Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements*

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Abstract

Preferential trading agreements (PTAs) are increasingly including elements of "deep" integration—efforts to agree to common disciplines for regulatory regimes. This paper explores what the PTA experience suggests regarding the relationship between the attainment of unconditional intra-area free trade (including the abolition of antidumping) and deeper integration, in particular agreement on common antitrust rules. It argues that the economic and empirical basis for such linkage is questionable, and finds that common antitrust disciplines in PTAs tend to be driven by a broader agenda that revolves around the attainment of economic integration (e.g., the creation of a single market), not by a need to abolish antidumping.

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Summary

Arguments have been made that the WTO should be extended to include multilateral disciplines on competition (antitrust) regimes. Rationales for this vary, but include a perception that private anticompetitive practices may restrict market access opportunities and effectively nullify or impair a country's trade liberalization commitments; assertions that national antitrust regimes may impose negative spillovers on other countries; that effective antitrust enforcement against firms with global market power requires a certain degree of harmonization of rules and cooperation between national enforcement agencies; and that a WTO agreement in the area of antitrust might prove to be an effective mechanism to constrain the use of contingent protection (antidumping).

Contingent protection, in particular antidumping, has become a major bone of contention in international trade relations. Perspectives on this issue vary widely, ranging from the perception that antidumping is an appropriate response to an activity that is condemned by the GATT to the view that antidumping is straightforward protectionism without any economic justification. Somewhere in between are those who argue in favor of the use of antidumping on second best grounds. For example, the need for antidumping may be motivated on the basis that foreign firms are able to leverage entry restrictions in their home markets into an "unfair" competitive advantage in export markets, and that absent common rules on antitrust disciplines, antidumping is required to "level the playing field."

A working group has been established in the WTO with the mandate to explore the relationship between trade and competition policies. This group can draw on a significant amount of experience that has already been generated in this connection in the context of preferential trade agreements (PTAs). These illustrate that governments can agree to abolish antidumping on intra-area trade flows. They also reveal that governments have been able and willing to agree to common competition disciplines. This paper explores what the PTA experience suggests regarding the relationship between the attainment of intra-area free trade and the pursuit of "deep" integration--actions by member states to effectively harmonize national regulatory regimes. More specifically, the following two questions are asked: (i) does free trade require deep integration?; and (ii) if so, is agreement on antitrust a necessary element of such deep integration?

Many economists are of the view that insofar as dumping is potentially an economic problem for an importing nation, it can and should be dealt with through enforcement of national competition law. This can be done unilaterally--there is no need for international agreement or harmonization of competition regimes. The implication is that if governments desire to form a free trade area there is no need to negotiate common antitrust rules as a precondition for the abolition of antidumping. Others argue that antidumping is a strategic tool that firms/governments use to counteract the extraterritorial impact of differences in domestic policies and that consequently that common competition disciplines are required in PTAs in order to abolish antidumping.
This paper argues that the economic and empirical basis for such "linkage" is questionable. The

regional experience illustrates that shallow integration--unconditional free trade--may be associated with the pursuit of a deeper integration agenda. However, the linkages that are sometimes argued to exist in practice between antidumping elimination and enforcement of common antitrust disciplines tend to be driven by a broader agenda that revolves around the attainment of economic integration (e.g., the creation of a "single" market). Although agreement on common antitrust disciplines is not necessary to eliminate antidumping, common disciplines in other regulatory areas affecting competition between firms in each jurisdiction may be needed to completely remove the reach of contingent protection.

In practice, the demise of antidumping in PTAs may be constrained because governments are concerned about the potential for their partners to engage in beggar-thy-neighbor industrial policies. They may consider antidumping a useful defensive instrument in this connection, because it can be used as a substitute for instruments like countervailing duties which have a much higher "foreign policy content" and may be more difficult to pursue. If so, it must be recognized that antidumping is a particularly ineffective and costly instrument. Indeed, a case can be made that this is another reason to eliminate it in the PTA context as this will help focus attention on the real source of problems (industrial policies; government intervention), rather than on the symptoms (allegations of "unfair dumping").

I. Introduction

Contingent protection, in particular antidumping, has become a major bone of contention in international trade relations. Perspectives on this issue vary widely, ranging from the perception that antidumping is an appropriate response to an activity that is condemned by the GATT to the view that antidumping is straightforward protectionism without any economic justification. Somewhere in between are those who argue in favor of the use of antidumping on second best grounds. For example, the need for antidumping may be motivated on the basis that foreign firms are able to leverage entry restrictions in their home markets into an "unfair" competitive advantage in export markets, and that absent common rules on antitrust disciplines, antidumping is required to "level the playing field."

A tentative start has been made in the WTO context to initiate discussions on the subject. A working group has been established with the mandate to explore the relationship between trade and competition policies. The work program for this group has been heavily contested, as was its terms of initial reference. Strong opposition exists on the part of import competing industries in a number of countries against any effort to discipline the reach of antidumping through the introduction of linkages to antitrust principles.[1] Conversely, some competition authorities are

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1/ This was illustrated in the Singapore Ministerial meeting of the WTO in December 1996 where the United States and the EU jointly agreed on a statement "clarifying" that the Ministerial declaration establishing a working group on trade and competition policy "is specifically directed at a work plan addressing antitrust issues and will not affect domestic antidumping standards and provisions." Statement on Competition Policy, USTR press release 96-95, 13 December 1996.

opposed to the introduction of antitrust into WTO because of a worry that antitrust enforcement might become affected by trade policy considerations.

This paper explores what can be learned from preferential trade agreements (PTAs) regarding the conditions that are perceived as necessary by governments in order to move to a free trade stance, including the removal of antidumping and other instruments of contingent protection from their trade policy arsenal. A number of PTAs have illustrated that governments can agree to abolish antidumping on intra-area trade flows. They also reveal that governments have been able and willing to agree to common competition disciplines. My interest is to explore what the PTA experience suggests regarding the relationship between the attainment of intra-area free trade and the pursuit of "deep" integration--actions by member states to effectively harmonize national regulatory regimes. More specifically, the following two questions are asked: (i) does free trade require deep integration?; and (ii) if so, is agreement on antitrust a necessary element of such deep integration?

It is well known that many PTAs have not eliminated the reach of trade policy--governments often exempt certain sectors and retain the right to impose antidumping, countervailing duty and "emergency" protection. The focus of attention in this paper is limited to PTAs that have managed to abolish the scope to pursue such actions and those where serious attempts have been (are being) made to do so by one or more members. In reviewing the approaches that have been taken in PTAs concerning the elimination of trade policy on intra-area

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Or, to cite the business view expressed in a 1996 ACTPN report on competition policy: "As long as exporters may engage in dumping, there will be a need for national antidumping laws" (http://www.ustr.gov/reports/actpn/policy.html). See Hoekman (1997) for a discussion and references to the rapidly expanding literature on this topic.

trade, particular attention will be given to one dimension of deeper integration: the extent of any linkage to the adoption of antitrust disciplines. Many economists are of the view that insofar as dumping is potentially an economic problem for an importing nation, it can and should be dealt with through enforcement of national competition law (Finger, 1993; Hoekman and Mavroidis, 1996). This can be done unilaterally--there is no need for international agreement or harmonization of competition regimes. The implication is that if governments desire to form a free trade area there is no need to negotiate common antitrust rules as a precondition for the abolition of antidumping. Others argue that antidumping is a strategic tool that firms/governments use to counteract the extraterritorial impact of differences in domestic policies and that consequently the "capacity of firms and governments to reach directly restrictive business practices wherever they take place within the regional area is a pre-condition *sine qua non*, before antidumping measures can be effectively phased out" (Marceau, 1995, pp. 35-36). That is, it is claimed that common competition disciplines are required in PTAs in order to abolish antidumping.

This paper argues that the economic and empirical basis for this line of reasoning is questionable. Section II defines terms and discusses the economics of trade policy-antitrust linkages. Section III reviews the evidence offered by PTAs that have been established since the second World War involving countries that have tended to use contingent protection relatively intensively--Australia, Canada, Western Europe, and the US--as well as several "new entrants" such as Argentina, Brazil and Mexico. Section IV summarizes the regional experience and draws some tentative lessons. Section V turns briefly to some implications of the regional experience for the reform of multilateral disciplines on PTAs. Section VI concludes.

II. Definitions and Conceptual Issues

As average tariffs of industrialized countries have fallen (to less than five percent currently) and

quantitative restrictions been abolished, international negotiations have increasingly centered on domestic regulatory policies that are alleged to impede the ability of foreign firms and products to contest a market. Examples of the latter include technical regulations that aim to safeguard public health or the environment, and licensing or certification requirements for service providers. Dealing with such "behind the border" policies has been termed "deeper integration" in the literature,[2] in contrast with the "shallow" integration that has been the staple of the General Agreement on Tariffs and Trade (GATT), which revolves around reducing the prevalence of measures applied at the border (tariffs, quotas). Rather than use the border-nonborder distinction, in this paper shallow integration is defined to comprise actions to eliminate discrimination between foreign and domestic firms—i.e., to apply the principle of national treatment. This implies not only zero tariffs and quotas, but also the abolition of contingent protection. Deep integration consists of explicit actions by governments to reduce the market segmenting effect of differences in national regulatory policies that pertain to products, production processes, producers and natural persons. In practice this will require decisions: (i) that a partner's policies are equivalent (mutual recognition); or (ii) to adopt a common regulatory stance in specific areas (harmonization). The latter approach may be complemented by decisions to cede enforcement authority to a supra-national entity.

Many PTAs are *only* about a shallow type of shallow integration: all that is sought is to eliminate measures that discriminate against foreigners by granting national treatment *to products* originating in the preferred partner country. But shallow integration can also extend to *factors of production* such as labor and capital--in this case nondiscrimination is applied to foreign labor and/or foreign investors. Allowing foreigners to operate on domestic markets does not constitute deep integration according to the definition used in this paper because there is no

2/ The term is due to Robert Lawrence, see e.g., Lawrence (1996).

harmonization/recognition of the regulatory regimes that are applied to labor markets or to investment in each of the participating countries. Governments remain sovereign and unconstrained in this regard. Clearly the economic impact of shallow integration may far exceed that of deep integration. Shallow does not mean that economic effects are limited.

Competition disciplines are one of the policy areas that may figure on a deep integration agenda. It is important in this connection to distinguish competition *policies* in general from antitrust or competition *law*. Antitrust involves instruments that control or regulate the permissible behavior of private firms or natural persons. They are a subset of competition *policy*. Generally antitrust laws prohibit anticompetitive practices such as price fixing, collusion between firms to restrict output, or the abuse of a dominant position. Competition policy spans the broader set of measures and instruments that may be pursued by governments to enhance the contestability of markets. This goes beyond antitrust to include efforts to privatize state-owned enterprises, deregulate, reduce firm-specific subsidy programs, liberalize trade and investment, etc. Elements of competition policy broadly defined have been on the agenda of the GATT for many decades.

There are two possible motivations for deeper integration efforts, and more specifically, why antitrust might figure on the agenda of a trade agreement. The first is that there are gains from cooperation in this particular area *and* an international trade agreement allows these to be attained. The second is that common disciplines on competition policy are *necessary* to achieve the objective of regional free trade (shallow integration). In the first case, a distinction must be made between situations where national competition policies result in outcomes that are sub-optimal (inefficient) from a joint welfare perspective and those where they do not. In Prisoners Dilemma-type situations there is a *prima facie* case for cooperation, but it is not clear why a preferential trade agreement is necessary as a vehicle to capture the gains from cooperation on

competition policy. If such gains exist, in principle governments can pursue issue-specific cooperation that results in outcomes that raise welfare in both countries. In practice, of course, that is what has often been done, as reflected in bilateral cooperation agreements between antitrust authorities.[3]

The case for inclusion of competition policy in a PTA becomes more compelling if the situation *ex ante* is akin to a zero sum game: efficient national enforcement of competition policies reduces the welfare of a trading partner or there are costs involved for a country to move its competition regime to conform more closely to that of a partner.[4] Here the issue becomes a distributional one, as moving away from the *status quo ante* may impose a loss on a country. Alternatively, there may be scope for increasing joint welfare through coordination of antitrust, but interest groups that would lose from a move to a more efficient (joint) outcome may be able to block this (insist on compensation). In such cases, side-payments are required to achieve agreement to adopt common competition regimes. Such side-payments may be easier to realize in the context of a broader trade agreement that has a large number of issues on the negotiating

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3/ Although this is not to say that existing arrangements are adequate. Many observers have concluded that such bilateral cooperation between competition authorities could benefit from substantial strengthening and expansion. See e.g., Commission of the European Communities (1995).

4/ This is not unlikely to be a frequent occurrence in practice, given the significant differences in the substantive provisions and interpretations of competition law across even OECD countries and he prevalence of exemptions for export cartels. See, e.g., Boner and Krueger (1991) for a review of national rules and provisions.

agenda. Indeed, they may be a necessary condition for deeper integration.

A second possible rationale for the introduction of antitrust on the agenda of a PTA is that governments regard common competition disciplines as a necessary condition for achieving shallow integration (the elimination of trade policy). Most PTAs have tended to be imperfect in the sense that many holes and loopholes are maintained that imply that intra-regional free trade is not achieved for a long period of time, if ever. Whole sectors may be excluded from the ambit of liberalization and a variety of instruments of contingent protection may continue to be applicable to intra-area trade. Full achievement of shallow integration therefore has been more the exception than the rule. This raises the question whether shallow integration requires introduction of deeper integration elements into the process, and, in particular, common disciplines in the area of antitrust.[5]

5/ Strong statements can be found in the legal literature implying that the answer is positive. For example: "..antidumping measures can be phased out between two countries only if and when: standards for transnational restrictive business practices (RBPs) exist; private firms have legal standing before the courts of the territory where the RBP takes place to enforce these standards; and/or when this issue is dealt with before domestic courts (other than that of the territory where the RBP takes place), the market of reference is transnational and the domestic courts are entitled to address transnational issues" (Marceau, 1995, p. 53).

Logically, there at least four "types" of PTAs: (i) those that achieve unconditional internal free trade (shallow integration) without any deep integration; (ii) shallow integration is accompanied with deep integration; (iii) shallow integration is not achieved (or sought) but the PTA embodies elements of deeper integration; and (iv) neither shallow nor deep integration is attained or pursued. Observations of the first type of PTA are sufficient to reject the view that agreement on antitrust is necessary for the abolition of antidumping. More difficult is to determine what motivates deeper integration in instances where this is observed in PTAs that realize shallow integration. There are three possibilities. First, deep integration may be considered *necessary* by governments in order to give up trade policy instruments. Second, it may be the case that no link is between trade and antitrust is perceived to be necessary and that agreement on common antitrust disciplines simply reflects the existence of gains from cooperation in this area. This might just as well have been pursued independently of the PTA and in the absence of the PTA might have been.[6] Finally, it may be that shallow integration does not require deeper integration, but cooperation on antitrust requires side payments. These may be achieved by linking cooperation on antitrust to the broader agenda of the PTA.

Distinguishing between these three situations in cases where PTAs embody both shallow and deep integration is important in understanding the role of antitrust disciplines in trade agreements. The more one observes instances of the first situation the greater the likelihood that agreement on antitrust will be necessary in the WTO if the multilateral trading system is to move further down the path towards free trade. Unfortunately, characterizing real world PTAs on the basis of this three-fold typology may not be straightforward. Recourse will have to be made to statements by the governments involved in such agreements, as well as the specific language and

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6/ This is the case among NAFTA members, for example, where common antitrust rules were not adopted but where national authorities have concluded a variety of bilateral cooperation agreements. These are pursued independently of the FTA (see below).

drafting/negotiating history of each agreement.

Why Link Abolition of Antidumping to Common Antitrust Rules?

Before reviewing the regional experience it is helpful to discuss briefly the most interesting type of PTA: those where deep integration is held to be a necessary condition for shallow integration. Specifically, why might governments be unwilling to abolish antidumping unless an agreement on common antitrust standards can be negotiated? Possible rationales for antidumping are to protect domestic agents from predatory (monopolizing) dumping (Viner, 1923) or as an instrument to counteract foreign strategic trade policy. A linkage argument must then demonstrate that absent common antitrust rules, a nation becomes open to predation or foreign rent-shifting policies.

Predation is the standard economic potential rationale for antidumping. Predatory dumping arises if a foreign firm (or cartel) seeks to force domestic competitors to exit the market by pricing below cost (with the intention of raising prices once the competition has exited). It has been pointed out frequently that if there is predation, national antitrust should in principle be able to address the problem and that there is no need for common antitrust disciplines. More important, predation is unlikely to be a strategy that is often used by firms. In practice, research suggests it is very much the exception, not the rule in antidumping cases.[7] Indeed, in real world antidumping actions an antitrust authority would not have intervened on competition, let alone predation, grounds (Messerlin, 1996; Schöne, 1996). The consensus among most observers is that antidumping as it is practiced today in the major jurisdictions has nothing to do with predation.

7/ There are many reasons for this, including the difficulty of restricting entry in the future and the likelihood that the importing country government would regulate the resulting monopoly (or cartel).

This leaves the second possible rationale for antidumping: a strategic policy instrument that aims to affect a country's terms of trade. Assuming a PTA aims to achieving free trade (eliminate trade policy), governments may be concerned to constrain the ability of other members to use alternative instruments (such as antitrust or subsidies) to circumvent the free trade goal. Absent such agreements, contingent protection may be seen an insurance mechanism to offset the strategic use by other member governments of policies that could reduce domestic welfare. This line of argument puts foreign government policy in the center of attention. The issue then is to determine if targeting individual firms (as antidumping does) is an efficient way of dealing with such foreign government policies. This depends in part on the source of the "problem". One possibility is that foreign firms benefit from high trade barriers that protect their home market, and that antidumping is seen as an instrument with which to put pressure on the foreign government to reduce such barriers (Stewart, 1996). However, given that in the PTA context presumably the objective is to eliminate trade barriers, this line of reasoning implies that antidumping should be removed once "classic" trade barriers such as tariffs and quotas have been eliminated. No link with antitrust is required.[8]

Another possible "problem policy" is foreign antitrust. This may have a negative effect on domestic welfare. For example, a merger between foreign firms that is allowed by the foreign antitrust authorities may result in an increase in export prices. The larger the share of the foreign entity in domestic consumption the more likely the resulting decline in consumer surplus will

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8/ As noted below, in a number of PTAs where the elimination of antidumping has been achieved or is an objective, abolition was (is) linked to the transition period for phasing out tariffs (e.g., the EC and free trade agreements between Canada and Chile, and between Australia and New Zealand).

exceed the increase in producer surplus of import-competing firms (Ordover and Willig, 1984; Dixit, 1984, 1998; Barros and Cabral, 1994). This is a variant of the export cartel issue—an antitrust authority of an industry that mostly exports (or where behavior on the home market can be regulated) has an incentive to allow the formation of export cartels as it improves the terms of trade. The relevant question in this context is what antidumping can do to counteract the effect of a "nationalistic" foreign antitrust policy. The answer is: very little. Whether trade policy in general (tariffs) may offset (some of) the welfare reducing effect of the increase in foreign market power depends on a number of factors, including market structure and demand. Collie (1997) concludes that in this type of situation tariffs may have a positive or negative effect and are inferior to domestic production subsidies. In any event, antidumping is not very relevant in this context as the effect of greater concentration (market power) is to increase export prices, thus reducing the probability of dumping. One can also question whether (the threat of) an antidumping duty can put pressure on affected firms in the export market to lobby their government to pursue a more vigorous antitrust stance—or to consider amending its practices to conform more closely with those demanded by its trading partner. This is because current antidumping enforcement takes no account of whether price discrimination or selling below cost is a function of a "strategic" antitrust stance by the home government of an exporter.

It is sometimes argued that as countries move to eliminate trade policies, they may perceive that possible negative spillovers due to differences in national antitrust regimes will *increase* after the achievement of free trade. That is, the incentive to use antitrust strategically may increase: once free trade is achieved, government's may shift to alternative instruments to shift foreign profits or surplus to domestic agents. However, analysts that have explored this issue question whether the abolition of trade policy will give rise to greater incentives to use antitrust strategically, even in areas where it would seem most easily applied--e.g., merger policies and

export cartels (Horn and Levinsohn, 1996; Motta and Onida, 1996).

A final potential "strategic" rationale for antidumping is as an instrument to counteract foreign industrial policies such as investment restrictions, subsidies and state involvement in industry. Such government support may give rise to significant negative repercussions on domestic firms. Consequently, the less PTAs do to control industrial policies of governments, the greater the resistance may be to giving up "commercial defense" instruments. There are valid theoretical economic justifications for the use of countervailing duties. Indeed, partial countervailing of a foreign export subsidy can be the optimal response by an importing country (Dixit, 1988; Collie, 1991). However, in general contingent protection is an inefficient instrument to deal with the effects of foreign subsidies or industrial policies as it imposes additional deadweight costs on domestic consumers without greatly increasing the incentives of the foreign government to change its ways (Deardorff and Stern, 1987). The appropriate policy is to draft rules that restrict the ability of a PTA member to use industrial policies in ways that are detrimental to the welfare of other member countries. In practice, this may be difficult to achieve, as is illustrated in many PTAs. If so, governments may seek to continue to pursue subsidy and/or countervail policies in part motivated by strategic considerations. But antidumping should not have a role to play in this connection as it does not focus on the existence of detrimental foreign export subsidies as a precondition for action. Of course, it may be a substitute for countervailing duties for exactly that reason: there is no need to confront foreign governments with allegations that their subsidy policies are detrimental to domestic industries. Indeed, it may be defended as allowing non-subsidy-based industrial policies to be targeted as well. But that is no virtue. Instead, this illustrates one of the major problems with antidumping from an economic policy perspective—it allows proponents to hide behind the cover of vague allegations of "unfair" trade practices without specifying what these are.

There has been a lot of research on the incentive effects of antidumping.[9] This has concluded that antidumping can have a pro-competitive impact in situations of oligopolistic rivalry. However, once rent-seeking incentives are recognized, account is taken of the fact that antidumping as actually applied does not consider the variables that matter from a strategic point of view, and that the possible "spillover" effects of antidumping on downstream industries can be significant (Hoekman and Leidy, 1992), in practice it is much more likely that antidumping has a detrimental effect on domestic welfare. Moreover, given the technical and "automatic" nature of antidumping and the fact that it is driven by private petitions, it is difficult to conceive of antidumping being used as an effective strategic instrument by governments.

Arguments that a necessary condition for the elimination of antidumping in the PTA-context (or in the WTO context for that matter) is the adoption of common competition rules are therefore not compelling. Insofar as the fear is predation, this can be achieved by the application of *domestic* antitrust. If the fear is foreign "strategic" policy, be it antitrust-related or more general industrial policies, antidumping can do little to address the problem. Antidumping as currently practiced is predominantly simple protectionism (Finger, 1993). There is therefore nothing special about antidumping that requires linkages to other policy areas—as just another form of trade policy it should be eliminated in conjunction with tariffs and quotas more generally as a PTA is implemented.

III. Regional Trade Agreements

9/ See, e.g., Dixit (1988), Leidy and Hoekman (1990), Messerlin (1990), Reitzes (1993), Staiger and Wolak (1989; 1992), Veugelers and Vandenbussche (1997).

Many preferential trade agreements have been negotiated over the years. Competition policy in general and antitrust in particular has played an important role in only few of these agreements. However, a number of the more recent agreements have pursued common antitrust disciplines. What follows looks at a number of PTAs that have gone far towards achieving either full free trade (shallow integration) or have sought to incorporate disciplines on antitrust. As noted earlier, the main focus of interest is to determine whether cooperation extends to the area of competition law and if so, what can be said about whether this appears to be a necessary condition for achieving free trade. Given the voluminous literature that exists on most of the PTAs considered here, the discussion will be succinct.[10]

European Economic Community (EEC)

The EEC (now the European Union) is unique in that it involves the complete liberalization of trade in goods, services, labor and capital. It is also unique in the extent and reach of the constraints that are imposed on member states regarding regulatory policies that may have an impact on trade. Thus, common disciplines are imposed on Member states with respect to state aids (subsidies), monopolies, government procurement practices, and competition policy, and these are complemented by detailed directives and regulations aimed at the achievement of the Internal Market. These disciplines are enforced by supranational bodies (the Commission and the European Court of Justice) as well as by national institutions.

10/ This section draws in part on Hoekman and Mavroidis (1996) and on Hoekman (1998).

Articles 85 and 86 of the European Community Treaty (ECT) prohibit practices that restrict or distort competition and abuses of dominant positions insofar as they affect intra-European trade flows. Art.85 deals with agreements and concerted practices and Article 86 prohibits abuse of a dominant position.[11] Public undertakings and entities granted special or exclusive rights are subject to the competition rules as long as this does not impede the realization of their assigned tasks (Article 90).[12] State-aids affecting trade flows are prohibited (Art. 92), although generally available subsidies are permitted in principle, as is aid targeted at disadvantaged regions (Article 92.3a).

11/ Dominance is determined on the basis of the relevant product and geographic markets; abuse may involve unfair trading, price discrimination, tie-ins, bundling, or restricting output or access to markets.

12/ State monopolies of a commercial character must also ensure nondiscrimination regarding the conditions under which goods are procured and marketed between EC nationals (Article 37 ECT).

In short, common disciplines are imposed on Member states with respect to state aids (subsidies), monopolies, government procurement practices, and antitrust. These are complemented by detailed European legislation relating to the achievement of the Internal Market. These disciplines have direct effect (supercede national law) and are enforced by supranational bodies (the Commission and the European Court of Justice) as well as by national courts. The various competition provisions were considered necessary in order to achieve the objective of creating an integrated European market. As has been emphasized many times by the European institutions and numerous commentators, the goal is to ensure a "level playing field" or "equal competitive opportunities" on European markets for suppliers originating in member states.[13] This "trade effects" focus has implied that in the enforcement of EC antitrust rules (Arts. 85-86) the Commission and Court may pursue a more "interventionist" policy stance than a national antitrust authority. The latter will generally be concerned with national welfare, and will balance the various economic effects of potential anticompetitive measures. In the EC context, the application of Arts. 85 and 86 is concerned as well with whether specific actions by entities are consistent with the objective of market integration (i.e., do not restrain intra-EC trade).[14]

13/ For more comprehensive discussions of the EC, see e.g., Bourgeois (1992), Brittan (1990) and Ehlermann (1992).

14/ This may lead to findings by the EC institutions that are inappropriate from a "pure" economic efficiency viewpoint. Treatment of vertical agreements provides an example. Exclusive distribution agreements between a producer in one country and a distributor in another may fall foul of EC law even if vigorous interbrand competition (including from imports) exists on all EC

markets because the agreement implies market partitioning. See Weatherill and Beaumont (1993, Chapter 22) for an extensive discussion.

A noteworthy feature of the EC regime is that no efforts were made to harmonize national antitrust regimes, which differed very substantially across countries. Indeed, some members states did not even have antitrust legislation; Italy adopted a comprehensive antitrust statute only in 1990 (Siragusa and Scassellati-Sforzolini, 1992). Particularly for smaller states this implied that EC rules had little impact, as the affected markets could easily be too small to satisfy the "trade effect test". In such cases effective enforcement requires that national authorities take the lead. If for whatever reason this does not occur, EC competition rules may be largely irrelevant.[15] Over time greater attention has come to be centered on the adoption of more effective national antitrust legislation in member states. For example, in 1983 Portugal drafted and adopted its antitrust legislation in part with a view to its future accession to the EC (Barros and Mata, 1996), and a number of member states have amended their statutes over time to conform more closely to the letter and spirit of EC rules. To some extent this has been driven by the EC Merger Regulation, which requires that national bodies exist to review mergers or acquisitions if these are referred to them by the European Commission, and by a more general concern to implement the principle of subsidiarity (in the process reducing somewhat the burden of enforcement that is carried by the Commission and the Court).[16]

As mentioned, the primary focus of the European Commission and the Court of Justice has been on contesting measures (public and private) that segment national markets. Facilitation of arbitrage has therefore been an important objective. This is perhaps best illustrated in the extensive case law pertaining to Article 30 (prohibiting the use of quantitative restrictions and measures with equivalent effect) and the Cassis de Dijon decision which led to adoption of the

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15/ For an example, see Fingleton (1996), who argues that this was the case in Ireland until passage of new legislation in 1991.

16/ See Neven, Nuttall and Seabright (1993) for an analysis of the EC's Merger Regulation.

principle of mutual recognition for standards (Weatherill and Beaumont, 1993, Chapter 15). But it is also reflected in the vigorous enforcement of competition provisions on the behavior of private agents and States that prevent arbitrage across markets. An example is the ban on restrictions on parallel imports—preventing distributors of a product from selling to entities that have the intention of re-selling the products in other member states.

The Treaty of Rome prohibits antidumping on intra-area trade once the transition period for full implementation of the treaty provisions has expired. However, during the transition period, members were permitted to petition the European Commission for authorization to impose antidumping (Art. 91).[17] No formal linkage was established between the application of the common competition rules (or national antitrust) and the elimination of antidumping; instead the presumption appears to have been that once tariffs and quotas had been removed, antidumping should go as well. It might be argued that there is an informal linkage, as Art. 91 is in the competition-related section of the ECT, preceded by provisions regarding anticompetitive practices by undertakings and followed by a provision dealing with state aids. However, this cannot be seen as evidence of a strong antidumping-antitrust link as the criteria of Articles 85-86 are very different from those that are applied in antidumping. Consequently, the argument that the EC is a prime example of a PTA where antidumping was removed because of a perception that the common antitrust disciplines could deal with the "problem" of dumping is not very

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17/ During the transition period, Article 91:2 required that products originating in one Member state and exported to another be free of duties, quotas and measures with similar effect if they are re-imported. Thus, during the transitional period governments were required to ensure that arbitrage between markets was not impeded by maximizing the incentive for consumers of the exporting country to re-import dumped goods. Transition periods varied across new members.

compelling. Instead, the view was taken that antidumping could have no place in a common market.

The European Economic Area (EEA)

The EEA was negotiated between the European Free Trade Association (EFTA) states (minus Switzerland) and the EU in 1992. It involves the former adopting much of the EC's *acquis communautaire*, including not only the EC's competition rules for firms *and* governments but also some 1,600 pieces of EC legislation (Norberg, 1992).[18] The EEA built upon free trade agreements negotiated between the EC and the EFTA states in the early 1970s. These contained disciplines on the application of competition policies, notwithstanding which the EC continues to extend the reach of anti-dumping to EFTA-based exporters. The abolition of antidumping duties in the EEA was one of the negotiating goals of the former EFTA countries, as their exporters sought to eliminate the threat of such actions completely (Hindley and Messerlin, 1993). This was achieved: Article 26 EEA states: "Anti-dumping measures, countervailing duties and measures against illicit commercial practices attributable to third countries shall not be applied in relations between the Contracting Parties, unless otherwise specified in this agreement."[19] Given adoption of the *acquis* and the effective extension of the EU Single Market to EEA members, clearly there was no option for the EU to retain antidumping. As in the EC proper, the driving force behind abolition of antidumping was the creation of a single market. Deep integration played an important part in this process, as reflected in the numerous directives and regulations that were adopted. But

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18/ The main exception is that the EU's Common Policies (such as agriculture and external trade) are not adopted by the EFTA states.

19/ The exceptions are listed in a protocol which states that it only applies to the areas covered by the provisions of the EEA in which the Community *acquis* is fully integrated (thus excluding agriculture); and that it is without prejudice to any measures which may be introduced to avoid circumvention of anti-dumping or similar measures by third countries.

antitrust regimes *per se* did not.

Enforcement of the EC competition disciplines is similar as in the EC proper, through a mix of direct effect (allowing the rules to be invoked by firms before the courts) and supra-national enforcement. However, the latter task is shared between two institutions: the European Commission and the EFTA Surveillance Body (the EFTA analogue of the Commission). It was agreed that the latter has jurisdiction if at least one third of the turnover of the firm(s) subject to complaint is in EFTA states.

The EEA is a free trade area, not a customs union, suggesting that whatever other necessary conditions must be satisfied for elimination of antidumping, a common trade policy vis-a-vis non-members is not required. Indeed, the EU illustrates that antidumping can co-exist with a customs union. Thus, in the customs union with Turkey, European firms may continue to petition for antidumping actions to be imposed on Turkish exports (see Togan, 1997).

EU Agreements with Eastern European and Mediterranean Countries

Starting in the early 1990s, the EU initiated a process of negotiating Association agreements with neighboring countries.[20] These commit signatories to achieve free trade on a reciprocal basis, usually over a transition period ranging from 10 to 12 years. As in the EEA, in the so-called Europe Agreements (EAs), Central and East European (CEE) countries committed themselves to adopt the EU's rules relating to agreements between firms restricting competition, abuse of dominant position, the behavior of public undertakings (state-owned firms) and competition-distorting state aids that have an effect on trade (Articles 85, 86, 90 and 92 ECT).[21]

20/ Formally, the EEA is also an Association Agreement under Art. 238 ECT.

21/ State-aid, compatible with EU rules for disadvantaged regions (Article 92.3a ECT), may be applied to the entire territories of the associated states during the first five years, and transition periods of 3 and 5 years were granted for abiding with Arts. 90 and 37 disciplines. Cooperation

Despite the agreement to adopt EU-compatible competition disciplines there is no analogue to Art. 91 ECT in the Europe Agreements specifying that antidumping will be phased out or eliminated. EU firms will therefore be permitted to engage in price discrimination or sell below cost on the EU market, whereas CEE firms will be constrained in pursuing such a strategy by the existence of EU antidumping procedures. On EU markets, price discrimination by CEE firms in the sense of selling products at prices below those charged at home may lead to antidumping petitions if this injures EU firms (Hoekman and Mavroidis, 1995).

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between the EU and CEE antitrust authorities is based on the principle of positive comity (this grants a state whose interests are affected the legal option of requesting another state to initiate appropriate enforcement proceedings in its market).

This situation has been justified by the Commission on the basis that antidumping and similar instruments must remain applicable to trade flows as long as it is still unclear to what extent partner countries have completed the transition to a market economy. Subsequent to the negotiation of the Europe Agreements the EU clarified its stance on this issue. At the December 1994 Essen Summit, the European Council declared that the Union "should be ready to consider refraining from using commercial defense instruments for industrial products" conditional upon the "satisfactory implementation of competition policy and control of state aids ... together with the wider application of other parts Community law linked to the internal market, providing a guarantee against unfair competition comparable to that existing inside the internal market." Clearly there is no firm commitment here to eliminate antidumping. Note that the EU insists that application of competition laws and principles are not enough; what is necessary (but not sufficient!) is that all of the Single Market directives are applied as well.[22]

22/ Indeed, as noted by Holmes (1996, p.5), in practice the EU is requiring its partners (future members) to adapt national competition rules to the EU's standards in a much more rigorous fashion than has been done by existing member states. A recent survey by Pittman (1997) documents that the CEE countries have already gone far down the harmonization road.

The situation is similar in the Euro-Mediterranean Partnership agreements that have been (are being) concluded by the EU. Under these agreements Mediterranean countries commit to abolish barriers to EU imports over a 12 year period and to abide by the principles of Articles 85, 86, and 92 of the ECT. For the first five years (as opposed to three for the CEE countries), Mediterranean nations will be regarded as disadvantaged regions for the purposes of the rules on subsidies (Art. 92). Rules to enforce the provisions of Arts. 85-86 and 92 are to be adopted by the Association Council after an initial five year period. The agreement does not require nondiscrimination in government procurement, and does not impose any requirements with respect to the liberalization of trade and investment in services. The Euro-Med agreements are therefore less far-reaching than the Europe Agreements, and it should come as no surprise that instruments of contingent protection remain applicable to intra-area trade flows.[23]

The Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)

ANZCERTA is a free trade agreement between Australia and New Zealand established in 1983. Article 12(1)(a) of the ANZCERTA requires the two countries to: "examine the scope for taking action to harmonize requirements relating to ...restrictive trade practices." Competition regimes in the two countries differed significantly in 1983. Australian antitrust laws followed the US model, whereas New Zealand's legislation was much more modeled on that of the UK. In 1986, New Zealand's Parliament enacted new competition legislation which was much more similar to the

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23/ See Galal and Hoekman (1997) for assessments of the content and economic effects of the Euro-Med agreements.

Australian system.[24] Although this was largely motivated by a desire of the government to enhance competition in the economy, it also facilitated discussions between the two countries to eliminate antidumping on bilateral trade flows.

In a review of ANZCERTA in 1988 a Protocol on Acceleration of Free Trade on Goods was appended to the Agreement. The Preamble to this Protocol states that : "...the maintenance of anti-dumping provisions in respect of goods originating in other Member States ceases to be appropriate as the Member States move towards the achievement of full trade in goods between them." Article 4 of the ANZCERTA was modified to read: "The member States agree that anti-dumping measures in respect of goods originating in the territory of the other Member States are not appropriate from time of achievement of both free trade in goods between the Member States on 1 July 1990, and the application of their competition laws to relevant anti-competitive conduct affecting trans-Tasman trade in goods"... and "Each Member State shall take such actions as are appropriate to achieve the application of its competition law by 1 July 1990 to [anticompetitive conduct affecting trans-Tasman trade] in a manner consistent with the principles and objectives of the Agreement." With this amendment the CER achieved unconditional free trade. Since the amended antitrust legislation came into effect, no cases have been brought alleging abuse of a dominant position that deters intra-Tasman competition.

Ahdar (1991) argues that in the ANZCERTA context full trade liberalization was judged necessary but not sufficient to eliminate the need for antidumping. Such elimination required active enforcement of *similar* competition laws and agreement that the jurisdiction of competition agencies extend to matters affecting trade between New Zealand and Australia. In this connection it was agreed that nationals of one state could be made the subject of an enquiry by the

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24/ Ahdar (1991, p. 332).

competition authorities of the other state and be required to respond to requests for information. Australian (New Zealand) antitrust legislation was amended to extend its scope to the behavior Australian and/or New Zealand firms with market power on either one of the national markets or the combined Australia/New Zealand market; Courts were empowered to sit in the other country; orders may be served in the other country; and judgements of Courts or authorities of one country are enforceable in the other country. In 1994 the competition authorities of the two countries concluded a bilateral Cooperation and Coordination Agreement to reduce the possibility for inconsistencies in the application of legislation in instances where this is not required by statutory provisions (WTO 1996).

As in the EU, elimination of antidumping was linked to the transition path for the realization of free trade (July 1990). There was no effort to gradually increase the "competition-consistency" of antidumping.[25] The elimination was accompanied by action by one member of the PTA to move towards the adoption of antitrust legislation that conformed relatively closely with that enforced by the partner country. The application of antitrust remedies remains strictly national. Ahdar (1991) argues that competition policy harmonization played a role in the decision to abolish antidumping. However, it is unclear why or how the link was made. A reading of the CER suggests rather that the focus was on the realization of free trade (a single market). The agreement includes various deeper integration elements that aim at achieving this goal. Thus, disciplines on subsidies are included. The 1988 Protocol banned industry-specific subsidies ("bounties and subsidies providing long term support can no longer be regarded as a viable

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25/ A facilitating factor could be that antidumping had become increasingly difficult to obtain. Between 1983 and 1988, New Zealand initiated 39 dumping investigations against Australia. Of these only two led to an affirmative finding. Similarly, Australia imposed duties in only 3 of 34 cases during this period (Ahdar, 1991).

instrument of industry policy");[26] export subsidies are also prohibited (these were eliminated by 1987). Although investment (capital flows) are not covered by CER, Australia and New Zealand also maintain relatively liberal investment regimes, and significant cross-investment flows have occurred.[27] ANZCERTA also unifies the labor market of the two countries (there is free mobility of labor), and contains relatively far-reaching commitments to liberalize trade in services. It is therefore similar to the EU in that the objective is to move towards the establishment of a single "trans-Tasman" market. As an instrument of protection, antidumping was inconsistent with the realization of this objective.

The North American Free Trade Agreement (NAFTA)

Both the Canada-US Free Trade Agreement and its successor NAFTA substantially liberalize trade and investment flows between signatories. However, NAFTA does little to discipline the use of subsidies—it simply restates the existing multilateral (WTO) disciplines and remedies in this area—or to apply common competition disciplines to intra-NAFTA trade. Antidumping remains applicable to internal trade flows. Despite the Canadian government's interest in disciplining the use of antidumping, negotiators were unable to move far down the path towards elimination. Although ostensibly antidumping and antitrust were not linked in the negotiations, in part this may have reflected differences in the competition rules and their enforcement in the member countries, (e.g., triple damages in the US; rights of private action for breach of competition rules). But the

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26/ Lloyd, 1991, p. 24

27/ As of the mid 1990s, Australian FDI stocks in New Zealand equaled US $8 billion, equivalent to 25 percent of the stock of inward FDI. The comparable figure for New Zealand FDI in Australia was US $5 billion, or 5 percent of the total stock. Kahler (1996, p.110) notes that a factor constraining extension of CER to cover investment is the Treaty of Nara between Australia and Japan, which would require that Australia extend any benefits granted New Zealand in this area to Japan.

major factor underlying the failure of the Canadian government to remove the threat of antidumping appears to have been the strength of the US lobby that supported the continued existence of antidumping.

As a result, the approach taken in NAFTA towards antidumping was limited to introducing mechanisms to ensure that domestic legislation is applied correctly. Independent binational panels may be called upon to review final antidumping determinations under the domestic law of each party. Moves to agree to link the abolition of antidumping to the implementation of common disciplines on antitrust, subsidies or exclusive rights are not on the agenda. This is not to say there is no recognition of potential gains from cooperation in these areas. For example, as far as antitrust is concerned, parties have agreed to apply the positive comity principle and are engaged in a process of discussing the trade-competition policy interface. Article 1504 of the NAFTA established a working group on trade and competition. This group is required to report to the NAFTA Commission on issues concerning the relationship between antitrust law and policy and intra-NAFTA trade before the end of 1998. This working group has mostly focused on a comparison of competition legislation in the three member states with a view to determine whether differences have any implications for intra-NAFTA trade. A perusal of the working group's 1997 interim report on its activities suggests that antidumping has not figured prominently in the discussions.[28] Instead the focus has been on the application and possible trade effects of competition law enforcement.

MERCOSUR

The Southern Cone Market (Mercado Commun del Sur—MERCOSUR) was established in

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28/ "Interim Report of the NAFTA 1504 Working Group to the NAFTA Commission" February 1997.

1991.[29] It is a common market and therefore has a common external tariff (implemented in 1995). The MERCOSUR treaty was amended in December 1994 to include a variety of institutional provisions, including on dispute settlement. In contrast to the EU—also a common market—there are no provisions for supranational enforcement of the agreement; disputes tend to be settled through negotiation.

29/ The agreement was notified to the WTO under the Tokyo Round Enabling Clause, which exempts developing countries from establishing full conformity of the agreement with the WTO rules on economic integration (Art. XXIV GATT and Art. V GATS) (Laird, 1997, p. 3). Laird (1997) provides a detailed description of the provisions and implementation of MERCOSUR.

While GATT Article XIX type safeguard actions ("emergency protection") on intra-MERCOSUR trade were prohibited as of the beginning of 1995, antidumping actions remain possible on internal trade. However, this possibility is intended to be temporary, and it is envisaged that antidumping will be eliminated once agreements has been reached on a set of "Common Rules on the Defense of Internal Competition." The question whether antidumping is to be maintained is to be reviewed by December 2000. MERCOSUR members have initiated a process to harmonize national competition laws and create a mechanism for coordinated action to prevent anticompetitive practices (Rowat, Lubrano and Porrata 1997).[30] In December 1996 a Protocol for the Defense of Competition within MERCOSUR was adopted. This establishes a prohibition on concerted practices that restrict or distort competition and affect trade between member states, and gives MERCOSUR institutions the power to enforce these rules, although implementation remains the responsibility of national competition agencies.[31] Progress is therefore being made which may allow antidumping to be eliminated at some point in the coming years. Presently, however, antidumping continues to be applied. For example, Argentina initiated 33 antidumping cases on imports from Brazil during the 1992-96 period, making Brazil the number one target for such actions (Tavares and Tineo, 1997).

In sum, it appears that Mercosur is following an approach that resembles ANZCERTA, with elements of the EU regime as well. The reach of competition policy disciplines are conditional upon a trade effects test; there will be a common external trade policy at some point; but competition policy will be enforced by national bodies. There is no explicit requirement or

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30/ Decision 21/94, "Basic Elements of the Defense of Competition in MERCOSUR," December 14, 1996.

31/ As MERCOSUR institutions operate by consensus, a national competition authority will have the option of refusing to implement a decision. The Protocol must be ratified by parliaments of members states before it becomes effective. Some countries have yet to create the necessary institutions (e.g., Uruguay and Paraguay).

commitment that antidumping on intra-area trade will be eliminated, or any formal statement to the effect that in principle antidumping has no place in a common market. However, this is on the agenda: members are committed to review the situation by the end of 2000.

Canada-Chile

In early 1996 Canada and Chile initiated negotiations to establish a bilateral FTA. It was envisaged that such an FTA would be an "interim" agreement to provide a bridge to full NAFTA accession for Chile.[32] An agreement was concluded within one year. It is an interesting agreement because it goes *beyond* NAFTA by eliminating antidumping.[33] As in the EU, elimination is conditional upon the abolition of tariffs and NTBs: antidumping on specific products ceases to be applicable on intra-FTA trade on the date that tariffs on that product are eliminated (defined at the 8-digit level). In no case is this period to extend beyond January 1, 2003. The abolition of antidumping does not extend to countervailing duties (CVDs). A Committee on Antidumping and Countervailing Duties has the mandate to consult with a view to defining subsidy disciplines further and eliminate the need for CVDs. Not much was done in the way of harmonizing antitrust. Article J-01 (Competition Policy) simply requires each party to adopt or maintain measures to proscribe anticompetitive business conditions and to take appropriate action where necessary. It also requires competition authorities to consult and cooperate, including via the exchange of information. Parties are prohibited from invocation of dispute settlement procedures on the basis of the competition policy article. There is no reference to the principle of positive

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32/ Government of Canada, Department of Foreign Affairs and International Trade, Press Release 240, December 29, 1995.

33/ The full text of the agreement can be found at http://www.sice.oas.org.

comity, nor are there restrictions on the right of parties to maintain monopolies or state enterprises.

This is an example of a PTA that aims to eliminate the reach of antidumping illustrates that this is feasible without harmonization of antitrust regimes. The explicit exception that is made to maintain CVDs suggests that subsidy/industrial policies were considered to be a greater cause for concern. Given the strategic dimension that possibly underlies the bilateral elimination of antidumping in Canada-Chile context, it is too soon to claim that progress can be made on the antidumping front in the absence of "deeper" integration.[34] Nonetheless, the agreement has set a precedent by revealing that antidumping can be "delinked" from the problem of disciplining industrial policies.

Prospective Agreements: the FTAA and APEC

Given their prominence it is perhaps useful to discuss briefly the two major regional initiatives that are under construction in the Asia-Pacific region and the Americas: the Asia Pacific Economic Cooperation (APEC) initiative and the Free Trade Area of the Americas (FTAA). Under APEC, high income (developing) member countries have agreed to achieve free trade and investment within the region by 2010 (2020). A large number of bodies have been created by APEC that are responsible for exploring possible "collective actions" in issue areas that are relevant in helping to attain and maintain the free trade goal. Competition policy is one of these topics, although

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34/ One of the mandates of the Canada-Chile Committee on Antidumping and Countervailing Duties is illuminating in this connection: it is to "consult on opportunities for working together with other like-minded countries with a view to expanding agreement on the elimination of the application of antidumping measures within free trade areas" (Article M-05).

contingent protection is not. APEC's objectives in this area are to introduce and maintain "effective or adequate competition policy and/or laws and associated enforcement policies, ensuring the transparency of the above, and promoting cooperation among APEC economies, thereby maximizing, *inter alia*, the efficient operation of markets, competition among producers and traders, and consumer benefits" (PECC, 1997, p.2). The main focus of work in this area has been on information gathering and sharing and on the provision of technical assistance. The end result may be the development of non-binding principles on competition law and policy in APEC.

There appears to have been little effort to link the antidumping and antitrust issue areas. The implications of a "competition framework" for various regulatory areas is one of the dimensions of the competition policy work program, and trade remedies are part of this agenda. However, given the US antipathy to address this issue, the limited attention that seems to have been given to antidumping as an "anticompetitive" practice is not surprising. Given that any principles that may be agreed upon in the competition area will be non-binding, it appears likely that antidumping will continue to figure in APEC trade relations for some time to come.

Similar to the APEC process, in the FTAA context efforts are also being devoted in a working group on competition policy to exploring possible modalities for cooperation. The terms of reference of the relevant working group are to compile a database/inventory of national legislation and practices, exchange views on the application/operation of competition policy regimes and their relationship to trade in a free trade area, and make specific recommendations on how to proceed in the construction of the FTAA in this area (OAS, 1997). Between May 1996 and July 1997 the working group met four times. A working group on subsidies, antidumping and countervailing duties was also created. This group has mostly engaged in a process of information collection and exchange, with a particular emphasis placed on eliminating remaining agricultural export subsidies and other trade distorting measures affecting agriculture. The terms of reference

of the group do not make any mention of developing recommendations for disciplining the use of contingent protection.

IV. Free Trade and Deep Integration in Regional Agreements

The regional experience to date illustrates that PTAs vary on many dimensions. Of primary interest here is whether PTAs achieve full shallow integration (free trade) (or at least have this as an objective) and whether shallow integration was conditional on the pursuit of deeper integration, particularly the adoption of common antitrust rules.

If shallow integration is defined as unconditional free trade in goods (including the elimination of antidumping), only four of the agreements qualify: the EC, EEA, CER and Canada-Chile (Table 1). This will increase to five if MERCOSUR members decide to abolish antidumping in 2000. If the definition of shallow integration includes freedom of movement of labor and capital, only the EC, the EEA and CER qualify.[35] Four of these PTAs have adopted common rules in the area of antitrust: the EC, EEA, CER and MERCOSUR. In all cases this is part of a broader competition policy agenda, including disciplines on industrial policy.

Table 1 here

There are significant differences in approaches. ANZCERTA involves significant harmonization of antitrust legislation and agreements allowing enforcement of national law in the other nation's jurisdiction. In contrast, the EC was not aimed at harmonization of national legal regimes. Instead, the objective of market integration is pursued through adoption of common competition disciplines for practices that restrain trade, enforcement by a supranational body and application of the principle of direct effect of EC law. The focus on trade effects was driven by

35/ Formally, as noted above, CER does not incorporate a right of establishment, but in practice cross-investment is relatively unconstrained.

the concern that private practices not be permitted to segment national markets. Both CER and MERCOSUR are similar to the EC in applying a trade effects criterion.

The close overlap between the agreements that have achieved shallow integration (or are seeking to do so) and those that have common antitrust rules does not indicate there is a relationship between the two. In the EU and EEA context abolition of antidumping was accompanied with not only complete liberalization of trade in goods, services and factors of production (shallow integration), but also coordination and substantial harmonization of competition policies, including disciplines on government procurement, state aids (subsidies) and entities granted exclusive rights. Indeed, it now appears that as far as the EU is concerned, a country must adopt all of its internal market rules before the EU will remove the reach of its "commercial defense" instruments. But there is not direct link between abolition of antidumping and adoption of common antitrust rules. The focus of the EU (and the EEA) is on the creation of a single market, and that has been the main factor underlying the elimination of antidumping.[36] Although market integration is somewhat less-reaching in the Australia-New Zealand CER agreement, it also has a "Single Market" dimension, illustrated by a common labor market, disciplines on the use of subsidies, and mutual recognition agreements for product standards. Here again the basic premise was that there was no scope to maintain antidumping if the objective was to attain a single trans-Tasman market. The concern underlying cooperation and

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36/ The weakness of the link is also illustrated by the fact that the conditions for elimination of antidumping are not spelled out clearly in the EU's free trade agreements with East European and Mediterranean countries. There is no language linking the elimination of antidumping to the implementation of competition policy disciplines broadly defined. A decision to eliminate the reach of antidumping is left firmly in the political domain.

convergence in antitrust was to ensure that similar rules would apply to anticompetitive practices with a detrimental impact on intra-area trade. Dumping did not figure prominently in this context.

Table 2 here

As illustrated in Table 2, all possible permutations of shallow and deep integration can be found in PTAs. Agreement to coordinate or even agree on common antitrust rules is neither necessary or sufficient to allow antidumping to be eliminated. Even far-reaching regulatory commitments (deep integration) that extend beyond antitrust *per se* may not be sufficient to make elimination of antidumping feasible (e.g., the Europe Agreements).[37] Examples can also be found where intra-regional free trade was attained without any move towards incorporation of rules on antitrust regimes (e.g., Canada-Chile). Finally, antitrust authorities have also pursued formal bilateral agreements independent of the existence of PTAs.

Although it is difficult to say anything definitive concerning the necessary or sufficient conditions for the abolition of antidumping, a number of conclusions can be drawn. First, explicit linkages between abolition of antidumping and adoption of common antitrust rules are not prevalent. Second, antidumping may be used as a tool to extract concessions from potential partner countries (e.g., the Europe Agreements; the Euro-Med Agreements). Third, if members of a PTA aim at the creation of a single market, there can be no role for antidumping. Although common antitrust disciplines may be adopted as part of a deeper integration effort, this is driven by the integration objective, not by a perception that such disciplines are required to abolish antidumping. Fourth, much may depend on the extent to which a PTA imposes disciplines on the ability of governments to directly intervene in or support domestic industries. This seems to be

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37/ In the case of the Europe Agreements, deep integration is part of the "price" to be paid by Central European nations to obtain duty-free access to the EC market and increase the likelihood that at some point in the future unconditional free trade will be attained (ultimately through accession).

one of the major concerns underlying the EU's unwillingness to give up its right to impose antidumping duties on imports from Central European and Mediterranean countries. The fact that NAFTA did little to impose disciplines on subsidies may be an important element in the US unwillingness to give up antidumping.[38] Canada-Chile is also noteworthy in this connection in that countervailing duties remain applicable.

38/ Of course, in principle countervailing duties are the legal instrument that should be used in this context, but in practice it is well known that antidumping and countervail are substitutes, with firms frequently expressing a preference for antidumping (Leidy, 1997).

Finally, it can be noted that PTAs have done little in the way of adopting approaches that are aimed at the *gradual* elimination of the instrument. Instead, abolition is either a dichotomous event—here one day, gone the next—or there is a transition period, usually linked to the elimination of tariffs more generally, after which it may not be used. No use has been made of mechanisms of the type that have been proposed in the trade policy literature to introduce competition criteria into the antidumping process. Such options include introduction of an "injury to competition" standards or a requirement that the importing country's competition authorities is given the mandate to block the imposition of antidumping measures if this would endanger competition on the market.[39] This also suggests the absence of strong link between elimination of antidumping and antitrust disciplines.

V. Implications for Multilateral Disciplines on Regional Agreements

GATT Article XXIV allows for the formation of PTAs between WTO members as long as these meet a number of conditions. One of these is that "duties and other restrictive regulations of commerce ... are eliminated with respect to substantially all trade between the constituent territories (Art. XXIV:8a). The only exceptions concern quantitative restrictions that satisfy GATT provisions (e.g., agriculture, balance of payments, and health or safety considerations). As no mention is made in Art. XXIV of antidumping as a valid exception, strictly speaking PTAs maintaining this instrument are "illegal" (being a form of restrictive regulation of commerce) (Mavroidis, 1996). How members of a PTA eliminate existing restrictions on commerce is not specified by Article XXIV. Thus, they are free to make cooperation in the area of antitrust a pre-

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39/ For more detailed discussion of these and other options, see, e.g., Wood (1989), Morris (1993), Messerlin (1994, 1996), Hoekman and Mavroidis (1996) and Schöne (1996).

condition for the elimination of antidumping if they desire to do so, but are certainly not required to. It could be argued that if deep integration is required to achieve unconditional free trade, Art. XXIV:8 cannot be held to have been violated as the WTO does not extend to deep integration. But many analysts have argued that regional agreements should only be tolerated on systemic grounds if they go *beyond* the rules and disciplines of the WTO (see, e.g., Bhagwati and Panagariya, 1996). Insofar deep integration is a (political) requirement to eliminate the reach of antidumping, this would imply that the PTA does go beyond the WTO. The same conclusion applies if deep integration is not required and one accepts the argument that antidumping is a perfectly legitimate exception to Art. XXIV:8. In that case, a prohibition on antidumping would also go beyond the WTO, thus satisfying the criterion.

Most of the PTAs notified to the GATT/WTO Secretariat over the years have not resulted in the elimination of contingent protection (if this existed) and have not included a transition period during which this was to be achieved.[40] Despite this, there has never been an instance where a GATT working party disapproved of a PTA because of the continued existence of antidumping. Of course, this no doubt reflects the more general weakness of the WTO process. In any event, abstracting from the political constraints affecting scrutiny of PTAs in the WTO context, the most straightforward solution to the problem of antidumping in the PTA context would be to require that to be compatible with the WTO any PTA should abolish the reach of contingent protection on intra-area trade

VI. Concluding Remarks

The regional experience illustrates that shallow integration--unconditional free trade--may be

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40/ Marceau (1994, pp. 147ff).

associated with the pursuit of a deeper integration agenda. However, arguments that common or similar antitrust rules are a necessary condition for the elimination of antidumping do not have a strong economic foundation and are only weakly supported by the regional evidence. The linkages that are sometimes argued to exist in practice between antidumping elimination and enforcement of common antitrust disciplines tend to be driven by a broader agenda that revolves around the attainment of greater economic integration (e.g., the "single" market goal of the EC, EEA and CER).

All the PTAs that have led to the abolition of antidumping, or are moving in that direction, go beyond the WTO in at least some important respects. This is also the case for the Canada-Chile agreement, which is NAFTA-like in the extent of its disciplines in the investment area. One can conclude from the available evidence that although agreement on common antitrust disciplines is not necessary to eliminate antidumping, common disciplines in other regulatory areas affecting competition between firms in each jurisdiction may be needed to completely remove the reach of contingent protection. The Canada-Chile agreement is again suggestive in this connection, as there are no strong disciplines on the use of subsidies and consequently countervailing duties continue to be applicable. In practice therefore, it may be that the demise of antidumping in PTAs is constrained because governments are concerned about the potential for their partners to engage in beggar thy neighbor industrial policies. They may consider antidumping a useful defensive instrument in this connection, because it can be used as a substitute for instruments like countervailing duties which have a much higher "foreign policy content" and may be more difficult to pursue. If so, it must be recognized that antidumping is a particularly ineffective and costly instrument. Indeed, a case can be made that this is another reason to eliminate it in the PTA context as this will help focus attention on the real source of problems (industrial policies; government intervention), rather than on the symptoms (allegations of "unfair dumping").

Experience has revealed that antidumping can be eliminated in the regional context. The burden of proof should therefore be put on those that argue for the maintenance of this instrument in a PTA. Existing WTO rules in this connection appear unambiguous in requiring that all duties and other restrictive regulations of commerce must be eliminated in a PTA. Given the pervasive spread of PTAs, perhaps a start could be made to reduce the reach of antidumping by beginning to take the existing provisions of the WTO more seriously.

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Table 1. Summary Comparison of PTAs

	EC	EEA	EA	EMA	NAFTA	CER	MERCO SUR	CAN-CHILE
Free labor mobility	Yes	Yes	No	No	No	Yes	No	No
Free capital flows	Yes	Yes	Yes	No	Yes	No	No	Yes
Free services trade	Yes	Yes	Yes	No	Significant	Signi-ficant	No	In part
Competition policy rules*	Yes	Yes	Yes	No	No	Yes	No	No
Harmonization of national antitrust	Partly, ex post	Partly, ex post	Partly, ex ante	No	No	Signi-ficant	In part	No
Area-wide antitrust rules conditional on "trade effects" test	Yes	Yes	Yes	Yes	n.a.	Yes	Yes	n.a.
Formal cooperation agreements between antitrust authorities	n.a.	Yes	Yes	No	Yes	Yes	t.b.d.	Yes
Supranational enforcement of antitrust	Yes	Yes	No	No	n.a.	No	No	n.a.
Binding dispute settlement on antitrust	No	No	No	No	n.a.	No	t.b.d.	n.a.
Elimination of contingent protection	Yes	Yes	No	No	No	Yes	t.b.d.	Yes

* Defined as significant disciplines on industrial policies (e.g., subsidies)

n.a.: not applicable; t.b.d.: to be determined.

Source: adapted from Hoekman (1998).

Table 2. Shallow/Deep Integration Permutations

	Full shallow integration	**Incomplete shallow integration**
Deep integration	EC, EEA, ANZCERTA	Euro-Med Agreements, Europe Agreements, MERCOSUR
No deep integration	Canada-Chile	NAFTA

Note: Shallow integration is defined as free trade in manufactures and abolition of antidumping. Deep integration comprises common competition policies, including antitrust.