art. 4.3 would be redrafted to allow NAFTA partners to perform joint investigations only in selected cases. The possibility of regional industry injury cases represents at best, a partial solution to this dilemma.

producers.[85/] Yet, such a loss of control over the launching of investigations may not be easily accepted. Moreover, one result could be investigations that lack the support of the importing country's own producers -- which would raise interesting practical and logistical challenges for injury investigators.

Given these constraints, it may be that any agreement among the NAFTA parties on third-country dumping would have to focus on some means other than AD duties to address the problems giving rise to injurious dumping in a given case. Perhaps the governments could agree to address the home-market barriers in the dumper's market directly -- through Section 301 in the United States and through analogous mechanisms in Canada and Mexico.

Closely related is the issue of cumulation. Many U.S. industries would find it considerably harder to win legitimate relief against dumping from outside North America if they could not cumulate Canadian and Mexican shipments for injury purposes. This problem may be even more extreme for petitioning industries in Canada and Mexico, where imports from the United States are likely to account for a higher percentage of the total market. A solution on this point that could attract support from affected parties in all three countries is difficult to imagine.

Third-country dumping is just one area in which greater coordination might be needed. Common external tariffs, which would equalize the deterrent effect of AD duties, may be needed as a practical matter as well. The point is that, absent adequate consideration of third-

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85/ One such case is pending now. *See Request for Third-Country Antidumping Investigation of Sodium Azide from Japan*, 61 Fed. Reg. 33,148 (USTR 1996). In this notice, the USTR asked not only for comment on the specific request tabled by Canada, but also more generally on how the United States ought to respond to such requests. Interestingly, a U.S. investigation of the alleged dumping was already underway based on a petition from the U.S. industry, with the ITC having issued an affirmative preliminary injury determination.

country trade policies, replacing antidumping with antitrust in the North American context might have serious, unanticipated and unwanted collateral consequences.

IV. Subsidies and Countervailing Duties -- A Different Story

The prospects for NAFTA AD reform are also complicated by the efforts of many reformers to link them to subsidy/CVD issues. The political impetus for trade remedy reform within the NAFTA comes primarily from Canada, where concerns over CVD issues are at least as strong as concerns over AD. Yet, CVD reform is impossible without some substitute form of subsidy discipline, which in turn, because of free-rider problems, is difficult to accomplish on a bilateral or regional basis (as Canada and the United States discovered during their abortive discussions after the entry into force of the CFTA).

This dynamic might change somewhat with implementation of the WTO Agreement on Subsidies and Countervailing Measures and settlement (for now) of the largest U.S.-Canada subsidy dispute, the *Softwood Lumber* case. The SCM Agreement contains some limited substantive provisions on subsidies and CVD of the kind that eluded U.S. and Canadian negotiators, and in general it codifies U.S. anti-subsidy practices long applied to imports from Canada and elsewhere. It remains to be seen whether these developments will allow the trade remedy debate in North America to focus more narrowly, as it should, on AD.

In any event, a replacement for the CVD remedy would be, presumably, some sort of supra-national subsidy authority empowered to approve (or force repayment of) trade-distorting subsidies. In the North American context, this is unrealistic and will remain so for the foreseeable future. Canada and the United States, at least, do not even have effective

national control over provincial and state government subsidies.[86/] In neither country are citizens ready to cede to a supra-national body the authority to disapprove such local subsidies (or, for that matter, those provided at the federal level).

V. Conclusion

The practical requirements for AD elimination in North America are substantial. If the NAFTA governments (as opposed to the armchair economists) truly viewed AD elimination as important to the NAFTA's success, they could find a way to achieve it. But they would have to do so in a manner consistent with the policies underlying both remedies and with market reality -- that is, bearing in mind:

- the legitimate goals and beneficial results of AD enforcement, including but not limited to wealth maximization;
- the need for comprehensive, as opposed to selective, market-opening in the NAFTA;
- the need for effective and relatively uniform antitrust enforcement, including price discrimination rules, unimpeded by comity and blocking statutes;
- the need for continued recognition of injury to competitors in the surviving competition law-based regime; and
- the need for coordinated, if not altogether common, third-country trade policies.

Absent such a broad approach, the debate is merely rhetoric and mischief. There may be other requirements for reform, and there is much room for debate over the relative importance of the issues covered here. At least one thing is certain, however: replacing AD with antitrust is nowhere near as simple as its advocates typically suggest.

86/ This problem should not be underestimated. Citizens in Ontario may be severely impacted by subsidies in Quebec which they have very limited power to influence through voting. Of course, in that situation, Canada at least has a federal government that can function as an intermediary. The same does not hold bilaterally.

ANNEX: AD "TINKERING" PROPOSALS AND PROBLEMS

In general, NAFTA "reform" proposals designed simply to make AD petitions less likely to succeed -- with no reference to AD's legitimate goals and benefits nor any discussion of reforms that would make AD more effective and efficient -- are unsound. This "tinkering" approach begs the question -- discussed in the body of this paper -- of whether fewer anti-dumping duties would necessarily be a good thing. Nevertheless, below, in outline form, are brief responses to some of the specific suggestions that have surfaced for "tinkering."[1/]

1. Pre-initiation Consultations

One proposal is that the NAFTA governments hold consultations prior to initiation of AD investigations on goods shipped within the free trade area.

- In AD cases, government-to-government consultations make little sense as the exporting country's government normally has no control over (or even knowledge about) the pricing practices of the alleged dumpers.[2/]

- Behind proposals for such consultations is the unsupported assumption that investigations are likely to occur regularly based on misunderstandings and/or clearly erroneous data that could easily be shown to be incorrect from publicly-available information.[3/]

- Required consultations would allow exporters to manipulate their shipping and pricing behavior to minimize dumping during the important but narrow window of time right around filing. Consultations could also raise antitrust problems, as the U.S. Justice Department has noted during the Multilateral Steel Agreement negotiations.

2. Higher Initiation Standards

The suggestion here is that NAFTA members apply to each other's goods a higher-than-normal standard for initiation.

1/ Some of these suggestions have been cast as applying to CVD as well as AD. Absent some form of assured subsidy discipline, there is even less basis for weakening CVD remedies than for AD reform. *See* Section IV of main paper. The discussion below is confined, for the most part, to AD.

2/ Consultations make more sense in CVD cases, which focus on government actions (subsidies) in the exporting country. The new SCM Code, accordingly, provides for consultations, while the new AD Code does not.

3/ The U.S. Commerce Department's practice of "pre-clearing" petitions allows it to demand a reasonably high level of rigor and documentation before it will initiate. Commerce imposes extra requirements for initiation of a COP investigation.

- This proposal has the questionable premise that standards for initiation in the three countries, or at least a subset of them, are inappropriately low.[4/]

- The AD process is investigatory in nature. To apply a highly exacting standard to claims made in a petition, an agency would have to collect information to compare those claims against. In effect, it would have to investigate in order to determine whether to investigate.[5/]

3. Public Interest Test/Lesser Duty Rule

A third reform suggestion is that NAFTA countries agree to conduct a "public interest" test to determine case-by-case, whenever NAFTA goods are involved, whether imposition of an antidumping duty is in the overall economic interest of the importing country.[6/]

- Introducing a public interest concept would severely politicize agency AD proceedings. Sound trade remedy regimes are automatic -- all parties know that duties will be imposed whenever dumping and injury are established -- and therefore predictable. Overlaying an essentially political review in each case would fundamentally change the character of the remedy, undermine predictability and increase costs.

- Public interest rationales have historically been based on the erroneous concept that consumers have a vested interest in access to unfairly traded goods.

- For the United States, Congress has made an across-the-board determination that offsetting injurious dumping, with a duty equal to the margin of dumping, is in the

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4/ *See* 19 U.S.C. § 1673a(b)(1) (petition must contain information reasonably available to the petitioner supporting the allegations); Mexican Regulations, Art. 75(XI) (requiring statement of facts, along with reasonably available evidence, from which it can be "inferred that there is a well-founded probability" that dumping is occurring); SIMA, Section 31(1) (AD investigation initiated only where there is "evidence" that the goods have been dumped and "reasonable indication" that the dumping has caused or is threatening injury).

5/ Courts have dealt with this problem by developing the concept of notice pleading, under which a complaint is generally considered sufficient so long as it reasonably notifies affected parties of the claims and issues being raised. In meeting evidentiary requirements imposed beyond that point, plaintiffs have the benefit of discovery (the collection of information that determines whether relief shall be granted). In AD cases, however, "discovery" is conducted by the agency after initiation.

6/ U.S. law contains no public interest provision. While Canadian law does contain such a provision, its application has tended to focus on whether imposition of a "lesser duty" (discussed below) would be in the public interest. *See, e.g.*, *Beer*, CITT No. 73, (PI-91-001) (Nov. 25, 1991).

public interest. Congress' determination takes into account, *inter alia*, the deterrent value of strict AD enforcement.

A related proposal is that the NAFTA parties agree to impose duties in an amount less than the full margin of dumping where such a lesser duty is determined to be sufficient to offset or prevent the domestic industry's injury.[7/]

- Determining what level of duties is needed to offset the injury associated with imports found to have been unfairly traded would be an expensive and inherently speculative exercise. Authorities could never do more than guess what level of duty might suffice.

- To the extent any logic lies behind the lesser duty rule, it consists of an analogy to other civil laws -- the idea being that the remedy applied should be limited to the economic injury caused. However, the analogy is invalid. AD is designed to prevent future injury and to discourage market barriers, not to compensate petitioners for damage already suffered. If AD duties went to petitioners upon collection, and were calculated to make petitioners whole for damages already inflicted, a lesser duty rule might make sense. A lesser duty rule would also lessen the deterrent effect of AD.

- Even if Canada and Mexico find using a lesser duty rule desirable as a matter of national interest, there is no practical or theoretical reason why this practice must be made NAFTA-wide.

4. Short Supply/Temporary Duty Suspension

The proposal here is that the NAFTA parties implement internally the controversial "short supply" concept -- that is, that they suspend the application of antidumping duties on intra-NAFTA shipments where the domestic "like product" is in "short supply." This proposal, while it sounds innocuous, is unsound.

- As with the "public interest" proposal, this would sharply politicize AD proceedings. Decisions would invariably come to focus not on whether domestic products are available, but on whether they are available at a desired (i.e., dumped) price.

- This costly proposal would give investigating agencies inappropriate power to implement industrial policy by choosing where duties should and should not be waived.

- A short supply mechanism is unnecessary. Agencies have adequate authority to prevent duties from being imposed on products not produced domestically through,

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7/ Mexico's AD law, Sec. 4, Art. 62, para. 2, permits duties lower than the margin of dumping if they are sufficient to discourage imports of the unfairly traded goods. *See Resolucion Definitiva Sobre las Importaciones de Peroxido de Hidrogeno Originaria y Proveniente de los Estados Unidos de America, Diario Oficial* 26, 33 (Dec. 23, 1993). The EU also has, but apparently relatively rarely uses, a lesser duty rule.

e.g., (1) scope determinations, (2) like product determinations, and (3) changed circumstances reviews.

- There is little evidence that AD duties are being systematically applied to intra-NAFTA shipments of products not produced by (or capable of being produced by) the domestic industry in the importing country. Indeed, in one recent case, a true no-supply situation arising under a U.S. AD order on Canadian steel was successfully addressed through a changed circumstances review.[8/]

5. Dispute Settlement

Some AD opponents see dispute settlement as a more effective way to neuter AD enforcement than agreed substantive reforms. This school of thought made some headway with the deeply flawed "Chapter 19" system under which judicial review of agency AD determinations has been replaced, for NAFTA goods, with review by ad hoc binational panels of non-judge participants. Proposals to go further in this direction are unsound. The best policy for the NAFTA parties would be to reinstate appellate review in national courts.

5.1 Stronger supra-national authority: Create a permanent review panel to replace ad hoc Chapter 19 panels.

- To the extent a permanent panel would consist of judges rather than practitioners, this reform would represent an improvement.

- Nevertheless, establishing a permanent panel would not solve, and in fact could aggravate, the problems of the existing NAFTA Chapter 19 system. Any review system that leaves an *international* body with final authority to decide questions of *national* law will perpetuate the existing system's problems and inconsistencies. To the extent a permanent panel would be more likely to treat its own decisions as precedential, existing problems will get worse, not better.

5.2 Supra-national investigator: Move appellate review back to national courts but assign bi- or tri-national panels to make final dumping and injury determinations.

- This proposal would go a long way toward addressing the constitutional and sovereignty issues presented by the current Chapter 19 system. The panel process (or replacement) could continue to apply national laws, subject to review by national courts. The courts would be obligated to enforce uniformity with domestic law.

8/ *Certain Cut-to-Length Carbon Steel Plate from Canada*, 61 Fed. Reg. 7471 (Dep't Comm. 1996) (Final Results of Changed Circumstances Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order).

- This proposal would be difficult to implement, however, because of the substantial resources and expertise needed to conduct AD investigations. It is not clear that the NAFTA governments are prepared to provide resources on that scale to an international entity when each must also retain a national investigatory capability to deal with AD complaints against non-NAFTA countries.

5.3 Harmonization: Harmonize appellate review standards, so that the standard of review does not differ depending on whether the determination being reviewed was made by a U.S., Canadian, or Mexican agency.

- All three countries already apply -- albeit with different nuances -- something akin to a "reasonableness" standard.[9/] The real problem is appellate panelists who refuse to apply the mandated standard of review.

- Further statutory harmonization would depart from the basic NAFTA bargain that national trade laws continue to apply to intra-NAFTA trade.

- Standard-of-review harmonization might provide a marginal benefit from the standpoint of how a binational panel appellate system (if one is retained) functions, but will not harmonize the underlying remedies.

6. Pro-Respondent Dumping Calculation Rules

6.1 Price-to-price comparisons: Base price-to-price comparisons on weighted-average prices in both investigations and administrative reviews.

- The comparison of weighted-average normal values to export prices during administrative reviews is consistent with the Uruguay Round AD Code. The Code requires comparison of weighted-average normal values to weighted-average export prices only during investigations.

- Comparison of weighted-average normal values to weighted-average export prices has been acknowledged to hide dumping where the dispersion of prices is greater in the export market than in the comparison market.[10/] Thus, average-to-average comparisons are inappropriate in administrative review because such comparisons would reduce, if not eliminate, the remedial effects of antidumping duties by hiding dumping.

6.2 Profit in price-to-price cases: Either (1) abandon any adjustment to constructed export price for profit or loss, or (2) whenever constructed export price is adjusted for profit, adjust normal value for profit as well.

9/ *See* Gary Horlick and Peggy Clarke, "Adjustments to the Administration of Antidumping Laws Among NAFTA Members: Proposals and Suggestions" (this volume).

10/ *See id.*, n.90.

- Article 2.4 of the Uruguay Round AD Code states that adjustments to constructed export price should be made for profits accruing. The Code is silent regarding losses.

- The AD Code requires comparison of normal value and export price at the "ex-factory level." Thus, the purpose of constructed export price adjustments is to reconstruct the export price at the ex-factory level. Failure to deduct profits accruing to an affiliated importer in the United States would not result in an export price constructed at the ex-factory level. Similarly, deducting post-importation losses would have the effect of reducing the constructed export price below its ex-factory level.

- As the deduction of profits accruing subsequent to exportation results in a constructed export price at the ex-factory level, no deduction of profit from normal value is necessary as normal value typically is based on sales at the ex-factory level as well.

6.3 Recovery of costs in COP cases: Define a "reasonable period of time" for cost recovery according to the business cycle and product life cycle for individual industries.

- This proposal is contrary to the AD Code, which specifies at Article 2.2.1 that period of investigation will serve as a reasonable period of time.

- Under this proposal, the "reasonable period of time" would differ for each AD case. Not only would this complicate an administering authority's investigation by requiring the authority to define the "reasonable period" in each case, it would create uncertainty and extra cost for interested parties -- particularly for domestic industries preparing petitions. Moreover, it would require production cost data for an entire business or product life cycle, which would needlessly delay AD proceedings.

- There already exist adequate provisions for dealing with the cost fluctuations that may reasonably be expected to occur during the course of a business cycle or product life cycle. See Article 2.2.1.1 of the AD Code. U.S. law contains provisions dealing with the amortization of production costs, including those incurred for start-up operations.

- The U.S. system of administrative reviews and applying AD duties retroactively minimizes the chance of application of antidumping duties over anything but an extended period of dumping.

6.4 Profits in COP cases: Base the calculation of profit for constructed value on all sales of the foreign like product, not just profitable sales.

- Article 2.2.2 of the AD Code provides that profit for constructed value is to be calculated based on sales made in the ordinary course of trade. Below-cost sales are

defined as being in the ordinary course of trade except where the three conditions set forth in Article 2.2.1 of the AD Code are met.[11/]

- Sales meeting the conditions of Article 2.2.1 should be excluded, as they make for an unrepresentative comparison. Over time, profit-seeking enterprises do not normally make below-cost sales in substantial quantities at prices that do not permit reasonably prompt cost recovery.

- If this proposal were accepted, AD respondents could manipulate dumping calculations to some extent by making below-cost sales of the foreign like product, while recouping the losses on sales of other products in the comparison market. Thus, including below-cost sales of the foreign like product in the calculation of profit for constructed value could mask dumping margins by artificially deflating constructed value.

6.5 De minimis margins: Apply the two percent de minimis threshold to both investigations and administrative reviews so that, in a review, no duty deposit would be collected if the calculated dumping margins were below the two percent threshold.

- Antidumping duties are imposed where sales at less than normal value cause injury to a domestic industry. In the presence of injury, dumping can have a detrimental effect even if the margins are below the two percent de minimis threshold, especially in commodity products.

- Like several of the other AD calculation proposals discussed above, this proposal was considered and rejected by the parties to the Uruguay Round AD negotiations.

7. Harder-to-Meet Injury Standards

7.1 Preliminary injury standard: Apply a higher standard to intra-NAFTA shipments.

- There is no evidence of a significant number of "non-meritorious" cases, affecting intra-NAFTA shipments, that are filed and can only be "weeded out" by a higher preliminary injury standard.

- A substantial proportion of cases -- including 13% of all U.S. cases filed in the last five years -- are rejected at the preliminary stage under current standards. The fact that more cases are rejected after full investigation does not mean that they were without merit or should not have been pursued to a final determination.

11/ This means that below-cost sales will, in many instances, be included in the calculation of profit for constructed value.

- At the preliminary stage, since time is short, authorities must focus on the condition of the domestic industry. A showing that the economic trends have been down and that imports are competing in the market should be a sufficient basis for an investigation.

7.2 Meeting competition defense: Preclude affirmative injury findings on NAFTA goods sold at prices that merely meet the prices of goods sold in the domestic market.

- As a practical matter, in many markets distinguishing between meeting competition and leading the market down is virtually impossible.

- Injury authorities already take into account, as appropriate, the existence of underselling and/or price suppression.

- Simply "meeting the competition" can lead to severe downward price spirals, which exporters operating from a protected market may be able to endure until the domestic producers have given up. A meeting the competition defense would give foreign producers the legal ability to do this.

7.3 Threat determinations: Raise standard, in cases involving NAFTA goods, for finding a threat of material injury.

- Since a threat finding by its nature requires some speculation, investigating authorities are already limited in their use of such findings.[12/]

- It is difficult to imagine a statute or agreement that would place greater restrictions on the use of threat determinations, without effectively eliminating the possibility of such determinations altogether.

8. AD Reforms to Make the Law More Effective

If AD tinkering within the NAFTA is to be pursued as a realistic option, several reforms should be considered that would make the AD remedy more effective and easier to obtain. Three examples follow:

12/ *See, e.g., Metallverken Nederland B.V. v. United States*, 744 F. Supp. 281, 287 (CIT 1990) ("Such a determination must be not be made on the basis of mere conjuncture or supposition."). In the United States, the AD statute itself treats threat cases differently, *e.g.*, by (1) making cumulation discretionary rather than mandatory and (2) exempting from duties imports entering between the preliminary and final determinations.

8.1 **<u>Compensation</u>: The NAFTA parties could agree to provide all, or some, of the duties collected to the domestic industry injured by dumping.**

- AD laws currently do not provide for any reimbursement to injured companies seeking relief from unfairly-traded imports. The short time period for relief under new sunset rules will be a disincentive for capital-intensive industries to reinvest. Compensation would improve the chances of reinvestment during the period of relief.

- In theory, compensation could apply to duties collected on NAFTA imports or to all AD duties.

8.2 **<u>Duty as a cost</u>: The NAFTA parties could agree to include antidumping duties imposed in related-party transactions as a cost in determining the export price or a constructed export price in administrative reviews.**

- Many U.S. manufacturing interests supported legislation to this effect during Uruguay Round implementation.

- In the United States, duty absorption must already be considered in sunset reviews, and the Commerce Department is required to publish during administrative reviews the amount of the antidumping duty that is being absorbed by a related party.

8.3 **<u>Causation standard</u>: The NAFTA parties could clarify that subject imports need only be "a cause" of injury to a domestic industry for duties to be imposed.**

- U.S. manufacturers have sought confirmation of Congress' intent in this area because some ITC Commissioners have refused to employ the standard set forth in the Trade Agreements Act of 1979.

- The proposed standard is fully consistent with the new AD Code.