GEORGE WASHINGTON UNIVERSITY
School of Business and Public Management
Institute of Brazilian Issues
Minerva Program
Fall – 2000

THE LINK BETWEEN COMPETITION POLICY AND ANTIDUMPING POLICY

Author: Anamélia Soccal Seyffarth

CONTENTS

INTRODUCTION ………………………………………………………………………………………. 1

I. ANTIDUMPING LAWS: OPERATION AND HISTORY ……………………………………………3

I.1. Definition ……………………………………………………………………………………. 3

I.2. Rationale for Antidumping Laws …………………………………………………………… 5

I.3. History of Antidumping Law and the World Trading System ……………………………….. 7

I.4. National Rules: Brazil and Its Procedures ……………………………………………………11

II. COMPETITION LAWS: OPERATION AND HISTORY ………………………………………………17

II.1. Objectives ………………………………………………………………………………………17

II.2. Goals and Instruments ……………………………………………………………………………..17

II.3. Sectorial Concerns of Competition Policy…………………………………………………………20

II.4. Propositions to an International System ……………………………………………………..23

II.5. National rules: Brazil and its Procedures ………………………………………………………….25

III. COMPARATION BETWEEN THE ELEMENTS OF ANTIDUMPING AND COMPETITION LAW …………………………………………………………28

III.1. The Different Policy Objectives of Antidumping and Competition PolicyLaws…………………28

III.2. Pressures to Reduce Antidumping Duties ……………………………………………………… 31

IV. DEEP INTEGRATION: ANTIDUMPING AND COMPETITION POLICY IN REGIONAL AGREEMENTS …………………………………………………34

IV.1. European Union – EU ……………………………………………………………………..34

IV.2. MERCOSUR ………………………………………………………………………………38

IV.3. NAFTA ……………………………………………………………………………………41

V. CONCLUSION ……………………………………………………………………………………45

Bibliography ……………………………………………………………………………………...48

INTRODUCTION

Enhancing the benefits of the elimination of trade barriers and promoting conditions of fair competition are two central thrusts of international trade agreements. Yet with the trends towards the globalization of international trade and production, and various regional market integration arrangements around the world, the international trade policy agenda is increasingly and competition policy should be.

The internalization of competition policy is a complicated issue. While theoretically antidumping could be replaced by competition rules, there are important differences between market access as defined by trade policy officials and the concept of market entry as applied by competition officials. This paper highlights, following the recent literature, the critical and complex relationship between these major public policy instruments.

As points out in Chapter one, in political terms, antidumping measures are biased in favour of a privileged interest-group: the producers. The chapter also explains that traditional economic rationale for antidumping measures has been the threat of international predation. In addition, it discusses the historical negotiations with this issue in the GATT/WTO negotiations and the procedures adopted in Brazil.

Chapter two is devoted to analyze competition policy. Government regulation of private business practices falls within the realm of competition policy. The main goals of competition policy are to achieve fairness and efficiency. The best means of doing so are for governments to ensure that markets are as contestable as possible, that is that new entry by domestic and foreign firms be made as easy as possible. But, at international level, the world trade law - as administered through the World Trade Organization

(WTO) - is not yet well equipped to handle such practices. Nonetheless, trade disputes centered on such issues are being taken to the WTO. Finally, the chapter shows how the issue is considered in the Brazilian legal code.

Chapter three presents the main elements relating to the different policy objectives of antidumping and competition policy laws and also the pressures to reduce antidumping measures.

Chapter four focuses on the dimension of antidumping and competition policy beyond the European Union, the North American Free Trade Agreement – NAFTA and MERCOSUR.

I – ANTIDUMPING LAWS: OPERATION AND HISTORY

I.1. Definition

What is dumping?

The definition of dumping as described in the General Agreement of Tariffs and Trade – GATT is often expressed as the sale of products for export at a price less than "normal value", where normal value means roughly the price for which those same products are sold on the "home" or exporting market[1]. In other words:

home-market sales price – export sales price = **margin of dumping**

When that margin is greater than zero, there is "dumping" in the sense used in international trade policy.

So defined, the concept of dumping is relatively simple to the GATT. As applied, however, it is more complex. Each term of the equation involves complicated calculations. A threshold question is what level of trade should be used to judge price, that is, wholesale or retail? Presumably whatever is used should be the same for both home market and export sales. Then with respect to the home-market sales price, how is it to be calculated? Often an "average" of prices at which the product is offered in the home market is used, but a complex series of adjustments may be necessary to align that price with comparable prices for exports. Suppose, however, the goods are not sold in the home market, or too few are sold to use as the basis of a valid home-market average price. Then laws may call for comparison to one of several other measures of "normal

[1] The antidumping measures are treat at Article VI/GATT and also at Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade.

value", such as comparison to prices for sales to other countries (third markets) or to a "constructed price" composed of an evaluation of cost plus reasonable profit.[2]

Whenever a "constructed cost" calculation is required, matters can became extremely complex. A foreign country may have different accounting systems, the firm involved may produce many products with costs that will have to be allocated, a foreign language is often involved, and methods of doing business vary greatly. Under some national laws, like Brazil, home-market prices that do not represent full recovery of cost plus a reasonable profit must be excluded from the home-price average. In such cases a "constructed cost" methodology must be followed to determine which home-market sales to exclude from the average, and this methodology introduces virtually all the same complexities of constructed cost computations in the absence of home market sales.

Likewise, finding the "export price" can become very difficult too. Often a number of adjustments to the transaction price actually used in an export sale will be necessary to try to keep comparisons with homes fair. Adjustments might include packaging, advertising costs, warranty services and so on.

So, after (or while) a finding of "dumping" has been made, a separate determination is made regarding whether the requisite "injury" has been caused by the dumping. If both dumping and injury findings are affirmative, then duties will be applied at the border up to the amount of the margin of dumping.

Deeping the definitions: transnational price discrimination practice and transnational sale below costs

---

[2] Id, article 2.

The GATT laws can be interpreted in two different concepts: the classical ones - which deal with transnational price discrimination - and transnational sale below costs.

In the Economic Theory[3] price discrimination occurs when different units of the same commodity are sold at different prices for reasons not associated with differences in costs or when different units of the same commodity are sold at the same price where costs are different. In the international market "dumping" is an international price discrimination and refers to a situation where prices are lower in the importing market than in the domestic market of the exporter.

The other way to define dumping is the pricing of exports below some definition of costs. The argument in favour of this definition is that exports below costs must be subsidized with sales at a much higher price somewhere (usually in the home market), thus evidence of price discrimination. Sales below costs may also be evidence that the exporter will raise its price in the future after predating the importer market.

MARCEAU (1994) argues, however, that experts and tribunals have expressed great difficulties in administering these definition because: marginal cost is a very difficult concept to identify in practice because it refers to the extra costs needed to produce an extra good and the structure and allocation of costs vary with different countries, management models, accounting methods, social institutions, culture, and legislation. Moreover, in a multi-product or multinational enterprise, the identification of such costs becomes even more arbitrary.

I.2 – Rationale for Antidumping Laws

[3] Deardoff, A., "Economic Perspectives on Antidumping Laws" (1991)

Business Rationales for Price Discrimination. HINDLEY (1991) indicates that the reasons why an enterprise may want to maintain, for a certain period of time, two different prices in two different markets, is based on the concentration of markets involved. In an industry with a low level of concentration predatory pricing is a totally "implausible" explanation for dumping. The possible justification for persistent differential price dumping is that foreign firms have an agreement with respect to prices in their own market which they are unwilling to break. All excess supply at that agreed price is therefore sold abroad. It is submitted that a governmental control of prices in one of the markets may also explain the price discrimination.

Its possible to identify other reasons why an enterprise may want to maintain, for a certain period of time, transnational discrimination prices[4]:

1. When a firm with market power in the exporting country enters a new market divided by tariffs, transport costs, technical standards, or other factors, it may maintain lower prices in the new and more competitive market (still at a profitable level) without any desire or capacity to eliminate competition in this new market;
2. In order to achieve economies of scale, for promotional reasons or to test a new product, a producer may need to expand into a new geographical market. If prices are controlled (by cartel or government) in the first market, the reduction of price occasioned by the increased output may take place only in the second market;
3. In a period of depression or of excess capacity, a producer active in two markets may be able to lower its prices in one market only if prices are regulated (by cartel or government);

[4] Clements, E.. 1991. 'Price Discrimination and the Multi-Product Firm', Reference Economic Studies', n. 19, referred to by Dale in *Antidumping Law*.

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

In the first three hypotheses above the producer may have the intention of raising its price rapidly when regular production starts. The producer may not have the capacity to predate, i.e. eliminate competition from all sources in order to collect monopolist profits (assuming firms are conducted only by profit-maximization interests).

So, in the first three patterns above, the problem is not the national market with low prices, nor the fact that there is a difference in prices between two markets. It is the market where prices are high which should be the focus of concern.

Reasons for selling below full costs. In the modern economic theory the first objective of firms is to maximize profits in the long term. In accounting terms, producing an extra good should yield at least the extra costs of producing that extra good: the so-called 'marginal cost of production'. As long as marginal costs are covered, producing at a price where at least some of the fixed costs are recouped can therefore be considered rational and sound business. For a firm to continue producing without recouping its full costs is reasonable when, for instance:

1. The testing and promotion of new products may justify sales below total average costs and even below marginal costs, for a certain period of time;
2. The market is depressed or there is excess capacity (due to an erroneous decision); then an enterprise with high fixed costs (and low variable costs) may keep on selling below average total cost of production in order to minimize its losses;

3. An enterprise is competing to enter a new market; it will be willing to forgo profits (therefore selling below total variable costs) for a while in order to make itself known to consumers with the assumption that it will soon sell at a price which covers full costs.
4. An enterprise wants to maximize sales instead of profits[5] without any intention of eliminating competitors. This is objectionable from the point of view of competitors because excess output will depress prices but consumers will gain, provided the situation does not turn into predation;
5. The uncertainty about new markets leads producers to make decisions on price in contracts before export costs are fully known. Prices may end up not covering marginal costs or even variable costs. However, this situation represents a wrongful evaluation of the costs rather than a decision not to cover marginal costs.
6. The possibility of predation exists, but it is usually accepted that there are other less risky and less expensive way of gaining monopoly power.

There seem to be very rational reasons why a firm may choose to discriminate in prices between two markets or sell bellow full cost. Therefore in economic terms[6], short of predation, dumping would increase the general welfare of the importing country. However, more concern should be raise for the potential lack of competition in the importing and exporting markets.

I. 3. History of Antidumping Law and the World Trading System

History and Origins - The concept of “dumping” in international trade has a long history.

---

[5] See Baumol’s theory against profit-maximization of big enterprise when officers and shareholders do not have the same interests.
[6] Marceau, G. (1994, p.14)

Some economists, like JACKSON (1999), MARCEAU (1994), and MASTEL (1998), show the writings of Adam Smith and Alexander Hamilton to explain that dumping has been an important issue to international trade.

Adam Smith wrote about the concern for predatory tactics by mercantilist powers and Hamilton in debates in the United States, in 1791, was warned about foreign country practices of underselling competitors in other countries.

The first national antidumping law was held by Canada, in 1904. New Zealand adopted his law one year later and Australia followed suit in 1906.

The United States joined the antidumping club in 1916. As related in MASTEL[7] the first U.S. antidumping act, the Antidumping Act of 1916, is often associated with the Sherman Act, the Clayton Act, and the Robinson-Putnam Act – the three major U.S. antitrust statutes.

JACKSON (1999) reports that during the early twentieth century dumping was most widespread by firms in Germany. During and after World War I the U.S. Congress enacted several antidumping statutes. During the 1930s the United States embarked on its reciprocal trade agreements program, negotiating about thirty bilateral treaties for the mutual reduction of tariff barriers.

The International Rules: GATT and the WTO

Given the long history of international concern with dumping, it is not surprising that when GATT was negotiated in 1947 they agreed a specific provision for cases of dumping, the article VI of the Agreement.

As time passed, some countries in GATT began to feel that other countries, in

[7] Mastel, G. (1998, p.18)

applying their antidumping laws, were doing it in such a way as to raise a new barrier to trade. Some believed that antidumping procedures – such as delay, or certain calculations of dumping margins, or certain applications of the injury test – were causing restrictions and distortions on international trade flows, sometimes by creating a period of risk and uncertainty to traders in a particular product. Thus, during the Kennedy Round of GATT trade negotiations (1962-1967), the GATT Contracting Parties negotiated an Antidumping Code (AD), which set forth a series of procedural and substantive rules regarding the application of antidumping duties, partly as a result of the desire to limit antidumping duty practices and procedures of governments that were damaging international trade[8].

During the Tokyo Round, the GATT parties developed a new Antidumping Code, which came into effect in 1979 replacing the 1967 Antidumping Code. After that, the Uruguay Round test on dumping, building on the prior Antidumping Codes, further modifies the AD rules, and of course prevails over them for all WTO members, given that it is now a mandatory agreement[9]. So, it was an improvement over the previous situation, since it now ensures a certain degree of transparency and predictability in investigation procedures.

After that, occurred the Third Ministerial Meeting of the World Trade Organization (WTO), in November-December 1999, in Seattle/USA. It was interrupted by street protests and also by fractious disputes among member countries. The launch of any new round of multilateral trade negotiations was indeed postponed indefinitely.

---

[8] Evans, J. W. (1971)
[9] Jackson, J. H. (1999, p. 256)

Probably the subject won't be left out of the coming round of multilateral trade negotiations in the WTO.

These measures have become such a prominent part of trade negotiations largely because the use of antidumping measures has increased and spread among the WTO members that it now represents a systemic threat. The WTO data[10] shows that the average number of countries routinely initiating antidumping cases has more than quadrupled, from five in the late 1980s to more than twenty in 1997. The average annual number cases have almost doubled, from 113 in 1987-89 to 203 in 1995-97. Since 1993, seven new users (Argentina, Brazil, India, Korea, Mexico, South Africa, and Turkey) have initiated as many cases as the five "old" users (Australia, Canada, the European Community (EC), New Zealand, and the United States). Though quite dramatic, these figures underestimate the real evolution: they do not include the many "reviews" of previous or existing cases, which almost systematically extend initial measures for indefinite periods, and they do not take into account the fact that the average number of tariff lines covered by antidumping cases has increased during the 1990s.

I.4 – National Rules: Brazil and Its Procedures

Brazil was signatory of the Tokio's round Antidumping Code (AD) in April of 1979, but only in 1987 the country incorporated these rules into its trade legislation. The use of such measures has taken place in conjunction with the elimination of import restrictions, reference price systems and exchange controls which previously reduced the

[10] WTO Annual Report, 1998.

country vulnerability to price fluctuations in international markets. After that, the country also joint the new AD code approved in the Uruguay Round.

The other factor which is relevant to understand the importance of AD measures in Brazil was the tariff reforms which reduce the protection of national industry, the average import tariff drops from 15.1% in 1993 to 11.3% in 1995[11].

So the adoption of antidumping policies in Brazil can be attributed to the increased external competition arising from the unilateral trade liberalization and multilateral trade liberalization in the context of the Uruguay Round.

All decisions made in Uruguay Round were implemented by Decree 1,355 of December 15, 1994, the Antidumping regulations were in Decree 1,602 of august 23, 1995. Additionally the government established the Consultant Committee of Commercial Defense[12] - (CCDC in portuguese) to examine the provisional/final investigation and to recommend decisions to competent authorities; if any of the authorities disagree with the Committee's recommendation, the final decision will be made by the authorities.

So the CCDC is a consultant committee, although since its creation the authorities have approved of its recommendations.

CCDC is composed of the Chamber of External Commerce and five Ministries: Agriculture; Budget and Planning; Development, Industry and External Commerce; International Affairs and Finance.

---

[11] Kume, H. 1996. 'Política de Importação no Plano Real e a Estrutura de Proteção Efetiva' Texto para Discussão No. 118, Fundação Centro de Estudos do Comércio Exterior , February; referred to by Laird, S. (1997, p. 15).
Laird, S. (1997, p.2) points out that 'as an indication of tariffs prior to these reforms Argentina had a tariff average of some 30 per cent in 1989, Brazil's rate was 51 per cent in 1988 and Uruguay's was over 100 per cent in 1978'.

[12] It was created by: "Portaria Interministerial MDIC/MF" 14 of September 14, 1995

The Decree 1,602 established the Ministry of Development, Industry and External Commerce and the Ministry of Finance as the legal authorities to sign the final Antidumping Measures.

Results of the investigations – Since the legislation was implemented in 1988, Brazil has initiated 105 investigations (table I.1), almost the half resulted in antidumping duties (54 investigations).

The most significant increases in the Antidumping final provision occurred after 1992. The year with the most number of measures was 1998 (35% of the total) because Brazil had a general increase in its imports, caused by overvalued-currency. After the country devalued its currency, in January of 1999, the final provisions declined to five. This year, until October, only three final decisions were adopted.

TABLE I.1

Brazil's Antidumping Investigations
1988-1999

Year	Initialed Investigations (A) = b+c+d	Conclusion			
		Price Undertakings (B)	Final Provision (C)	Variation	No Measures (D)
1988	4	0	0	-	0
1989	0	0	4	100 %	0
1990	2	0	0	-	0
1991	7	2	0	-	0
1992	2	0	7	100.0%	0
1993	17	0	5	-28.6%	3
1994	9	0	3	-40.0%	21
1995	3	0	3	0%	7
1996	15	0	6	100.0%	4
1997	15	0	2	-66.7%	5
1998	20	0	19	850%	7
1999	12	0	5	-73.7%	2
Total	**105**	**2**	**54**	**-**	**49**

Source: Brazil ; "Relatório do Departamento de Defesa Comercial - Ministério do Desenvolvimento, da Indústria e do Comércio Exterior- Secretaria de Comércio Exterior- 1999"

The Brazilian industry complaints were directed at the following sectors (table I.2): metallurgy (41,2%); chemistry and rubber (26,5%); others manufactured and capital goods (23,5%); textile, fibers and leather industry (5,9%) and agriculture industry.

TABLE I.2

Brazil's Antidumping Investigations, by Economic Sectors
1988-1999

Sector	Measures applied	Participation of total applied
Agriculture industry	1	2,9%
Chemistry, Oil and rubber	9	26,5%
Metallurgy	14	41,2%
Textile, fibers, and leather industry	2	5,9%
Others intermediate industries	0	-
Others manufactured and capital goods	8	23,5%
Total	**34**	**100%**

Source: Brazil; "Relatório do Departamento de Defesa Comercial - Ministério do Desenvolvimento, da Indústria e do Comércio Exterior- Secretaria de Comércio Exterior – 1999".

NAIDIN (1999) points out that the antidumping measures participation in the Brazilian imports is very low: 0.37% of the total imports, during 1988/1997 (table I.3).

TABLE I.3

Antidumping Investigations: affected imports
1988-1999

(US$ million FOB)

Year	Total of Investigated Products	Total of imports	Imports affected by antidumping measures (%)
1988	1,643	14,605,254	0.0004
1989	565	18,263,433	-
1990	3,912	20,661,362	0.01
1991	19,666	21,041,459	0.05
1992	106,142	20,554,091	0.32
1993	261,839	25,256,001	0.66
1994	501,461	33,078,702	0.72
1995	817,932	49,971,896	0.28
1996	989,994	53,296,053	0.48
1997	1,089,117	61,249,775	0.49
Total	**3,701,272**	**317,978,025**	**0.37**

Source: Table elaborated by Naidin, L.C., in "Nove anos de aplicação da política antidumping no Brasil", 1999". *Revista Brasileira de Comércio Exterior* n. 58 – 1999.

Brazil's and the new round negotiations at WTO[13] – The commitment of Brazilian government to improve the AD Agreement is based on the assumption that it has significant gaps in its text, which permit the improper use of the Agreement as an instrument of veiled protectionism. Such misuse is actually encouraged by the fact that the affected countries have insufficient legal resources to contest the legitimacy or legality of an AD measure. On the other hand, the country imposing the measure is protected by the Agreement's lack of clarity, especially with respect to the criteria for the imposition and collection of duties, the procedures for reviews, and methodology of calculations.[14]

Therefore, Brazil believes that several provisions of the Antidumping Agreement should be improved, with a view to reduce the ability of Members to arbitrarily apply antidumping measures, and to prevent the perpetuity of such measures or their widespread use as a means to protect inefficient sectors of the domestic industry.

Brazil submitted the following proposals to the General Council of WTO, before the Seattle Meeting[15]:

- 'Provisions of Antidumping Agreement should be improved, with a view to prevent the imposition of arbitrary or primarily protectionist measures. The provisions to be revisited should include, *inter alia*, (i) the criteria, methodology, and procedures of

[13] The International Affairs Ministry coordinated a Ministerial Group to study the suggestion to Seattle's Meetings. One of the subgroups was of Antidumping, which was formed by External Commerce Chamber and the following Ministries: Development, Industry and External Commerce; Finance; Agriculture and Technology.

[14] The United States is the country with the major number of reviews against Brazilian exports. According to the WTO (1999), orange juice had four reviews during 1987-june 1999 and metal silicon had eight reviews during 1991-1999.

[15] The suggestions presented were the conclusions of the Antidumping Ministerial Subgroup.

- the reviews specified in the Agreement (expeditious review for new exporters, final review, reviews upon request), (ii) the definition of the product motivating the investigation, (iii) the determination of the margin of dumping, (iv) the imposition and collection of duties, (v) the “cumulation” clauses;
- The provisions of Developing Countries (Article 15) shall be detailed in order to become more comprehensive, operational and mandatory;
- When investigating dumping of imports from a developing country, the use of the “lesser duty” rule shall be made mandatory;
- The Antidumping Code Shall be modified to allow Members to effectively challenge, under the Dispute settlement Understanding, any aspect related to the implementation of the Agreement or to a specific anti-dumping measure. In particular, Panels shall be authorized (a) to fully assess whether or not the investigating authorities properly established and evaluated the facts of a specific case; and (b) to determine conformity of a measure based on the Panel’s own interpretation of relevant provisions of the Agreement’.

II. COMPETITION LAWS: OPERATION AND HISTORY

II.1. Objectives

Competition policy aims to make the market work better. If designed properly, it is a market-perfecting part of the social infrastructure. It regulates the intensity of competition and the scope of cooperation and defines the legal boundaries for both. Examples of impermissible competition and impermissible cooperation, respectively, are predation (equivalent to the premeditated murder of a market competitor) and coercive collusion (one firm being forced to join a group of others).

Like all social regulations, competition policy reflects history and culture. Therefore, they are constantly changing, and they always differ among countries. Not all countries have a formal, codified competition policy[16], but they have informal competition conventions. As markets become global, however, differing competition policies and conventions have come into contact.

To meet the two broad objectives of competition policies, efficiency and fairness, every country must developed conventions or rules of conduct for firms acting alone and together, over short intervals of time and over their entire corporate lifetime.

II.2. Goals and Instruments

HAY (1997) and JENNY (1997) conclud that competition around the world seek a blend of efficiency and fairness in their markets. Efficiency has a fairly clear economic meaning. It is a conservational objective; it aims to minimize waste. Efficiency is the ideal of getting the most out of the resources at hand. Examples are an efficient market that generates goods that buyers really want at least cost and an efficient charity that

moves resources from one project to another so that the value of the good generated by those resources is at its highest. Likewise, an efficient society seeks the highest standard of living consistent with its available resources.

If society includes only those people currently living, and the relevant time frame is short, then that society pursues static efficiency. But if it includes future generations, and the relevant time frame is longer, it pursues dynamic efficiency.

The meaning of fairness, by contrast, is internationally nuanced and culturally distinctive. In the United States, it often means equality of opportunity or (in economic sense) free entry into a business endeavor.[17]

Indeed, emphasizing fairness almost invites contention, acrimony, and even international conflict when the protagonists are of different nationalities. But there is no denying the importance of fairness as a motive for competition; hence, there is a clear need for definition of what is and what is not fair in a market system and for mutual recognition of threshold standards of fairness in international competition. This need is great because the concepts of fairness and especially, fair trade have been much abused by special interest groups.

Competition can be a means to attaining efficiency and fairness. For example, a perfectly competitive market –in which there are many small firms that freely enter and exit an industry that produces a standardized product- often achieves efficiency and

[16]According to Green and Rosenthal (1996); Tineo (1997), the number of countries implementing formal competition policies in recent years has risen sharply. Most Eastern European and Latin American countries and South Korea, Mexico, and Taiwan have recently promulgated or revised their legislation
[17] See Scherer, F. M. and Ross, D. (1990).

equality of opportunity (fairness). But this is not always the case. In the market for innovation, perfect competition is generally believed to deliver (inefficiently) too little.[18]

For a natural monopoly, a single supplier for the entire market is efficient-competition is not. Where buyers of a product have varied rather than one standardized product, monopolistic competition-where numerous producers of those varieties have limited monopoly power and can enter and exit freely- is efficient.

Finally, perfect competition makes no promise about fairness of process or outcome, only fairness of opportunity.

Efficiency and fairness are the prizes for competition policy; competition is a secondary objective or, more accurately, an instrument.

The Efficiency Objective – competition policy aims to reduce inefficiencies. One of the most familiar inefficiencies is the wasteful underproduction and overpricing of a monopolist with market power. Almost as familiar are distortions in relative prices and costs that mislead investors and buyers. Less familiar inefficiencies are excessive product standardization or its opposite: wasteful product differentiation, unduly sluggish innovation or unnecessary duplication of research effort, inadequate realization of scale economies, and underprovisioning of future generations.

The Fairness Objective – there is also a distributional economics of competition policy, concerned with process and fairness in markets. It most obvious expression is in policies that oppose coercion and various abuses of market power that imply involuntary action.

---

[18] *Id*

Many competition policies are the legislative expression of the anticoercion principle. Other policies prohibit abuses of market power, such as a horizontal cartel's boycott of distributors that deal with outsiders or new suppliers.

II.3. Sectorial Concerns of Competition Policy

Firm behavior – Competition policy is first of all concerned with a firm's behavior and market power. This concern involves inefficiencies in prices or marketing, inequities in the treatment of customers or potential rivals, and other abuses of market power. These concerns, sometimes called restrictive business practices, implicitly involve assessments of how close a firm's prices come to its costs; how closely a firm meets buyer demand for products of varying size, durability, reliability, and other characteristics; and how freely a firm will allow rival firms and products to emerge. Competition-policy authorities never try to comprehensively or continuously monitor corporate decision making on these details, much less to direct it. But when anticompetitive behavior is suspected, most authorities have the legal right to summon detailed information from firms in their jurisdiction.

In brief, the first concern of competition policy is to discipline the market power of firms.

Market Power - Market power is first defined with reference to price and then with respect to attributes. Firms that have the capacity to choose their own price from a menu of options, ranging from high prices with low sales to low prices with high sales, are said to have price-setting power. Firms that can produce any mix of product varieties (e.g., high or low quality, durability, and flexibility) are said to have attribute-selection power.

In reality, most firms have some degree of price-setting and attribute-selection power. But both kinds of power are limited by the prices and attributes that rival firms choose. In the perfectly competitive extreme, power is perfectly limited to a single price ceiling and a single attribute floor. In a market structure called monopolistic competition, a firm has price-setting power over the precise blend of attributes that makes its product unique. But others firms produce so many close substitutes to that attribute package that the firm's price choices range over a narrow band, and its power can be severely constrained. At the other extreme, monopoly, both price-setting power and attribute-selection power are maximal, because such a firm is the sole producer of a product with no close substitutes. The term oligopoly describes a market structure in which a small number of firms produce a product with no close substitutes; as the number of rivals and substitutes increases, oligopoly bleeds into monopolistic competition.

Price-setting market power usually leads a firm to boost profits by supplying less to buyers than would be socially ideal but also charging a higher price than is ideal.[19]

Market power can allow a firm to be unconcerned about maintaining the most efficient production techniques and, thereby, raise its costs. One way this happens is through sluggish innovation. However, a firm with market power might also allow costs to rise wastefully unchecked by the discipline of having to keep them in line with costs of rival firms.

Yet another source of inefficient inputs is costly efforts to deter rivals and maintain market power. These efforts can include lobbying of government agencies that brings benefits to the firm but is wasteful from society's perspective.

---

[19] There is, however, one important exception - price discrimination.

Enhanced contestability in a market often leads firms to improve cost control and performance.[20] Likewise, enhanced contestability can lead to favorable restructuring of industries, allowing those firms that are adaptable and effective to absorb the business of those that are not and, thus, improving performance of the industry.

In an extreme application of market power is, for example, when an established airline not only deters would-be rivals, but successfully preys upon new entrants. Such predation is the strategic, temporary deployment by the predator firm of attributes that are so attractive (and prices are so low) that existing rivals leave a market, allowing the predator firm subsequently to enhance market power by reducing quality, raising price, and deterring reentry. Though such predation clearly would be anticompetitive, its real-life occurrence seems rare.[21] Ordinarily, it seems, a firm is only displaced by another firm that offers indefinitely lower prices, better quality, and higher performance. So, in the long term, predation is unsuccessful because it is impossible that firms have this behavior for a long period of time.

Contestability – In a perfectly contestable market the varieties offered and their prices come close to the social ideal. In general, markets can be made more contestable (hence more efficient) if potential entrants can enter and exit freely and if set-up and withdrawal (exit) costs are low.

From this perspective, global liberalization can be an important force for contestability by multiplying the number of potential entrants and reducing set-up and

[20] See See Scherer, F. M. and Ross, D. (1990,p. 667-78)

[21] Graham, E. M. and Richardson, J. D. (1997) point out the studies of Shin (1992) and Bourgeois and Messerlin (1993) to demonstrate the rejection of predation in the US and EU antidumping cases they examined. More recently, Lindsey, B. (2000) shows that there would be only two cases of the 107 affirmative (during January 1995 to December 1998) dumping findings reviewed price discrimination.

withdrawal costs. There are usually more potential entrants after trade and investment liberalization. When entering a market, established firms from abroad may have lower set-up costs than would completely new domestic entrants. Thus, liberalization that makes the potential entry of those established firms more likely enhances contestablility. Liberalization affects set-up costs in several ways[22]:

- foreign firms may no longer need to pay for licenses to ship their goods as imports (of the domestic country);
- foreign firms may no longer need to pay (or bribe) various middle-men to establish their investors on a par with local firms. Liberatization may alter withdrawal costs as well;
- suppliers of exports to the domestic market will obviously not have to meet the same withdrawal requirements as a domestic firm that employs local labor and pays local taxes.

So globalization makes more contestable.

II.4. Propositions to an International System

As a tool of domestic economic policy, competition policy has been in existence in the United States for more than a century, and in Canada for even longer. And, since the late 1950s, competition policy has also been an integral element of the law and institutions of the European Common Market, now the European Union. More recently,

[22] See Graham, E. M. and Lawrence, R. Z. (1996)

about 70 countries have adopted some form of competition law or are actively contemplating doing so.[23]

In their objectives, competition policy and liberal trade policy are quite similar. Both aim to enhance economic welfare by making markets more contestable. While the goals of competition policy and liberal trade policy are largely the same, the two are not formally integrated in the sense that there are no multilateral agreements or institutions to ensure that private business practices do not create welfare-reducing barriers to international trade flows.

There have been several failed efforts to do so, including the stillborn Havana Treaty to create the International Trade Organization in 1947.[24] During the late 1990s, however, there have been calls from several quarters for a new effort to negotiate multilateral rules to link competition policy with trade policy. These rules could reside under the aegis of the World Trade Organization – WTO but might possibly exist in some other context.

In fact, some WTO members support the notion that such a negotiation be included in a future round of multilateral trade negotiations. These proponents constitute a diverse lot, including the European Union, Japan and South Africa. However, the United States opposed such a negotiation, as do many developing nations that resist a broadening of the WTO agenda.[25]

---

[23] See Schott, J.J. (2000, p. 205)
[24] *Id*

[25] Id, p.206

Even if the European view were to prevail, however, it is unlikely that the WTO would emerge as the repository of a "global antitrust act" under which the WTO serve as a supranational antitrust enforcement agency.

GRAHAM (2000) proposes that at most what might ensue is that the WTO, or WTO dispute settlement panels, be given some limited powers in the competition area – perhaps the right to request of member governments that antitrust investigations be initiated by domestic authorities and/ or that the results of such investigations, along with any proposed remedies that might emerge, be reported to WTO and be subject to scrutiny for compliance with WTO obligations.

II.5. National rules: Brazil and its procedures

Brazil's original antitrust law, effective in 1962[26], contained general prohibitions similar to the Sherman Act (USA). It forbade price fixing and abuse of market power. The 1962 law created CADE - the Administrative Council for Economic Defense - to enforce these antitrust prohibitions, but CADE rarely undertook any enforcement actions.[27] The Competition Act adopted in 1994[28] replaced the prior antitrust laws and introduced merger control by an independent competition agency in Brazil.

There are three government agencies in Brazil involved in antitrust investigation and enforcement: (1) SDE, the Economic Law Office of the Ministry of Justice; (2) SEAE, the Economic Monitoring Office of the Ministry of Finance; and (3) CADE, the

[26] Law 4,137/62.

[27] Between 1963 and 1990, there were only 16 cases prohibiting or condemning conduct.

[28] Law 8,884 of June 11,1994.

Administrative Council for Economic Protection. All three agencies have investigatory functions (sometimes overlapping), while CADE alone has the adjudicative function. Since 1994, CADE has enlarged its role, originally intended to focus on adjudicative functions, into the investigation phases.[29]

The Competition Act covers single-firm conduct, concerted action, distribution, and other matters in addition to merger control.

COWIE and MATTOS (1999) point out that the Article 54 of the Competition Act contains two separate reporting requirements, one specific and the other more general, that apply to mergers, acquisitions, and joint ventures. It requires firms to notify any transaction in which either (1) the resulting firm accounts for 20 percent or more of a relevant market, or (2) one of the firms involved has annual gross sales of at least R$ 400 million (approximately U.S. $ 345 million).[30] Firms also must report for review a transaction that may "restrain open competition" or "result in the control of relevant markets."[31] Consequently, a merger, acquisition, or joint venture that falls below the more specific thresholds may nonetheless be subject to reporting on the general grounds that it restrains open competition or advances control of a relevant market.

Merger enforcement requires substantive antitrust analysis at the most sophisticated levels. CADE's substantive analysis has improved considerably since enactment of the Competition Act. CADE has reduced the use of behavioral performance commitments, and now seeks to tailor the performance commitments more narrowly in order to remedy the specific anticompetitive threat presented by the transaction. CADE's

[29] For further discussion about the functions of these agencies see Cowie, M. G. and Mattos, C. C. A. (1999).
[30] Competition Act, art. 54.
[31] *Id*.

product market definition analysis now focuses more on consumer preference rather than product characteristics. Geographic market definition should become more dynamic, without the prejudice against world markets.

III – COMPARATION BETWEEN THE ELEMENTS OF ANTIDUMPING AND COMPETITION LAW

III.1 - The Different Policy Objectives of Antidumping and Competition Policy Laws

Dumping illustrates differences in regulation under international trade and competition law regimes and the importance of the choice of policy objective in these two areas.

From a competition perspective, dumping is an act of price discrimination or selling below cost which might or might not be judged conduct restricting competition.

However, international trade economists have taken a very different view from international trade officials at the national and international levels. From the time of the classic study of dumping by VINER (1926), international trade economists have regarded dumping as a form of price discrimination and most have been opposed to the application of antidumping actions by governments. In recent years, the definition of dumping has been broadened to include sales below average cost, even though these sales are not necessarily discriminatory. There has been a proliferation of model of dumping which offer new explanations of this behaviour; for example, demand uncertainty or strategic dumping to discourage firms in the dumped markets from reaching a scale of output that would make them competitive in the exporting country.[32] Only the cases of predatory and

[32] See Ethier, 1987, and Tharakan, 1995.

strategic dumping are regarded by international economists as harmful to the competition process and welfare of the country in which the goods are 'dumped".

International trade economists regards most antidumping action as a form of contingent protection which is intended to provide a margin of protection for domestic producers without regard to the costs imposed on consumers or users of the imported goods. Dumping actions are taken predominantly by the industrialized countries.[33]According to MESSERLIN and REED (1995), the protective dumping margins in the US and the EU are on average two to three times higher than the substantive rates of tariffs. Calculations of dumping in Australia provide similar results[34] Antidumping cases handled by the US and EU authorities revealed that at most 10 per cent and most probably only 5 per cent of cases involve predatory dumping.[35]

GREEN (1996) neatly expressed the difference between antidumping laws and true competition law in the following terms: 'unlike competition laws, which seek to protect competition itself, antidumping laws protect domestic competitors at the expense of importers and generally result in higher costs to consumers'.

Antidumping action should take account of the interests of final consumer or the buyers of intermediate goods. However, antidumping provisions in the WTO and in the legislation of most nations that take antidumping actions ignore the interests of consumers or buyers.[36]

---

[33] Lloyd, P. J. and Vautier, K. M., 1999, p.167
[34] See Vautier,K. M. and Lloyd, P.J., 1997.
[35] See Messerlin P.A. and Reed G., 1995.
[36] Lloyd, P. J. and Vautier, K. M., 1999, p.167

The problems of antidumping actions are getting worse. More countries are taking actions; more developing countries are introducing legislation providing for antidumping duties, though there is no obligation for them to do so under the Antidumping Agreement.

Pricing behaviour is examined under a competition law regime. First, competition law typically does not prohibit selling below cost *per se* although prohibitions on the abuse of a dominant position might catch some below cost pricing. One consequence of the co-existence of competition law and international trade law is that conduct when it is not actionable for a domestic seller in the home market of the importing country is actionable, under dumping legislation, when the seller is outside the country. This is discrimination and it evidently causes inefficiency in the global economy.

Secondly, there is growing evidence that some antidumping actions are themselves anti-competitive in effect.[37] Domestic producers sometimes use antidumping complaints as a means of restricting foreign competition and thereby reinforcing price-fixing agreements in the domestic markets. The OECD Recommendations relating to cooperation between member countries in areas of potential conflict betwwen competition and trade policies specifically enjoin member countries to take care that the exercise of proceedings under laws dealing with international unfair trade practices is not misused for anti-competitive purposes.[38]

III.2 – Pressures to Reduce Antidumping Duties

[37] For EU see Messerlin P.A. and Reed G., 1995, and for Australia, see Lloyd, P. J. and Vautier, K. M., 1999.

[38] See World Trade Organization - WTO, 1997

The present provisions of the GATT/WTO need to be reviewed as antidumping action itself is becoming a major barrier to international trade and cause of friction in the international trading system. Article VI differs form other in the GATT/WTO in that it is concerned with 'unfair trade' whereas the other articles are concerned with border barriers, which is an aspect of the objective of efficiency in the world economy. The provisions for antidumping action also differ in that they do not prescribe what governments may do but they permit them, at their individual discretion and subject to the rules laid down in the Article, to take action.

There are several options. First, remove antidumping regulation. The EU, CER and Canada-Chile Agreements have taken this view for intra-area dumping, because international pricing may be a competition problem and as such it should, in principle, be addressed as a part of competition laws. In fact, as discussed in chapter II[39], in the US and some other countries, dumping arose as part of anti-trust legislation and it is only in recent decades that it has come to be regarded increasingly as a problem of international trade rather than of competition. If provision for antidumping action were removed from WTO, countries would have no remedy readily available to deal with cases which did involve cross-border price predation. This pricing practice is likely to become less frequent as globalizing goods markets become more competitive. In any event, there is a question of appropriate remedies. So, there is unlikely to be support for removing antidumping provisions from the WTO.

[39] See II.3. History of Antidumping Law – *History and Origins*.

Secondly, economists have begun to ask whether competition objectives and standards could be used within the WTO to guide the applications of antidumping actions[40]. Canadian antidumping law allows competition considerations to be taken into account in the determination of both the dumping margin and injury.[41] HOECKMAN and KOSTECKI (1995) suggest that allegations of dumping be investigated by the competition authority of the exporter's home country and a finding of anti-competitive behaviour be requires before antidumping duties are imposed by the importing country. In effect, this would add a competition test to the existing dumping and injury tests. This would make an antidumping action consistent with the competition law of the exporting country but it would mean that, in the importing country, an antidumping action would vary with the competition standards applied by the competition authority in the exporting country, assuming that one existed. Alternatively, the alleged dumping could be investigated by the competition authority of the importing country, assuming it had one. To obtain consistency of standards across importing countries, there would have to be WTO negotiations to adopt a common competition standard for all members. This would be extremely difficult, as OECD attempts to devise common competition standards have shown.

Many of the antidumping actions currently taken would not be taken if the objectives and standards of competition law were substituted for those of international trade law. This would lead to an improvement in the regulation of antidumping actions and consistency with competition law relating to other anti-competitive behaviour.

---

[40] See Hoeckman and Kostecki, 1995 p. 258; Hoekman and Mavroidis, 1996

[41] For more information about Canadian Antidumping Law see GOLDMAN, C.S.; BODRUG, J.D. and WARNER, M.A.A., 1997.

It would, however, be peculiar to subject one set of WTO policies deriving from only one article of GATT/WTO to competition objectives and standards whereas all other WTO rules continued to follow traditional international trade objectives and tests. Furthermore, dumping is only one form of price discrimination or pricing below costs; all forms of price discrimination and other practices which potentially reduce competition need to be considered together.

Thirdly, the WTO could negotiate amendment of Article to replace the (producer) injury test by a national (or international) economic welfare test. This would obligate countries investigating alleged dumping to offset consumer/user gains against producer losses. Such a reform could go a long way, if enforced, to removing the use of antidumping actin as a form of contingent protection.

IV - Deep Integration: Antidumping and Competition Policy in Regional Agreements

IV.1 – European Union – EU

The European Union is not a free-trade area, it is a Monetary Union.

A customs union is defined as a regional trade arrangement where countries share common foreign trade policies, and within which there is no restriction to trade between member states. A common market goes one stage further; it creates a single market within the common trade frontiers of the member states. Therefore, it follows that firms should necessarily be subject to the same treatment throughout the common market territory.

Within the common market of the EU, internal antidumping laws have been replaced by supranational rules on competition directed at firms. The EU has a common antidumping policy against third countries. Parallel national competition laws are still applicable to national transactions when they do not affect trade between member states. In practice, the domestic laws on competition of the member states of the EU have involved towards adopting similar criteria and patterns.[42]

In the EU Treaty rules on internal dumping are considered along with other rules on the behaviour of firms. Internal dumping is treated in parallel with Articles 85 and 86, all under the title of competition. This clearly reveals the symmetry between the two sets of rules. Internal antidumping measures were permitted during the transitional period in which the original member states set up their customs union. For the founding members Article 91 stated:

[42] See Marceau, G (1994) and Matlli, W. (1999)

'1. If during the transitional period, the Commission, on application by a Member State or by any other interested party, finds that dumping is being practiced within the common market, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them'.[43]

Should the practices continue, the Commission shall authorize the injures Member State to take protective measures, the conditions and details of which the Commission shall determine.

The second paragraph of EU Article 91 contained a so-called 'boomerang clause', the main purpose of which is to counteract and arbitrage the effects of dumping in order to discourage the dumper.

91.2 'As soon as this treaty enters into force, products which originate in or are in free circulation in one Member State and which have been exported to another Member State shall, on reimportation be admitted into the territory of the first-mentioned State free of all customs duties, quantitative restrictions or measures having equivalent effect'.[44]

So, the ultimate goal of the two sub-paragraphs of Article 91 of the EU Treaty is to supplement antidumping actions by more competitive rules regulating the behaviour of firms throughout the territory of the common market. This purpose has to be understood, in the wider context of the completion of the common market, as a means to promote a harmonious development of economic activities, an accelerated raising of standards of living, and closer relations between states belonging to the common market. Antidumping actions between member states were considered as important limitations to the realization of these goals.

[43] See Lloyd, P. J. and Vautier, K. M. (1999, p. 59)
[44] *Id.*

The coverage of the EU Competition System

As LLOYD, P. J. and VAUTIER, K. M. (1999, P.61) wrote 'a Common Competition Policy was one of only four areas of common policies originally provided for in the Treaty of Rome; the others were a common trade policy, a common agricultural policy and a common transport policy'. The role of competition policy has been strengthened in the revisions of the Treaty in the Single Act and the Maastricht Treaty.

The coverage of the competition law can be considered in terms of the countries covered, the division between EU-level and national-level jurisdictions, the types of conduct covered and sectorial dimensions.

The country coverage of competition law extends beyond the 15 full members of the EU to the members of the European Economic Area (EEA) and the Associated States of the Central and East European Countries (CEECs) and the Mediterranean. SMITH (1998, p. 96) explains that, 'under EEA Agreement, the members of the EEA were required to modify the competition law provisions of the European Free trade Area (EFTA) of which they were members to conform to the *acquis communitaire* of the EU including its competition law'.

SMITH (1998) also states that similar arrangements apply under the European Agreements with the ten CEEC Associated States, which were signed between 1991 and 1996.

The second dimension of coverage is the division between EU level and national jurisdictions. This is determined by the principle of subsidiarity. It divides between the

national government level and the EU level functions which are not the exclusive competence of the Community.[45]

In the case of competition law, the exclusive assignment of laws to the EU level is restricted to competition issues which affect actual or potential intra-EU trade. It does not include merger controls. The EU level has taken responsibility for all the international dimensions of competition law, including those which affect trade and competition between the EU countries and third countries, while the national competition authorities deal with those which affect only the markets in these individual countries.

So, the application of subsidiarity to competition law in the Treaty of Rome and the Maastricht Treaty explains the choice of a centralized supranational authority rather than a coordination of the actions of the competition authorities of the member states.

The third dimension of coverage is that of the extent of conduct covered. This coverage is unusually wide, and includes all standard aspects of unilateral conduct, horizontal and vertical restraints and mergers, plus government conduct in the forms of state aids, state monopolies and regulatory structures.[46]

The fourth dimension of coverage is that of the number of sectors exempted. SLEUWAEGEN, L. (1998, p. 1079) shows that there are general exemptions for coal,iron and steel products, but these are handled in a similar way under the European Coal and Steel Community (ECSC) Treaty which coexists with the Treaty of Rome. Labor and collective bargains are excluded and there are partial exclusions for agriculture

---

[45] For further explains about the principle of ‘subsidiarity’, see Lloyd, P. J. and Vautier, K. M., (1999, p.63) p. 63)

[46] According to Mattli, W. (1999, p 68), ‘the core of competition law in the EU derives from the Treaty of Rome plus the Merger Regulations’.

and defense and special rules for transport and financial institutions; undertaking by cartels relating to exports from the European Community are generally exempt.[47]

IV.2 – MERCOSUR

Establishment of MERCOSUR

Under the Treaty of Asunción, signed on 26 March 1991 by the Presidents of Argentina, Brazil, Paraguay and Uruguay, the Mercado Común del Sur (MERCOSUR) was established. The treaty was subsequently ratified by all members and entered into force on 29 November 1991. The Treaty of Asunción has been formally amended once, in the Additional Protocol of the Treaty of Asunción, know as the "Protocol of Ouro Preto", signed on 17 December 1994.[48] This protocol, which concerns mainly institutional issues as well as dispute settlement, is also considered to confer on MERCOSUR a distinct international legal personality.

The treaty of Asunción foreshadowed the establishment of a common market among the four countries with free circulation of goods, services, capital and workers from 1 January 1995, but not all of this ambitious program was achieved.

Antidumping Policy to third countries

Common Rules on Unfair Trade Practices against third countries were agreed under Decision No. 17/96 of Common Market Council in December 1996.[49] Under the decision, a Trade Defence and Safeguards Committee was also created.

[47] See OECD, 1996, 9chapter on the EU).
[48] These documents are available at: http://www.mre.gov.br/unir
[49] MERCOSUR Decisions are available at: http://www.mre.gov.br/unir

However, antidumping actions are still allowed under Resolution No. 12/94 of the Common Market Group - CMC until such time as there is the Constitutional approval from Common Market - CMC. It was decided under Decision CMC No. 18/96 and No. 28/00 to continue this situation until 31 December 2001.

So, during these transitional period, antidumping actions have been allowed on intra-trade in MERCOSUR.

Common Rules on the Defence of Internal Competition

The 1996 Protocol of the Defence of Competition in MERCOSUR[50] was pending Congressional approval by three of MERCOSUR's four member countries for enforceability as national law (only Paraguay had ratified the protocol).

The preamble of the protocol focuses on the link between the free movement of goods and services amongst MERCOSUR members and equal conditions of free competition. The protocol rules are designed to apply to all persons and entities (including monopolies) 'whose purpose is to influence or to bring influence to bear upon competition in the framework of the MERCOSUR and consequently to influence trade between the member states'.[51] These rules are clearly aimed at spillover effects with adverse impacts on competition and trade. Where the influence on competition is limited to a member's respective territory, the conduct in question falls within the exclusive competence of that member state.

Targeted conduct is clearly that which has the purpose or final effect of restricting, limiting, falsifying or distorting competition or access to the market, or which constitutes an abuse of the dominant position and the relevant goods and services market

[50] *Id*
[51] Decision/CMC n.18/96, p.1

in the MERCOSUR framework and which affects inter-member trade. The protocol alerts market players that a wide range of conduct might be caught. Indeed, 17 different practices are listed, including price fixing, artificial market division, tying, preventing competitor access to raw materials, investment goods or technologies or distribution channels. Importantly, market success through efficiency is itself protected.

The protocol is applied by the Trade Commission of the MERCOSUR and by Committee for the Defense of Competition (an inter-government body comprising those in each state responsible for the application of the protocol). The Committee can apply preventative measures, including the cessation of a practice subject to inquiry. Where differences regarding the application of procedures arise, an opinion can be requested from the MERCOSUR Trade Commission (comprising one member from each of the four states). If the MERCOSUR Trade Commission cannot reach a consensus the Common Market Group makes a ruling. Failing consensus in that Group, a member state could resort directly to MERCOSUR's Dispute Settlement Protocol.

Part of the protocol deals with cooperation and technical consultation between the national enforcement agencies – but it is noted that, at the time of writing neither Paraguay nor Uruguay had competition-specific legislation or institutions; and neither they have this legislation today.

Importantly, the protocol envisages an autonomous competition agency in each member country and the application of the law to all public and private enterprises. So, different from the EU**,** MERCOSUR doesn't have the subsidiarity principle**.**

The protocol itself is intended to be a force for a comprehensive convergence of approach to competition. Article 7 requires the member states to adopt :

'common rules for the control of acts and contracts, of any kind, which may limit or in any way cause prejudice to free trade, or result in the domination of the relevant regional market of goods and services, including which result in economic concentration, with a view to preventing their possible anti-competitive effects in the framework of the MERCOSUR'.

It seems that the ultimate direction of MERCOSUR's approach to competition will depend largely on Brazil's influence. In 1994, Brazil expressly emphasized the protection of competition as an objective; as noted in chapter II, the government created the Brazilian Competition System.

IV.3 – NAFTA

Competion Policy

NAFTA is the second largest regional trading arrangement[52] but the provisions in the agreement relating to 'competition policy' are rudimentary compared to those of the EU. This is despite the fact that anti-trust concepts were first developed in the US and anti-trust law is pursued more aggressively in the US than in any other country.

The US in particular, Canada and, more recently, Mexico have developed polices to promote competition but they are exclusively national policies.

NAFTA's Chapter 15[53], dealing with competition policy, is essentially competition law. The chapter has only five pages (out of the 2,000 pages in total) and there are only four substantive articles. Article 1501 (Competition Law) imposes on the member countries a general obligation to maintain and enforce a competition law and to

[52] The North American Free Trade Agreement (NAFTA) is reproduced in Bhala, Raj (1996).
[53] *Id*

cooperate with each other in the enforcement of these national laws. Cooperation comprises mutual legal assistance, notification, consultation and exchange of information. No party may have recourse to dispute settlement under the Agreement for any matter arising under this Article. Articles 1502 and 1503 provide rules for monopolies (sole providers or purchasers of a good or service) and state enterprises. These provisions do not do proscribe monopolies or state enterprises but do proscribe acts which are inconsistent with obligations of members under the Agreement or which nullify or impair benefits of the Agreement. Article 1504 establishes a Working Group on Trade and Competition to examine the issues concerning the relationship between competition laws and policies and trade in the NAFTA area.

Thus, the obligations of the member countries are limited to maintaining and enforcing a competition law and to cooperating with each other in the enforcement of theses national laws. There are no common rules in the sense of the EU-level competition law and no supranational authority. The chapter takes a behavioral and not a structural approach, in that neither monopolies nor state enterprise are prohibited. Nor are particular practices, such as differential pricing or cross-subsidization, prohibited unless they are used as instruments of anti-competitive behavior.

Because there is no dispute settlement procedure relating to competition law matters, any dispute between members has to be resolved under bilateral competition cooperation agreements, in the case of Canada and the US, or are probably left unresolved.

This limited approach to competition law within NAFTA reflects the views of the member countries that a national competition law is an essential component of efficient

market behavior and that bilateral cooperation is the best means to deal with cross-border issues.

LLOYD (1999, p.104) points out that the obligation to have national competition laws was put there primarily to ensure that Mexico, which did not have a competition law before the Agreement, would introduce a national law and to foster cooperation among the three national authorities.

The Competition Policy chapter essentially lays down general provisions for national governments to follow but it does not establish any competition standards. There are no specific provisions relating to abuse of dominance, collusion, vertical restraints or mergers.

This NAFTA approach reflects the approach of the members to the regional agreement as a whole. Unlike the EU, and to a considerable extent MERCOSUR , the NAFTA members are not pursuing a common or single market with high degree of integration of the markets of the member countries. NAFTA is primarily a free trade agreement. In respect of 'competition policy', NAFTA has, under the leadership of the US, concentrated on competition law.

Antidumping Actions

NAFTA allows members to retain their Antidumping laws, but any changes may be subject to panel review. Moreover, Mexico agreed to adapt its trade policy procedures to the US model by providing full due-process guarantees and judicial review to US exporters for Antidumping cases. HAGGARD, S. (1995, p. 93) says that 'never before has a developing county accepted a dispute-settlement mechanism that has the power to levy fines and invoke trade sanctions to guarantee compliance with a treaty'.

The procedure for review of antidumping actions is similar to the general dispute-settlement mechanism, including binding panel decisions and the option of calling for an extraordinary challenge committee.[54] In addition, however, a country may request a special committee to determine whether another country's domestic law has undermined the functioning of the panel system.

[54] According to Mattli, W. (1999, p. 184), the general dispute-settlement mechanism has the folowing procedures ' the NAFTA rules establish a trilateral North American Free Trade Commission, composed of cabinet-level representatives from each country, to administer the agreement and adjudicate disputes over the interpretation or application of NAFTA law. If a dispute arises, a country can call a meeting of the Commission which will try to resolve the dispute using its good offices, mediation or conciliation. In the absence of a mutually satisfactory solution, the Commission will create a panel of private-sector experts which is to issue a first report within ninety days of panel selection and a final version thirty days later. Failure to comply with a ruling gives the complaining country the right to impose trade sanctions for the duration of the dispute'**.**

V – CONCLUSION

International trade economists have taken a very different view from international trade officials at the national and international levels about dumping. From the time of the classic study of dumping by VINER (1926), international trade economists have regarded dumping as a form of price discrimination and most have been opposed to the application of antidumping actions by governments. In recent years, the definition of dumping has been broadened to include sales below average cost, even though these sales are not necessarily discriminatory. There has been a proliferation of model of dumping which offer new explanations of this behaviour; for example, demand uncertainty or strategic dumping to discourage firms in the dumped markets from reaching a scale of output that would make them competitive in the exporting country. Only the cases of predatory and strategic dumping are regarded by international economists as harmful to the competition process and welfare of the country in which the goods are ‘dumped”.

International trade economists regards most antidumping action as a form of contingent protection which is intended to provide a margin of protection for domestic producers without regard to the costs imposed on consumers or users of the imported goods.

The number of antidumping investigations increased, unless the Uruguay Round had changed the antidumping rules. The industrialized countries are ones who use it the most. This is predictable if we consider the size of these economies. On the other hand, there are some studies that show only 10 to 5 per cent of the cases involve predatory

dumping. The other cases are based on 'constructed price' and the 'best available information', which are very discretionary rules[55].

So, Article VI of GATT would be revised in the next round of WTO to restrict the use of antidumping measures in the cases without predatory action.

This paper illustrates the Brazilian experience with antidumping policy. The country also increased the use of the Antidumping Code. It was effective in the time when Brazil did the import tariff reforms (1985-1994), because some adjustments in the internal market were still needed. Nowadays, however, the internal producers have to face the international competition.

In the World Trade Organization, the official position of the government is to pressure the industrialized countries, especially the United States and Canada, to reduce the possibilities of protectionism in the Antidumping Codes.

There are some propositions to reformulate the antidumping measures, as pointed out in chapter III. To the Brazilian perspective, the most useful proposition is to allow consideration of competition policy in the determination of both the dumping margin and injury test.

The reduction of protectionism in antidumping measures can be an important force for market contestability by multiplying the number of potential entrants and reducing set-up and withdrawal costs.

The European Union has the most integrated model of antidumping and competition policy among the international agreements considered in this paper (European Union, NAFTA and MERCOSUR).

---

[55] For EU see Messerlin P.A. and Reed G., 1995, for United States see Lindsey, B., 2000

In the European Union, a single new supranational competition law replaces national antidumping law amongst trading partners. This involves an important loss of sovereignty for less powerful states. It also necessitates a supranational authority, which will ensure some homogeneity in the application of the competition rules throughout the territory covered by the supranational legislation.

MERCOSUR, as a common market, is going to replace antidumping policy with a competition policy in the internal market, in January 2002. At the same time, the antidumping common policy will be used in the imports. Differently from the European Union policy, MERCOSUR does not have supranational institutions and so the decisions have been taken by consensus.

In the North American Free Trade Agreement - NAFTA, which is, by definition, a free trade agreement, each member uses their national legislation to competition policy and antidumping policy, but they agree to harmonize the legislation to have the same functions and interpretation.

The perspective of the Free Trade Agreement of Americas – FTAA is to follow the negotiations of NAFTA. Like the Brazilian position to reformulate the antidumping Code at WTO, the Brazilian officials will try to reduce the protectionism provisions in the antidumping measures and improve the competitive policy throughout the hemisphere.

BIBLIOGRAPHY

BAUMOL, W. 1979. 'Quasi-Permanence of Price Reductions: a policy for prevention of predatory pricing', Yale L.J.89/1.

BHALA, R. 1996. *International trade law: cases and materials*. Charlottesville, Virginia: Michie Law publishers

COWIE, M. G. and MATTOS, C. C. A. 1999. 'Antitrust Review Mergers, Acquisitions, and Joint Ventures in Brazil', Antitrust Law Journal, 67, issue 1, ABA – American Bar Association

DALE, R. 1980. *Antidumping Law in Liberal Trade Order*, London: Macmillan.

DEARDOFF, A. 1991. 'Economic Perspectives on Antidumping Law', in Jackson and E. Vermulst (eds), *Antidumping Law and Practice*: 23.

EVANS, J.W. *The Kennedy Round in American Trade Policy: the twilight of the GATT?*, Cambridge, MA: Harvard University Press.

GENERAL AGREEMENT ON TARIFFS AND TRADE. 1959. "Report of the Group of Experts on Antidumping and Countervailing Duties." Basic Instruments and Selected Documents, 8th supp. Geneva: GATT Secretariat.

GOLDMAN, C.S.; BODRUG, J.D. and WARNER, M.A.A., 1997. 'Canada' in E.M. Graham and D. Richardson (eds) *Global Competition Policy*, Washington, D.C: Institute for International Economics

GRAHAM, E. M. 2000. 'Trade, Competition, and the WTO Agenda' in SCHOTT, J. J. (ed) *The WTO After Seattle,* Washington: Institute For International Economics

GRAHAM, E. M. and LAWRENCE, R. Z. 1996. 'Measuring the International Contestability of Markets? A conceptual approach', *Journal of World Trade Law*, 30, Octuber

GRAHAM, E. M. and RICHARDSON, J. D. 1997. *Competition Policies for the Global Economy*. Policy Analyses in International Economics, n. 51,november. Washington: Institute for International Economics

GREEN, C. 1996. 'Competition Regulation in the Asia-Pacific Region', paper presented to the Asia-Pacific Roundtable Meeting on the Global Contestability of National Markets, Singapure, 26-28 January.

GREEN, C. J., and ROSENTHAL, D. E., eds.,1996. *Competition Regulation Wthin the APEC region: Commonality and Divergence*. New York: Oceana Press

HAGGARD, S. 1995.Developing Nations and the Politics of global Integration. Washington: Brookings Institution

HAY, D. 1997. In *Global Competition Policy*, ed. by Edward M. Graham and J. David Richardson. Washington: Institute for International Economics

HINDELEY, B. 1991. 'The Economics of Dumping and Anti-dumping Action: Is there a Baby in the Bathwater?', in P. K. M. Tharaken (ed.), *Policy Implications of Antidumping Measures*: 25.

HOECKMAN, B and KOSTECKI, M. 1995. *The political Economy of the World Trading System*: From GATT to WTO, Oxford: Oxford University Press

HOECKMAN, B. and. MAVROIDIS, P.C., 1996. 'Dumping, Antidumping and

Antitrust', *Journal of World Trade Law*, 30, February

JACKSON, J. H. 1999. *The World Trade System,* Cambridge: the MIT Press, second edition.

JENNY, F. 1997 In *Global Competition Policy*, ed. by Edward M. Graham and J. David Richardson. Washington: Institute for International Economics

LAIRD, S. 1997. *Mercosur: objectives and achievements*, Staff Working Paper TPRD9702.WPF, WTO, avaible at *hpp:www.wto.org*

LINDSEY, B. 2000. 'The US Antidumping Law: rhetoric versus reality', *Journal of World Trade Law*, 34, February

LLOYD, P. J. and VAUTIER, K.M., 1999. *Promoting Competition in Global Markets*. Massachusetts.Edward Elgar Publishing, Inc.

MARCEAU, G. 1994. *Antidumping and Antitrust Issues in Free Trade Areas*, New York: Oxford University Press Inc.

MASTEL, G. 1998. *Antidumping Laws and the U.S. Economy*, New York: M.E. Sharpe, Inc.

MATTLI, W. 1999. *The Logic of Regional Integration*. Cambridge-UK: Press Syndicate of the University of Cambridge

NAIDIN, L.C., 1999, in "Nove anos de aplicação da política antidumping no Brasil", 1999".*Revista Brasileira de Comércio Exterior,* 58. Rio de Janeiro (FUNCEX)

SCHERER, F. M. and ROSS, D. 1990. *Industrial Market Structure and Economic Performance*, 3d ed. Boston: Hougton Mifflin

SCHOTT, J. J. (ed) 2000. *The WTO After Seattle,* Washington: Institute For International Economics

TAVARES, J. A. and TINEO, L. 1999. 'Competition Policy and Regional trade: NAFTA, Andean Community, MERCOSUR and FTAA' in P. Low, B. Kotschwar and M. R. Mendoza (eds), *Multilateral and Regional Trade Negotiations: Convergence or Conflict?*, Washington, D.C: Brookings Institution

TINEO, L. 1997. *Competition Policy and Law in Latin America: from distributive regulations to market efficiency*. Center for Trade and Commercial Diplomacy Working Paper n. 4. Monterey, CA: Monterey Institute of International Studies.

VINER, J. 1926. Dumping: A Problem in International Trade. Geneva: League of Nations

WORLD TRADE ORGANIZATION (WTO), 1997. Working Group on the Interaction between Trade and Competition Policy, *Communication from the OECD*, Geneva

____, 1999. *Annual Report.* Geneva, available at http:www.wto.org.