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What kind of interaction between antidumping and competition policies is desirable within Mercosur?

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ABSTRACT

This paper examines what are the possible interactions between antidumping and competition policies within Mercosur given the main objectives and challenges of the regional agreement. Taking into account the respective advantages and drawbacks of the analysed models it proposes a method for the progressive elimination of antidumping duties within Mercosur through the gradual insertion of competition policy principles in national antidumping proceedings.

The topic is particularly important since the application of antidumping duties in a customs union is incompatible with the main objectives of this type of regional agreement, with provisions set forth in the World Trade Organisation and because they essentially represent a protectionist trade practice with unsound economic justification. Furthermore, the use of these trade measures represents a recurrent source of tension between Brazil and Argentina, given its widespread use by the latter country against the former.

LIST OF ABBREVIATIONS

- LAFTA - Latin American Free Trade Area.
- CET - Common External Tariff.
- GDP - Gross Domestic Product.
- WTO - World Trade Organisation.
- CCM - Mercosur Commerce Commission.
- GATT - General Agreements on Tariffs and Trade.
- OECD – Organisation for Economic Co-operation and Development.
- EU – European Union.

1 – INTRODUCTION

At the beginning of the nineties most Latin American nations were intensively engaged in structural economic reforms and stabilisation control programs. These initiatives were influenced by the rise of democratic regimes and the progressive acceptance of neo-liberal economic concepts in the region that followed the collapse of communism.

In this context, four South American countries engaged in a regional agreement called Mercosur, or Common Market of the Southern Cone, sharing the conviction that regional integration would be an essential step to promote development and the overall welfare of participating countries.² Mercosur had the ultimate goal of creating a common market between Brazil, Argentina, Uruguay and Paraguay.³

The Common Market of the Southern Cone inaugurated a new pattern of development strategy style in South America. In diametric contrast with the previous growth policies of protectionist nature, established in a framework of political repression, Mercosur was meant to promote a competitive insertion of its member countries in the world economy taking into account market liberalisation policies, political transparency, consumer welfare and democratic principles.⁴

Elimination of antidumping duties between member states and establishment of a common legislation of competition policy were among the several goals set forth in Mercosur's norms and constituent treaties.⁵ These goals are consistent with the ultimate target of forming a common market in the region since they essentially require the coordination of main national policies.⁶

However, an analysis of the number of antidumping duties levied within member states and of the perspectives of actually establishing an effective common competition legislation reveals that these targets are way beyond achievement.⁷ The non-accomplishment of these goals and the failure in tackling resulting problems delays the completion of the integration process and inevitably undermines it.

² See Treaty of Assuncao at Mercosur's official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th 2005.

³ *Ibid*, Chapter 1, Article 1.

⁴ See Tavares, J. and Tineo, L. (1997) "The Harmonization of Competition Policies Among Mercosur Countries," Organization of American States, mimeo, pg 1, available at the Organization of American States' website at <http://www.sice.oas.org/tunit/STUDIES/COMPET/Index.asp>, accessed on August 15th 2005.

⁵ See Treaty of Assuncion at Mercosur's official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th 2005, and also MERCOSUL/CMC/DEC. N° 18/96, MERCOSUL/CMC/DEC N° 11/97, MERCOSUL/CMC/DEC. N° 28/00, MERCOSUL/CMC/DEC. N° 64/00 and MERCOSUL/CMC/DEC. N° 66/00, available at Mercosur's official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th 2005.

⁶ See definition of a common market in the Agricultural Trade Policies and Issues' website at http://www.agtrade.org/glossary_search.cfm?letter=c, accessed on August 15th 2005.

⁷ See Tavares, J. and Tineo, L. (1997), op. cit. footnote 3.

Two basic problems arise from not being able to fulfil these targets. First, economists usually consider antidumping practices a protectionist tool with unsound economic justification.⁸ Therefore, its maintenance represents a clear threat to an effective liberalisation course enabled by the trade agreement.

Second, the establishment of a regional agreement without paying due regard to competition principles tends to create a situation in which the benefits of increasing trade opportunities and competition among business entities are not passed to consumers. In other words, the reduction of public barriers made possible through trade liberalisation could merely be substituted for private barriers resulting from restrictive business practices.⁹

In a context of integration, business conducts taking place in one particular country tend to progressively affect other nations, leading to a landscape of intense correlation between private actions of enterprises located in one particular member state and trade results of other partner countries such as export performance.

The close relationship between trade and competition policies in regional integration agreements therefore demand a coordinated approach to these issues in order to maximise their positive interconnections and synergies and minimise any inconsistency or divergence between them.¹⁰

A prosperous and symbiotic relationship among different public policies is a key element in any advanced integration process since it provides for the gradual elimination of asymmetries and leads to the convergence of objectives that confer mutual gains to participating countries. Only with reciprocity of gains and confluence of interests will the regional endeavour have long-term endurance and consistency.¹¹

Bearing in mind that antidumping is a trade policy tool increasingly used,¹² this paper provides an exam of the possible relationships between antidumping and competition policies within Mercosur. In view of the achievable interconnections between these two public policies, it examines what is the best possible interplay, given Mercosur's main targets.

The paper is divided in five parts. The first chapter is the introduction. The second describes Mercosur as a regional trade agreement and provides an analysis of its main problems and challenges. Particular attention is given to the main regional issues related to antidumping and competition policies.

⁸ This topic will be further discussed in chapter 3.

⁹ See Chang, S. (2004) "Interaction Between Trade and Competition: Why a Multilateral Approach for the United States?" in *Duke Journal of Comparative and International Law – Winter/Spring 2004* 14 Duke J. Comp. & Int'l L. 1, pg. 5.

¹⁰ For a further analysis of this issue see Pena, F. (2001), "Una Política de Competencia Economía en el Mercosur" in *Boletín Latinoamericano de Competencia*, N. 12, July 2001, available at http://europa.eu.int/comm/competition/international/others/latin_america/boletin/boletin_12.pdf, accessed on August 15th 2005.

¹¹ *Ibid*, pg. 10.

¹² See Zanardi, M. and Wooton, I. (2002), "Trade and Competition Policy: Antidumping versus Antitrust" Working Papers 2002 of the Department of Economics of the University of Glasgow, pgs. 3-6, available at <http://ideas.repec.org/e/c/pza18.html>, accessed on August 15th 2005.

The following chapter discusses the major objectives of competition and antidumping policies and seeks to examine what are the areas of convergence and incompatibility between these two public policies. There will not be any particular focus on the aims of these policies in Mercosur since they are mainly determined by general policy objectives and also because such goals will be pinpointed throughout the paper.

Based on the conclusion that there is no inherent incompatibility between antidumping and competition policies that hinder any type of interaction, chapter four will analyse what kind of interconnection between these two public policies is best suited to promote Mercosur's main goals.

Two different types of interplay are examined: the substitution of antidumping policy for competition policy, which is the model believed to be under consideration nowadays, and the gradual inclusion of competition policy principles in antidumping analysis. Based on conclusions of previous parts, the chapter also proposes a method for eliminating the application of antidumping duties within Mercosur.

Finally, the fifth and last chapter concludes the paper driving attention to the main inferences of the paper and to the answer of the question proposed in the title stressing the main advantages of the proposal made in the previous section.

2 – MERCOSUR AS A REGIONAL TRADE AGREEMENT

2.1 Origins, evolution and main goals of Mercosur

The idea of Latin American regionalism is certainly not new. Its origins lead back to the nineteenth century, to the figure of the military leader Simon Bolivar responsible for the independence of Venezuela, Colombia, Peru and an enthusiastic advocate of South American union.¹³ However, it was only in 1960 that an official integration effort took place among Mercosur countries.¹⁴ In this year, Brazil, Argentina, Paraguay and Uruguay as well as other Latin American countries joined the Latin American Free Trade Area (LAFTA).

The Latin American Free Trade Area set the goal of establishing a free trade area among eleven Latin American countries. This excessively ambitious venture did not accomplish its goals. Two important reasons explain its failure.¹⁵ First, the contradiction between the target of establishing a free trade area and the development strategies undertaken by most countries based on import substitution. Second, the rise of nationalist military regimes in the region

¹³ See Guira, J. (2003), "Mercosur – trade and investment amid financial crisis", International Economic Development Law Series, Kluwer Law International, The Hague, pg. 16.

¹⁴ See Richards, D. (1997) "*Dependent Development and Regional Integration: A Critical Examination of the Southern Cone Common Market*" in Latin American Perspectives, Volume 24, Issue 6, Argentina Under Menem (November 1997) 133-155, pgs. 136-139.

¹⁵ See article about the explanation of the origins of Mercosur "Antecedentes Remotos" (unmentioned author) in Mercosur's official website <http://www.mercosul.gov.br/textos/default.asp?Key=15>, accessed on August 15th 2005, and also L. Pereira (1999), "*Toward the common market of the south*" in Roett, R. 9ed.) Mercosur – regional integration, world markets Lynne Rienner Publishers, London, pg. 8.

with strong geopolitical and national security concerns led to a climate of mutual distrust and martial antagonisms between neighbour countries.

During the 1980's, the consolidation of democratic regimes in Brazil and Argentina and their commitment to liberal economic reforms favoured a convergence of interests between these two countries and a consequent mitigation of diplomatic tensions brought by previous military regimes. This new context contributed for the accomplishment of several cooperation projects and paved the way for the signature of the Treaty on Integration, Cooperation and Development, aiming to establish a common market between these two countries.¹⁶

In March 1991 this aim was formalised. The Treaty of Assuncion was signed, including Paraguay and Uruguay in the integration process launched by Brazil and Argentina.¹⁷ Mercosur was officially inaugurated. The formation of a customs union in January 1st 1995 was established as a first step to consolidate a common market within the Southern Cone.¹⁸

Mercosur therefore represented an initiative of South American countries launched by Brazil and Argentina with the main target of achieving sustainable economic development and a higher international exposure of its member states. Above all, it must be understood as an integration process¹⁹ between neighbour countries committed to economic liberalism and democratic principles. In this sense, it is substantially different from previous integration experiences and also because of its pragmatic character, reduced scope and higher concern about civil society's engagement.²⁰ This context mainly explains Mercosur's reduced number of members, its flexible and adaptable nature as well as the lack of supranational institutional structures, as will be further seen.

Nonetheless, even though Mercosur is commonly considered a customs union, this label is correctly rejected or reconsidered.²¹ The integration process in the Southern cone is often referred to as an "imperfect customs union". According to this view, Mercosur would be in an intermediate position between a free trade area and a customs union.²² There are three main reasons for this approach.

First, there are several exceptions to the common external tariff (CET) within Mercosur.²³ The idea of allowing these exclusions was to confer a higher degree of flexibility, allowing a gradual adjustment to the stringent

¹⁶ Richards, D. (1997), pg. 139, op. cit. footnote 13.

¹⁷ See Treaty of Assuncion, op. cit. footnote 1.

¹⁸ See Preamble of the Ouro Preto Protocol, available at Mercosur's official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th 2005.

¹⁹ See Florencio, S. and Fraga, E. (1996), "O Mercosul hoje", Alfa Omega, Sao Paulo – SP, pg. 23.

²⁰ *Ibid*, pg. 107.

²¹ The main characteristic of a customs union is the existence of a common foreign tariff and the free flow of goods among member states. See Florencio, S. and Fraga, E. (1996), pg. 24, *ibid*.

²² See article in The Economist – December 9th 2004 – "Visions of Unity" (unmentioned author) available at http://economist.com/agenda/displayStory.cfm?story_id=3477620, accessed on August 15th 2005, and also Mera, L. (2005) "Explaining Mercosur's Survival: Strategic Sources of Argentine – Brazilian Convergence" in *J. Lat. Amer. Stud.* 37, Cambridge University Press 109–140.

²³ For an explanation about the exceptions, see MERCOSUL/CMC/DEC. N° 22/94, available at Mercosur's official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th 2005, and also "Mercosur current issues" article of the former Brazilian Ambassador

requirement of a perfectly unified trade policy.²⁴ Second, imported goods from abroad are charged the CET each time they cross the border to another Mercosur country, instead of being levied only once, while entering the customs union.²⁵ Finally, antidumping duties can still be applied between member states in Mercosur.

Particularly with respect to antidumping duties, it is expected to diminish in a landscape of effective free flow of goods. The possibility of re-exporting a good back to the country from where it came tends to reduce dumping practices, a phenomenon known in economic theory as arbitrage.²⁶ In Mercosur, however, arbitrage movements are mitigated because of the exceptions to free flow of goods within member states²⁷ and due to the multiple taxation of the common external tariff within the region.²⁸

Concerning the CET, because of all its exceptions and loopholes, it is often referred to as a “Swiss cheese” in the press and amongst diplomats.²⁹ This is particularly troublesome since in Mercosur’s early stages the CET was considered a fundamental first step for the future establishment of a common market and a proof of irreversibility of the agreement.³⁰ At that moment, its only existence was reckoned as an evidence of success of the regional endeavour.³¹ Interestingly, nowadays, the perception seems to have changed given the excessive number of exceptions in the CET and

Rubem Barbosa, at the Brazilian Embassy’s (Washington) website at http://www.brasilemb.org/embassy/embaixador_mercosul.shtml, accessed on August 15th 2005.

²⁴ See article at the Organisation of American States’ website (unmentioned author) “Promoting Trade and Investment in the Common Market of the South Lessons for Development Cooperation”, section iv, available at the Organization of American States’ official website at <http://www.sice.oas.org/geograph/south/bouzas.asp>, accessed on August 15th 2005.

²⁵ See official website of the Uruguayan Ministry of foreign Affairs at <http://www.mrree.gub.uy/Mercosur/ComisionComercioMercosur/Reunion48/Anexos/Anexo8.html>, accessed on August 15th 2005.

²⁶ See definition of arbitrage at www.esecleending.com/industry/glossary.html, accessed on August 15th 2005.

²⁷ See Averbug, A., “Mercosul: Conjuntura e Perspectivas”, pgs. 3-7, available at the official website of the Brazilian Development Bank (BNDES) at <http://www.bndes.gov.br/conhecimento/revista/rev1006.pdf>, accessed on August 15th 2005.

²⁸ See MERCOSUL/CMC/DEC. N° 27/00, Article 3, available at Mercosur’s official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th 2005.

²⁹ Exceptions are “holes” in Portuguese. See article from the Brazilian newspaper “Folha de Sao Paulo” at 17/06/2003, available at http://www.mbc.org.br/noticias/mostra_not.asp?idNoticia=1447, accessed on August 15th 2005.

³⁰ See Assuncion Treaty, Article 3, op. cit. footnote 4, and also MERCOSUR/CMC/DEC N° 13/93, available at Mercosur’s official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th 2005.

³¹ See, for example, Mera, L. (2005) “Explaining Mercosur’s Survival: Strategic Sources of Argentine – Brazilian Convergence” in *J. Lat. Amer. Stud.* 37, 109–140, Cambridge University Press, 109-139, pg. 120 and also article at the Organisation of American States’ website (unmentioned author) “Promoting Trade and Investment in the Common Market of the South Lessons for Development Cooperation”, introduction, available at the Organization of American States’ official website at <http://www.sice.oas.org/geograph/south/bouzas.asp>, accessed on August 15th 2005.

due to the disproportionate number of allowed modifications to the tariff since it came into force.³² What was once an icon of achievement and certainty seems rather today a symbol of failure and unpredictability.³³

One other distinctive feature of Mercosur is its essentially intergovernmental nature. In contrast with the European Union or with the Andean Pact, Mercosur lacks any kind of supranational institutions and the decision making process always takes place through consensus. This procedure aimed at privileging debate, transparency and civil society's participation as a means to progressively placate possible tensions and differences resulting from the integration process.³⁴ Despite these positive aspects, this particular feature can also cause substantial negotiation stalemates due to the resistance of one sole country to one particular regional issue, despite acceptance of all others.

In a similar vein, differently from the European Union, Mercosur does not have clear principles of supremacy of community law,³⁵ direct effect,³⁶ direct applicability³⁷ and subsidiarity.³⁸ As a result, decisions taken at the regional level lack the necessary self-inducement dynamics to confer autonomy and efficiency to the integration process. For a Mercosur deliberation to come into effect it has to pass through a time consuming process of incorporation by all four members.³⁹ This requirement has hindered the coming into force of important statutes such as the common competition legislation, as will be further described. In June 2003, only thirty percent of all Mercosur decisions had been incorporated by all member states and was effectively valid.⁴⁰

According to public international law, international treaties do not necessarily require incorporation by all countries to enter into force.⁴¹ Mercosur chose to opt for this procedure of validation of regional laws to guarantee a common, uniform and synchronic enactment of laws among member states.⁴² Nevertheless, this procedure has some evident drawbacks, as seen above. The clearest one is that the process towards legal corroboration and validity of Mercosur laws becomes cumbersome, less predictable and lengthy.

³² About exceptions in the CET see O'Keefe, T. (2000), "*Recent Developments Affecting The MERCOSUR Economic Integration Project*" in *Thunderbird International Business Review*, Volume 42, Number 1, January-February 2000, 1-7, available at <http://www.mercosurconsulting.net/Articles/article6.html>, accessed on August 15th 2005.

³³ See Rossi, C. "Mercosul sonha ser 'Estados Unidos da América do Sul'", article from the Brazilian newspaper "Folha de Sao Paulo", at 17/06/2003, available at http://www.mbc.org.br/noticias/mostra_not.asp?idNoticia=1447, accessed on August 15th 2005.

³⁴ See Bauman, R. (2005), "*Algumas licoes da Uniao Europeia e da Comunidade Andina como processos de integracao regional*" Comissao Economica para a America Latina e o Caribe (CEPAL) LC/BRS/DT.027.

³⁵ For a good definition see "*European Union Law - Cavendish Lawcards Series*", Cavendish Publishing Limited, London (2004), Fourth Edition, pg. 47.

³⁶ *Ibid*, pg. 23.

³⁷ *Ibid*, pg. 25.

³⁸ For a good definition see Craig, P. and De Burca, G. (2003), "EU Law – Text, Cases and Materials", Third Edition, Oxford University Press, Oxford, pg. 132.

³⁹ See Rowat, M., Lubrano, M. and Porrata, R. (1997), "Competition Policy and Mercosur", World Bank Technical Paper N. 385, Washington D.C, pg 17.

⁴⁰ See MERCOSUR/CPC/REC.13/2003, available at the Brazilian Congress' website at <http://www.camara.gov.br/mercotel/Oficial/asuncion-junio-2003/Anexo-III-2003.htm>, accessed on August 15th 2005.

⁴¹ See Shaw, M. (2003) "International Law", Fifth Edition, Cambridge University Press, Cambridge., pgs. 831-832.

⁴² See Ouro Preto Protocol, Article 40, available at Mercosur's official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th 2005.

One other main challenge for the South American regional endeavour is how to deal with member states' conflicting public policy objectives. Incompatible public policy targets sometimes lead to inconsistent government acts like, for example, the promotion of market liberalisation and free competition on one hand, while establishing regulations and market distortions on the other.⁴³

The challenges in dealing with these mismatched actions is significantly increased in Mercosur taking into account its endemic economic vulnerability and essentially asymmetric composition. The asymmetry in the Common Market of the Southern Cone results not only from Brazil's much higher GDP and population but mainly because of its increased economic competitiveness.⁴⁴

Recent history shows that the most significant crises in Mercosur resulted from the urge to tackle macroeconomic problems due to speculative attacks against local currencies in an adverse foreign scenario. In these cases, the need to solve emergency macroeconomic situations led national governments to neglect the public policy goal of integration.⁴⁵

In 1999, for example, a speculation movement against the Brazilian currency, which was until then pegged to the dollar, caused its significant devaluation. As a consequence of this depreciation, some industrial sectors in Argentina were negatively affected, which forced the Argentine government to impose a series of antidumping duties and quotas against Brazilian exports. In a similar vein, in the year 2001, a severe economic crisis in Argentina led its economic minister to unilaterally modify foreign tariffs in frontal disrespect to Mercosur's common external tariff system. As will be further seen, these facts reinforce the need to develop a framework for regional public policy coordination to assure the success of Mercosur in the future.

2.2 Antidumping and competition policies in Mercosur

Free competition is one of the essential pillars of a common market. In this sense, it is natural that Mercosur as an integration process that expects to turn into a common market has provided for the establishment of a common competition legislation.

⁴³See Tavares, J. (2001), "Competition Policy", in J.M. Salazar and M. Robert (eds.), Toward Free Trade in the Americas, Washington, DC: Brookings Institution, pg 237, available at the Ministry of Finance's Secretary for Economic Monitoring website at <http://www.fazenda.gov.br/seae/artigos/Chap11.pdf>, accessed on August 15th 2005.

⁴⁴ See article at the Organisation of American States' website (unmentioned author) "Promoting Trade and Investment in the Common Market of the South Lessons for Development Cooperation", available at the Organization of American States' official website at <http://www.sice.oas.org/geograph/south/bouzas.asp>, accessed on August 15th 2005.

⁴⁵ See Mera, L. (2005) "Explaining Mercosur's Survival: Strategic Sources of Argentine – Brazilian Convergence" in J. Lat. Amer. Stud. 37, 109–140, Cambridge University Press, 109-139, pgs. 109-110.

Article 4 of the Treaty of Assuncion sets forth as one of its main targets the coordination of national policies towards the establishment of a common legislation of trade competition.⁴⁶ Furthermore, Article 1 provides for “*the coordination of macroeconomic and sectoral policies between the States Parties*”⁴⁷, and, therefore, as stated by Tavares and Tineo, there is a “*commitment by the States Parties to harmonize their legislation in the relevant areas in order to strengthen the integration process.*”⁴⁸

To accomplish the task of establishing a common legislation of competition policy, a working group was created in Mercosur. In 1996, the proposal submitted by this working group was concluded and officially approved.⁴⁹

The statute, which was called the Fortaleza Protocol, maintained strict coherence to Mercosur’s intergovernmental nature.⁵⁰ In this sense, no supranational deliberative institutions were created and the decision making process rested essentially upon national agencies.

Nonetheless, as previously mentioned, for this piece of legislation to come into effect it has to be internalised by all four members. Until now, only Brazil⁵¹ and Paraguay⁵² have taken this step. The draft bill to incorporate the decision to national laws in other countries is still pending parliamentary approval.⁵³ One other problem of the protocol is that Uruguay and Paraguay still do not have competition agencies. This represents a threat to the coming into force of the statute because, according to its own provisions, national competition authorities are supposed to enforce it.⁵⁴

With respect to antidumping policies, even though the elimination of these practices is not mentioned in Mercosur’s constituent treaties, its subsequent decisions clearly establish it as a priority.⁵⁵ The application of this remedy in a customs union is particularly inconsistent to its original purposes and to rules established in the World

⁴⁶ See Treaty of Assuncion, Article 4, op. cit. footnote 1.

⁴⁷ See Tavares, J. and Tineo, L. (1997), pgs. 1-2, op. cit. footnote 3.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ MERCOSUL/CMC/DEC. N° 18/96, available at Mercosur’s official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th 2005.

⁵¹ Decree 3602, dated 09/18/2000, published in the Federal Gazette on 09/19/2000. Information taken from the Brazilian Finance Ministry’s Secretary for Economic Monitoring website at <http://www.fazenda.gov.br/seae/>, accessed on August 15th 2005.

⁵² Law 1143, dated 10/02/1997, published in the Official Gazette on 10/20/1997. Information taken from the Brazilian Finance Ministry’s Secretary for Economic Monitoring website at <http://www.fazenda.gov.br/seae/>, accessed on August 15th 2005.

⁵³ See Pena, F., “*Una Política de Competencia Economía en el Mercosur*” in *Boletín Latinoamericano de Competencia*, N. 12, July 2001, pg. 14, available at http://europa.eu.int/comm/competition/international/others/latin_america/boletin/boletin_12.pdf, accessed on August 15th.

⁵⁴ See Tavares, J. “Competition Policy and the EU-Mercosur Trade Negotiations”, paper prepared for the Working Group on EU-Mercosur Trade Negotiations Paris, May 12-13, 2000, available at http://www.sice.oas.org/tunit/staff_article/tav00_cpeumerc.asp, accessed on August 15th 2005.

⁵⁵ See MERCOSUL/CMC/DEC. N° 18/96, MERCOSUL/CMC/DEC N° 11/97, MERCOSUL/CMC/DEC. N° 28/00, MERCOSUL/CMC/DEC. N° 64/00 and MERCOSUL/CMC/DEC. N° 66/00, available at Mercosur’s official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th.

Trade Organisation (WTO), which suppose the elimination of substantially all duties and restrictive regulations of commerce in a customs union.⁵⁶

Particularly within Mercosur, the multiplication of antidumping duties has become a source of tension between Brazil and Argentina, in view of the pervasive use of this mechanism between these two countries. Tavares points out that from a total of 165 antidumping duties applied by Argentina between 1987 and 2000, 38 were aimed against Brazilian exports.⁵⁷ Brazil was the second country against which Argentina most applied antidumping measures in this period. The chart below shows that as of December 2003 the number of antidumping investigations against Brazilian exports by Argentina was still significantly high.⁵⁸

Country undergoing antidumping investigations against	Number of investigations
Brazil	
United States	18
Argentina	6
Canada	5
India	4
South Africa	3
Mexico	2
European Union	1

In December 2003, Brazil had only one antidumping duty applied against Argentina. In May 2005, of a total of 26 opened antidumping investigations, 2 were against Argentine exports.⁵⁹ The figures therefore show that Brazil suffers much more antidumping measures from Argentina than actually applies it.

In 1994 the abolition of antidumping duties inside Mercosur was conditioned to the establishment of a common competition policy legislation.⁶⁰ In 1996, with the approval of the Fortaleza Protocol and the continuing application of antidumping duties, this condition seemed to have been abandoned. However, in the year 2000, Mercosur Commerce Commission (CCM) was given the task to elaborate a proposal to phase-out the application of antidumping

⁵⁶ See Article XXIV 8 of GATT, available at the World Trade Organization's official website at http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm, accessed on August 15th 2005.

⁵⁷ See Tavares, J. Macario, C. and Steinfatt, K. (2001), "*Antidumping in the Americas*", publication of the Organization of American States' Trade Unit, March 2001, pg. 3, available at the Organization of American States' website at <http://www.sice.oas.org/tunit/studies/subsid/Antidumptav.pdf>, accessed on August 15th 2005.

⁵⁸ Self elaborated charter with data available at the Brazilian Development and Trade Ministry website at <http://www.desenvolvimento.gov.br/arquivo/secex/decom/relatorios/relatorio2003.pdf>, accessed on August 15th.

⁵⁹ Information taken from the Brazilian Development and Trade Ministry website. available at <http://www.desenvolvimento.gov.br/arquivo/secex/decom/investigacoes/emCurso.pdf>, accessed on August 15th.

⁶⁰ See MERCOSUL/GMC/RES N°129/94, available at Mercosur's official website at <http://www.sice.oas.org/trade/mrcsrs/resolutions/RE12994p.asp>, accessed on August 15th.

within Mercosur.⁶¹ The reference that the proposal should be jointly prepared by the competition policy committee and the commercial dispute committee might indicate that the abovementioned condition is still supposed to be observed.

Consequently, the situation nowadays is still not clear with respect to the condition for the abolition of antidumping duties. What is however evident enough is that the application of antidumping duties is inconsistent with the existence of a customs union and, as a result, its removal is an imperative for the further development of Mercosur and the fulfilment of its original aims of forming a common market.

2.3 Conclusion

After an initial phase of success, in which intra-regional trade was multiplied by four and foreign investment significantly increased, Mercosur has been facing constant periods of crises after 1998.⁶² These crises are revealed in several ways.

First, in trade terms, given the significant decrease of regional flow of goods after 1998. Second, by means of an increasing public questioning of the effective cost-benefit ratio of the trade agreement, given the autonomy limitations it causes and the problems in effectively interconnecting productive structures in Mercosur.⁶³ Third, in institutional terms the Common Market of the South is currently facing the limitations and challenges of its intergovernmental nature and institution minimalism that hinder the decision making process and the incorporation of regional provisions.

The trade aspect of the crisis mainly derives from the high economic instability of countries in Mercosur, which frequently leads to periods of recession and of consequent reduction of intra-regional trade.⁶⁴ Its two other facets actually reveal a dilemma between flexibility and adaptability on one hand, and predictability and legal certainty on the other.

If a greater flexibility of the CET favours the accommodation of interests among essentially asymmetric countries with different industrial structures, it also hinders an effective restructuring and interconnection of intra-regional industrial sectors due to business unpredictability and legal uncertainty.

⁶¹ See MERCOSUL/CMC/DEC. N° 28/00, available at Mercosur's official website at <http://www.mercosur.org.uy/paginabienvendidaportugues.htm>, accessed on August 15th.

⁶² See article at the Organisation of American States' website (unmentioned author) "Promoting Trade and Investment in the Common Market of the South Lessons for Development Cooperation", available at <http://www.sice.oas.org/geograph/south/bouzas.asp>, accessed on August 15th 2005.

⁶³ About the interconnection of productive structures in Mercosur see publication of the Working Group on EU-Mercosur Negotiations (WG) "Implementing a EU-Mercosur Agreement Non-Trade Issues" Edited by Alfredo G. A. Valladão, Chaire Mercosur de Sciences Po – 2004, chapter 2, available at the Chair Mercosur de Science Po's website at <http://chairemercursosciences-po.fr/negotiations/Implementing.htm>, accessed on August 15th 2005.

⁶⁴ A detailed analysis of the reasons of this economic instability goes beyond the scope of this dissertation.

The advantage of actually being in a free trade area instead of a customs union is that countries can benefit from an increased trade made possible through the free flow of goods, without loss of national autonomy.⁶⁵ The shift to a customs union is particularly attractive as a means of achieving a greater systemic competitiveness by favouring the interconnection of member states' productive structures, the convergence of national public policies and also as a way of acquiring higher bargaining power in international negotiation.⁶⁶ The first reasons are mainly economic while the last is essentially strategic.

In Mercosur, however, moves towards effectively promoting a structured interdependent regional industrial sector is constantly impaired by changes in competitive conditions among member states resulting from unilateral national policies detrimental to regional efforts and by an environment of legal uncertainty, economic instability and lack of public policy coordination.⁶⁷

Therefore, for this exact reason, Mercosur's participation in international negotiations is often inconsistent and divergent since member states' interests tend to be mismatched. As a result, the conclusion of trade agreements with other countries and blocs is often hindered because of internal tensions, which undermine, on the other hand, the increased bargaining power derived from the consolidation of a customs union for strategic reasons.⁶⁸ Even worse, because of the requirement to participate in negotiations as a bloc, one particular country often loses the opportunity of celebrating an interesting trade agreement because of the resistance of another neighbour country.

If Mercosur remains in a midway position between a free trade area and a customs union it risks to face the problems of loss of autonomy that derive from creating a customs union without being able to really benefit from the advantages of this type of preferential agreement, and, as a consequence, public criticisms of the regional endeavour are likely to increase.

⁶⁵ The move towards a customs union and the establishment of a CET requires a level of coordination of trade policies and a consequent loss of autonomy of member states since further trade agreements with third countries require a joint negotiation of all members.

⁶⁶ See article at the Organisation of American States' website (unmentioned author) "Promoting Trade and Investment in the Common Market of the South Lessons for Development Cooperation", section iv available at the Organization of American States' official website at <http://www.sice.oas.org/geograph/south/bouzas.asp>, accessed on August 15th 2005 and also Mera, L. (2005) "Explaining Mercosur's Survival: Strategic Sources of Argentine – Brazilian Convergence" in *J. Lat. Amer. Stud.* 37, Cambridge University Press 109–140, particularly pgs. 115-117 and Pereira, L. (1999), "Toward the common market of the south", *in Mercosur – regional integration, world markets* Lynne Rienner Publishers, London 7-23, pg. 18 and Vaillant M., Berlinski, J. and Kume, H. (coordinators), "Descrição e avaliação da Política Comercial Comum no Mercosul – Rede de Pesquisas Economicas do Mercosul – Serie Brief Numero 6", Document resultant from a research project between 2002 and 2004, according to the programme of cooperation between the IDRC and the "Rede Mercosul", available at the Rede Mercosul's website at http://www.redmercosur.org.uy/encuentro2004/pol%EDtica_comercial_comun/brief_6_pg.doc, pgs. 1-2, accessed on August 15th 2005.

⁶⁷ See Mera, L. (2005), pgs. 118-123, op. cit. footnote 45.

⁶⁸ Bouzas, for example, considers that the collapse of the negotiations between Mercosur and the Andean Community and Mexico were due to the impossibility of presenting a unified position by Mercosur. See Bouzas, R. (2005) "Mercosul: Dez Anos Depois. Processo de Aprendizado ou Dejavu?", in *Revista Brasileira de Comercio Exterior*, Edicao N. 68, pg. 14, available at the Foundation's Study Centre of Foreign Trade (FUNCEX) website at <http://www.funcex.com.br/bases/68-Integra%E7ao-RB.pdf>, accessed on August 15th 2005.

In a similar vein, concerning institutional aspects, the mentioned dilemma between flexibility and legal certainty is also observed. The consensus decision-making process and the burdensome incorporation procedures to national laws of Mercosur's deliberations demand the creation of stronger institutions undeniably committed to the integration endeavour and a more agile decision system. All these actions might lead to a loss of national autonomy. Nevertheless, the challenges of an increasingly globalised and interdependent world sometimes require individualised national responses and self-government public policies that may be detrimental to regional efforts.⁶⁹

This dilemma presently faced by Mercosur is particularly evident with respect to antidumping and competition policies. While there are national commitments towards Mercosur's determinations in these fields and an apparent effort to cope with them at the negotiation level, the lack of incorporation of previously approved provisions and some inconsistent government policies to the regionalisation endeavour signal that national responses are often favoured to the expense of integration.⁷⁰ This contradictory stance mainly explains why there is a Mercosur decision of eliminating antidumping duties within member states while these measures have continuously been applied. It also clarifies why the Fortaleza Protocol has not come into force despite its approval by Mercosur.

3 – OBJECTIVES OF ANTIDUMPING AND COMPETITION POLICIES

The discussion of the objectives of antidumping and competition policies is a difficult task. The complexity mainly arises from the variety of views about the issues and the ideological component that each one of them inevitably has. This chapter does not intend to provide a thorough analysis of the different theories of antidumping and competition policies' goals. It exclusively seeks to give an overview of the debate, covering its main relevant aspects. At the end it hopes to come to a conclusion of whether there is any inherent incompatibility between antidumping and competition policies' goals that inevitably undermines any type of interaction between them.

3.1 – Objectives of competition policy

The first modern legislation of competition policy was the American Sherman act, from 1890.⁷¹ This piece of legislation was mainly concerned with the common ownership of competing companies represented by the excessive development of trusts in the United States. According to the perception of these early years of competition policy, antitrust should primarily focus on excessive market power, favouring, as a result, small decentralised firms.

A few decades later, in the mid 20th century, the structure, conduct, performance paradigm of the Harvard School echoed a similar approach to the subject. This school mainly supported the view that high degrees of industrial concentration tended particularly to favour anticompetitive conducts, causing, consequently, poor economic performance.⁷²

⁶⁹ See Pereira, L. (1999), "Toward the common market of the south", in Roett, R. (ed.) Mercosur – regional integration, world markets Lynne Rienner Publishers, London 7-23, pg. 15-16.

⁷⁰ See Mera, L. (2005), pgs. 118-123, op. cit. footnote 44.

⁷¹ See Jones, A. and Sufrin, B. (2004), "EC Competition Law", second edition, Oxford University Press, Oxford, pgs 19-20.

⁷² *Ibid*, pgs. 21-22.

This approach began to be contested in the 1970's by theorists of the Chicago School. Academics from the University of Chicago argued that the sole objective of competition policy should be economic efficiency. In this sense, a concentrated sector could be essentially beneficial to the economy, as long as such constitution responded to an efficient economic imperative demanded by its environment.⁷³ One of the main exponents of the Chicago school, Robert Bork, claimed that competition policy should remain ideology-free and as immune as possible to other objectives apart from efficiency.⁷⁴ This approach, according to him, would have the benefit to confer certainty and predictability to business transactions, contributing, consequently, to an increased social welfare.

Despite the overwhelming influence of this school of thought in competition policy, especially in the United States, its basic principles have undergone some substantial criticisms. Most arguments presented against the Chicago school approach assert that pursuing a unique competition policy objective also represents an ideological posture with respect to the issue, and, consequently, this view is not ideology-free as it claims to be.⁷⁵ Furthermore, it undeniably elevates one of antitrust's most useful tools, the analysis of economic efficiency, to be its sole and unique purpose.

In fact, competition policy laws must not be separated from their social, political and historical context. The pursuit of some peculiar objective, singular to where these policies are supposed to apply is natural and desirable for them to have a minimum degree of legitimacy and effectiveness. In this sense it is understandable why competition policy in the European Union mainly takes into account the ultimate goal of promoting a single market.⁷⁶ The past experience of Mercosur countries of high inflation rates also explains why the objective of controlling inflation is still appealing for antitrust agencies in the region.⁷⁷

The main contribution of the Chicago school was to insert economic efficiency principles as one of the main goals of competition policy. The Harvard paradigm and the early approaches to antitrust expressed in the Sherman act also played a relevant role in maintaining antitrust authorities' awareness to big structures, where anticompetitive conducts are more likely to happen. All the approaches here described had their importance in shaping competition policy as it is nowadays.

Nevertheless, these particular paradigms cannot be taken independently from each other in a clear-cut analysis supposed to provide absolute truths for a certain situation. In contrast, they must be pondered, nuanced and adapted to the specific context in which they will come into force or to the particular reality they are deemed to explain. It is essential to bear in mind this aspect to understand the main problems faced by competition policy in Mercosur.

⁷³ *Ibid*, pg. 23.

⁷⁴ *Ibid*, pg. 24.

⁷⁵ *Ibid*, pg. 28.

⁷⁶ Motta, M. (2004) "Competition Policy – Theory and Practice", first edition, Cambridge University Press, Cambridge, pg. 15.

⁷⁷ See, for example, Brazilian Competition Law 8884/94, Article 21, XXIV, available at the Ministry of Finance's Secretary for Economic Monitoring website at http://www.fazenda.gov.br/seae/english/index_english.html, accessed on August 15th 2005.

3.2 – Objectives of antidumping policy

Antidumping policy should be analysed as a component of trade policy since antidumping is essentially a tool applied by countries to remedy undesirable trade practices.⁷⁸ States basically engage in commerce activities to enhance the well being of their own citizens. David Ricardo's comparative advantage theory, based on the principles of free and unrestricted trade provides theoretical support to the belief that countries can benefit from foreign commerce.⁷⁹ As stated by Chang, "*At least theoretically, therefore, trade policy contributes to an increase in consumer welfare and economic efficiency.*"⁸⁰

Nevertheless, besides the fact of essentially being a trade tool, the origins of antidumping laws in the early twentieth century show that the first provisions related to the subject mainly followed concerns expressed in antitrust laws⁸¹. This view has been gradually changed, and, nowadays, the concept of dumping as defined in article VI of the General Agreements on Tariffs and Trade (GATT) shows slight correlations with antitrust provisions.

According to GATT, dumping is an export price below the normal value of the same good in the exporting country. The normal value is considered to be the price of the like product in the ordinary course of trade for consumption in the exporting country. If dumping is proved and it causes or threatens to cause injury to a national industry, the injured party can impose antidumping duties.⁸²

Normally, dumping can be associated with two anticompetitive practices: price discrimination and predatory pricing.⁸³

Dumping could be considered as a price discrimination case in a situation in which a producer faces two markets with different degrees of demand elasticity.⁸⁴ The discriminating firm sets a higher price at the place with the less elastic demand, which should be the exporting country for dumping to exist.

⁷⁸ See Guasch, J. L. and Rajapatirana, S. (1998), "*Antidumping and Competition Policies in Latin America and the Caribbean*", The World Bank, Policy Research Working Paper 1958, Washington D.C. August. Available at the World Bank's website at <http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1900series/wps1958/wps1958.pdf>, accessed on August 15th 2005.

⁷⁹ See Trebilcock, M. and Howse, R. (1998), "The Regulation of International Trade", Second Edition, Routledge, London, pgs. 3-4.

⁸⁰ Chang, S. (2004), pg. 3, op. cit. footnote 8.

⁸¹ See Niels, G. (2000) "*What is Antidumping Policy Really About*" in *Journal of Economic Surveys* Vol. 14 No. 4., Oxford, 467-492, pgs. 468-469, available at <http://www.ingentaconnect.com/content/bpl/joes/2000/00000014/00000004/art00118>, accessed on August 15th 2005.

⁸² See General Agreements on Tariffs and Trade (GATT 1947), Article VI, available at the World Trade Organisation's website at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleVI, accessed on August 15th 2005.

⁸³ See Guasch, J. L. and Rajapatirana, S. (1998), pg. 19, op. cit. footnote 77.

⁸⁴ See Niels, G. (2000), pg. 474, op. cit. footnote 80.

According to industrial organisation theory and the studies of Varian⁸⁵ and Layson,⁸⁶ the effect of this type of price discrimination on global welfare is not certain. Generally, welfare analysis of price discrimination is done by comparing it to a situation of single pricing monopoly instead of comparing it to a perfect competition situation. By doing so, the conclusion is that price discrimination is welfare enhancing because it promotes an overall raise in output.⁸⁷ The output expansion mainly results from the possibility of selling in a less demand elastic market because of the option of charging different prices.⁸⁸ In fact, if the possibility of price discrimination were not possible, the monopolist at the exporting country would just prefer to maintain the domestic level of production at the same production stage that maximises his profit.

Predatory pricing, on the other hand, is a situation in which a dominant firm establishes a price below a standard point of remuneration for a sufficient period to be able to eliminate rivals or deter competitors from entering the market. After this is done, the firm will be able to charge anticompetitive prices, reaping the benefits of its action.⁸⁹

Thus, predatory practice involves the analysis of three elements: 1) whether the charged price is at a non-remunerative level, 2) if the firm has a dominant position in the market, and 3) the exam of whether it eventually can eliminate competitors or entrant firms and subsequently charge non competitive prices; in other words, if it can recoup its losses.⁹⁰

The comparison of these three elements with the analysis that is suggested in GATT's provisions, cited above, show an intrinsic incompatibility. First, in order to consider predatory pricing equivalent to dumping according to the rules stated in GATT, normal value should be considered an adequate remuneration level for the firm, such as average variable cost or average cost.⁹¹ This does not seem to be the case since the definition of normal value establishes the requirement of the price charged in the exporting country to be in "the ordinary course of trade", as cited above.

Furthermore, the Agreement for implementation of Article VI of GATT clearly states that "*Sales of the like product in the domestic market of the exporting country ... at prices below per unit (fixed and variable) costs of production*

⁸⁵ Varian, H.R. (1989), "*Price Discrimination*" in Schmalensee, R. and Willig, R. D. (eds.) *Handbook of Industrial Organization*, Amsterdam, pgs. 619-624.

⁸⁶ Layson, S. (1988), "*Third degree price discrimination, welfare and profits; a geometrical analysis*" in *American Economic Review*, 78, 1131-1132., cited in Niels, G. (2000) "*What is Antidumping Policy Really About*" in *Journal of Economic Surveys* Vol. 14 No. 4., Oxford, 467-492, pg. 474, available at <http://www.ingentaconnect.com/content/bpl/joes/2000/00000014/00000004/art00118>, accessed on August 15th 2005.

⁸⁷ See Philips, L. (1983) "*The Economics of Price Discrimination*" – Cambridge University Press. Cambridge (UK), cited in Niels, G. (2000) "*What is Antidumping Policy Really About*" in *Journal of Economic Surveys* Vol. 14 No. 4., Oxford, 467-492, pgs. 474, available at <http://www.ingentaconnect.com/content/bpl/joes/2000/00000014/00000004/art00118>, accessed on August 15th 2005.

⁸⁸ *Ibid.*

⁸⁹ See Jones, A. and Sufrin, B. (2004), pgs. 385-387, op. cit. footnote 70.

⁹⁰ *Ibid.*

⁹¹ See "Areeda – Turner Test" in Jones, A. and Sufrin, B. (2004), pgs. 388-390, op. cit. footnote 70.

plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value (...)".⁹²

The second reason for the incompatibility is that generally in predatory pricing cases a proof of dominance and of capacity of recoupment of losses is required as a condition of viability of the anticompetitive practice. No such exam is suggested nor implied in GATT's dumping rules.

Moreover, according to understandings of the Chicago School, as showed in Bork⁹³ and Easterbrook,⁹⁴ predatory pricing is normally not a rational strategy because it is rarely successful. Particularly with respect to dumping, its occurrence is even more implausible because of the low probability of recoupment by the predator firm.⁹⁵ Niels refers to an empirical study performed by the OECD in 1995 in which only 28 out of 282 American, one out of 297 EU, and none of the 155 Canadian and 20 Australian antidumping proceedings had a market environment that could lead to predation.⁹⁶

In view of the confusion and difficulty to rationally explain the reasons for the incorporation of antidumping practices as a main WTO provision, some authors conclude that it actually represents a necessary device to ensure support to the multilateral trading system. Tavares refers to antidumping measures as *"a safety valve – perhaps a cynical one – that ensures political support to trade liberalizing initiatives."*⁹⁷

John Jackson, on the other hand, posits that antidumping measures are actually applied as "buffers" between dissimilar structural conditions among countries that affect international trade. In this sense, national antidumping laws are a necessary connecting element between different social and economical environments, a view that is referred in the literature as the "Interface Theory".⁹⁸

⁹² Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade – available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf, accessed on August 15th 2005, emphasis added.

⁹³ Bork, R. H. (1978), *"The Antitrust Paradox: A Policy at war with Itself"*, Basic Books, New York, cited in Niels, G. (2000) *"What is Antidumping Policy Really About"* in *Journal of Economic Surveys* Vol. 14 No. 4., Oxford, 467-492, pg. 476, available at <http://www.ingentaconnect.com/content/bpl/joes/2000/00000014/00000004/art00118>, accessed on August 15th 2005.

⁹⁴ Easterbrook, F. H. (1981), *"Predatory strategies and counterstrategies"* in *University of Chicago Law Review*, 48, 263-337, cited in Niels, G. (2000) *"What is Antidumping Policy Really About"* in *Journal of Economic Surveys* Vol. 14 No. 4., Oxford, 467-492, pg. 476, available at <http://www.ingentaconnect.com/content/bpl/joes/2000/00000014/00000004/art00118>, accessed on August 15th 2005.

⁹⁵ See Viner, J. (1923) *"Dumping: A Problem in International Trade"*, University of Chicago Press, Chicago, cited in Niels, G. (2000) *"What is Antidumping Policy Really About"* in *Journal of Economic Surveys* Vol. 14 No. 4., Oxford, 467-492, pg. 476, available at <http://www.ingentaconnect.com/content/bpl/joes/2000/00000014/00000004/art00118>, accessed on August 15th 2005.

⁹⁶ See Niels, G. (2000), pg. 483, op. cit. footnote 80.

⁹⁷ Tavares, J. (2001), *"Legal and Economic Interfaces Between Antidumping and Competition Policy"*, available at the Organisation of American States' website at http://www.sice.oas.org/tunit/STAFF_ARTICLE/tav01_cpant.asp, accessed on August 15th 2005.

⁹⁸ See Marceau, G. (1994), *"Antidumping and Antitrust Issues in Free Trade Areas"*, Oxford University Press, Oxford, pgs. 46-47.

Nevertheless, WTO rules clearly provide for other mechanisms for the provisional protection of industries due to a sudden surge in imports because of different circumstantial and structural competition conditions.⁹⁹ Safeguards represent the right tool in these cases since they are directly focused to the issue of inefficiency and structural differences, more transparent and they do not shift the attention of the wrongdoing to foreign countries as antidumping measures do.¹⁰⁰ There is no reason for WTO provisions to have two remedies with the same goal. Therefore, the explanation that antidumping duties are the price to be paid for the maintenance of a free trade multilateral system is, to say the least, incomplete.

3.3 – Conclusion

Antidumping and competition policies tend to address the same ultimate objective of enhancing consumer welfare through economic efficiency. While this goal might be more straightforward with respect to competition policy, in antidumping policy it is somewhat blurred because of the misapplication of rules and due to misunderstandings and confusions related to the main role of antidumping devices.

As stated by Guash and Rajapatirana:

“From a normative standpoint, trade and competition policy share the common economic objective of attempting to remove barriers to the competitive process and thus ensuring market access and presence, promoting efficiency. But, in practice, however, when other objectives are introduced from pressures from interest groups, there could be considerable friction in the trade and competition policy nexus.”¹⁰¹

Therefore, because of the ultimate common goals and close interplay of these two policies, they should be dealt with in constant interconnection. For antidumping measures to maintain consistency with the main objectives of trade policy and coherence to economic principles its legislation and enforcement procedures should be improved as to bring it closer to competition policy concerns. The use of this device according to competition policy principles can provide greater transparency, predictability and theoretical consistency to it.¹⁰²

⁹⁹ See Tavares, J. (2001), op. cit. footnote 96.

¹⁰⁰ *Ibid.*

¹⁰¹ See Guasch, J. L. and Rajapatirana, S. (1998), pg. 1, op. cit. footnote 77.

¹⁰² *Ibid.*, pgs. 20-24.

4 – POSSIBLE INTERACTIONS BETWEEN ANTIDUMPING AND COMPETITION POLICIES WITHIN MERCOSUR

The present chapter provides an exam of the possible interactions between antidumping and competition policies within Mercosur. Two different models of interplay are analysed: the substitution of antidumping for competition policy and the progressive use of the concepts of the later in the proceedings of the former. Based on the findings of the advantages and drawbacks of each one of these models, a proposal for the elimination of antidumping duties within Mercosur will follow.

4.1 – Substitution of antidumping policy for competition policy

The main idea behind the substitution of antidumping for competition policy within advanced preferential trade agreements is that in integration processes where all restrictions to trade have been eliminated there should be a common piece of legislation to counteract restrictive business practices.¹⁰³ If there is no such provision in a regional agreement after antidumping duties have been abolished, a certain anticompetitive conduct in one country that has effect in another one would have to depend on the extraterritorial application of national laws to offset it.

Nonetheless, not all countries have extraterritorial provisions in their laws. In some preferential agreements, certain member states do not have competition rules at all, as is the case of Uruguay and Paraguay in Mercosur. Furthermore, extraterritorial application of laws can often lead to a conflict of interests among member states and actually create a climate of potential antagonisms, exactly the opposite of what a regional agreement should foster. International jurisprudence has plenty of examples of conflictive situations among jurisdictions because of the application of extraterritorial rules.¹⁰⁴

On the other hand, the maintenance of different competition policy legislations with divergent principles within a regional agreement tends to affect trade conditions among member states, conferring an imbalance and disruptive element to the integration endeavour. If a certain country is more lenient towards a particular anticompetitive practice this posture will inevitably affect its trade performance with respect to its partners and might harm their local producers and trigger an opposition to the regional agreement.¹⁰⁵

Restrictive business practices can foreclose markets to competitors, hindering any kind of competition allowed by an integration move. This possibility mainly explains the strict approach of the European Union with respect to

¹⁰³ See Marceau, G. (1994), pgs. 7-100, op. cit. footnote 97.

¹⁰⁴ See analysis of conflict of jurisdictions in Lowenfeld, A. (2002), "International Litigation and Arbitration", Second Edition, St. Paul, Minnesota, pgs. 105-143.

¹⁰⁵ For a further discussion of the topic see Marceau, pgs. 194-195, op. cit. footnote 97.

private practices that might contribute to market segmentation at the expense of the integration process.¹⁰⁶ It also elucidates why competition policy concerns have been progressively taken into account in the WTO.¹⁰⁷

Consequently, considering the advantages of having a common competition legislation within preferential trade areas and the urge in counteracting foreign anticompetitive practices in a landscape of elimination of antidumping duties, some scholars like Marceau,¹⁰⁸ Guash and Rajapatirana¹⁰⁹ advocate the benefits of substituting antidumping provisions for a common competition legislation. To a great extent such proposals derive from the drawbacks of applying national legislations extraterritorially in these cases. While positing a necessary conditional link between elimination of antidumping measures and the application of a competition statute, these authors specifically have in mind the successful experience of the European Union in abolishing antidumping measures within member states and in establishing a common competition legislation.¹¹⁰

In Mercosur, as was previously described, even though there has been a resolution establishing the approval of the Fortaleza Protocol as a condition for the elimination of antidumping duties within the region, the situation nowadays is still not clear with respect to this requirement.¹¹¹ Despite the confusion related to the issue, there is a strong view amongst specialists and scholars that the abovementioned condition still applies.¹¹² Since the Protocol has already been approved and antidumping measures are still applied, the natural conclusion is that, for these specialists, the elimination of these trade measures is conditional upon the coming into force of the competition statute.

Particularly for the Common Market of the Southern Cone, the establishment of this conditional prerequisite for abolishing antidumping measures is counterproductive and might actually lead to a continuous negotiation stalemate, considerably hindering the integration effort. The following reasons explain this conclusion.

First, it should be noted that such approach of conditional substitution tends to be successful in trade agreements like the European Union, formed by member states with a previous degree of coordination of public policies, a strong level of institutional commitment among them and in an environment of credibility of regional provisions. In these cases, the effective implementation of a common competition legislation is likely to ensure and maintain the competitive conditions among countries, without the perspective of being undermined by urgent unilateral national policies or powerful private lobbies. In such conditions, the reliability of economic agents in the adequate enforcement of regional legislation

¹⁰⁶ See Whish, R. (2003), "Competition Law", Fifth Edition, Lexis Nexis – UK, London, pgs. 583-644.

¹⁰⁷ See Matsushita, M., Schoenbaum, T.J. and Mavroidis, P.C. (2002), *The World Trade Organization, Law, Practice, and Policy*, Oxford University Press, Oxford, pg. 569.

¹⁰⁸ Marceau, pg. 197, op. cit. footnote 97.

¹⁰⁹ See Guash, J. L. and Rajapatirana, S. (1998), pg. 13, op. cit. footnote 77.

¹¹⁰ See an opposite view in Hoekman, B. (1998) "*Free Trade and Deep Integration – Antidumping and Antitrust in Regional Agreements*" paper provided by The World Bank in its series Policy Research Working Paper Series with number 1950, available at <http://ideas.repec.org/p/wbk/wbrwps/1950.html>, accessed on August 15th 2005.

¹¹¹ See discussion in section 2.2.

¹¹² See Zanardi, M. and Wooton, I. (2002), pg. 10, op. cit. footnote 11, and also Tavares, J. "*Política de Concorrência no Mercosul: uma agenda mínima*", available at the Website of the Organization of American States – Trade Unite at http://www.sice.oas.org/tunit/STAFF_ARTICLE/tav01_conc_agenda.asp, accessed on August 15th 2005.

lead them to undertake their activities in accordance with those provisions, conferring a virtuous cycle which converges to the maintenance of adequate competition conditions among member states. In this landscape, the substitution of antidumping for competition policy tends to occur naturally.

Mercosur, in contrast, has a past of divergent and conflicting public policies and a low degree of enforcement credibility of its own legislation. The mere fact that only one third of its deliberations have been incorporated to all member states' national laws and are effectively valid gives signals of legal uncertainty and unpredictability to the business community.¹¹³ Moreover, absent any clear principle which grants supremacy to regional laws over national ones, as exists in the European Union, the outcome of future disputes arising from conflicts of national laws with Mercosur provisions remains uncertain.¹¹⁴ Finally, Mercosur does not have any superior court undeniably committed to the integration effort, as the European Court of Justice, for example, which ensures that the enforcement of laws will take place in a harmonised and convergent way.¹¹⁵

Two other aspects should also be considered. First, as previously shown, inconsistent public policies among member states to the expense of integration efforts are recurrent within Mercosur. Second, the pressure of powerful lobbying groups in countries of the Southern cone tends to encounter widespread acceptance within national governments, overcoming superior preoccupations with economic efficiency principles.¹¹⁶ Therefore, any public policy translated into rules has to take these concerns into account, since the enactment of rational and praiseworthy Mercosur laws cannot be isolated from their cultural and historical context in order to be minimally effective.¹¹⁷

Guira, referring to Mercosur's institutions, pondered: *"The core problem therefore lies less in formal adoption of laws which stimulate the norms of advanced industrial nations. (...) The object is for the law to avoid becoming like a beautiful musical instrument that is rarely played."*¹¹⁸

In this standpoint, countries like Argentina that strongly rely on the application of antidumping duties as a means to offset a distortion in competition conditions due to conflicting public policies¹¹⁹ and restrictive business practices don't have an incentive to abandon this certain and effective method to substitute it for an uncertain and unpredictable common legislation policy.

Actually, it is easy to understand why the competition statute has not been incorporated into national law by Argentina if one takes into account the following points: i) Argentina often uses antidumping duties as a buffer to

¹¹³ See discussions in section 2.2.

¹¹⁴ See Guira, J. (2003), pg. 8, op. cit. footnote 12.

¹¹⁵ See discussions in Marceau, G. (1994), pg. 221, op. cit. footnote 97.

¹¹⁶ See Tavares, J. "A Proteção à Indústria Automobilística na Europa e no Mercosul" in Revista de Economia Política, Vol. 18, no. 4, out.-dez. 1998. Available at http://www.sice.oas.org/tunit/STAFF_ARTICLE/tav98_auto.asp, accessed on August 15th 2005.

¹¹⁷ See discussions in section 3.1

¹¹⁸ Guira, J. (2003), pg. 61, op. cit. footnote 12, emphasis added.

¹¹⁹ See Guasch, J. L. and Rajapatirana, S. (1998), pgs. 11-17, op. cit. footnote 77.

conflicting public policies that affect competition conditions within Mercosur;¹²⁰ ii) most specialists believe that there is a required link between the elimination of antidumping measures and the coming into force of a common competition legislation, and, iii) antidumping duties are applied quite easily and certainly against restrictive business practices; in opposition, there is a great deal of uncertainty if the Fortaleza Protocol will be able to perform the same task.

The incorporation of the competition statute by Argentina would in fact represent a significant step towards its effective coming into force in Mercosur,¹²¹ and, therefore, a major move towards the elimination of antidumping duties in the region. In this context, instead of a certain and speedy remedy provided by national antidumping laws there would be a dubious regional law of uncertain enforcement. If the necessary substitution link between antidumping and competition policies continues to exist it is most likely that Mercosur's common competition legislation will not be internalised by Argentina, and, therefore, will never come into force in the region.

In fact, the application of antidumping duties as “a buffer to structural differences in international trade”, as proposed by the “Interface Theory”,¹²² gives rise to a situation of moral hazard.¹²³ The sole possibility of using this device reduces the incentives for reaching a socially more desirable and efficient condition. Marceau, bearing in mind the application of antidumping duties according to the same theory points out that the elimination of antidumping is conditional upon the establishment of similar market conditions.¹²⁴ Nevertheless, paradoxically, the mere possibility of applying antidumping duties to offset divergent market structures reduces the incentives for harmonising these same market conditions.

In Mercosur, particularly, given the current state of discussions with respect to antidumping and antitrust, the existence of this moral hazard situation has no perspective of being eliminated or even reduced. Unfortunately, if the substitution link between antidumping and competition policies continues, antidumping duties are very likely to remain in the horizon of the Southern Cone and the Fortaleza Protocol will most certainly become “*a beautiful musical instrument that is rarely played*”.¹²⁵

¹²⁰ See article at the Organisation of American States' website (unmentioned author) “Promoting Trade and Investment in the Common Market of the South Lessons for Development Cooperation”, available at <http://www.sice.oas.org/geograph/south/bouzas.asp>, accessed on August 15th 2005.

¹²¹ See discussions in section 2.2.

¹²² See discussions in section 3.2.

¹²³ See definition of moral hazard in The Halifax Initiative Glossary, available at www.halifaxinitiative.org/index.php/Resources_Glossary, accessed on August 15th 2005.

¹²⁴ See Marceau, G. (1994), pgs. 204-205, op. cit. footnote 97.

¹²⁵ Guira, pg. 61, op. cit. footnote 12

4.2 – Progressive use of the concepts of competition policy in antidumping policy

4.2.1 – What does it mean?

One alternative way to promote a progressive phasing out of antidumping duties within a regional trade agreement is to gradually take into account competition policy principles into national antidumping proceedings.¹²⁶

According to section 3, antitrust concepts provide a more rational and theoretically sound response to restrictive business practices than antidumping duties. As a result, they reduce the possibility of anticompetitive remedies being used for other purposes apart from those established in laws. In this sense, the use of competition policy principles to justify protectionist claims detrimental to economic efficiency concepts tends to be more difficult.

The suggested use of competition policy principles in antidumping proceedings does not mean that all antidumping cases are to be analysed as predatory pricing or price discrimination conducts, as might be thought.¹²⁷ This might be the ultimate desired outcome once antidumping duties are totally phased out. In a first moment, however, the main target for competition policy principles applied to antidumping proceedings is to assure that competition conditions will not be distorted by inconsistent public policies. This is the most important issue to be addressed in the case of Mercosur and an essential task of competition advocacy.¹²⁸

As stressed by the World Bank, one main facet of competition advocacy is to emphasise the competition and efficiency impacts of public policies so that the major objectives of competition law are not undermined by other governmental initiatives.¹²⁹ In an integration process where the interests of several countries are considered, the possibility of public policy conflicts with competition principles is significantly increased. In an integration endeavour with an essentially asymmetric composition such as Mercosur, this probability is even higher.

¹²⁶ For a similar approach see Hoeckman, Bernard M. and Petros C. Mavroidis (1994) “Antitrust Based Remedies and Dumping in International Trade,” Center for Economic Policy Research, Discussion Paper 1010, August 1994, mentioned in See Guash, J. L. and Rajapatirana, S. (1998), “*Antidumping and Competition Policies in Latin America and the Caribbean*”, The World Bank, Policy Research Working Paper 1958, Washington D.C., pgs. 23-24, available at the World Bank’s website at <http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1900series/wps1958/wps1958.pdf>, accessed on August 15th 2005, and also Rioux, M. (1999), “*Vers Un Droit Mondial de la Concurrence?*”, Cahier de Recherche 99-8, Decembre 1999, Groupe de Recherche sur l’Integration Continentale, Universite de Quebec a Montreal, pg. 7, available at the site of the Universite de Quebec at <http://www.unites.uqam.ca/gric/pdf/Concurodroit.pdf>, accessed on August 15th 2005.

¹²⁷ See discussions in section 3.

¹²⁸ See discussions in section 2.2.

¹²⁹ See World Bank’s definition of “competition advocacy” in the International Competition Network (ICN) Questionnaire on competition advocacy. Available at the ICN’s webpage at <http://www.internationalcompetitionnetwork.org/advocacyquestionnairem.pdf>, accessed on August 15th 2005.

Competition advocacy can consequently have a very important role in antidumping analysis, especially in a context of regional integration, since these remedies inevitably have relevant impacts on competition conditions in preferential agreements, or are applied to counteract different market structures, as implied by the “Interface Theory”.

Therefore, the progressive insertion of antitrust principles in antidumping proceedings within Mercosur is expected to promote a greater concern with respect to the alteration of competition conditions due to conflicting public policies among member states. As a result, the analysis of antidumping cases taking into account competition advocacy concerns will most likely promote a regional debate about whether the imposition of a measure will distort market competition structures to the detriment of efficiency, or, alternatively, if it is being applied to counteract a sudden disruption of competitive conditions launched by any other governmental act.

The series of antidumping duties applied by the Argentine government in 1999, after the Brazilian currency devaluation, can serve as an illustrative example.¹³⁰ In that case, if competition advocacy concerns had been taken into account, the institution applying antidumping measures would probably come to the conclusion that the sudden Brazilian currency depreciation on that occasion caused an abrupt alteration of the competition conditions which particularly harmed local Argentine producers. A discussion with respect to the need of further macroeconomic coordination would then be initiated instead of unilaterally imposing an antidumping duty, which does not address the main cause of the problem, i.e., the need of coordination of public policies among member states.

4.2.2 – How to do it?

As suggested before, antidumping policy is a field often subject to successful lobbying practices with protectionist concerns and visible short run expected gains for lobbyists. This is exactly the opposite reality faced by competition policy, which generally takes into account diffuse interests subject to long run and less tangible economic benefits. As a consequence, antidumping policy encounters fierce opposition for its abolition, generally with governmental support.¹³¹

In this context, it is desirable that the inclusion of antitrust principles in antidumping analysis occurs gradually, in a way to maximise acceptance and to minimise political resistance. Particularly in Mercosur, given the pervasive use of antidumping measures by Argentina against Brazilian exports¹³² it is most certain that any proposal to eliminate this device in the near future will encounter fierce opposition.

Therefore, it is essential to disseminate a competition culture to foster public awareness of the benefits of eliminating antidumping and to reduce resistance to the abolition of this trade remedy. If an appropriate work of competition advocacy is undertaken, the abolition of antidumping measures should encounter more approval than opposition, since most antidumping duties tend to decrease social welfare, as the majority of economic studies show.¹³³

¹³⁰ See discussions in section 2.2.

¹³¹ See Guasch, J. L. and Rajapatirana, S. (1998), pg 21, op. cit. footnote 77.

¹³² See table in section 2.3.

¹³³ See Tavares, J. Macario, C. and Steinfatt, K. (2001), pgs. 4-7, op. cit. footnote 56.

In fact, one main advantage of progressively inserting competition policy principles in domestic antidumping proceedings in Mercosur is that this could be done without any legal amendment to current national statutes on the issue, reducing, therefore, potential resistance to the venture. This is mainly possible because of the “public interest” clause present in all national antidumping laws, except for Uruguay.¹³⁴

The “public interest” clause is a provision that allows countries not to apply antidumping measures even when dumping, injury and a causation link exist, as long as the ultimate public interests of the countries require so.¹³⁵ In a case where all the elements for the imposition of antidumping duties exist but this act would considerably deteriorate competition conditions in the country or provide an overall decrease in social welfare, there could be perfectly a case for non application of the measure using the public interest clause more accordingly with competition principles.¹³⁶

Until now, however, the concept of public interest has been too much associated to national industry concerns and has ignored consumers’ interests.¹³⁷ The progressive use of competition issues through this clause could make antidumping proceedings significantly less protectionist and more concerned with efficiency principles, further incorporating the interests of other groups in the public interest clause apart from local producers.¹³⁸

Brazil particularly, until the beginning of 2005, had only used its “public interest” provision twice.¹³⁹ In these two cases, however, the clause was used in a manner that can provide useful guidance as how to proceed with respect to antidumping measures within Mercosur.

In the first investigation on imports of soda ash from Bulgaria, Poland and Romania, Brazilian authorities considered that the application of an antidumping duty could negatively affect the glass and cleaning industries.¹⁴⁰ These two industries are intensive users of soda ash. In the second investigation, on the imports of bicycle tires from India and China, Brazil decided that an antidumping measure could be detrimental to foreign relations with India and China.¹⁴¹

¹³⁴ The fact that this clause does not exist in Uruguayan law should not be viewed as a major problem since this country until August 2001 had never applied antidumping duties. See Tavares, J., “Política da concorrência no Mercosul: uma agenda mínima” in *El Desafío de Integrarse para Crecer*, Chudnovsky, D and Fanelli, J (coordinators), Red Mercosur and Siglo XXI – Argentina (eds.), chapter 8. Available at <http://www.redmercosur.org.uy/espanol/publicaciones/>, accessed on August 15th 2005.

¹³⁵ See Brazilian Presidential Decree 1602/1995, Art. 64, § 3º, Argentine Decree N° 1088/2001, Chapter IV, Art. 28 and Paraguayan Decree 15286/96, Article 18.4.

¹³⁶ See Marceau, G. (1994), pg. 138, op. cit. footnote 97.

¹³⁷ See Marceau, G. (1994), pg. 235, op. cit. footnote 97.

¹³⁸ *Ibid.*

¹³⁹ See “*The Use of Antidumping in Brazil, China, India and South Africa – A Study of the National Board of Trade of Sweden*”, available at <http://www.tralac.org/scripts/content.php?id=3456>, accessed on August 15th 2005.

¹⁴⁰ Brazilian Ministry of Development, Trade and Industry (MDIC), Trade Protection Department (DECOM) Investigation no. 52100-000016/1996-11, cited in “*The Use of Antidumping in Brazil, China, India and South Africa – A Study of the National Board of Trade of Sweden*”, pg. 18, available at <http://www.tralac.org/scripts/content.php?id=3456>, accessed on August 15th 2005.

¹⁴¹ Brazilian Ministry of Development, Trade and Industry (MDIC), Trade Protection Department (DECOM) Investigation no. 52100-085489/2002-27, cited in “*The Use of Antidumping in Brazil, China, India and South Africa – A Study of the National Board of Trade of Sweden*”, pg. 18, available at <http://www.tralac.org/scripts/content.php?id=3456>, accessed on August 15th 2005.

Therefore, even though in the first case Brazilian authorities did not undertake a thorough exam of welfare implications of the imposition of an antidumping duty, they rejected its application on the grounds that it would significantly affect a major consumer. In the second case, the refusal to impose an antidumping measure was based on foreign policy implications, which is exactly what countries in Mercosur should take into account while imposing measures against their member state partners.

Particularly within Mercosur, foreign policy concerns should be even more important, given the interest in avoiding public policy conflicts in the region, the urge in consolidating a customs union and the requirement of not distorting competition conditions among member states.

If countries in Mercosur, especially Argentina, could gradually incorporate competition principles and foreign policy concerns to their “public interest” clause, antidumping duties are expected to be progressively reduced within the Southern Cone and the integration process would greatly benefit from it.

4.2.3 – Proposal for the elimination of antidumping duties within Mercosur¹⁴²

The present section will propose a method for the progressive elimination of antidumping duties within Mercosur. The proposals herein are mainly focused on the idea of creating mechanisms for fostering the coordination of public policies in the region, promoting the elimination of competition distortions and assuring the effective free flow of goods. According to Hoekman¹⁴³, Marceau¹⁴⁴ and Tavares¹⁴⁵ and to the explanations previously provided, these are the elements that actually enable the phasing out of antidumping measures within preferential trade agreements.

Taking into account these concerns and the idea that the progressive use of competition principles in antidumping policy is more adequate than the model of conditional substitution, as previously shown, the elimination of antidumping duties within Mercosur requires five essential steps.

¹⁴² The main ideas for this section were based on discussions provided in See Guash, J. L. and Rajapatirana, S. (1998), “*Antidumping and Competition Policies in Latin America and the Caribbean*”, The World Bank, Policy Research Working Paper 1958, Washington D.C. August, available at the World Bank’s website at <http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1900series/wps1958/wps1958.pdf>, accessed on August 15th 2005, Tavares, J. (2001), “Política da concorrência no Mercosul: uma agenda mínima” in *El Desafío de Integrarse para Crecer*, Chudnovsky, D and Fanelli, J (coordinators), Red Mercosur and Siglo XXI – Argentina (eds.), chapter 8. Available at <http://www.redmercosur.org.uy/espanol/publicaciones/>, accessed on August 15th 2005 and Marceau, G. (1994), “*Antidumping and Antitrust Issues in Free Trade Areas*”, Oxford University Press, Oxford.

¹⁴³ See Hoekman, B. (1998) “*Free Trade and Deep Integration – Antidumping and Antitrust in Regional Agreements*” paper provided by The World Bank in its series Policy Research Working Paper Series with number 1950. Available at <http://ideas.repec.org/p/wbk/wbrwps/1950.html>, accessed on August 15th 2005.

¹⁴⁴ See Marceau, G. (1994), op. cit. footnote 97.

¹⁴⁵ See Tavares, J. (2000) “*Competition Policy and the EU*” paper prepared for the Working Group on EU-Mercosur Trade Negotiations Paris, May 12-13, 2000, available at the Organization of American States’ website at <http://www.sice.oas.org/compol/Articles/cpeumerc.doc>, accessed on August 15th 2005.

First of all, one should remember that antidumping duties in preferential trade agreements tend to be eliminated by the free flow of goods between member countries due to the possibility of arbitrage, as previously mentioned.¹⁴⁶ Therefore, it is essential to eliminate the exceptions to an effective free trade within Mercosur and, particularly, the double taxation of the foreign common tariff.¹⁴⁷

However, as stated before, even in a context of free flow of goods, there are several factors that mitigate arbitrage practices. Hence, it is crucial to also develop mechanisms that actually enable and foster a convergence towards similar competitive conditions, market structures and an adequate degree of coordination of public policies among member states.

In this context, as an essential second step, it is proposed that countries in Mercosur attempt to progressively use competition principles in their respective antidumping cases against other member states through the use of “public interest” clauses. As previously mentioned, such venture should not be problematic since it precludes legal amendments.

As an important complementary third action, it is desirable that every time an antidumping investigation is opened involving two countries in the region, the two respective competition policy authorities and the two foreign affairs ministries of the involved member states issue technical reports on the impacts of the possible duty.

The technical report of the competition agencies would particularly focus on the competitive impacts of the measure and also on the exam whether the claim for the application of the duty derived from a disruptive unilateral public policy. The reports of the foreign affairs ministries would essentially ponder how the hypothetical measure could affect the integration effort and foreign relations with member partners.

Even though the decision, in a first moment, would rest upon the current institutions responsible for it, the only fact of having other institutions involved in the decision making process, adding new concerns, would be commendable.

In Paraguay and Uruguay, which do not have competition policy agencies, the economic ministries, in a first moment, would be responsible for the report taking into account competition policy issues. This requirement would have the positive aspect of enticing these countries to create their antitrust agencies. Brazil and Argentina could also provide for the necessary technical cooperation whenever required.

The fourth recommendation relates to the development of an intense cooperation path involving competition agencies in Brazil and Argentina. The bilateral treaty for antitrust collaboration between these two countries is an adequate framework for this initiative.¹⁴⁸

¹⁴⁶ See discussions in section 2.

¹⁴⁷ *Ibid.*

¹⁴⁸ “Acordo de cooperacao entre a Republica Federativa do Brasil e a Republica da Argentina relative a cooperacao entra suas autoridades de defesa da concorrancia relative a aplicacao de suas leis de

The exchange of information could be a first step. In a second moment, efforts towards the joint analysis of cases in which the relevant market involves both countries or the Mercosur region would be desirable. Finally, in an ultimate degree of cooperation, joint analysis of all cases could be sought between the two agencies.¹⁴⁹

As pointed out by Tavares while referring to the advantages of a bilateral cooperation between Brazil and Argentina in antitrust: *“once launched the cooperation, new dimensions of Mercosur’s integration process will start to gather the attention from the press, governments and public opinion.”*¹⁵⁰

This model of cooperation launched by Brazil and Argentina could serve as a framework for the creation of antitrust agencies in Paraguay and Uruguay and for the enactment of their own competition legislation taking into account regional competition concerns.¹⁵¹

Finally, one last improvement that could be sought, maybe in a second stage, is for Mercosur countries to provide a common regulation for the “public interest” clause in their respective antidumping statutes. This regulation, in opposition to the previous proposals, would involve a normative deliberation, even if a minor one. However, it would have the advantage of formally inserting competition policy concerns into antidumping norms. It would be particularly interesting to provide for a “Mercosur Interest Clause”. This provision could stipulate the obligation to take into account competition concerns considering the Mercosur region as a whole.

The success of the progressive use of competition principles in antidumping analysis according to the proposals herein detailed is expected to gradually reduce the number of antidumping proceedings in the region, promoting a higher coordination of public policies and a synchronic cooperation effort between competition agencies towards the use of common principles and enforcement procedures. This is exactly the necessary landscape for the effective coming into effect of a common competition legislation and for definitely phasing out antidumping duties within Mercosur.

5 – CONCLUSION

This paper had two major goals. First, to analyse the possible interactions between antidumping and competition policies within Mercosur, and second, to propose a method for the elimination of antidumping duties among its member states taking into account the achievable interplay between these two public policies in the region. The following conclusions can be derived from the exam provided herein.

Despite its past achievements, Mercosur is a regional agreement that is currently facing a crisis related to its very essence. It is actually supposed to become a common market but is, in reality, an “imperfect customs union”. The number of exceptions, loopholes and modifications to the CET and the criticisms and questionings to the regional project

concorrença”, available at the Ministry of Finance’s Secretary for Economic Monitoring website at <http://www.fazenda.gov.br/seae/>, accessed on August 15th 2005.

¹⁴⁹ See Tavares, J. (2001), “Política da concorrência no Mercosul: uma agenda mínima” in *El Desafío de Integrarse para Crecer*, Chudnovsky, D and Fanelli, J (coordinators), Red Mercosur and Siglo XXI – Argentina (eds.), chapter 8, available at <http://www.redmercosur.org.uy/espanol/publicaciones/>, accessed on August 15th 2005.

¹⁵⁰ *Ibid*, section 4, personal translation.

¹⁵¹ *Ibid*.

confer a great deal of uncertainty about the possibility of effectively consolidating a customs union in the Southern cone.¹⁵²

Mercosur's recurrent criticisms and the excessive plasticity of regional deliberations, especially the CET, derive, to a great extent, from its asymmetric composition. Divergent and heterogeneous interests and demands tend to arise in such uneven and diverse environment, subjecting the regional endeavour to constant tensions, often placated through an increasing flexibility of its provisions, including the CET.¹⁵³ Nonetheless, the reliability of the regional project and the consolidation of a customs union require a minimum degree of predictability and legal certainty. Only in this context can there be an adequate environment for investment decisions and a prosperous rearrangement of intra-regional industrial structures taking advantage of long lasting complementarities, synergies and economies of scale.

Therefore, the fulfilment of Mercosur's original aim of moving towards a common market requires a progress in the effective elimination of the exceptions and loopholes in the CET, a decrease in the excessive flexibility and uncertainty of regional provisions and a joint reduction of asymmetries and competition disparities among member states to promote a convergence towards similar market conditions. Only in this situation can the benefits of the customs union be completely met and an advance to a common market sought.

As proved herein, the elimination of antidumping duties through the progressive insertion of competition principles can provide great help in this particular task. The proposal described in section 4.3 particularly assists to develop an environment of continuous monitoring of the competition conditions within Mercosur and, consequently, creates conditions for the recurrent questioning whether public policies are effectively being coordinated. Furthermore, it tends to highlight the positive aspects of an increased regional cooperation.

Even though the proposal has no guarantee of success, if applied, it is expected to at least promote a discussion about the real need of coordinating public policies among member states, conferring similar competitive conditions to all economic agents in the region, and, thus, an adequate environment for the long lasting integration of industrial structures. In this sense, the elimination of antidumping duties within Mercosur can raise a debate related to the very essence of the integration process, essentially questioning whether countries are really willing to confer equal treatment to firms, independent of their locations, to the benefit of an overall systemic competitiveness.

If successful, the recommendation can serve to highlight the beneficial aspects of integration in a topic that traditionally evokes antagonistic reactions based on national claims, such as antidumping.

In this positive scenario, Mercosur could progressively abolish antidumping measures and gradually create conditions for the effective coming into force of a common competition legislation. Competition policy could finally occupy a central place in the region instead of a marginal and neglected one.¹⁵⁴ It could be definitely elevated to an

¹⁵² See discussions in section 2.

¹⁵³ See article at the Organisation of American States' website (unmentioned author) "Promoting Trade and Investment in the Common Market of the South Lessons for Development Cooperation", section iv, available at the Organization of American States' official website at <http://www.sice.oas.org/geograph/south/bouzas.asp>, accessed on August 15th 2005.

¹⁵⁴ See Pena, F. (2001), pg. 7, op. cit. footnote 9.

essential public policy aimed to confer balance to the integration endeavour and overall consistency to other public policies.¹⁵⁵

As a result of this outcome, the whole region is expected to benefit. Transaction costs are likely to be significantly reduced in the southern cone due to the establishment of a common set of laws with harmonised enforcement procedures among all member states.¹⁵⁶ This landscape could actually represent an important differential for attracting foreign investment.¹⁵⁷ Investors considering the possibility of driving their savings to Mercosur would be facing similar competition conditions in the entire region and a guarantee of a unified set of competition laws.

This ultimate desired outcome, however, is still way beyond the horizon of the Southern Cone. “*Trusting antitrust to dump antidumping*”¹⁵⁸ could be the first step to make it closer. Otherwise, dumping antitrust to trust antidumping is more likely to remove the integration horizon away. As experience shows, moments of crisis are adequate for questions, reconsiderations and changes. The options are on the table.

¹⁵⁵ *Ibid*, pgs. 13-14.

¹⁵⁶ See Guira, J. (2003), pg. 66, op. cit. footnote 12.

¹⁵⁷ See Rioux, M. (1999), “*Vers Un Droit Mondial de la Concurrence?*”, Cahier de Recherche 99-8, Decembre 1999, Groupe de Recherche sur l’Integration Continentale, Universite de Quebec a Montreal, available at the site of the Universite de Quebec at <http://www.unites.uqam.ca/gric/pdf/Concurdroit.pdf>, accessed on August 15th 2005.

¹⁵⁸ This sentence is a title of an article of Niels, G. and Ten, K. A. (1997) “*Trusting Antitrust to Dump Antidumping Abolishing Antidumping in Free Trade Agreements without Replacing it with Competition Law*” in *Journal of World Trade* 31, 6: 29-43.

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