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Legal and economic interfaces between antidumping and competition policy.

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Abstract

The interaction between antidumping and antitrust is a polemic issue in every integration process for both legal and economic reasons. From a legal perspective, antidumping rules allow practices such as price undertakings and quantitative trade restrictions that are forbidden by competition law, and punish certain types of price differentiation that are justifiable under the antitrust rules. From an economic viewpoint, the two policies pursue different objectives that eventually may lead to conflicting situations. Antidumping is a trade remedy for industries injured by import competition. The final goal of antitrust is to promote consumer welfare and productive efficiency, which in part depend upon market contestability, wherein import competition often plays a key role.

This paper addresses several issues from three complementary perspectives. Section 2 summarizes the current debate about antidumping rules in the United States. This debate includes a large and growing academic literature that has been surveyed recently by Blonigen and Prusa (2001), papers and speeches by influential personalities such as Kenneth Dam, Alan Greenspan and Joseph Stiglitz, and the active participation of business associations, lawyers, lobbyists and politicians. This diverse collection of policy suggestions provides a normative background for the discussion in the rest of the paper. Section 3 reviews the instruments used by the European Union and the U.S. government for reconciling a strong enforcement of competition laws with an intense use of antidumping measures. Section 4 highlights some peculiarities of the FTAA process. Section 5 presents the main conclusions.

I. Introduction[1]

The interaction between antidumping and antitrust is a polemic issue in every integration process for both legal and economic reasons. From a legal perspective, antidumping rules allow practices such as price undertakings and quantitative trade restrictions that are forbidden by competition law, and punish certain types of price differentiation that are justifiable under the antitrust rules. From an economic viewpoint, the two policies pursue different objectives that eventually may lead to conflicting situations. Antidumping is a trade remedy for industries injured by import competition. The final goal of antitrust is to promote consumer welfare and productive efficiency, which in part depend upon market contestability, wherein import competition often plays a key role.

The enforcement procedures of these policies also differ significantly. Antidumping procedures are defined under the assumption that a domestic competitive industry is facing a foreign monopolist or an international cartel, but this assumption is not supposed to be tested during the investigation. Thus, in each case, the data to be collected are limited to import figures, price comparisons and performance indicators of the domestic industry. There is no room for any query about industry configurations, entry barriers, market power and other conditions of competition at home or abroad. In contrast, the starting point of every antitrust inquiry is the identification

[1] I thank Caldwell Harrop and Karsten Steinfatt for helpful suggestions, and Mariana Tavares de Araujo for the research assistance on legal matters.

of the relevant market and its conditions of competition. Another peculiarity of the interplay between antidumping and antitrust is that many industrialized economies are leading users of both policies. This implies a series of compromising solutions with different degrees of coherence and transparency for reconciling the legal and economic interfaces between the two policies. Some of these solutions may provide useful guidelines for the current negotiations on the creation of a Free Trade Area of the Americas (FTAA), where the attainment of a compromising solution will require an intricate exercise of economic diplomacy. Besides the disparities in terms of size and level of economic development of the member countries, one additional challenge to be faced by the FTAA initiative results from the uneven degree of law enforcement in the region. In most Latin American and Caribbean countries, antitrust institutions are still at an infant stage or simply do not exist. On the other hand, the main users of antidumping in the hemisphere are the United States, Canada, Mexico, Argentina and Brazil. The smaller economies seldom apply this policy (see Tavares, Macario and Steinfatt, 2001).

This paper addresses the above issues from three complementary perspectives. Section 2 summarizes the current debate about antidumping rules in the United States. This debate includes a large and growing academic literature that has been surveyed recently by Blonigen and Prusa (2001), papers and speeches by influential personalities such as Kenneth Dam, Alan Greenspan and Joseph Stiglitz, and the active participation of business associations, lawyers, lobbyists and politicians. This diverse collection of policy suggestions provides a normative background for the discussion in the rest of the paper. Section 3 reviews the instruments used by the European Union and the U.S. government for reconciling a strong enforcement of competition laws with an intense use of antidumping measures. Section 4 highlights some peculiarities of the FTAA process. Section 5 presents the main conclusions.

II. The Controversy on Antidumping

Thousands of pages have been written about antidumping over the last 25 years. One remarkable feature of this vast literature is that – at least within the academic community – most authors would share Michael Finger's view that "antidumping is a trouble-making diplomacy, stupid economics and unprincipled law" (1993, p. 56). According the existing multilateral rules, antidumping actions are applied on a discriminatory basis and require no formal compensation to the affected parties, as they are under the blame of unfair behavior. Yet, in many cases the targeted exporting industries are well rewarded, by sharing the protection rents with their competitors from the importing country, but this compensation is never acknowledged by either party. Thus, antidumping rules generate unnecessary tensions among trading partners, because there is no clear record of the costs and benefits involved in each case, nor any transparent recognition of winners and losers. Moreover, the empirical literature has demonstrated that the aggregate welfare results of antidumping measures are systematically negative for the importing country. Finally, antidumping rules have another discriminatory component, as they impose requirements to foreign producers that are not applicable to domestic firms.

In a similar vein, Kenneth Dam, deputy Treasure secretary of the present Bush Administration, noted: "The focus of protectionist arguments in the United States has turned away from direct calls for protection to an emphasis on 'fairness'. […] Despite this smiling fair trade face, the antidumping proceeding always has been and is increasingly a protectionist device, as various Congresses have amended the underlying statute to make the proceeding and remedy

more effective. This darker face of antidumping proceeding is so well known inside the Washington Beltway that it has become a trite joke among trade lawyers that antidumping is the protectionist's weapon of choice[2]" (2001, p. 148).

Alan Greenspan, chairman of the Federal Reserve Board, pointed out the historical roots of this joke: "Generation after generation has experienced episodes in which the technologically obsolescent endeavored to undermine progress, often appealing to the very real short-term costs of adjusting to a changing economic environment. From the Luddites to the Smoots and the Hawleys, competitive forces were under attack. […] Administrative protection in the form of antidumping suits and countervailing duties is a case in point. While these forms of protection have often been imposed under the label of promoting 'fair trade', oftentimes they are just simple guises for inhibiting competition" (1999, p. 3)."

Joseph Stiglitz, a Nobel Prize winner and former chief economist at the World Bank, highlighted the anti-competitive effects of these laws: "Perpetuating unfair trade laws that are themselves unfair thus imposes substantial burdens on our consumers and on our most efficient exporters while protecting our least efficient import-competing firms" (1997, p. 418).

Great part of the academic research on antidumping has been focused on the American economy. One reason for this is that the U.S. has maintained a leading international performance in regard to this instrument, as the principal user and the second worldwide target of antidumping investigations during the last decade (see Miranda, Torres and Ruiz, 1998). Another possible explanation stems from the contrast between the scholars' denigration of antidumping and the longstanding commitment to this trade remedy by the U.S. government. Besides, as Blonigen and Prusa (2001) have reminded, antidumping can provide stimulating illustrations for an endless list of economic concepts, such as capture, rent-seeking, moral hazard, adverse selection, contingent protection, imperfect competition, cartel behavior, transaction costs, optimal tariffs, comparative advantage, regional integration, and so on.

Another interesting aspect of this controversy is that the most complete study so far on the welfare impact of antidumping on the U.S. economy was made in 1995 by the staff of the International Trade Commission (ITC), the institution responsible for this trade remedy in the country. The study showed that removing the antidumping and countervailing duties that were active in 1991 would have allowed a welfare gain of US$l.6 billion, i.e., about 0.03 percent of U.S. GDP in that year. This finding had no effect on the ITC conduct in subsequent years, for the reasons bluntly explained by Commissioners Janet Nuzum and David Rohr in their comments on the study: "…when viewing the conclusions of this report, it must be remembered that the purpose of the antidumping and countervailing duty laws is not to protect consumers, but rather to protect producers. Inevitably, some cost is associated with this purpose. However, unlike the antitrust laws, which are designed to protect consumer interests, the function of the AD/CVD laws is, indeed, to protect firms and workers engaged in production activities in the United States. So it should not come as a surprise that the economic benefits of the remedies accrue to producers, and the economic costs accrue to consumers. The United States Government, through legislation, has made a conscious policy choice to provide these trade remedies in recognition of the reality that free and open trade does not yet exist worldwide. […] The alternative to these trade remedies is most likely to be politically-driven decisions, which may have even more profound costs to our economic interests" (ITC, 1995, pp. VIII-IX)

In a communication to the World Trade Organization (WTO), the U.S. Government presented the same argument under a more sophisticated format: "Contrary to the assumptions of some economists, the antidumping rules are not intended as a remedy for the predatory pricing

[2] According to Dam, the original author of this joke is Gary Horlick (1989).

practices of firms or as a remedy for any other private anti-competitive practices typically condemned by competition laws. Rather, the antidumping rules are a trade remedy which WTO Members have agreed is necessary to the maintenance of the multilateral trading system. Without this and other trade remedies, there could have been no agreement on broader GATT and later WTO packages of market-opening agreements, especially given imperfections which remain in the multilateral trading system." (U.S. Government, 1998, p. 2)

In other words, antidumping is the price to be paid for the maintenance of an open trading system among nations wherein some industries are not prepared to face import competition. It is a safety valve – perhaps a cynical one – that ensures political support to trade liberalizing initiatives. As Dam (2001) has argued: “The case for antidumping duties is thus not so much sound economic policy but rather statecraft that channels protectionism to narrowly defined products and renders it less harmful to the economy as a whole” (p. 156).

Among trade economists, the standard reply to the above reasoning is that the correct instrument for providing temporary protection to inefficient industries is a safeguard measure, not antidumping (Nicolaides and Van Wijngaarden, 1993; Messerlin, 1996; Finger 1998; Tavares, Macario and Steinfatt, 2001). Safeguards are more transparent, less belligerent and better focused than antidumping. Instead of blaming foreigners for the country’s trading problems, safeguards direct the government’s attention to the domestic factors that may be limiting the competitiveness of local firms. But governments prefer antidumping because it is easier to apply. It does not require negotiating compensations with trading partners, nor implementing industrial restructuring programs at home.

Over the last two decades several proposals have been made to improve the disciplines on antidumping. They varied from bold initiatives that would replace antidumping with competition law to narrow reforms that would introduce some antitrust principles into antidumping investigations, such as analyzing the conditions of competition in the importing country and abroad, or examining the aggregate welfare consequences of that protection measure (Hoekman and Mavroidis, 1996; Hart, 1997; Lipstein, 1997; Stiglitz, 1997; Lloyd and Vautier, 1999; Messerlin and Tharakan, 1999; Lloyd, 2001). But instead of more rigorous, the WTO rules on this matter became more flexible, due in part to the lack of a multilateral framework for dealing with competition issues. Nowadays, perhaps the only mechanism that engenders some parsimony on the use of this trade remedy is the effort made by some governments to avoid daily conflicts between antidumping and competition law enforcement in their domestic economies, as the next section shows.

III. The Room for Compromising Solutions

The effort to reconcile a serious enforcement of competition law with an active use of antidumping measures implies a difficult challenge for any government, as the experiences of the European Union and the United States well illustrate. Despite the different legal traditions and institutional settings of these economies, their experiences have shared one important point in common, which is the primacy of competition law over antidumping and other trade policy instruments. As the following discussion shows, this rule is explicit in the European legislation, while in the U.S. it resulted from jurisprudence. But its enforcement is severe in both economies.

A. The Legal Interface

The European legislation ensures the primacy of competition law with three overlapping provisions. First, the EU Treaty establishes clear limits on the implementation of any policy whose results would be inconsistent with its Articles 81 (on restrictive practices) and 82 (on market dominance). As Bourgeois and Demaret (1995) noted: "… from a legal point of view, the primacy of competition policy only implies that the Community may not violate its own specific competition rules and that, in addition, it may not take measures whose effect is to significantly distort competition in the internal market. Beyond that, the primacy of competition policy is essentially of a political nature and cannot be translated into sufficiently precise norms of conduct to become operative" (p. 85).

The second provision is the famous "Community interest" clause stated by Article 21 of the EU antidumping legislation. "A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers; (…) In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that is not in the Community interest to apply such measures" (Article 21§1 of the Council Regulation No. 384/96).

The third provision refers to price undertakings. The preamble of the above-mentioned regulation and its article 8 establish that price undertakings should not be accepted if they were likely to provoke anticompetitive results. Therefore, each provision reinforces the others and leaves the EU authorities with wide latitude for discretion when applying both antidumping and competition rules.

In the early sixties, two rulings by the U.S. Supreme Court established the Noerr-Pennington doctrine, which afterwards became the defining feature of the interaction between antidumping and antitrust in the U.S. legal system.[3] This doctrine is based on the First Amendment right of citizens to petition the government and to participate in the legitimate processes of government (Jones, Lee and Shin, 2001). Accordingly, the Noerr immunity protects private actors from antitrust liability for lobbying and other attempts to influence government action, even when those efforts are intended to eliminate competition or otherwise restrain trade (Von Kalinowski, 2001). However, as Davidow (1999) noted, "… the Court has also stated that this privilege may be lost if the antitrust plaintiff proves it was injured competitively by means of a pattern of knowingly baseless litigation motivated by a desire to injure rather than to prevail on the merits" (p. 2). Indeed, the limits of the Noerr immunity are well described in the 1995 Antitrust Enforcement Guidelines for International Operations, issued by the U.S. DOJ Antitrust Division and the Federal Trade Commission. These guidelines include illustrative examples of situations wherein the parties would be protected by the Noerr immunity, but also highlight those facts that would go beyond the scope of that immunity. For instance, the information exchanged by domestic firms during a proceeding should not include their costs, the prices each has charged for the product, pricing trends, and profitability, nor "… information about specific transactions that went beyond the scope of those facts required for the adjudication" (p. 23).

Cases such as the abuse of dominant position by soda ash producers in Europe and the ferrosilicon cartel in the United States show that the primacy of competition policy is undisputed whenever the authorities detect illicit practices fostered by antidumping measures. In December 1990, the European Commission imposed a series of fines on soda ash producers that varied from ECU 7 million to ECU 20 million, as a result of an investigation started in March 1989. Those firms were involved in concerted practices that restricted the distribution of soda ash in the European market, and one instrument supporting such practices was an antidumping duty that blocked import competition from the U.S. and Eastern Europe. During the investigation, the Commission initiated a review proceeding of that antidumping measure, which was suspended in September 1990 (see Bourgeois and Demaret, 1995). The ferrosilicon case was similar (see Pierce, 2000). In 1996, the three largest U.S. producers of that metal were convicted of conspiring to fix domestic prices. At the time, the American industry of ferrosilicon was composed by only six firms, which were enjoying the benefits of several antidumping measures enacted since 1993

[3] Eastern Railways Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

against exporters from Brazil, China, Kazakhstan, Russia, Ukraine and Venezuela. In August 1999, the ITC finally realized that these measures were taken under "the erroneous belief that the U.S. ferrosilicon market was competitive and price sensitive" (ITC, 1999, p. 3), and revoked them.

However, in both jurisdictions, the flexible boundaries between antidumping and competition law enforcement sometimes lead to controversial results. For instance, in the often cited Extramet case (Marceau, 1994; Bourgeois and Demaret, 1995; Van Bael, 1996), the Commission applied antidumping duties on the imports of calcium metal from China and Russia, thus protecting Pechiney, the sole European producer of this good. Many authors have criticized the decision, but in the Commission's view the conditions of competition in the European market were preserved, because the main supplying sources, the imports from the U.S. and Canada, were not affected by the measure. In the U.S., antidumping investigations in different industries such as fertilizers, pharmaceuticals and rubber have generated antitrust litigations with mixed results[4] (Davidow, 1999). But there is no record – either in Europe or in the U.S. – of unlawful practices that remained unpunished because the competition authorities were unwilling to destroy privileges granted by an existing antidumping measure.

B. The Economic Interface

In contrast with the flexible, but clear, legal boundaries between the two policies, their economic interaction is much less transparent; due to the uncertain evidence about how often the competition policy goals of promoting efficiency and consumer welfare are hindered by market distortions created by antidumping measures. The regular use of antidumping provokes a series of unintended outcomes that exceed by far the standard welfare costs of conventional trade barriers. Besides raising the prices of imported goods and reducing the contestability of domestic markets, the potential distortions include incentives for collusion and/or retaliatory behavior among local and foreign oligopolies, trade diversion, perverse incentives to inward foreign direct investment and superfluous transfers of protection rents to trading partners. As Blonigen and Prusa (2001) pointed out, most of these consequences are difficult to observe and quantify. They do not necessarily imply unlawful business conduct, but impose an additional burden on competition authorities.

Therefore, despite the normative consensus among scholars reported in the preceding section, the empirical literature has produced some conflicting evidences about the economic interface between antidumping and competition policy. For instance, Messerlin (1990) found that 27 cartel cases investigated by the European Commission between 1980 and 1987 dealt with chemical products that have been also involved in antidumping cases. These results reinforce the argument for subordinating antidumping to competition law. The author concludes: "… firms that have lodged anti-dumping complaints to enforce cartel agreements have easily captured EC anti-dumping procedures. As a result, the EC *de facto* has two procedures for granting an exemption from the competition rules, one under the Treaty of Rome, and another that is a consequence of the EC anti-dumping regulations, which are only vaguely linked to the Treaty" (Messerlin, 1990, p. 491).

I found rather different results for the United States. I compared the list of goods involved in 223 cases of anti-competitive behavior filed the DOJ Antitrust Division during 1994–1998 with the 348 antidumping and countervailing measures that were active in the United States by December 1997. Both lists had just <u>*one*</u> item in common, ferrosilicon, which was related to the aforementioned cartel case dismantled in 1996. I concluded that, at least in the U.S., there was a

[4] Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 176 F. 3d 1055 (8th Cir. 1999); Cheminor Drugs, Ltd. v. Ethyl Corp., 993 F. Supp. 271 (D.N.J. 1998); Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd., 982 F.Supp. (E.D.Va. 1997).

peaceful division of labor between the two policies. While the industries protected by trade remedies were apparently well behaved, those engaged in illicit actions did not seem interested in spending resources in rent-seeking activities (see Tavares, 1998, 2001).

On a related research topic, Prusa (1992), Zanardi (2000) and Taylor (2001) studied the incentives for collusion between domestic and foreign firms involved in antidumping investigations. Prusa presented a bargaining model to explain why so many antidumping petitions were withdrawn during 1980–1985, when duties had been imposed in only 27% of the investigations initiated by the ITC, while 38% of the petitions were withdrawn and 35% rejected. His model shows that antidumping petitions serve as a vehicle to achieve cooperative levels of profits among competitors. Zanardi examined the period 1980–1992 and reached the same conclusion. Using an extended version of Prusa's model, he shows that incentives to collude depend on two basic parameters: coordination costs and the relative bargaining power of participating firms. However, Taylor analyzed the period 1990–1997 and concluded that there is little empirical support for the notion that withdrawn petitions imply collusion. He examined the behavior of import prices and quantities of withdrawn cases, and found pro-competitive results in most cases, i.e., lower prices and larger imported quantities after the petition is withdrawn.

In sum, the problems that antidumping may create to competition policy authorities are as uncertain as those engendered by technical progress. Innovations bring about new forms of competition that oftentimes raise entry barriers, promote informational asymmetries, strengthen the market power of innovating firms, and consequently present new challenges to the competition authorities. Antidumping is a protection instrument that eventually may lead to the same type of consequences. A common feature of the compromising solutions found by the European Union and the United States was to insulate one policy from the other, while protecting the credibility of competition policy. It remains to be seen whether this recipe could work in other circumstances. The next section addresses this issue.

IV. The FTAA Peculiarities

Some integration initiatives, such as the European Union and the Australia–New Zealand trade agreement, have solved their internal disputes arising from antidumping by simply abolishing the use of this instrument among the member countries. Others, such as the 1996 Canada–Chile agreement, have replaced it with safeguards; which is a second best solution that has the merits pointed out in section 2. The current FTAA negotiating agenda does not include an eventual abolishment of antidumping in the region; the mandate defined by the member countries is restricted to “improving, where possible, the rules and procedures regarding the operation and application of trade remedy laws in order to not create unjustified barriers to trade in the Hemisphere”. In regard to competition policy, one of the main objectives is “to advance towards the establishment of juridical and institutional coverage at the national, sub-regional or regional level, that proscribes the carrying out of anti-competitive business practices.”

After the Doha Ministerial Declaration, which defined a new set of multilateral goals to be pursued at the WTO, one doubt that has emerged is whether is it still necessary to carry out hemispheric negotiations on antidumping. The facts discussed below show that the answer is yes.

The first aspect to note is that the FTAA negotiations on antidumping affect mainly the interests of the five largest parties. As table 1 shows, the U.S., Brazil, Mexico, Canada and Argentina were targets in 435 of the 485 investigations initiated within the hemisphere during 1987–2000. On the other hand, these parties were responsible for 410 of those investigations. The other FTAA countries seldom use or are affected by this trade remedy. Indeed, if we exclude the

participation of the smaller economies, either as targets or authors of the investigations, the outcome is that 78% of the investigations involved only the five largest economies in the region.

Table 1
ANTIDUMPING INVESTIGATIONS WITHIN THE WESTERN HEMISPHERE, 1987–2000

Origin / *Target*	**Argentina**	**Brazil**	**Canada**	**Mexico**	**United States**	**Others**	**Total**
Argentina	-	2	2	1	14	3	22
Brazil	38	-	13	19	30	4	104
Canada	-	1	-	4	42	1	48
Mexico	3	4	3	-	34	10	54
United States	10	26	65	68	-	13	182
Others	10	7	1	11	27	19	75
Total	**61**	**40**	**84**	**103**	**147**	**50**	**485**

Source: WTO

Among the main users of antidumping in the Americas, only Brazil and the United States have suffered more investigations than applied. Together, these countries have been affected by almost 60% of the antidumping measures in the hemisphere, while their initiatives represented less than 40% of the cases. In principle, this aspect should have implied convergent negotiating strategies, instead of the antagonist positions they have followed so far. While the public stance of the Brazilian government seeks to protect the interests of the exporting industries affected by antidumping, the U.S. attitude highlights only the other side of the coin, i.e., the interests of the protected industries.[5]

Another peculiarity of antidumping in the Americas refers to its relationship with competition law enforcement. Among the 12 countries that have competition policy institutions in the hemisphere, Jamaica is the only one that never used antidumping measures. In contrast, among the 22 countries without antitrust laws, only Ecuador, Guatemala, Nicaragua and Trinidad & Tobago have occasionally initiated some investigations.[6] Therefore, the apparent trend among Latin American and Caribbean economies is toward either applying both policies (like most advanced economies do), or not using any of them. This aspect may help the FTAA negotiations on the interaction between the two policies.

Finally, and most importantly, some of the industries regularly affected by antidumping are precisely those responsible for the main trading flows of manufactures in the hemisphere: steel and base metals, chemicals, pulp and paper, textiles and capital goods (see Miranda, Torres and Ruiz, 1998; Tavares, Macario and Steifatt, 2001; Lindsey and Ikenson, 2001). Thus, antidumping spoils the critical driving force in every integration process, which is the interest of exporting firms on new market opportunities. For this reason, while the improvement of multilateral rules on

[5] There has been a growing domestic criticism on the U.S. government's inability to address the interests of the exporting industries affected by antidumping: "It is past time for U.S. policymakers to widen their view of antidumping's effects to include the victims as well the beneficiaries of the U.S. law and to recognize the growing dangers posed by foreign laws. From that broadened perspective, they should see that international negotiations to address the antidumping problem are emphatically in the U.S. national interest. In WTO or FTAA, or bilateral initiatives, U.S. trade officials should join together with like-minded governments to stem and then reverse the tide of antidumping activity" (Lindsey and Ikenson, 2001, p. 17). See also Dam (2001); Stiglitz (1997).

[6] During 1987–2000, these four countries initiated 11 investigations, of which 8 were against other trading partners in the hemisphere (Tavares, Macario and Steifatt, 2001).

antidumping will certainly facilitate regional negotiations, it will be insufficient for the FTAA process, wherein the parties will need additional disciplines for eliminating the use of antidumping as surrogate safeguards.

Likewise, compromising solutions such as those discussed in section 3 will be useful for reconciling the legal boundaries between antidumping and antitrust in the FTAA, but will not address the hemispheric issues arising from their economic interaction. Inside each country, while an active use of antidumping may bruise the credibility of a newborn competition authority, this challenge should be similar to those appearing in other areas, such as privatization, export promotion and intellectual property, for instance. These problems are typical everywhere, particularly during periods of economic reform. However, at the hemispheric level, antidumping is a serious threat, not to antitrust, but to the integration process itself. Therefore, besides ensuring the primacy of competition policy, an additional task for the FTAA parties will be setting out effective safeguards for assisting industries unable to face import competition.

To become politically viable, the FTAA safeguard mechanism should be able to provide sustainable solutions to a restricted set of conflicting situations whose main actors are the aforementioned industries located in the five countries listed on table 1. Accordingly, one preliminary step to negotiate that mechanism should be an inquiry about the empirical effects of antidumping actions among FTAA countries in the recent past. This inquiry should include three complementary studies. The first should be focused on the responses to antidumping by the affected foreign firms, which may include tariff-jumping foreign direct investment, trade diversion, product differentiation, price undertakings, voluntary export restraints and other efforts to share protection rents with the firms from the importing country. The second study should look at the signs of eventual anticompetitive practices promoted by antidumping in the Americas, and the third should discuss the impact of macroeconomic conditions on the pace of antidumping activity in the region.

These studies could produce startling results that might change the mood of the current FTAA negotiations on antidumping. For example, Prusa (1996) finds that trade diversion not only offsets large part of the benefits expected by domestic firms, but also rewards exporting firms from countries not named in the investigation. One interesting outcome reported by him is that Brazil, Canada and Mexico, who are usual targets of the U.S. investigations (see table 1), may nevertheless be net beneficiaries of such actions since they also gain from sanctions on other countries.[7] The figures presented by Tavares, Macario and Steifatt (2001) suggest that trade diversion may be a generalized feature of antidumping in the Americas. In contrast with the 485 investigations initiated against partners in the hemisphere during 1987–2000, FTAA countries opened 1259 additional cases against the rest of the world. Surprisingly, the rest of the world did not reciprocate with the same strength, as only 153 actions were launched against the western hemisphere from countries outside the region.

A firm's power to extract benefits from an antidumping case opened in a foreign country is highly uneven across industries. The business strategies that are efficient in this circumstance usually require foreign direct investment, product differentiation and managerial skills to exploit in due time a new market niche. Therefore, size, profile of activities and innovation capability are the main indicators of a firm's ability to follow those strategies. Blonigen (1999) examined the incidence of tariff-jumping FDI among firms affected to U.S. antidumping investigations from 1980 through 1990. He found that economies of scale and the firm's previous experience in

[7] "Even though successful AD actions restrict imports from the named country, the countries who are not subject to the investigation can offset this restraint by increasing their sales to the U.S. […] The diversion of trade is large, not only when duties are levied but also when the case is rejected. In fact, surprisingly, we find that diversion is even more substantial when duties are not levied" (Prusa, 1996, p. 11).

producing abroad are the explanatory variables for the likelihood of tariff-jumping FDI. So, transnational corporations are more apt to tariff-jump than small companies from developing countries and firms from industries with large plant-level economies of scale.

In regard to anti-competitive practices, a research on the recent hemispheric experience with antidumping should verify whether the results found by Braga and Silber (1993) on the orange juice industry are present in other cases: "Unfair trade cases against Brazilian firms had little direct impact on output or price levels. However, they apparently created incentives for the adoption of practices that promote oligopolistic coordination among Brazilian firms. […] The folly of these unfair trade actions is particularly evident from their impact on its supposed beneficiaries – the U.S. citrus industry. The antidumping cases were basically used to protect orange growers and higher-cost frozen concentrate producers at the expense of the U.S. juice and soft drink processors and distributors linked by marketing arrangements to Brazilian concentrate exporters. Its main effect has probably been to strengthen the oligopoly–oligopsony relationship between Brazilian producers and their U.S. partners, as suggested by their joint defense strategy in the antidumping investigation, further hindering the prospects for competition in the world market for frozen concentrated orange juice" (pp. 99–100).

V. Conclusion

Contrary to the desire of most economists, antidumping is not likely to be abolished soon. The good news is that its importance is not about to grow either. Like other conventional trade barriers such as tariffs and quotas, antidumping belongs to a generation of policy instruments that were designed to protect domestic producers from international competition patterns that prevailed during the nineteenth century and the first part of the twentieth century. Those instruments are useless to meet the challenges stemming from the competition patterns created by technical progress over the last three decades. Microsoft will never file an antidumping petition against a foreign competitor that has launched an innovative software in the U.S. market, as it would be futile, but also because Microsoft would have more powerful strategies to face that risk. Nowadays, antidumping remains as the protectionist’s weapon of choice only in traditional industries such as steel, chemicals, textiles and others whose instruments of competition are limited by their technological base.

Despite its declining utility as a protection tool, antidumping has retained a great capacity to provoke serious, if misleading, trade disputes, as the FTAA negotiations well illustrate. This paper has argued that while this trade remedy may impose an unnecessary burden on competition authorities, it does not offset antitrust law enforcement. Therefore, in the FTAA case, the priority task to be attained by negotiating parties is not to reconcile marginal legal contradictions between the two policy instruments, but to clarify what are the real conflicting national interests that are delaying the integration process.

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