



The American
Antitrust Institute

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

WORKING GROUP ON INTERNATIONAL ISSUES

July 15, 2005

INTRODUCTION

These are the comments of a Working Group on International Issues established by the American Antitrust Institute for purposes of responding to the AMC's request for public comments. These comments reflect what appears to be a consensus of the Working Group, but it should not be assumed that all agree with every statement or position herein. The Working Group is chaired by Philip Nelson (Economists, Inc.) and the other members are John Connor (Purdue),¹ Beth Farmer (Penn State), Harry First (NYU), Albert Foer (AAI), Eleanor Fox (NYU), Douglas Rosenthal (Sonnenschein et al.), and Spencer Waller (Loyola).²

COMMENTS ON THE AMC'S SUGGESTED QUESTIONS

Issue #1: Should the FTAIA be amended to clarify the circumstances in which the Sherman Act and FTC Act apply to extraterritorial anticompetitive conduct?

The Foreign Trade Antitrust Improvements Act is widely regarded as a textbook example of poor drafting, a statute whose full meaning eludes even the most careful reader. Sporadically, albeit increasingly, litigated since its passage in 1982, it took more than twenty years before the Supreme Court decided to hear a case involving the statute. The Court's decision in that case, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*,³ did not settle the interpretation of the statute, however. Rather, in a somewhat Delphic opinion, the Court set off a new round of litigation to interpret both the statutory language and the meaning of the Court's decision.

Despite the criticisms of the statute and a substantial concern about the direction in which court interpretation may be headed, we do not advocate any legislative change at this time, unless, perhaps, it would be to repeal the statute completely. We believe that the common law process, generally an effective one for antitrust interpretation, should be

¹ In accordance with Purdue University Executive Memorandum B-4 (1972), John Connor wishes to inform readers that any views expressed in this message are his own and quite likely do not represent the views of his University.

² Spencer Waller did not participate in the drafting or review of the section discussing Issue #1.

³ 542 U.S. 155, 124 S.Ct. 2359 (2004).

given time to work out some of the statute's interpretive problems before Congressional intervention is considered.

Our conclusion is based on the following four points.

1. Post-*Empagran* cases: In *Empagran* the Court held that non-U.S. plaintiffs who purchased price-fixed vitamins outside the United States from a cartel of vitamin producers could not recover for overcharges they paid as a result of the price fixing if the foreign effect (higher prices outside the United States) was independent of the domestic U.S. effect (higher prices inside the United States caused by the cartel's operations). The Court remanded the case, however, for the lower courts to consider whether the foreign injury was dependent on the anticompetitive domestic effect, that is, whether the foreign and domestic effects were linked. The Court did not decide, however, whether factually there was a link or, if there were, whether such dependent effects would give rise to a claim under the statute.

On remand, the district court held that the “The statutory language—‘gives rise to’—indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for ‘nexus’ the appellants advanced in their brief [which involved the argument that monopolistic prices in the U.S. were required to make the foreign collusion effective since otherwise there foreign purchasers would have purchased bulk vitamins at lower prices either directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States].”⁴ We find the court's effort to make a distinction between “direct causal relationships” and the real economic relationship in the case between foreign effects and collusive U.S. prices to be strained, particularly because it ignores the fact that the mere threat of international arbitrage creates a very immediate and direct economic connection between U.S. prices and foreign prices. Nonetheless, given that this case might be appealed and that there will be other post-*Empagran* cases (some of which are already awaiting decisions), we believe it makes sense to allow the law to continue to evolve.⁵ These cases will give the courts of appeals an opportunity to consider both the specific facts of each claim as well as arguments on the interpretation of the FTAIA. It is possible that a consensus interpretation of the Act will emerge from these decisions that more accurately reflects the direct ties between foreign markets and the U.S. market when arbitrage is a direct, and immediate threat that connects the markets.

⁴ *Empagran S.A. et al. v. F. Hoffmann-Laroche, Ltd. et al.*, No. 00cv01686, slip op. at 7 (D.C. Cir. June 28, 2005). All three briefs submitted to the Supreme Court by economists agreed that, to be effective in raising prices, international cartels selling tradable products had to engage in conduct to prevent international geographic arbitrage. See, for example, Bernheim, Brief of Certain Professors of Economics as Amici Curiae in Support of Respondents, *F. Hoffmann-LaRoche, et al., Petitioners v. Empagran et al., Respondents, et al.*, 2003 U.S. Briefs 724. (March 15, 2004).

⁵See e.g., *BHP N.Z. Ltd. v. UCAR Int'l, Inc.*, 106 Fed. Appx. 138, 142-143 (3d Cir. 2004) (remanding for further proceedings).

2. Other recent FTAIA cases: FTAIA problems have arisen outside the price fixing area, in distribution cases,⁶ in monopolization cases,⁷ even in a Government case involving a joint venture agreement dividing markets.⁸ Given the increasing globalization of the economy, it is likely that FTAIA cases will continue to arise in a variety of contexts. The diversity of the jurisdictional problems makes it debatable whether legislative tinkering with the Act's language will relieve its interpretative problems or make them worse, as Congress tries to foresee the numerous ways in which conduct outside the United States might give rise to liability under U.S. antitrust law.

3. The deterrence debate: A critical argument that relates to cases such as *Empagran* is the effect on deterrence of allowing recovery by persons injured outside the United States. Substantial scholarly support was presented to the Court for the proposition that increasing the total penalties for cartel activities would produce an increase in deterrence.⁹ In contrast, the Justice Department (and others) argued that deterrence would suffer because cartelists would be less likely to seek amnesty if they knew they would expose themselves to greater financial liability. The Supreme Court could not say "on balance" which side of this "empirically based argument" was correct.¹⁰

Shortly after *Empagran* was decided by the Court, however, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which provides for detrebling of antitrust damages for defendants who have entered into an amnesty agreement with the Department of Justice. This statute is subject to a five year sunset provision.¹¹

The interrelationship between the statutory detrebling and the ability of non-U.S. plaintiffs to collect damages from price-fixing cartels has yet to be assessed. It may be that the combination of the new statute and a denial of recovery to non-U.S. victims (if

⁶See, e.g., *MM Global Servs. v. Dow Chem. Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004) (Indian distributor terminated for failure to sell at minimum resale prices in India, allegedly to maintain prices in U.S.) (suit permitted to go forward under FTAIA).

⁷See *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 716-17 (D. Md. 2001) (Greek citizen purchasing Windows program from Microsoft, using the Internet; court wonders whether this is a sale in the United States and therefore outside the FTAIA).

⁸See *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004) (no jurisdiction under FTAIA).

⁹ *Bush Brief Amicus Curiae in Support of Respondents*, No. 03-742, *F. Hoffmann LaRoche, Ltd. et al., Petitioners, v. Empagran S.A., et al., Respondents*, 2003 U.S. Briefs 724.

¹⁰See *Empagran*, 124 S.Ct. at 2372.

¹¹See Pub. L. 108-227, Title II, §§ 211-215, June 22, 2004, 118 Stat. 666.

such recoveries are denied) will be seen as a substantial weakening of deterrence, or it may be that experience will show otherwise. In either event, it seems wise to gain experience both with post-*Empagran* decisions and with the 2004 Act before deciding whether there is something that needs legislative fixing in the FTAIA.

4. Form of amendment: However tortured the current statutory language may be, it is not so easy to come up with amendments to the statute that would improve it. Nevertheless, the critical point is not so much how the statute should read, but what the goal of the statute (or any amendments to the statute) should be. On this point, it might be argued that the most elegant, and direct, solution to the FTAIA's language problems is to repeal the statute completely. After all, the FTAIA was originally enacted to give greater leeway to U.S. export cartels to operate abroad free of U.S. antitrust constraints and it substantially overlaps the policies of the Export Trading Company Act of 1982 (the FTAIA being Title IV of that Act). There never was a good reason to have two statutes; and there may not be a good reason to have even one. If we still want export cartels, however, we could leave that to the Export Trading Company Act. Without the FTAIA, courts would then be free to continue developing the meaning of the foreign commerce clause of the Sherman and FTC Acts, much as they have been doing since the Sherman Act was passed in 1890. Common law development could then focus directly on whether a particular restraint involved "trade or commerce . . . with foreign nations" within the meaning of the Sherman Act and on the separate question whether the particular plaintiff bringing suit had standing to sue for that violation. This would likely be a preferable outcome to any attempt to alter the language of the FTAIA to achieve some more specific goal.

Issue #2: Are there technical or procedural steps the United States could take to facilitate further coordination with foreign antitrust enforcement authorities?

Because of the AAI's interest in stimulating research and awareness of sound antitrust policy, it is particularly interested in the question of whether there are actions that could be taken to further "facilitate the provision of international antitrust technical assistance to foreign antitrust authorities." Recognizing the need to find better ways to train the officials of the hundred or so antitrust agencies now established around the world (many of which are relatively new), we urge the AMC to endorse the concept of a centralized, permanent faculty for this purpose, and to seek the budgetary authority for the United States to take a leading role in promoting the creation of such a facility. We suggest it might follow the lines proposed by the AAI in the attached document.

COMMENTS ON OMITTED INTERNATIONAL ISSUES

While the Commission is planning to address many important issues, few measures would make so dramatic a contribution to competition and consumer welfare as reform of the anti-dumping laws. The question "Should the antidumping laws be reevaluated?" appeared on the issues the AMC first recommended for study, by memorandum of December 21, 2004, and we infer from this reference that you, too, recognize the great importance of the issue. We want to urge that you return the issue to your agenda, and to try to get it on the table for legitimate debate.

There are at least three reasons why this issue should be given importance. First and obviously, the antidumping laws rob consumers by forcing them to pay prices that are substantially above world-market levels. Second, by putting costs on intermediate buyers (who are often manufacturers that compete in world markets), they make American businesses less competitive in the global economy. Third, antidumping laws notoriously facilitate cartels and/or other anticompetitive coordination.¹² Indeed, coordinated activity going beyond the dumping settlement has been justified on the grounds that the court could not infer an antitrust conspiracy because it made economic sense for each producer acting in its own interests to raise its prices to a supracompetitive and parallel level (e.g., *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F. 3d 1028,(8th Cir.), cert. denied, 531 U.S. 815 (2000)).

Despite the always highly charged political climate surrounding proposed reform of antidumping laws, discussion and modest recommendations are possible. An example is chapter 6 of the ABA Antitrust Section's NAFTA Report (1994), which we attach. Chapter 6 was written largely by Harvey Applebaum, an expert in both trade and antitrust, although the report was a group project. The report was presented to the American Bar Association by the Antitrust Section, which urged the ABA to adopt the eight framework principles (not the entire report, which was too highly detailed). The ABA adopted the eight principles, as the Antitrust Section urged. The principle relating to antidumping is stated as follows: "The Governments of the three NAFTA Parties should work together on the following tasks and towards the following goals: ... addressing the interrelationship between the trade laws and the antitrust laws"

That the NAFTA Report involves a free trade area is not important; the FTA simply provided the occasion to consider options in ratcheting back the antidumping laws. Those options should be equally important to your enterprise. You will note that the options and recommendations are modest; but they are a start.

We believe that the mere express recognition by you of the importance of the issue and the promise antidumping reform offers to competition, consumers, and antitrust would be progress.

Additional Submissions:

1. Proposal for International Academy of Competition Policy (attached)
2. ABA NAFTA Report (separate document)

¹² In the global cartel for bulk vitamin C in the early 1990s, the European members of the cartel threatened to bring an EU dumping action against fringe Chinese manufacturers of vitamin C. See European Commission. *Commission Decision of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/E-1/37.512 – Vitamins)*. Brussels (January 10, 2003).

Contact Person for these Comments: Albert Foer, President, American Antitrust Institute, [REDACTED]

Proposal for International Academy
of
Competition Policy

Executive Summary:

Countries all over the world have now adopted antitrust laws, yet few of these countries have substantial experience enforcing them. The American Antitrust Institute proposes to address this and related problems through the establishment of an International Academy of Competition Policy. Students at the academy would be antitrust enforcement officials from all over the world, including many countries with developing or recently liberalized economies.

This proposal was drafted five years ago. It has been presented to the major logical funding sources without success. Everyone approached by the AAI has praised the idea. No one has come forth with the money that will make it possible. The Antitrust Modernization Commission could get behind the Academy idea by urging that the U.S. take the initiative in meeting with the European Union, the World Bank, the OECD, and others to agree on sharing the funding, with the U.S. putting up the first dollars. This project would complement the work of the International Competition Network (ICN) in its efforts to develop best practices, informal harmonization, and an effective capacity for building an international antitrust presence that can help market economies succeed.

**Creating Better Competition-Policy Enforcement
By Creating Better-Trained Competition-Policy Enforcement Officials**

In this era of market liberalization and globalization, interest in antitrust law is expanding dramatically. In the past decade, many national economies that were once highly regulated or state-run have moved to free-market models. And as they have done

so, their governments have quickly realized that free markets work best within a structure of institutions and ground rules—including fiscal and monetary policy and, as the United States discovered more than 110 years ago, antitrust law.

Often called “competition law” or “competition policy” outside the United States, antitrust is perhaps best described as a collection of rules against abusive behavior in the marketplace. The most infamous behavior that violates competition policy everywhere is price-fixing, that is, collusion among many or all of the producers in an industry to keep prices high, guaranteeing high profits for the colluders. Other examples include mergers to a high level of industry concentration, “predatory strategies” used by large companies to drive smaller rivals out of business, and the “tying” or “bundling” of a possibly inferior product with a different product that dominates its market—forcing consumers to buy both. Anticompetitive activity leads to higher prices and fewer choices for all consumers, with the largest impact likely to be on the poor.

Ultimately, competition policy helps align the private goals of market participants with the broader public good by insuring that businesses can succeed only by providing superior products and services or by finding ways to produce the same products at a lower price. Thus, competition policy helps create the link between the selfish aims of capitalism and the broader social aims that nations have for their citizens: more wealth, more leisure, and their combination, labor efficiency—that is, more wealth created per hour worked. Moreover, competition policy helps insure that all entrepreneurs are free to compete on an even playing field, and will not have their efforts squelched by powerful companies looking to sidestep competition.

National governments are rapidly committing to competition laws, but have not yet acquired the skills needed to enforce them effectively.

Recognizing the importance of competition policy, governments have raced to establish their own competition laws. As of 1989, only about 30 countries in the world had enacted such laws. But by early 1999 the figure was up to approximately 80, and about 20 more governments had draft laws on their way to adoption. Countries with

competition laws accounted for nearly 80 percent of world output and 86 percent of world trade. In the industrialized world, where competition laws have existed for many years, they are now being enforced with greater rigor.

Unfortunately, the recent upwelling of competition policy has outstripped the capacities of many countries to enforce it effectively. The American Antitrust Institute has learned this from its own formal group of advisors on the issue, as well as its informal information sources—a combined group that includes many of the world’s leading experts in the international training of competition-policy enforcement officials. In interviews with these advisors, the AAI has discovered that most countries’ competition laws are still enforced by officials who have little theoretical background in law, economics, or business strategies, and little experience in the techniques of gathering evidence, ferreting out, and prosecuting violations in competition cases. Many of these officials are career civil servants who have not been well trained for their current assignments. Indeed, some of them (especially in formerly communist countries) have basic misunderstandings about how competition works and what sorts of behavior are likely to threaten it.

Enforcing competition laws is considerably different from enforcing many other types of law. Although a few bright lines exist, most questions of competition law require careful and sophisticated analysis. To assess whether a competition law has been violated, investigators must often school themselves in the workings of an entire industry. Their activities often have as much in common with the work of an investigative journalist, or an academic teacher of marketing or microeconomics, as they do with the everyday work of a criminal prosecutor. Information sources routinely include informal interviews, articles in the popular and trade press, analysts’ reports, and rough econometric calculations, in addition to more traditional sources such as deposition testimony, affidavits, “hot documents,” and the like. Competition-law educators who have spent years working with less-experienced countries say that most of those countries’ enforcement officials are under-equipped to carry out all these unfamiliar tasks.

Current international efforts to build better enforcement skills are inadequate and unfocused, considering the scope of the problem.

To help enforcement officials overcome some of these difficulties, several governments and international organizations offer “technical assistance” on competition law enforcement, including international conferences and internships with the more-experienced enforcement agencies. By all accounts the most useful kind of assistance consists of long-term visits to a less-experienced country by a more-experienced enforcement official. The main organizations providing such assistance have included the World Bank, the European Commission, the United States Agency for International Development, and the Organization for Economic Cooperation and Development. In an environment of increasingly global commerce, when one country fails to enforce (or erroneously enforces) its competition laws, the harm may be felt by the citizens of other countries as well as the local citizenry. For instance, if a company in Country A is allowed to stifle competition and ends up raising its prices, the consumers of all other countries that import Country A’s products suffer as a result.

Competition policy enforcement, then, should really be an international concern—much like monetary policy, trade policy, and environmental policy. In all four areas, the “spillover effects” are large and growing. Unfortunately, experts in the area agree that the technical assistance directed toward competition-law enforcement has been grossly insufficient to deal with the enormous harms wrought by diminished competition. What’s worse, the technical assistance that does exist has been inconsistent, uncoordinated, and ad-hoc. Indeed, the exact dollar amount spent on technical assistance is hard to compute, because the aid comes in many administrative guises representing several organizations. In late 1999, the American Antitrust Institute conducted a survey of competition-policy officials in 22 countries, most of whose competition laws are

relatively new.¹³ Based on the responses, we believe there are many countries whose officials feel that they acutely need better training. In recent years, this sentiment has prompted some discussion within the World Bank and the OECD concerning the establishment of an international competition-policy *training center*, or some other program to address the problem in a more coordinated way. But as yet no one has undertaken such a project.

The American Antitrust Institute proposes a new, centralized academy for the training of enforcement officials from all countries

The AAI urges establishment of an International Academy of Competition Policy (IACP), where enforcement officials from many different nations could gather to learn—and to teach one another—investigative techniques suitable to competition law, and to study substantive topics that underlie that field of law, such as the basic legal doctrine, microeconomics and business strategy. The IACP would teach the basics of antitrust enforcement to officials from many countries at once, thus avoiding the duplication of effort that currently exists in country-by-country training programs. Students would attend the academy for an extended period of time, so that they could learn the kinds of investigative and prosecutorial skills that come only with long-term, hands-on training.

Based on the responses to the AAI survey of competition authorities, we suggest enrolling roughly 75 students per year in the academy: 25 students per term, for three terms each year. Before coming to the IACP, each cohort of students would spend roughly 16 weeks in their home countries taking distance-learning courses that cover the more theoretical parts of the curriculum: basic antitrust doctrine, micro-economics, and business strategy. All 25 students would then travel to the IACP, where they would attend courses full-time for roughly 6 weeks. These courses would likely emphasize case studies, group projects, and other skills-based exercises. The primary location of the

¹³ Eighteen responding countries had transitioning or developing economies: Benin, Colombia, Croatia, Cyprus, Czech Republic, Estonia, Kenya, Lithuania, Malta, Mexico, Philippine Republic, Poland, Romania, Slovak Republic, Taiwan, Uzbekistan, Venezuela, and Zambia. Four represented advanced economies with well-established competition laws and institutions: Canada, Israel, New Zealand, and Switzerland.

IACP would likely be in Europe. The academy would be a not-for-profit educational institution, governed by an independent international board that includes representatives from students' home countries, funding sources, and international organizations with competition-law expertise. It would be truly international: students would learn as much from each other as from the instructors, and their home countries would have considerable influence on the curriculum.

At the IACP students would forge personal and professional relationships, helping to build a much-needed global competition-policy community. We hope that this might lead to the dissemination of "best practices" and the informal harmonization of competition policies among many market economies. The IACP would likely be affiliated with an existing institution of higher learning, and students would receive some sort of academic degree. As a condition for receipt of the degree, each student would have to (i) remain with his or her home country's competition authority for at least two years after graduating, (ii) run training sessions within that country's competition agency to teach the other officials some of what the student learned at the IACP, and (iii) contribute one publishable article to the IACP's journal of international competition policy. These degree requirements would, respectively, help to (i) solve the serious problem of staff turnover at competition policy agencies, (ii) disseminate the IACP's training to more than 75 people each year, and (iii) encourage scholarly dialog concerning international issues in competition policy. Of the countries that responded to the AAI survey, all but one said they would be interested in sending professional-level staff members to attend such an academy.

Before going ahead with the project, we need a more precise, expert-created curriculum, and a detailed accounting of the costs that it implies.

Although it appears that many countries would be willing to continue paying the salaries of enforcement officials while they were studying at the IACP, we believe that few countries will be able to cover the cost of transportation to the academy, let alone the

substantial costs for food, housing and tuition. For the moment, then, we are assuming that all IACP-related expenses will need to be underwritten.

The AAI prepared a draft business plan for the IACP, which includes a detailed itemization of costs and the description of a model curriculum. Five years ago, we estimated that costs will be roughly \$1.5 million per year, when the IACP is running at its 75-student-per-year capacity. The cost would be higher today. The model plan has been very well-received by our expert advisors and others to whom we have presented it. Still, the model curriculum in the business plan is highly speculative and variations in the curriculum could affect the budget significantly.

To get the project off the ground, then, we feel that there should be a preliminary study of the IACP's curriculum, in day-by-day, lesson-by-lesson detail. In particular, it will be necessary to resolve a certain tension between a skills-based curriculum and a multi-national student body. To develop skills, the IACP will want to focus on mock cases and other hands-on exercises. But the more practical the exercises become, the greater the chances that they will stray from the legal rules of any given country. For instance, it may make little sense to teach students how to issue civil investigative demands (mandatory calls for evidence prior to the filing of a civil or criminal action), if half of those students come from countries where investigative tools similar to CIDs do not exist. We are confident that remaining curriculum questions can be pinpointed and resolved. A key question is whether the Academy should operate in one location with one language or whether multiple centers will be needed, each with its own language.

Albert A. Foer, President
American Antitrust Institute
Washington, DC
Revised, May 25, 2005

REPORT OF
THE TASK FORCE
OF THE
ABA SECTION OF
ANTITRUST LAW
ON

THE COMPETITION DIMENSION OF NAFTA

Eleanor M. Fox, Chair
Harvey M. Applebaum
Donald I. Baker
Jodi S. Balsam
Yee Wah Chin
Calvin S. Goldman
Ray V. Hartwell
Caswell O. Hobbs, III
Charles A. James
Jeffrey L. Kessler
Thomas B. Leary
Abbott B. Lipsky, Jr.
Kenneth R. Logan
Janusz A. Ordover
Sergio Garcia Rodriguez
Douglas E. Rosenthal
Allen Van Fleet
Mark A. A. Warner
Robert C. Weinbaum

Elizabeth A. Fuerstman
Project Assistant

July 20, 1994

This report is a background document suggesting means to achieve eight principles of trade/free competition in North America. The principles contained herein were adopted by the American Bar Association. The report, however, is not policy of the American Bar Association.

FOREWORD

With the coming of the North American Free Trade Area, the Section of Antitrust Law saw the opportunity to contribute to the liberalization of trade and investment on the continent through competition policy. The Section appointed a Task Force on the Competition Dimension of NAFTA. The Task Force submitted its Report, proposing eight framework principles and detailing options and suggestions for carrying them out. The Section of Antitrust Law approved the Report, adopting the framework principles and commending the options and suggestions for the consideration of policymakers. It submitted to the ABA House of Delegates the eight framework principles, which the House of Delegates adopted, as Resolution 116A, on August 9, 1994.

As the Task Force Report reveals, there are many challenges and intricacies involved in the task of achieving coordination and market integration through free competition in a free trade area. The Task Force Report provides roadmaps through this complex terrain.

The Report should be useful to the NAFTA working groups and the trade and competition officials of the three NAFTA nations as they address the difficult problems at the interface of trade and competition. It should be useful, likewise, to the antitrust bars of all three nations as they seek to understand the convergences and divergences of the three sets of antitrust laws. Also, it should be useful to officials, policymakers, and academics around the world as they grapple with the challenge of coordination and convergence of the competition policies of nations and the harmonization of competition and trade policies in the wake of global competition.

The Section of Antitrust Law is indebted to the members of the Task Force, and gives particular thanks to the antitrust officials of all three NAFTA nations who served *ex officio* on the Task Force and who, without endorsing any of the suggestions, provided an invaluable resource.

Alan H. Silberman
Chair, Section of Antitrust Law
1993-1994

August 1994

CHAPTER ONE

INTRODUCTION AND EXECUTIVE SUMMARY

Principles, Suggestions and Options for Consideration by the Working Groups and Other Appropriate Bodies

I. INTRODUCTION

On January 1, 1994, the North American Free Trade Agreement ("NAFTA") became effective, immediately abolishing numerous trade barriers among Canada, the United States and Mexico. In addition to eliminating and phasing out tariffs and quotas, NAFTA takes market-freeing, progress-promoting initiatives, mainly in the areas of intellectual property, financial services, cross-border investment, technical standards, telecommunications, and competition law, while providing for certain enforcement mechanisms in the areas of environment and labor.

Competition policy¹ is an important area for study in the context of NAFTA, for five reasons. First, competition policy and trade policy go hand in hand in providing fundamental economic underpinnings of market economies, notwithstanding significant derogations from these policies. Just as free trade measures lift government barriers to trade, competition law enforcement can eliminate private barriers to trade. Second, as trade becomes freer, private and national incentives to block trade and protect traditional markets may become stronger; a competition policy to prevent rebuilding barriers by anticompetitive restraints becomes more imperative. Third, as trade becomes freer, disruption of trade flows by disharmonies in nations' laws becomes more visible, and the opportunity is presented to examine and perhaps alleviate these disruptions. Fourth, the increased closeness of neighbors carries with it the likelihood that more problems will be common problems and the possibility that common solutions may be superior to individual solutions. Fifth, clashes of national policies are also likely to become more apparent, stimulating the now closer neighbors to decide upon rules of procedure, process, priority, deference, and, where common substantive solutions are not feasible, modes for resolution of disputes.

The first two reasons are specific to competition as a fundamental policy for the free trade area. The latter three are more broadly applicable. Side agreements to NAFTA reflect cooperative initiatives already taken regarding labor and the environment. This Report, by identifying problems, opportunities, and options in the area of competition law, could help to advance the economic interests of North Americans that are served by competition policy, and, as well, the Report could become a resource for cooperative efforts in other areas of law.

¹ We use the phrase "competition policy" to describe a set of issues broader than prescriptive antitrust rules. Competition policy includes conditions for competition, and it addresses to some extent public as well as private restraints on competition.

We address some hard questions in this Report. Items in this category include convergence of antitrust and antidumping law in the free trade area, treatment of blocking statutes, the role of comity, recognition of damage judgments, and dispute resolution. We do not necessarily agree on the answers to these hard questions but we do agree that the questions need to be addressed. In some cases solutions may require the building of broad-based consensus among the legal, business and political communities in each nation. Extensive consultations among the governments and other interested parties may advance the effort. The dialogues and coordinative efforts suggested herein for consideration by the working groups may be important first steps.

II. STATEMENT OF PRINCIPLES

This Report suggests framework principles for developing the competition dimension of NAFTA, and provides an elaboration of how those principles might be put into practice. The principles are:

The Governments of the three NAFTA Parties should work together on the following tasks and towards the following goals:

- identifying the creation of a barrier-free and distortion-free North America as a fundamental goal;
- enforcing national antitrust laws;
- prohibiting hard-core cartels that harm other NAFTA nations;
- seeking a common approach to principles of comity;
- seeking convergence of antitrust procedures where feasible and efficient;
- cooperating in antitrust discovery and enforcement;
- addressing the interrelationship between the trade laws and the antitrust laws; and
- considering the development of institutions for dispute resolution in competition matters.

* The eight framework principles, which follow, were approved by the American Bar Association as Resolution 116A on August 9, 1994. The principles are therefore ABA policy.

CHAPTER SIX

ANTIDUMPING AND ANTITRUST

I. INTRODUCTION

The creation of a free trade area focuses attention on the interaction of antidumping laws and competition law. There has always been tension between these two areas of law, and also between them and safeguard or "escape" clause relief. This stress stems from the very different objectives served by the three bodies of law, which are:

- (i) antidumping remedies focus on material injury to domestic producers from international price discrimination;^{1'}
- (ii) safeguard or "escape" clause relief (Section 201) focuses on the short term effects of an increased volume of (fairly traded) imports that are a substantial cause of serious injury to domestic producers; and
- (iii) antitrust/competition law, in particular below cost (predatory) pricing law,^{2'} focuses on consumer welfare effects of anticompetitive conduct emanating from any source, private, domestic or foreign in origin.

The creation of a free trade area both brings these differences to the forefront and provides an opportunity to address them. Before discussing these implications, we first review the general statutory and regulatory framework of the U.S. trade laws.

II. THE TRADE LAWS

In this section, we focus on the U.S. trade laws to frame our discussion of the differences between the way in which price discrimination and below cost pricing are dealt with under the trade and antitrust laws. Since the trade laws of each NAFTA Party are GATT-based (*i.e.*, based on guidelines authorized by the General Agreement on Tariffs and Trade), the processes under each are generally similar.^{3'}

^{1'} There is a clear relationship between antidumping and countervailing duty trade remedies which address injury from foreign government subsidization of exports. The issue of subsidies is analyzed substantively elsewhere in this report. It should be emphasized, however, that the injury analysis of antidumping is also applicable to the countervailing duty law.

^{2'} The parameters of this law are discussed in the appendix to this chapter.

^{3'} The participants in the recently concluded Uruguay Round of GATT negotiations have agreed to some important changes to these guidelines which, if implemented by their
(continued...)

In the United States, the analysis of allegations that certain foreign imports are being "dumped" into the U.S. market is conducted under a bifurcated process.⁴ First, in response to the filing of a petition by the domestic industry, the Department of Commerce (the "DOC") makes a preliminary determination of whether a dumping margin exists; that is, the DOC determines whether an imported product is being sold in the United States at "less than its fair value" (normally its price in the home market). Where there are no sales or an insufficient number of arms-length sales in the home market, the DOC may then look to the sales in some similar third country or to constructed value which includes the costs of production, profits and overhead.⁵ Accordingly, in the first instance the analysis of dumping by the DOC is about international price discrimination and only secondarily about costs.

More or less concurrently with the DOC investigation, the International Trade Commission (the "ITC") assesses whether the domestic U.S. industry has suffered material injury as a result of the dumped imports. Subsequently, the DOC makes a final determination of the dumping margin. If both the DOC and the ITC reach final affirmative determinations, then an antidumping duty order is issued directing the antidumping duties be assessed in addition to the normal duties imposed on imports of the merchandise. The amount of the antidumping duty is appraised on an entry-by-entry basis; any merchandise entering at or above its fair value (price) will not be assessed the antidumping duty. At this stage, Canada provides for a discretionary inquiry by the Canadian International Trade Tribunal (the "CITT") to make a report to the Minister of Finance on whether the imposition of an antidumping duty would be in the Canadian "public interest."⁶

Four interesting features of the administration of the dumping laws should be discussed. First, a domestic industry is defined as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major

³(...continued)

respective governments by July 1, 1995, may go part of the way toward resolving some of the issues discussed in this Chapter, particularly the determination of material injury. See, The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN/FA, December 15, 1993, Special Distribution (UR-93-0246), and in particular the Agreement on Implementation of Article VI of GATT 1994, MTN/FA II-A1A-8 contained therein.

⁴ With respect to Section 201 escape clause actions, the ITC alone determines whether increased imports have caused or threaten to cause serious injury to a domestic U.S. industry and then recommends to the President relief that is adequate to remedy such injury.

⁵ See generally 19 U.S.C. §§ 1673, 1677.

⁶ Section 45, *The Special Import Measures Act*, R.S.C. 1985, c. 47 (4th Supp.) as amended (the "SIMA").

proportion of the total domestic production of that product"⁷ The determination of the domestic industry is more consistent with the DOJ's pre-1982 approach to market definition in merger cases than with the inquiry currently conducted under the "hypothetical monopolist" approach employed by the DOJ and the FTC in respect of merger evaluations.⁸

Second, in the "garden variety" dumping case involving allegations of international price discrimination, price comparisons are made on an ex-factory (netback) basis, thus facilitating a comparison of the foreign and domestic goods at a similar level in the production and marketing process.⁹ Thereby, a foreign producer can be found to have made sales in the United States at "less than fair value" even though those sales were profitable or covered average variable or marginal costs.¹⁰

Third, where an insufficient number of foreign home market sales or where no appropriate third country sales are found, the DOC is instructed to use the "constructed value method" to calculate the dumping margin.¹¹ When this method is used, the DOC examines fully allocated costs, not average variable or marginal costs.¹²

⁷ "Like product" is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to investigation under this subtitle." 19 U.S.C. 1677 (4)(A). In escape clause actions, the domestic industry is defined as those domestic firms producing an article that is "like or directly competitive with" the imported article in question. 19 U.S.C. 2522 (c)(4).

⁸ K. Kelly, *Empirical Analysis for Antitrust and International Trade*, 61 U. Cincinnati L. Rev. 889, 892-897 (1993).

⁹ H.M. Applebaum and D.R. Grace, *U.S. Antitrust Law and Antidumping Actions Under Title VII of the Trade Agreements Act of 1979*, 56 Antitrust L.J. 497, 508 (1987).

¹⁰ H.M. Applebaum, *The Interface of Trade/ Competition Law and Policy: An Antitrust Perspective*, 56 Antitrust L.J. 409, 411 (1987). Furthermore, the law requires that if certain home market sales are made at prices below the cost of production, such sales are to be disregarded when determining foreign market value. See also, T. Murray, *The Administration of the Antidumping Law by the Department of Commerce*, in *Down in the Dumps: Administration of the Unfair Trade Laws* 23, 38-40 (R. Boltuck and R.E. Litan eds., 1991). Applebaum and Grace, *supra*, note 9 at 508, note that "in recent years, more than half of the antidumping petitions filed by U.S. producers have contained allegations of below-cost sales in the foreign home market. In many of these cases, the (DOC) has used constructed value, rather than home market prices to calculate dumping margins."

¹¹ 19 U.S.C. § 1677(b).

¹² Applebaum, *supra*, note 10 at 411. U.S. law also specifies that minimums for overhead (10 percent of operating expenses) and for profit (8 percent of operating

(continued...)

Fourth, under United States antidumping law, before obtaining relief, a showing must be made that the challenged imports are a contributing cause of "material injury" (defined as "harm which is not inconsequential, immaterial, or unimportant") to the domestic industry.¹³ In contrast, the safeguard remedy requires a showing that the increased imports are "a substantial cause [defined as "a cause which is important and not less than any other cause"] of serious injury" to the domestic industry before relief can be granted.¹⁴

Each of the features of the trade laws discussed is rooted in the principal objectives served by the trade laws; to protect U.S. producers from unfairly (with respect to dumping) or fairly (with respect to escape clause actions) traded foreign imports. In the next section, we discuss how NAFTA may affect the underpinning of the trade laws where imports from NAFTA Parties are concerned.

III. *THE EFFECT OF A FREE TRADE AREA ON THE ANALYSIS OF THE ROLES OF ANTIDUMPING AND ANTITRUST*

The antidumping laws in North America are generally designed and applied in a manner consistent with the objectives identified in Section I.¹⁵ However, the commitment to these objectives are affected by the creation of a free trade area. There are at least three areas in which the objectives of antidumping law are affected by the creation of a free trade area.

¹²(...continued)

expenses) be included in the constructed value. *See generally*, Murray *supra*, note 10 at 48-49. 19 U.S.C. § 1677b (e)(1)(B)(i) & (ii). Regulations under SIMA in Canada only mandate the inclusion of a minimum for profits. SOR/84-927, r.11(b)(v).

¹³ 19 U.S.C. §§ 1673, 1677(7)(A).

¹⁴ 19 U.S.C. §§ 2251(a), 2252(b)(1)(B).

¹⁵ The substantive and procedural aspects of antidumping (and countervailing duty) law in North America have been extensively critiqued elsewhere. *See generally*, Richard Boltuck and Robert Litan, eds. *supra*, note 10; *Symposium on Unfair Imports*, 61 *University of Cincinnati Law Review* 877 (1993); A.M. Rugman and S.D. Porteous, *Canadian and U.S. Unfair Trade Laws: A Comparison of Their Legal and Administrative Structures*, 15 *North Carolina Journal of International Law and Commercial Regulation* 67 (1990); J.R. Holbein, *Comparative Analysis of Specific Elements in United States and Canadian Unfair Trade Law*, 26 *The International Lawyer* 873 (Winter 1992); P.F. McLaughlin, *Mexico's Antidumping and Countervailing Duty Laws: Amenable to a Free Trade Agreement?*, 23 *Law and Policy in International Business* 1009 (1992); H.M. Applebaum, *Foreign Predation & Price Discrimination Against U.S. Firms - Antidumping Under Title VII*, *Fordham Corp. L. Inst.* (1985).

First, to the extent a free trade area is created, artificial barriers to trade are reduced or eliminated, whether they are tariff or nontariff in nature. The reduction of these barriers generally means less protection for domestic industry, in conflict with the goal of antidumping law to protect domestic industry from injury from international price discrimination.

Second, the concept of a free trade area implies that foreign and domestic products should be given the same legal treatment. This principle of national treatment is consistent with the proposition that artificial barriers to trade should be eliminated or at least reduced substantially in a free trade area. It might be noted in this connection that the Canada/U.S. Free Trade Agreement and NAFTA can be distinguished from the GATT by the greater degree to which they provide for free trade in goods, services and investment. Therefore, a stronger case exists under NAFTA for applying the principle of national treatment.

Third, the lowering of artificial trade barriers, particularly tariffs, which is at the heart of a free trade area, may make dumping much less likely. This is because, as tariffs are eliminated in the free trade area, it will become more difficult for a firm to maintain a higher price in the home market than in the export market. Attempts to maintain price differentials where there are no tariffs should induce arbitrage and exports or re-exports to the home market, which would eliminate the price differential.

In light of these three conceptual and practical factors, free trade implies that foreign goods subject to allegations of cross-border price discrimination or predatory pricing should be subjected to the same legal analysis as competing domestic goods. The rule should be free market competition.

IV. *OPTIONS FOR THE TREATMENT OF DUMPING IN THE NORTH AMERICAN FREE TRADE AREA*

We review four possible options for the treatment of dumping in the free trade area, ranging from relatively minor procedural and definitional changes in antidumping law to the complete replacement of antidumping law applicable to member states by competition law.

A. *Procedural and Definitional Changes in Antidumping Law*

The first approach, which requires the least change, calls for the NAFTA nations to make some procedural and definitional changes in their antidumping laws. The NAFTA nations would:

- (i) maintain the existing antidumping law, but create or increase *de minimis* thresholds for finding dumping and/or material injury;¹⁶

¹⁶ Consideration may be given to including in antidumping proceedings analysis of the effect on domestic downstream producers.

- (ii) allow more flexibility for industry participants to respond to information requests and thereby avoid the use of "best information available"^{17/} by the administrative agencies which have wide latitude to reach factual conclusions without significant input from industry participants who may not be able to provide data in the format required; and
- (iii) continue to work at the multilateral level under the aegis of the GATT for consistent definitions of "standing," "domestic industry," "material injury" and "costs."^{18/}

These changes address some of the criticisms of the present antidumping regime, particularly that it unduly favors domestic industry. These steps, particularly steps (i) and (ii), will go part way toward providing national treatment to foreign competitors, which will further the goal of a free trade area. Antitrust law is irrelevant to this option.

**B. *Expanded or Adjusted Use of Safeguard/
Escape Clause Remedies***^{19/}

A second approach which involves greater change would require the NAFTA nations to:

- (i) curtail or abolish the availability of antidumping remedies;
- (ii) rely instead on "safeguard" remedies which generally: (a) require proof meeting a higher standard of injury and causation; (b) are temporary; and (c) at least technically, require compensation to be paid to affected trading partners; and

^{17/} Under the "best information available" rule of evidence generally, triers of fact are entitled to assume that a party in possession of information, who refuses to produce it, is refusing because disclosure would not be in that party's interest. However, in dumping investigations, parties on occasion are subjected to an adverse inference arising from a failure to produce that is due principally to the short deadlines imposed and the complexity of the information requested, not from an intent to obstruct the investigatory process.

^{18/} See *supra*, note 4.

^{19/} Michael J. Trebilcock, *Throwing Deep: Trade Remedy Laws in a First-Best World, Fair Exchange: Reforming Trade Remedy Laws* 235 (Michael J. Trebilcock and Robert C. York eds., 1990).

- (iii) revise the current "safeguard" procedure to become more adjudicative and less discretionary.^{20/}

Safeguard, or "escape" clause, remedies provide relief to domestic producers from injury which is shown to be primarily due to an increased volume of imports. They are by nature temporary, intended solely to provide some breathing space to domestic industry to adjust to the sudden influx of foreign competition.

This option replaces dumping concepts by the concept that the sheer volume of imports from a particular country may be subject to temporary sanctions if it can be shown that the volume injured domestic producers. Since the standard of proof of injury from the sheer import volume under safeguard remedies is generally more stringent than the standard under the dumping laws, this approach may give foreign competitors something closer to national treatment. For example, as discussed above, under United States antidumping law, before obtaining relief, a showing must be made that the challenged imports are a contributing cause of "material injury" (defined as "harm which is not inconsequential, immaterial, or unimportant") to the domestic industry. The safeguard remedy requires a showing that the increased imports are "a substantial cause [defined as "a cause which is important and not less than any other cause"] of serious injury" to the domestic industry before relief can be granted. Moreover, the relief provided by the safeguard remedies is temporary, while antidumping duties may continue indefinitely or for an extended period.^{21/} Therefore, any handicap on foreign competitors from safeguard remedies would be temporary and be less at odds with the concept of a free trade area.

C. *Inclusion of Antitrust/Competitive Analysis in Dumping Law*^{22/}

An intermediate step directly addressing the relationship between antidumping and competition principles is to have the NAFTA nations:

- (i) maintain the existing antidumping and antitrust/competition laws as separate processes designed to address different objectives; and

^{20/} The current process in the United States provides for a recommendation by the International Trade Commission to the President, with the final decision to be made by the President. The Canadian International Trade Tribunal Act, R.S.C. 1985 (4th Supp.), c. 47, as amended, establishes a similar framework for the imposition of "safeguard" measures.

^{21/} However, the participants in the Uruguay Round of GATT negotiations have agreed to make antidumping duties subject to a five year sunset provision.

^{22/} D. Wood, "Unfair" Trade Injury: A Competition-Based Approach, 41 Stanford Law Review 1153 (1989) and R.D. Boltuck and S. Kaplan, *Conflicting Entitlements: Can Antidumping and Antitrust be Reconciled?*, 61 U. Cincinnati L. Rev. 903 (1993).

- (ii) use market definition, predation and injury^{23/} analysis from antitrust law in antidumping analysis to the extent it is consistent with the protection of domestic producers, particularly with respect to determination of actionable injury.

This approach retains the goal of the antidumping laws of protecting domestic producers, regardless of consumer impact.^{24/} However, it would significantly narrow the group of activities subject to antidumping challenge within the free trade area. It accomplishes this by raising the standard of proof in antidumping cases and making more consistent the approaches of antitrust and trade law to the common questions of market definition (generally resulting in a broader market definition), causation and the standard of actionable injury. Thus, actionable injury may no longer be found unless the alleged dumping caused, and not just contributed to, the injury. Such an injury analysis may also therefore permit consideration of a meeting competition defense, since an import priced to meet domestic competition should not cause any injury to a domestic competitor distinct from that resulting from existing domestic competition. And as antitrust remedies are limited to the actual injury suffered from the violation, dumping margins should reflect the extent of the injury resulting from the alleged dumping, and antidumping duties should be calibrated to relieve domestic industry only from that injury.^{25/} A similar approach may be taken with respect to the analysis of the presence of dumping. The antitrust approach to determining cost may be applied in antidumping proceedings to determine the relevant cost of the offending imports for purposes of determining the existence of dumping.

Such an approach does not require the convergence of the legal standards under antitrust and trade law. For example, if the analysis under both laws are identical, then there would be agreement as to the relevant market and the injury resulting from the challenged conduct. However, because of differing legal standards as to permissible conduct and effect, the same injury may be acceptable under antitrust law but not under trade law, and vice versa. This is particularly the case where the challenged activity may have favorable consumer impact while injuring domestic producers.

This approach may equalize treatment somewhat between competitors from different member states within the free trade area. While it would arguably offer domestic competitors protection from foreign competition which they do not have from domestic

^{23/} This approach to injury might also be combined with consideration of injury to domestic industries other than the industry competing with the challenged imports, such as domestic downstream producers who purchase the imports. Such an approach would be consistent with the goal of the antidumping laws to protect domestic industry.

^{24/} It might be noted, however, that the U.S. Department of Justice and Federal Trade Commission have tried unsuccessfully to persuade the U.S. Department of Commerce to adopt this approach. See Applebaum and Grace, *supra*, note 9 at 515-517.

^{25/} See, e.g., Applebaum, *supra*, note 10, for a comparison of the measures of injury and damages under the antidumping and the antitrust laws.

competition, this approach should make clearer the nature and extent of the extra protection offered by the trade laws.

D. *Replace Antidumping Law Applicable to the Parties with Antitrust/Competition Law*²⁶

The most ambitious approach to dumping and antitrust in the free trade area is to:

- (i) abolish existing domestic antidumping law as it applies to NAFTA nations;
- (ii) rely instead on the domestic law of price discrimination, predation and monopolization to remedy below cost pricing; and
- (iii) consider applying an agreed common legal standard in each of the NAFTA nations.²⁷

This approach goes farthest in granting national treatment in low pricing situations to competitors from different nations within the free trade area. It is therefore perhaps most consistent with the principle of free trade.²⁸ It also provides a much smaller shield against low priced imports than that offered by the antidumping laws. The first two parts of this approach ensure that the standards applicable within any NAFTA country to domestic competitors and to competitors from other NAFTA countries are identical. This approach may require amendment of competition laws to apply to transactions between NAFTA nations.²⁹

²⁶ I.R. Feltham, *Competition (Antitrust) and Antidumping Laws in the Context of the Canada/U.S. Free Trade Agreement: A Study for the Committee on Canada-United States Relations of the Canadian Chamber of Commerce and the Chamber of Commerce of the United States* (1991); E.M. Graham and M.A.A. Warner, *Multinationals and Competition Policy in North America*, in *Multinationals in North America* (L. Eden ed., 1994).

²⁷ The Appendix to this Chapter contains a discussion of the price discrimination and predatory pricing laws of the NAFTA nations and some of the issues which may arise if convergence of these laws is sought.

²⁸ This replacement option is a significant feature of other trade areas, such as the Australia-New Zealand free trade area. This approach is favorably regarded by the Canadian Bureau of Competition Policy. See, e.g., Calvin S. Goldman, Q.C., Director of Investigation and Research of the Canadian Bureau of Competition Policy, Notes for an Address on Competition, Anti-dumping and the Canada/U.S. Trade Negotiations to the Canada/United States Law Institute of Case Western Reserve University School of Law 12-23 (April 3, 1987).

²⁹ For example, the Robinson-Patman Act now applies only to price discrimination within the United States.

Part (iii) of this option is, strictly speaking, not necessary to ensure a level playing field between domestic and foreign competitors. However, it would further the goal of convergence of law and the efficient allocation of resources within the free trade area. A complicating factor may be the multiplicity of antitrust jurisdictions within the United States: the majority of the 50 states have their own antitrust laws, and there is ready availability of private remedies.

This option raises the question of the treatment of dumping into the free trade area by competitors from non-NAFTA countries. If antidumping relief remains available against non-NAFTA imports into the free trade area, then current antidumping law may not provide relief to domestic competitors in such a situation. For example, non-NAFTA imports into one NAFTA nation in the free trade area may not be subject to dumping challenge by domestic competitors in another NAFTA nation.

There is also the issue of the treatment of cases against imports from several countries. Such multi-country cases are now fairly common. If such cases are brought against imports from NAFTA nations and other states, then under this option there will be the phenomenon of different legal standards being applied to the same type of alleged conduct in a single case.

Finally, this option raises questions of dispute resolution, and possibilities of a North American competition authority which are discussed in Chapter Eight of this Report.

V. CONCLUSION

We suggest that the NAFTA Parties give further consideration to the fourth option. The replacement of antidumping law by competition law for transactions between and within NAFTA nations in the free trade area is more clearly consistent with the concept of a free trade area than the continuation of the antidumping law. The fourth option applies the principle of national treatment implicit in the concept of a free trade area and eliminates a nontariff barrier to trade within the free trade area. However, we recognize that this option may be a difficult one to implement, because it does require a substantial change in the current trade law regimes of the Parties. Therefore, we suggest that, if the fourth option is not chosen by the NAFTA nations, the third option -- applying some competition analysis in the antidumping law -- be considered. This option retains the policy objective implicit in antidumping laws of protecting domestic industry even at the expense of domestic consumers. However, it does inject some antitrust concepts into dumping actions. In that way, the third option can promote one of the objectives of a free trade area, that of "leveling the playing field" between competitors from different nations within the free trade area. The third option also may foster an environment that may be conducive to the eventual replacement of antidumping laws by competition laws. In either case, however, we suggest that the Antidumping Working Group coordinate with the Article 1504 Working Group, for the tasks are interrelated.

The final two options are less desirable even though they may be more realistic in the short term and do offer some relief from the weaknesses in the current antidumping regimes, because they are less consistent with the concept of a free trade area. Between these two options, we suggest that the second -- expanded use of safeguard and escape clause remedies

-- is the more desirable. The standard of proof of injury from sheer import volume under safeguard remedies is generally more stringent than the standard under the antidumping laws. The second option also provides only temporary protection to domestic industry, in contrast to the present indefinite protection granted by antidumping laws. Therefore, the second option may level the playing field somewhat between domestic and foreign competitors within the free trade zone and achieve some of the effects which the third option may attain in greater degree. The first option -- merely procedural and definitional changes in the antidumping law -- is the least desirable although it requires the least change in the system, because it reflects to the smallest extent the central principle of national treatment implicit in a free trade area.

VI. COMPARISON OF THE PRICE DISCRIMINATION AND PREDATORY PRICING LAWS OF THE NAFTA NATIONS

A. Introduction

In this appendix, we briefly review the price discrimination and predatory pricing laws in the U.S., Canada, and Mexico to assess the prospects for the convergence or harmonization of these laws more generally if the abolition of dumping rules within the free trade area could be achieved in the context of NAFTA.

B. Price Discrimination/Predatory Pricing Law In The United States

Price discrimination under U.S. law is governed primarily by the Section 2(a) of the Robinson-Patman Act, which reads in pertinent part as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States...and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who grants or knowingly receives the benefit of...such discrimination."

Accordingly, to find unlawful price discrimination there must be: (1) two sales; (2) in interstate commerce; (3) for use, consumption or resale in the United States; (4) by the same seller; (5) at different prices; (6) of commodities; (7) of like grade and quality; and (8) resulting in injury to competition with the seller, the favored buyer or their customers. The Robinson-Patman Act applies to both primary line (to competitors of the seller) and secondary line (to the disfavored buyer) injury arising from price discrimination. Primary line injury is relevant to dumping because the entire focus in dumping is on the injury to the rival domestic industry as an impetus of the seller's lower pricing to buyers in a particular export market.

A showing of injury to competition is generally sufficient to support injunctive relief, although this rarely occurs.^{30/} The FTC or a private party seeking monetary damages under Section 4 of the Clayton Act is required to establish that it is injured in some measurable amount, and that the injury is caused by the defendant's antitrust violation.^{31/} Generally, a plaintiff claiming primary line injury must show either a reasonable possibility of substantial injury to competition through (1) actual market analysis; or (2) a rebuttable inference based upon "predatory intent" coupled with a showing of injury to a competitor.^{32/}

Under the first approach, which is rarely successful, courts may consider factors such as: the level of concentration in the relevant market; the overall vigor in the contest for business; the ranking of competitors; changes in the number of competitors; trends of prices; relative changes in market positions; and barriers to entry.^{33/} Under the second approach, courts may infer predatory intent either directly or indirectly by evidence of below cost pricing.^{34/}

In U.S. law, below cost pricing without price discrimination can be used to demonstrate an attempt to monopolize a market under Section 2 of the Sherman Act.^{35/} In a recent decision, *Brooke*, the U.S. Supreme Court set forth "two prerequisites to recovery" for claims under Section 2 of the Sherman Act of attempted monopolization by pricing and Section 2(a) of the Robinson-Patman Act of primary-line price discrimination.^{36/}

First, a "plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices are below an appropriate measure of its rival's costs."^{37/}

^{30/} *Fall City Industry, Inc. v. Vanco Beverage*, 460 U.S. 428, 434-35 (1983).

^{31/} *J. Truett Payne Company v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

^{32/} *See Henry v. Chloride*, 809 F.2d 1334 (8th Cir. 1987); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 348-350 (3d Cir. 1981), *cert. denied*, 455 U.S. 1125 (1982); and *ITT Continental Baking*, 104 F.T.C. 280 (1984).

^{33/} *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582 (8th Cir. 1987).

^{34/} *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578, 2588-90 (1993).

^{35/} The Federal Trade Commission Act is not specifically discussed here since violations of the Robinson-Patman Act and the ^{35/} Sherman Act also may violate the Federal Trade Commission Act. Although very rarely used for this purpose, section 5 of the Federal Trade Commission Act which addresses unfair methods of competition may be applied to certain other pricing practices which may not be considered predatory under the Sherman Act and the Robinson-Patman Act.

^{36/} *Brooke*, *supra*, note 34 at 4702.

^{37/} *Id.* at 4702.

However, because the parties in *Brooke* agreed with each other that the relevant measure of cost was average variable cost, the Supreme Court again declined "to resolve the conflict among the lower courts over the appropriate measure of costs."³⁸

In the U.S., there is no uniform standard for predatory - below cost - pricing. There is some support in the First, Second, Fifth and Eighth Circuits and the FTC for the proposition that prices above short-term average variable cost are presumptively lawful and prices below average variable costs are presumptively predatory.³⁹ Courts in the Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have supported the proposition that prices above average total cost are lawful, but prices between average total cost and average variable cost may be unlawful.⁴⁰ The Ninth Circuit has on occasion supported the proposition that prices above average total cost may be unlawful where a monopolist engages in "limit pricing" in a market with otherwise high entry barriers.⁴¹ Eschewing proof of below cost pricing, the Seventh Circuit has made the feasibility of recouping lost profits the threshold issue in predatory pricing cases under Section 2 of the Sherman Act, but not under Section 2(a) of the Robinson-Patman Act.⁴²

Second, where inferring a reasonable possibility of substantial injury from evidence of predatory intent in *Brooke* the Court, citing *Matsushita*,⁴³ and *Cargill*,⁴⁴ held that a plaintiff

³⁸ *Id.* at 4702 note 1; See also: *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 585 note 8 (1986); *Cargill Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117-118 note 12 (1986); and *ARCO v. U.S.A. Petroleum*, 110 S.Ct. 1884, 1891-1892 (1990).

³⁹ *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 483 (1st Cir. 1988); *Northeast Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 88 (2d Cir. 1981); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975); *Henry v. Chloride*, 809 F.2d 1334, 1346 (8th Cir. 1987); and *ITT Continental Baking, supra*, note 32.

⁴⁰ *D.E. Rogers Associates, Inc. v. Gardner Denver Co.*, 718 F.2d 1431, 1436 (6th Cir. 1983); *Morgan v. Ponder*, 892 F.2d 1355, 1360 (8th Cir. 1989); *William Inglis & Sons Baking Co. v. Continental Baking Co.*, 668 F.2d 1014, 1035-1036 (9th Cir. 1981); *Pacific Engineering & Production Co. of Nevada v. Kerr-McGhee Corp.*, 551 F.2d 790 (10th Cir.); and *McGahee v. Northern*, 858 F.2d 1487, 1503-1504 (11th Cir. 1988).

⁴¹ See *William Inglis, supra*, note 40; and *Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir., 1983).

⁴² *A.A. Poultry Farms v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1405-1406 (7th Cir., 1989) and *American Academic Suppliers v. Beckley-Cardy*, 922 F.2d 1317, 1322-1323 (7th Cir. 1991).

⁴³ *Supra*, note 38.

⁴⁴ *Supra*, note 38.

must demonstrate that the competitor had a "dangerous probability of recouping its investment in below-cost prices."⁴⁵ Quoting *Matsushita*, the Court reiterated that for an investment in below-cost pricing to be rational, the predator "must have a reasonable expectation of recovering, in the form of monopoly profits, more than the losses suffered."⁴⁶ Furthermore, the Court re-emphasized that: (1) the antitrust laws were intended to protect competition, *not* competitors; and (2) the injury to competition and not losses suffered by the target is relevant for antitrust analysis; and (3) without recoupment, predatory pricing produces lower aggregate prices in the market and thus enhances consumer welfare.⁴⁷ However, following *Brooke* it is not clear whether proof of recoupment is now necessary where courts determine the reasonable possibility of substantial injury based on actual market analysis as opposed to an inference from predatory intent.

The Robinson-Patman Act provides several statutory defenses to price discrimination claims. Section 2(b) allows discriminatory prices offered in good faith to meet an equally low price of a competitor." However, the seller is permitted only to "meet" *not* "beat" the competing lower price.⁴⁸ Section 2(a) also allows price discrimination "which make(s) only due allowance for differences in the cost, manufacture, sale or delivery resulting from the differing methods or quantities which such commodities are...sold or delivered."⁴⁹

In addition to the standard for predatory pricing, there are other unresolved issues under U.S. law that may be relevant to a discussion of harmonizing antitrust law in North America. First, The Robinson-Patman Act does apply where there are two sales made in the United States. If a U.S. seller exports at a different price than it sells in the U.S. market, the Robinson-Patman Act would not be triggered; nor would it be triggered where a foreign seller used different prices in the foreign and U.S. markets. Accordingly, the Robinson-Patman Act

⁴⁵ *Brooke, supra*, note 34 at 4703.

⁴⁶ *Id.* at 4703, quoting *Matsushita, supra*, note 38 at 588-589.

⁴⁷ *Id.* at 4703.

⁴⁸ *Great Atlantic and Pacific Tea Company, Inc. v. FTC*, 440 U.S. 69 (1979). Section 2(a) also allows discriminatory prices to be offered due to "changing conditions affecting the market for or the marketability of the goods concerned, such as...actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process or sales in good faith in discontinuance of business in the goods concerned."

⁴⁹ Another frequently used defense in price discrimination cases is the judicially constructed "availability" defense where a seller offers a high and low price but the buyer unilaterally chooses the higher price and hence any injury is self-inflicted and not recoverable. See e.g. *Comcoa, Inc. v. NEC Telephones, Inc.*, 931 F.2d 655 (10th Cir. 1991) and *Bouldis v. Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir. 1983). This defense is primarily applicable in secondary line injury cases and hence is not particularly relevant to our discussion of replacing dumping laws with primary line price discrimination laws.

would not be available as a substitute for dumping law, unless amended.⁵⁰ Second, there is little precedent as to whether specific cost categories are variable or fixed and many courts treat this as an issue to be resolved by the jury.⁵¹ Third, most courts apply the cost standard to a defendant's entire line of products while some apply it to a specific brand or package size.⁵² Fourth, there is no clear agreement among U.S. courts on the treatment of low introductory prices and temporary price reductions.⁵³

C. Canadian Price Discrimination And Predatory Pricing Law

In Canada, price discrimination is dealt with primarily in paragraph 50(1)(a) of the Competition Act which may be violated by anyone, wherever situated, who sells articles in Canada to two or more competitors at price differences that are not justified by differences in quantity. The law applies only to sales to purchasers at the same level of distribution. Proof of competitive injury or anti-competitive intent is not required to establish the price discrimination offense in Canada. However, as a practical matter, the less the conduct affects competition in Canada, the less the Director will be inclined to devote scarce resources to pursue the matter. The price discrimination provisions of the Competition Act are criminal law provisions and consequently, a violation of these can expose a company to fines and individual directors, officers, and employees to fines or imprisonment not exceeding two years. Thus far, the highest fine imposed is \$50,000 and no one has been sent to jail for price discrimination in Canada.⁵⁴

A violation of the price discrimination provisions may also give rise to civil suits for single damages equal to the amount of the economic loss resulting from such violation. The

⁵⁰ However, although it has not been challenged often, the ⁵⁰ Robinson-Patman Act applies to items imported for resale in the United States by a foreign supplier or distributor who engages in price discrimination; see *Matsushita*, *supra*, note 38 at 578.

⁵¹ See M. Denger, "Issues in Establishing Predatory Pricing Under Section 2 of the Sherman Act and Section 2(a) of the Robinson-Patman Act", Paper prepared for the ABA Section on Antitrust Meeting New York (August 9, 1993) at 5. See also *Kelco Disposal, Inc. v. Browning-Ferris Industries*, 845 F.2d 404, 407-408 (2d Cir 1988); and *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

⁵² *Id.* at 5-6; see also *American Academic Suppliers v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1321-1322 (7 Cir. 1990) and *Bayou Bottling, Inc. v. Dr Pepper Co.*, 725 F.2d 300, 305 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984).

⁵³ *Id.* at 6; see also *American Academic Suppliers*, *supra*, note 42 at 1322 and *Fall City*, *supra*, note 30.

⁵⁴ See generally, Calvin S. Goldman, Q.C. and John D. Bodrug, "The Canadian Price Discrimination Enforcement Guidelines and Their Application to Cross-Border Transactions" *The Antitrust Bulletin* (forthcoming, Spring, 1994).

private right of action has only rarely been used because of inter alia: (1) the fact that the Competition Act provides for the recovery of only single (not multiple) damages; (2) the limited availability of class action suits and contingency fees in Canada, particularly in the largest province and most significant legal forum, Ontario; and (3) the application of the "English Rule" for allocating costs such that an unsuccessful plaintiff must pay a significant portion of the defendant's costs. It should be noted that Ontario has recently amended its laws to facilitate class action suits.⁵⁵ Furthermore, contingency fees are permitted in varying degrees in most other Canadian provinces.⁵⁶

Perhaps the most significant difference (for the purposes of harmonization) between Canadian and U.S. price discrimination laws is that the Canadian law applies extraterritorially. In addition, unlike in the U.S., in Canada traditionally courts have focused on secondary line price discrimination. This is a difference in emphasis from the Robinson-Patman Act in the U.S. which also is applicable to primary line injury (competitors of the seller) and to tertiary line injury (to customers of the disfavored buyers).

The Director recently issued Price Discrimination Enforcement Guidelines⁵⁷ which may significantly liberalize Canadian enforcement policy to generally permit a broader range of functional and other discounts provided they are available to competing purchasers. Unlike in the United States, it is not a defense to a price discrimination charge for a defendant to argue that the price differentials were "cost justified" or engaged in to "meet the competition." However, such conduct may be permitted if it does not amount to a "practice." For instance, the Price Discrimination Enforcement Guidelines indicate that a temporary price reduction designed to win a new account or to enter a new market may not be considered a "practice". The Price Discrimination Enforcement Guidelines state that "a price concession that is accessible or obtainable by a purchaser, but not acted upon, is nevertheless "available" to the purchaser." Accordingly, the fact that a firm could qualify for a discount only by providing a service which it does not currently offer, may not mean that the discount is not "available" to it. The Director has further indicated that a seller's obligation to communicate the availability of a discount will vary with the circumstances. In these respects, there is some similarity to the amended "Fred Meyer Guidelines" of the U.S. Federal Trade Commission.

In Canada, predatory pricing is dealt with primarily under paragraph 50(1)(c) and under section 79 of the Competition Act. Paragraph 50(1)(c) makes it a criminal offence for a business person to engage in a policy of selling at "unreasonably" low prices, which either: (1) have the effect or tendency to substantially lessen competition or eliminate a competitor; or (2)

⁵⁵ See Class Proceedings Act, 1992, S.O. 1992, c.6 which came into force on January 1, 1993. Regulated contingency fees have been permitted in a number of Canadian provinces, but were not permitted in Ontario until this law came into effect. Contingency fees are now permitted in class action proceedings subject to the approval of the court.

⁵⁶ *Id.*

⁵⁷ Supply and Services Canada, Hull, Quebec, 1992.

are designed to have that effect. Paragraph 50(1)(c) is not expressly limited to conduct occurring within Canada, but rather refers only to the effects on competition within Canada, and so conceivably could be used in cases of alleged dumping into Canada by a foreign producer.

Canadian courts have held that if an article is sold for more than the cost to the vendor, the price can never be held to be unreasonably low under the Competition Act.^{58/} Furthermore, courts have held that one may not simply infer from a price-cost relationship that a price is unreasonably low. Even in instances of below cost pricing, courts have held that other competitive factors could justify such prices.^{59/} Canadian courts have also found that prices between average variable cost and average total cost may be predatory.^{60/}

The Predatory Pricing Enforcement Guidelines (the "PPEG") issued by the Director of Investigation and Research (the "Director") in 1992 attempt to flesh out the limited judicial precedent.^{61/} In determining whether a sale is unreasonably low, the Director first examines market characteristics to determine whether the seller possesses actual or potential market power. These characteristics include market share, concentration and conditions of entry. The Director has indicated that he will rarely challenge a pricing practice where the firm's market share is below 35%. Assuming that actual or potential market power is found, the Director then compares the price and costs of the alleged predator. The PPEG indicate that the Director will likely recommend enforcement action by the federal Attorney General if the firm in question is pricing below average variable cost. Pricing between average variable cost and average total cost is in a "grey" zone in which the Director's decision to recommend prosecution will depend on a number of market circumstances.

The PPEG do offer some guidance on defining costs: For purposes of the price-cost comparison in the Director's second stage analysis average variable cost is defined to include "the costs of labour, materials, energy, promotional allowances, use-related plant depreciation and all other costs that vary with levels of output."^{62/} Average total cost is defined as "costs associated with investments in real plant and machinery and other fixed assets which do not vary with output produced".^{63/} Wherever, possible the Director bases his analysis on reasonably anticipated, rather than historical or "book" costs.^{64/} As discussed above, the first step in the

^{58/} *Director of Investigation and Research v. Hoffman-La-Roche*, (1980), 28 O.R. (2d) 164, 200; affirmed (1981), 33 O.R. (2d) 694 (Ont. C.A.).

^{59/} *Id.*

^{60/} *Director of Investigation and Research v. Consumers Glass Co.*, (1981), 33 O.R. (2d) 228 (Ont. H.C.J.).

^{61/} Consumer and Corporate Affairs, Canada, 1992.

^{62/} *Id.* at 10.

^{63/} *Id.* at 11.

^{64/} *Id.* at 11.

Director's analysis of a predatory pricing claim is the definition of the appropriate product and geographic market.⁶⁵ Accordingly, the facts will determine whether the cost standard should be applied over a product line or to specific brand or package sizes. However, again it should be noted that the PPEG are only guidelines that are not binding on courts. Consequently, the Canadian definition of costs or markets in judicially considered predatory pricing cases may not be any clearer than in the United States.

D. Price Discrimination And Predatory Pricing Under Mexican Law

Price discrimination and predatory pricing are not specifically addressed in the Mexican Federal Economic Competition Law (the "LFCE"). However, the catchall provision in Article 10 of the LFCE applies to acts by a firm with substantial market power whose purpose or effect may be to "unduly displace other agents from the market, impede substantially their access [to the market], or establish exclusive advantages in favor of one or more persons...." We understand that although predatory pricing is unlikely to be found under Article 10, the law will do so in the rare case when the predator has the power to drive future as well as present competitors from the market. We understand that the drafters of the LFCE believe that given international competition and ease of entry for supplies and investments, the scope for successful predatory pricing is small. This reasoning is consistent with that prevailing in both the United States and Canada. However, given the nascent stage of the Mexican law, it is not yet clear how costs will be defined or how the analysis of predatory pricing will actually be conducted.

E. Conclusion

This appendix shows that there already is similarity in the substantive price discrimination and predatory pricing laws of the United States, Canada and Mexico; however, there remain some key differences.

First, in respect of price discrimination laws, the Robinson-Patman Act does not apply extraterritorially except for items imported for resale or consumption in the United States. If dumping law were to be replaced by the Act primary-line price discrimination actions then the Act would have to be amended. Second, following Brooke, there is stronger support for proving primary line price discrimination under the Act by proof of predation (by showing the feasibility of recoupment). In Canada, proof of injury is unnecessary to satisfy a claim of price discrimination under the Competition Act. Third, in Canada traditionally price discrimination law has focused on secondary-line injury. Accordingly, harmonization of price discrimination laws may require a clearer Canadian accession to an injury test for price discrimination and clearer indication that the relevant provisions of the Competition Act apply to primary line injury. Fourth, Canada appears to recognize fewer defenses to price discrimination claims. Harmonization of price discrimination laws would require further clarification of appropriate defenses to price discrimination claims in Canada. There does not appear to be an explicit price discrimination law in Mexico and therefore this may require further consideration in any discussion of harmonization or convergence of such laws.

⁶⁵ *Id.* at 6.

In respect of below-cost pricing, the greatest obstacle to further harmonization may be the uncertainty in the U.S. concerning the appropriate measure of determining costs in assessing below-cost pricing. In Canada, the enforcement policy enunciated by the Director provides some comfort as to the standards for predatory pricing under Canadian law. However, these guidelines are not binding on the judicial branch in Canada and so may not be determinative in either civil suits or in contested actions initiated by the Director. In Mexico, what is known of the enforcement policy with respect to predatory pricing appears to be consistent with U.S. and Canadian principles. However, to be effective harmonization or convergence may require greater clarity as to the policy.

Another outstanding matter for consideration in any further harmonization is the incentives for private parties to litigate apparent violations of the predatory pricing and price discrimination laws. In the United States, the private right of action in price discrimination and below-cost pricing cases is widespread and common. In contrast, in Canada, historically, the private right of action has been limited or not used effectively. This may be due, in part, to the limited provision for contingency fees and class action suits in most Canadian provinces. Similarly, the Canadian adherence to the "English" rule whereby the loser bears a substantial part of the winner's legal costs acts as an effective deterrent to the initiation of antitrust actions by private parties. Furthermore, it appears that Mexico is alone among the North American nations in not providing a private right of action in predatory pricing and price discrimination claims.

All of these issues may have to be revisited if further harmonization of policy is pursued among the three member states.