The Case for Liberalizing North American Trade Remedy Laws*

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TABLE OF CONTENTS

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I. INTRODUCTION

Canada and the United States have the largest bilateral trade relationship in the world.[1] However, over the past decade, trade remedy laws, in particular antidumping duties (ADDs), countervailing duties (CVDs), and safeguard actions, have substantially impeded the free flow of goods between the two markets. ADDs purportedly offset adverse effects on a domestic industry which result from foreign firms engaging in international price discrimination. In contrast, CVDs are aimed at unfair subsidization of foreign firms by their own governments. Safeguard actions permit temporary relief from unexpected import surges resulting from prior trade concessions.

As reflected in Figure 1, worldwide antidumping cases have increased dramatically since 1990 with many countries adopting antidumping regimes for the first time. In addition, as reflected in Figure 2, the United States is now a principal defendant. With the decline in tariffs over successive rounds of the General Agreement on Tariffs and Trade (GATT),[2] antidumping actions have now become the remedy of choice for import-impacted domestic industries.[3] In contrast, countervailing duty actions remain almost the exclusive preserve of the United States, while safeguard actions under Article XIX of the GATT,[4] or Chapter 11 of the Canada-United States Free Trade Agreement (FTA),[5] are relatively rare.

One of Canada's main goals during the negotiation of the FTA was the attainment of more secure and predictable access to the U.S. market. Similarly, Canadian negotiators sought to increase access to continental markets through the North American Free Trade Agreement (NAFTA).[6] To an important degree, more secure and predictable access is predicated on obtaining

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1. MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE (forthcoming 1995) (manuscript at ch. II, pt. II.1, on file with author).

2. General Agreement on Tariffs and Trade, *opened for signature* October 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (current version in GENERAL AGREEMENT ON TARIFFS AND TRADE, 4 BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969)) [hereinafter GATT].

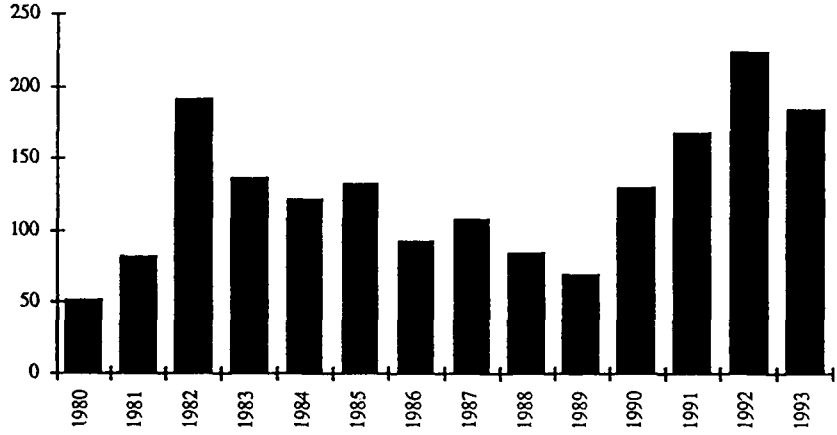
3. *See* TREBILCOCK & HOWSE, *supra* note 1, at ch. I, pt. II.3.

4. GATT, *supra* note 2.

5. Canada-United States Free Trade Agreement, Jan. 1, 1989, 27 I.L.M. 281 [hereinafter FTA].

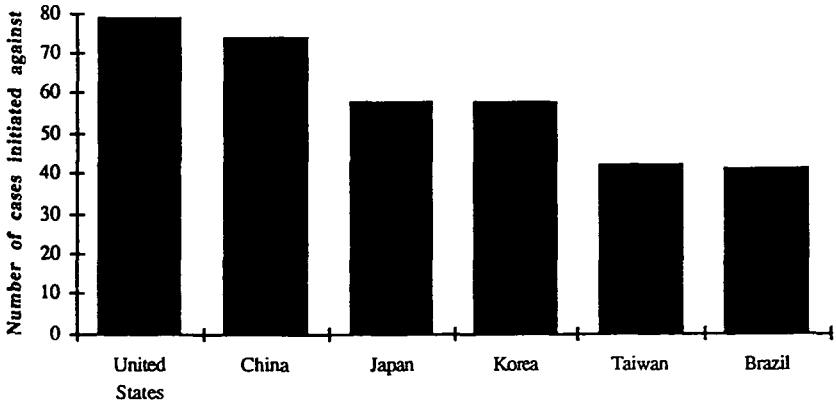
6. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 and 32 I.L.M. 605 [hereinafter NAFTA].

Figure 1: Antidumping Cases Filed
(Non-US GATT Signatories)



Note: The figure depicts the total number of antidumping cases reported to the GATT Committee on Antidumping Practices minus the number reported by the United States. Only signatories to the antidumping code within the GATT are required to file such reports, and many countries (including many GATT Contracting Parties) are not signatories. In addition, some signatories (e.g., the European Union) do not report some cases filed against non-signatories. The figures presented thus represent a lower bound on the total number of antidumping cases filed outside the United States. Sources: For 1980 through 1988, U.S. GENERAL ACCOUNTING OFFICE, INTERNATIONAL TRADE: THE USE OF THE GATT ANTIDUMPING CODE 16 (July 1990); for 1989 through 1993, compilations based on GATT reports.

Figure 2: Targets of Antidumping Cases
January 1989 - June 1993



Source: Compilations from GATT reports.

relief from other countries applying trade remedy laws.[7] The uncertainty and unpredictability surrounding the invocation and application of these laws significantly increases what might be called "border risk," along with other factors such as uncertain application of rules of origin and volatile exchange rates. For firms or investors contemplating the option of either producing in Canada and exporting into the United States, or producing in the larger U.S. market and exporting to the smaller Canadian market, this asymmetric border risk may significantly influence decisions which, in most cases, would be adverse to the interests of Canada.

Although neither the FTA nor NAFTA achieves the elimination of trade remedy laws, these agreements represent positive steps toward disciplining the use of trade remedy laws between the two countries. The FTA introduced some procedural innovations, principally the provisional Chapter 19 binational panel review process for final ADD and CVD determinations.[8] These innovations, which NAFTA makes permanent, have already had a significant effect in ameliorating certain features of the trade remedy process, but they leave the substance of each country's trade remedy law regimes untouched. The Chapter 19 experience, therefore, is worth briefly reviewing.[9]

First, the initiation rate for new ADD and CVD actions has not significantly decreased, and indeed may have increased, since the FTA commenced on January 1, 1989. From 1980 to 1988, U.S. producers initiated twenty-two ADD actions and eleven CVD actions against Canadian exporters, whereas between 1989 and 1993, twelve ADD actions and six CVD actions were initiated.[10] From 1980 to 1988, Canadian producers initiated fifty ADD actions and one CVD action against U.S. exporters, whereas between 1989 and 1993, twenty-three ADD actions

7. *See* INTERNATIONAL TRADE COMMUNICATIONS GROUP, CAN. DEP'T OF EXTERNAL AFFAIRS, THE CANADA-U.S. FREE TRADE AGREEMENT 267 (1987). In the Canadian government's official version of the FTA, the preface to Chapter 19 states that "[t]he goal of any new regime . . . will be to obviate the need for border remedies, as are now sanctioned by the GATT Antidumping and Subsidies Codes, for example, by developing new rules on subsidy practices and relying on domestic competition law." *Id.* at 268.

8. FTA, *supra* note 5, art. 1904.

9. The following statistics and details are drawn from MICHAEL J. TREBILCOCK ET AL., ONTARIO DEP'T OF INTERGOVERNMENT AFFAIRS, U.S. TRADE REMEDY LAWS AND THE ISSUE OF MARKET ACCESS: A COMPARATIVE EVALUATION OF CANADIAN PROTECTIONS UNDER THE GATT, THE FTA AND NAFTA 48-52 (1994) [hereinafter MARKET ACCESS].

10. *Id.* at 49.

and no CVD actions have been initiated. These figures suggest that the existence of the binational panel review process has had little or no deterrent effect on the initiation of trade remedy actions.[11]

Second, as of the end of 1993, there were forty-nine requests for binational panel reviews. Thirty of the forty-nine requests related to panel review of U.S. agency determinations: eighteen to investigations initiated prior to 1989, and twelve to investigations initiated after the FTA. Nineteen of the forty-nine requests related to panel review of Canadian agency determinations, and only two to investigations commenced prior to the FTA. Article 1905 of the FTA provides that the binational panel review process shall apply only prospectively to final determinations made after the FTA comes into force.[12] This, however, still embraces actions initiated, but not determined, before this date. Apparently, as a matter of course, exporters now appeal to binational panels almost all adverse final determinations by an agency of the other country.

Third, there have been twenty-three Chapter 19 cases resulting in a panel opinion to date. Seventeen of the twenty-three related to U.S. agency determinations, and twelve involved panel remands to the originating agency. Six related to Canadian agency determinations, and five involved panel remands to the originating agency. This pattern suggests a high level of panel intervention in agency determinations. All remands entail curtailing the expansive application of trade remedy laws by domestic agencies.

Fourth, a binational panel under Chapter 19 is limited to remanding decisions to the originating agency and is not able to substitute its own decision. Therefore, the agency's response on remand is of critical importance. This response, however, is subject to review by the panel that initially reviewed the agency's determinations. Of the twelve U.S. cases remanded by panels, eight involved more than one panel remand. Of the five Canadian cases remanded by panels, none involved more than one panel remand.

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11. However, other evidence suggests an inverse relationship between initiation rates (at least for ADDs) and the state of the economy. Susan Hutton & Michael J. Trebilcock, *An Empirical Study of the Application of Canadian Antidumping Laws: A Search for Normative Rationales*, 24 J. WORLD TRADE 123, 141-42 (June 1990). The early 1990s recession in the United States and Canada may also explain the relatively unaffected initiation rate.

12. FTA, *supra* note 5.

Fifth, from the date of a panel request, there is a 315-day target for a final decision.[13] Although this figure has largely been met, the average number of days from panel request to final disposition has been 459 days, reflecting the complexity of the remand process. On the other hand, the more protracted cases, like pork, swine, and softwood lumber, have often been of considerable importance to Canada.

Sixth, while we do not have any systematic evidence of the cost of the binational panel review process, it appears to be very costly for the participants. This is especially true of private exporter interests that typically initiate requests for panel reviews. These private exporters must effectively assume the carriage of the application for review, face the possibility of domestic agencies reopening aspects of their proceedings to elicit new evidence in response to panel remands, and face the possibility of further panel reviews of new agency determinations.

Seventh, the Extraordinary Challenge Procedure[14] has been sparingly invoked. In the cases of pork and swine, the United States has challenged panel decisions but in both cases the Extraordinary Challenge Committee has peremptorily dismissed the challenge.

Eighth, the volume of binational panel review requests is clearly straining the institutional capacity of the process.[15] The panels engaged in the currently active cases involve eighty panelists. Given panels of five members and national rosters of twenty-five members each,[16] this number is well in excess of the number on the two countries' rosters. These figures imply that the search for qualified, available, independent and non-conflicted panelists, who are ad hoc appointees typically with other full-time commitments, may present increasingly critical problems.

Several implications emerge from this analysis of the Chapter 19 experience to date. First, the binational panels are clearly exerting a significant disciplining influence on domestic agency determinations. Second, the complexities and delays inherent in the remand process warrant consideration of an extension of the panels' powers to include the ability, as with other appellate bodies, to substitute their own decisions for those of a domestic

13. *Id.* art. 1904(14).

14. *Id.* Annex 1904.13.

15. There have been 49 requests for binational panel review, with 16 cases outstanding. MARKET ACCESS, *supra* note 9, at 52.

16. FTA, *supra* note 5, Annex 1901.2.

agency where further inquiry or analysis by the agency is not warranted. Third, to address the increasingly critical problem of the scarcity of qualified panelists, consideration needs to be given to constituting a permanent full-time binational roster of panelists. For instance, a panel could consist of fifteen members serving for fixed terms, terminable only for cause to be determined by an Extraordinary Challenge Committee, from which the parties would be required to choose two panelists. The chairperson could be chosen from the roster by agreement of the nominated panelists or otherwise by lot from other panelists on the roster.

The unresolved question is whether and to what degree further trade liberalization will be promoted through reform of the trade remedy law regime. Under Articles 1906 and 1907 of the FTA, a Working Group was to be established to develop a substitute system of rules for ADDs and CVDs over the first five to seven years of the agreement.[17] After seven years, in the absence of an agreement on a new regime, either Party could cancel the whole FTA on six months notice.[18] Under Article 1504 of NAFTA, within five years of the date of entry into force of the agreement, a Working Group, comprising representatives of each party, is to report to the Trilateral Free Trade Commission on the relationship between competition laws and policies and trade in the free trade area.[19] Under Article 1907 of NAFTA, the parties agree to consult on developing more effective rules concerning government subsidization and transborder pricing practices.[20] No time limit is placed on the latter consultations and no consequences are stipulated in the event of failure to agree on a new regime.[21] However, under a trilateral side accord, endorsed by the Canadian government in December 1993, a Working Group is to report within two years on solutions for reducing the possibility of disputes concerning the issues of subsidies, dumping and the operation of trade remedy laws.[22]

The remainder of this Article focuses on the problems inherent in the substance of trade remedy laws in the bilateral context, and a set of reform proposals is advanced. Consideration is also given to the applicability of the suggested reforms to the

17. *Id.* arts. 1906 and 1907.
18. *Id.* art. 1906.
19. NAFTA, *supra* note 6.
20. *Id.* art. 1907(2)(b).
21. *Id.*
22. *See Canadian Government to Implement NAFTA After Receiving Assurances on Concerns*, 10 Int'l Trade Rep. (BNA) No. 48, at 2051 (Dec. 8, 1993).

trilateral context. Reform of the various trade remedy laws cannot be sensibly pursued in isolation from one another, because of the high degree of substitutability among these remedies.[23] Thus, our proposals reflect an integrated approach to all the major trade remedy laws.

II. PROBLEMS INHERENT IN THE PRESENT TRADE REMEDY LAW REGIME

A. THE FOUNDATIONS OF LIBERAL TRADE THEORY

A compelling economic case for increasing freedom of contract through reform of the existing ADD and CVD law regimes can be made through an understanding of the basic elements of liberal trade theory. In the realm of contract law generally, economic theory favors private ordering and freedom of contract between informed parties to a bilaterally voluntary transaction. This preference is based on the belief that such transactions will tend to be welfare enhancing.[24] Liberal trade theory reasons that restrictions on the free movement of goods across national borders entails a reduction in social welfare.

Liberal trade theory can be traced back to 1776 and Adam Smith, who, in *The Wealth of Nations*, launched a broad assault on prevailing theories of mercantilism.[25] Smith argued that specialization in the production of goods in which one has an absolute advantage, and trade of these goods for those in which one does not have an absolute advantage, will lead to mutual gains.[26] Smith extended this argument to the international context:

> What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.[27]

In domestic economic activities, most of us agree that it makes no sense for individuals to produce all of the goods and services they wish to consume. For example, few of us find it rational to grow all our own food, produce all our own clothes, build our own

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23. *See* Michael J. Trebilcock, *Throwing Deep: Trade Remedy Laws in a First-Best World, in* FAIR EXCHANGE: REFORMING TRADE REMEDY LAWS 235, 236 (Michael J. Trebilcock & Robert C. York eds., 1990).

24. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 13 (1962).

25. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Modern Library ed. 1937).

26. *Id.* at vol. II, p. 23.

27. *Id.*

shelter, do our own plumbing, perform our own medical services, act as our own lawyers, or do our own dental work. In its extreme form, this kind of autarky postulates an existence close to that of the hermit or caveman. An individual is better off specializing in the production of some goods and services for consumption and meeting remaining needs through the purchase of goods and services produced by other individuals. On Smith's theory, it follows that similar specialization is likely to generate mutual gains in international exchanges.

The theory of absolute advantage failed, however, to answer the question of whether trade would take place when a country possesses no absolute advantages in relation to its trading partners. In 1817, David Ricardo answered this question with the theory of comparative advantage, which continues to form the basis of conventional international trade theory today.[28] Basically, this theory shows that trade flows are determined by the relative costs of goods produced.[29] A country with no absolute advantages will still benefit from specialization in goods for which it is at a comparatively smaller cost disadvantage. Efficiency considerations dictate production of goods in which one has a relative cost advantage and trade for goods in which one has a relative cost disadvantage.

Over time there have been many refinements to the theory of comparative advantage.[30] There remains the constant proposition that liberal trade theory "rests ultimately upon the belief that economic specialization produces gains in productive efficiency and national income."[31]

Despite the compelling argument for allowing free trade across national boundaries presented by liberal trade theory, strains of mercantilism continue to exist today in the arguments of economic nationalists. Those who espouse such views tend to accept the competitive process in the domestic context, but not at the international level. This differential approach, which discriminates on the basis of where the parties to the transaction are located, is indefensible on economic grounds. Free trade theory encourages competition to extend across national bounda-

28. DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (London, J. Murray 1817).

29. *See id.*

30. *See* Richard G. Harris, *Trade, Industrial Policy and International Competition*, *in* 13 RESEARCH STUDIES OF THE ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA (1985).

31. ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 172-73 (1987).

ries, resulting in efficient allocation of global resources and reduced global prices.[32]

In the absence of trade liberalization, gains from protectionism for domestic producers would equal the losses suffered by domestic consumers forced to pay higher prices. When consumers are denied lower priced foreign goods, higher domestic prices force additional consumers out of the market altogether. As a result, there is a net welfare loss in the domestic economy. In contrast, an environment of internationally unimpeded trade results in consumer gains, including those consumers who would otherwise have been priced out of the market. These gains will exceed any losses suffered by domestic producers who are denied opportunities which would have accrued to them in the absence of trade liberalization. Trade remedy laws do not heed this logic. In the course of providing protection to domestic producers, trade remedy laws restrict the available contract opportunity set for domestic consumers, both of inputs and final products.[33]

B. THE DIVERGENCE BETWEEN LIBERAL TRADE THEORY AND TRADE REMEDY LAWS

ADD and CVD laws focus on the causes of an increase in competing imports, such as cross-border pricing practices and government subsidization. The typical argument in favor of trade remedy protection posits that such protection reduces the volume of imports which leads to an increase in domestic output and profits. The domestic industry, therefore, is able to modernize its capital equipment and become more competitive.[34]

However, ADD and CVD laws generally fail to provide any permanent relief from trade impacts. The grant of relief from foreign competition may send the wrong signals to both employees and investors, resulting in new competitive disadvantages in addition to those which already exist.[35] Protection may lead to increased wage demands by employees who anticipate greater firm profitability. Protection may also encourage investment by

32. John J. Barceló III, *Antidumping Laws as Barriers to Trade: The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 500 (1972).

33. Michael J. Trebilcock & John Quinn, *The Canadian Antidumping Act: A Reaction to Professor Slayton*, 2 CAN.-U.S. L.J. 101, 113 (1979).

34. *But see* Robert E. Baldwin, *Ineffectiveness of Protection in Promoting Social Goals*, 8 WORLD ECON. 109 (1985) (outlining and rejecting this argument in favor of trade remedy protection).

35. *See* Marc Levinson, *Asking For Protection is Asking for Trouble*, HARVARD BUS. REV., July-Aug. 1987, at 42.

new industry entrants. Both of these developments can increase the vulnerability of protected firms to import competition. The international competitiveness of other domestic firms who use these inputs may be impaired where trade remedy laws raise the cost of imported inputs such as steel and textiles.

In the majority of cases, firms successfully securing protection will continue to be inefficient, and will not become internationally competitive again.[36] The evidence indicates that "companies emerge from the protected environment only to stagger under the weight of competition . . . . The idea that [protection gives] a battered company temporary shelter without sapping its vitality is a pipe dream."[37]

The extent to which so-called "unfairly" traded imports injure domestic firms also appears to be widely exaggerated. A recent U.S. study analyzed the effect of dumped and/or subsidized imports on competing domestic industries between 1980 and 1988.[38] The economic methodology employed estimated what the performance of domestic industries competing with dumped or subsidized imports would have been if such imports had not been "unfairly" traded.[39] By comparing this estimated performance with the actual performance of these industries, the effect of "unfairly" traded imports upon domestic industry is calculated. Of the 179 cases analyzed, only fifty-three suffered a loss greater than five percent in domestic industry revenue as a result of unfairly traded imports.[40] Only twenty-one cases involved a loss greater than ten percent in revenue as a result of "unfairly" traded imports.[41] Because of the methodology employed and the data relied upon, the study found it likely that an even smaller amount of domestic industries have suffered revenue losses this large because of "unfairly" traded imports.

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36. A study of 16 major industries receiving some form of trade protection since 1950, such as ADDs or CVDs, concluded that after the protection was removed, only one industry expanded while 15 continued to decline. Robert Z. Lawrence & Robert E. Litan, *Why Protectionism Doesn't Pay*, HARVARD BUS. REV., May-June 1987, at 60, 63. Another study showed that only when the protection provided by trade remedy laws extends indefinitely, and is constantly increased, will the protected industry's output and employment levels be maintained. *See* Harry Flam et al., *Optimal Subsidies to Declining Industries: Efficiency and Equity Considerations*, 22 J. PUB. ECON. 327 (1983).

37. Levinson, *supra* note 35, at 47.

38. MORRIS E. MORKRE & KENNETH H. KELLY, BUREAU OF ECONOMICS, U.S. FEDERAL TRADE COMM'N, EFFECTS OF UNFAIR IMPORTS ON DOMESTIC INDUSTRIES: U.S. ANTIDUMPING AND COUNTERVAILING DUTY CASES, 1980 TO 1988 ix (1994).

39. *Id.*

40. *Id.*

41. *Id.*

In determining whether any policy response to increased imports, whatever the cause, is appropriate, the impact on domestic constituents must be examined. In liberal trade theory, there is a net gain in domestic and global social welfare from more liberal trade. However, this gain is often realized at the expense of domestic producer interests. Therefore, a possible policy response could evolve through a consideration of the adverse trade impacts which accrue to certain domestic constituents. These adverse impacts result from increasing international trade, irrespective of the causes of increased imports. To put the matter succinctly:

> The central policy issue that confronts governments, specifically in mixed market economies and liberal democracies such as Canada's, is the appropriate extent of collective responsibility for the consequences of destructive features of the process of change, however much these may be outweighed in the aggregate and in the longer term by their creative potential.[42]

There are two main groups within adversely affected firms who may seek relief or compensation: the owners or shareholders, and the workers. Shareholders must provide strong grounds to justify a redistribution because any relief or compensation received comes at the expense of consumers or taxpayers.[43] Such grounds for shareholder claims do not exist, given the mobility of capital and the ability to diversify risk through portfolio investment.

Workers in domestic firms have a stronger claim to relief or compensation. The economic assumption of perfect mobility in factor markets is less valid in the context of labor than it is in the context of capital. The transaction costs which accompany the flow of capital from one use to another tend to be small when contrasted with the financial and psychic costs borne by individuals forced to retrain or relocate in order to obtain alternate employment. In addition to the imperfect mobility of labor, a claim to compensation can be based on the inability to diversify investments in human capital. Particularly in cases of highly specialized human capital investments, the worker assumes a high degree of undiversified risk.

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42. MICHAEL J. TREBILCOCK ET AL., TRADE AND TRANSITIONS: A COMPARATIVE ANALYSIS OF ADJUSTMENT POLICIES 6 (1990) [hereinafter TRADE AND TRANSITIONS].

43. Alan O. Sykes, *GATT Safeguards Reform: The Injury Test*, *in* FAIR EXCHANGE: REFORMING TRADE REMEDY LAWS 203, 220 (Michael J. Trebilcock & Robert C. York eds., 1990).

Both Canada and the United States, however, have a social safety net in place to protect displaced workers from extreme hardship. In the case of a domestic firm failing as a result of the inability to compete with other domestic firms, the displaced employees are only compensated or protected to the extent provided by this social safety net. The relevant question is whether employees displaced by international competition should be treated in the same manner, or whether they merit additional assistance.

It is difficult to make a principled argument for treating the worker facing unemployment as a result of increased imports in a more favorable manner than the worker facing unemployment as a result of domestic competition, technological change, or shifts in demand. The impacts which accrue to the worker in terms of adjustment costs are the same regardless of the cause of the unemployment. Even if some form of assistance beyond that which is provided by the social safety net is justified in the case of trade-related job displacement, perhaps because of the scale of the impacts in some cases, trade restrictions deal less effectively with distributional issues than domestic adjustment assistance programs.[44] To the greatest extent possible, the issue of adjustment costs should be kept separate and distinct from trade policy issues. The trade policy response offered by ADD and CVD laws is inconsistent with liberal trade theory in that it focuses on the causes of trade increases, rather than the nature of trade impacts. To elaborate on this premise, both ADD and CVD laws are discussed in more detail.

C. ECONOMIC ANALYSIS OF ANTIDUMPING LAW

The practice of dumping is simply defined as international price discrimination.[45] The relevant question is whether there are any economic objections to international price discrimination from the perspective of the country receiving the lower priced goods.

Price discrimination involves dividing the total market into two or more consumer groups and charging each group a different price. This practice is only possible in a market where imperfect competition negates the possibility of successful

44. *See* ROBERT Z. LAWRENCE & ROBERT E. LITAN, BROOKINGS INST., SAVING FREE TRADE 12-14 (1986); JAGDISH BHAGWATI & T.N. SRINIVASAN, LECTURES ON INTERNATIONAL TRADE (1983).

45. For one of the first works to define dumping as international price discrimination, see JACOB VINER, DUMPING (1923).

arbitrage. Where price discrimination occurs within a single economy, the objection is that the seller engaging in market segmentation is "gouging" the group of consumers characterized by relatively inelastic demand. In the international context where dumping occurs, however, the consumers in the importing country belong to the group in whose favor the seller engaging in market segmentation discriminates. As a whole, consumers in the importing country benefit unambiguously from dumping, through access to imported goods at a lower price.[46] It seems counter-intuitive that consumers who purchase imported goods should wish to be "gouged" by being required to pay the same high price the exporter charges in its home market. This may be the result of the fact that it has a protected position at home and hence some degree of market power that it lacks in the export market. Thus, economic analysis rejects the validity of ADD law in the case of simple international price discrimination.

Predatory pricing has also been advanced as a justification for the imposition of ADDs.[47] Predation is the practice of systematically pricing below cost in the short run in an attempt to eliminate rivals. Once rivals are eliminated, the predator's ultimate objective is to obtain market power and subsequently raise prices to supra-competitive levels.[48]

Domestically, both Canada and the United States prohibit predatory pricing through antitrust legislation. The economic rationale is that a successful predation strategy, while lowering prices in the short run, may reduce consumer welfare in the long run, when higher monopoly prices result in some consumers being priced out of the market. This means that net losses to consumers exceed the gains to the predator, creating an economically inefficient result (a reduction in consumer welfare).

Internationally, the same economic rationale applies and thereby justifies the prohibition of international predatory pricing practices. The successful international predator causes the

46. Alan V. Deardorff, *Economic Perspectives on Anti-dumping Law*, *in* ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY 27 (John H. Jackson & E.A. Vermulst eds., 1989). Several authors have advanced this argument. *See* Barceló, *supra* note 32, at 513; Trebilcock & Quinn, *supra* note 33, at 104; Hutton & Trebilcock, *supra* note 11, at 125.

47. *See* VINER, *supra* note 45 (arguing that international price discrimination is basically harmless, with the exceptions of predation and short-run dumping which destabilizes the domestic market).

48. *See* BRUCE DUNLOP ET AL., CANADIAN COMPETITION POLICY: A LEGAL AND ECONOMIC ANALYSIS 208 (1987); *see also* Janusz A. Ordover & Robert D. Willing, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8 (1981).

same long run reduction in consumer welfare as does the successful domestic predator. There is a serious question, however, as to whether predatory pricing in international markets warrants any special policy response, let alone justifies the specific policy response provided by ADD law.

There are strong theoretical reasons and empirical evidence suggesting that predatory pricing, and in particular, international predation, will be a very improbable occurrence. In any market and particularly international markets, sustainable market power is extremely difficult to achieve through predatory pricing.[49] A corollary of setting prices below cost in the short run is the occurrence of short-term losses for the predator. The profit maximizing producer would only incur such losses if there is a reasonable probability that such losses can be eventually recouped through supra-competitive prices.

The international predator faces the formidable task of eliminating not only domestic competition in the target market, but worldwide competition as well.[50] Even if the strategy of predation eliminates producers in the domestic market, an attempt to raise prices to supra-competitive levels will attract both domestic and foreign entrants. In fact, it is possible that when domestic competitors are eliminated, their assets may be sold to other competitors at prices well below their pre-existing value, creating a situation in which the predator faces a new round of competition from producers with reduced costs of production.[51] Thus, in the absence of significant barriers to entry for new competitors, the cost of predation in terms of current revenue sacrificed is unlikely to be offset by the benefit of future monopoly rents.[52] A recent study found that of the thirty Canadian ADD cases resulting in positive final determinations between October 30, 1984, and February 3, 1989, none involved predatory pricing on the part of the exporter.[53]

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49. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 26 (1984); *see also* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981); B.S. Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J.L. & ECON. 129 (1972).

50. *See* Barceló, *supra* note 32, at 502.

51. *See* Herbert Hovenkamp & Avarelle Silver-Westrick, *Predatory Pricing and the Ninth Circuit*, 1983 ARIZ. ST. L.J. 443, 460; *see also* John S. McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289 (1980).

52. *See* Trebilcock & Quinn, *supra* note 33, at 105.

53. *See* Hutton & Trebilcock, *supra* note 11, at 123. In 26 of the 30 cases studied, the number of actual or potential competitors from other countries was sufficiently large to render futile any predation strategy. In two cases, the foreign competitor controlled an extremely small share of a Canadian market dom-

Another justification for ADD laws is the prevention of market destabilization caused by transitory or intermittent dumping. The usual objection to this form of dumping is that when carried out over a period of several months or years, it causes exit and re-entry costs for domestic firms, leading to inefficient resource allocation.[54]

Intermittent dumping may occur when foreign exporters are unable to successfully compete in the domestic market under normal conditions. The foreign exporters sell in the domestic market at low prices in order to maintain capacity utilization and a high home market price during a period of low demand in the home market.[55] By doing so, the exporters may successfully avoid the costs of temporary adjustment in plant utilization and maintain current employment levels.[56] Alternatively, intermittent dumping may result from the need to clear the market in a situation where there is an oversupply of perishable goods.

The capacity utilization argument will rarely describe the actual motivation behind intermittent dumping. Of the thirty Canadian ADD cases resulting in positive final determinations between October 30, 1984, and February 3, 1989, only four cases provided any indication that the exporter could possibly have been involved in intermittent dumping.[57] Furthermore, none of these cases involved firms seeking to maintain capacity utilization or employment rates. All four cases involved perishable agricultural products and attempts by U.S. producers to clear a

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inated by oligopolistic firms, making the acquisition of market power and the elimination of the powerful Canadian producers unlikely. In the last two cases, the availability of a close substitute made demand for the product in question very price elastic, precluding the possibility of a successful predation strategy.

The evidence also indicated that rather than preventing foreign firms from acquiring Canadian market power, ADDs may have enhanced the domestic market power of Canadian firms. In several cases, the Canadian industry was oligopolistic. Canadian firms seeking protection already had a degree of market power and were invoking the protection of ADDs to prevent market erosion by foreign imports. In other cases there was evidence that the injury was caused by the inefficiency of the domestic firm seeking protection. These two types of cases comprise 20 of the 30 cases reviewed, supporting the conclusion that ADDs promote domestic inefficiency and indeed protect from competition Canadian firms with market power who may be reaping supra-competitive profits at the expense of domestic consumers. *Id.*

54. *See* VINER, *supra* note 45; James A. Kohn, *The Antidumping Act: Its Administration and Place in American Trade Policy*, 60 MICH. L. REV. 407, 410 (1962).

55. *See* Trebilcock & Quinn, *supra* note 33, at 110.

56. *See* WILLIAM A. WARES, THE THEORY OF DUMPING AND AMERICAN COMMERICAL POLICY 82 (1977).

57. *See* Hutton & Trebilcock, *supra* note 11, at 130.

market characterized by conditions of oversupply. It should be noted, however, that such agricultural products tend to have fluctuating production cycles. Even in the absence of imports, Canadian producers would have faced depressed prices. The imposition of an ADD simply raises future domestic prices, thereby making inefficient production economically viable.[58] The economic costs generated by industry instability are not addressed by a trade remedy which focuses on the source of increased supply rather than the nature of the subsequent competitive impacts.

In summary, there are no economic justifications for ADD law. In reality, what is called dumping in the international context is usually just healthy competition, generally welcomed in the domestic context. Foreign firms with legitimate comparative advantages are branded unfair traders for performing in a manner which would be commendable had they been domestic producers.[59]

The only practice which ADD law purports to address, which is unambiguously worthy of some policy response, is predatory pricing. ADD law, however, is an inappropriate response, as it provides a means for domestic producers to impede the entry of competitively priced goods into the domestic market, thereby allowing oligopolistic or inefficient domestic firms to charge excessive prices. Antitrust legislation presents a more direct policy response to the problem of predation. The application of antitrust legislation to international predation is discussed in our reform proposals.

D. ECONOMIC ANALYSIS OF COUNTERVAILING DUTY LAW

The purpose of CVD law is to offset competitive advantages which accrue to foreign exporters as a result of government subsidies. From a strictly national point of view, economic analysis attempts to determine whether the imposition of a CVD by the importing country would lead to an increase or a decrease in the overall welfare of that country. In a recent article, Alan Sykes convincingly demonstrated that if "social welfare" is defined as the maximization of producer, consumer, and government sur-

58. *Id.* at 131.

59. *See* J. Michael Finger et al., *The Political Economy of Administered Protection*, 72 AM. ECON. REV. 452 (1982); *see generally* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT chs. 1-4 (J. Michael Finger ed., 1993).

plus, in almost every conceivable set of circumstances CVDs reduce domestic social welfare in the importing country.[60]

The imposition of a CVD on foreign producers increases the price at which their goods are sold in the domestic market. This reduces the price competition faced by domestic producers, who are able to increase their own prices accordingly. However, the gains to domestic producers are offset by losses to domestic consumers forced to pay the higher price. There is a further loss to consumers in that some who would have purchased the product in question are priced out of the market and suffer a welfare loss. Even after accounting for the increase in government surplus in terms of revenue from duties, consumer welfare loss exceeds producer and government surplus.

The above analysis is often confronted by a "fairness" argument in the United States. According to this argument, the United States should play a unilateral role in ensuring the maximization of economic efficiency both globally and regionally, through the exertion of pressure for the elimination of distortive subsidies. This argument has been subject to much criticism.[61] First, it assumes that unilateral action will be effective in forcing foreign governments to cease their subsidization practices. In reality, unilateral action may have the opposite effect. One nation's action may lead to another country's retaliatory policies, creating a scenario in which protectionist interests in both countries thrive.[62] Second, seeking to achieve fairness through such mechanisms opens the door for the capture of the process by concentrated and organized producer interests at the expense of diffuse consumer interests. The fairness argument is often simply a rhetorical convention attempting to provide some legitimacy to the imposition of CVDs. This process takes place through the application of technical and arcane rules which protect domestic industries and have little or no basis in any coherent conception of fairness.[63]

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60. *See* Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 210 (1989).

61. *See* Jagdish Bhagwati, *Fair Trade, Reciprocity and Harmonization: The New Challenge to the Theory and Policy of Free Trade*, *in* ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM 547 (Alan V. Deardorff & Robert M. Stern eds., 1994); Robert E. Hudec, *"Mirror, Mirror, on the Wall": The Concept of Fairness in United States Trade Policy*, *in* PROCEEDINGS OF THE 1990 CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW 88 (1990).

62. *See* Bhagwati, *supra* note 61.

63. *See* Hudec, *supra* note 61.

The attempted justification of CVD law as a means through which major users such as the United States can act unilaterally as a global or regional policeman, attempting to deter governments which engage in trade distorting subsidization practices, faces another intractable problem. Administrators of domestic CVD regimes face the daunting task of evaluating which foreign subsidies contribute to, or derogate from, efficient resource allocation. Warren Schwartz and Eugene Harper convincingly show this task to be highly indeterminate.[64] Their analysis addresses the pervasiveness of externalities which subsidies may help to internalize.[65] They also recognize the existence of preferences which may not be adequately captured in private market transactions, such as promotion of regional development or preservation of the family farm or rural lifestyles.[66] They also note the possibility that positive governmental benefits conferred upon a firm may be designed to offset some other governmental burden, such as high minimum wage laws or demanding environmental regulations.[67] Thus, it is not surprising that domestic CVD law regimes do not provide a means for distinguishing cases of inefficient subsidization from cases where no inefficiency is involved.[68]

The rejection of a policy of unilateral invocations of CVD law to combat subsidization practices of foreign governments should not be taken as an endorsement of extensive subsidization as a tool of industrial policy. Admittedly, in some cases, the use of government subsidies can correct market failures and thereby enhance the economic welfare of the subsidizing country. However, they also often lead to distortions in resource allocation and a decrease in domestic welfare.[69] Where there are export spillovers, there will also be distortions in foreign markets.

Where subsidization clearly creates market distortions, the reduction of such distortions will lead to an increase in economic efficiency within the international or regional market. However, CVD law is not the appropriate policy instrument for achieving

64. *See* Warren F. Schwartz & Eugene W. Harper, *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831 (1972).

65. *Id.*

66. *Id.*

67. *Id.*

68. *See* John J. Barceló III, *Subsidies and Countervailing Duties: Analysis and a Proposal*, 9 LAW & POL'Y INT'L BUS. 779 (1977).

69. Sykes, *supra* note 60, at 214.

this result. An alternative approach is set out in our reform proposals.

E. SAFEGUARDS AND ADJUSTMENT COSTS

An alternative means of securing protection from foreign competition is through the invocation of safeguard measures. The use of safeguard measures is governed at the multilateral level by Article XIX of the GATT.[70] This provision permits a party to withdraw or modify previous trade concessions where these concessions have resulted in a surge of imports that cause or threaten to cause serious injury to domestic producers of like or directly competitive products.[71] Safeguard action may be taken for such time as may be necessary to prevent or remedy such injury.[72] The Uruguay Round Safeguards Agreement substantially constrains the safeguard regime through time limits and prohibitions on renewal.[73] In the regional context, such "emergency relief" is provided for in Chapter 11 of the FTA[74] and Chapter 8 of NAFTA,[75] subject to a three-year time limitation.[76]

Economic arguments in support of safeguard measures are not especially convincing. The most common justification cited is that safeguard actions can provide an ailing firm or industry with "breathing space" from foreign competition. Safeguard action leads to the generation of profits which can be invested in new plant and equipment, thereby allowing the firm or industry to compete successfully against foreign exporters in the future.[77]

Three difficulties arise with this argument. First, it assumes that governments intend and are able to select those industries likely to become competitive again, when in fact they may simply be responding to well organized lobbying efforts by firms and industries more interested in securing protection than in becoming internationally competitive. Second, it ignores the

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70. *See* GATT, *supra* note 2.

71. *Id.* art. XIX:1.

72. *Id.*

73. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, Annex 1A: Multilateral Agreements on Trade in Goods; Agreement on Safeguards, art. 7, OFFICE OF THE U.S. TRADE REPRESENTATIVE, at 276 [hereinafter Final Act].

74. *See* FTA, *supra* note 5.

75. *See* NAFTA, *supra* note 6.

76. FTA, *supra* note 5, art. 1101(2)(b); NAFTA, *supra* note 6, art. 801(2)(c)(i).

77. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 150 (1989).

fact that direct assistance to individuals facing adjustment costs as a result of increased trade liberalization is likely to be a less socially burdensome and more economically defensible approach. Third, it dismisses the fact that government intervention for restoring competitiveness is unnecessary in countries with well-developed capital markets. In these situations private lenders can finance the efforts of ailing firms to become internationally competitive in cases where the expected return from doing so justifies the costs incurred.[78]

Safeguard actions, like ADD and CVD laws, are often simply another means of imposing trade restrictions in the interests of protecting domestic constituents. From an economic perspective, safeguard actions are no more defensible than ADD or CVD laws, in that their effect is the protection of a domestic industry at the expense of a reduction in net domestic and global social welfare.

F. NON-ECONOMIC RATIONALES FOR TRADE REMEDY LAWS

While there are few economic reasons for trade remedy laws, economic efficiency is not the only normative criterion which can or should drive the policymaking process. Non-economic criteria are often advanced in defense of particular policy responses to domestic problems, including problems related to international trade. Two non-economic criteria which potentially justify the existence of ADD law, CVD law, or safeguards are distributive justice and communitarianism.[79] Even if these justify some policy response, however, neither theory can justify the retention of ADD law, CVD law, or safeguards.

A social contractarian ethical perspective, grounded in principles of distributive justice, posits that society has a moral obligation not to pursue collective policies which prejudice its least-advantaged members.[80] This theory has been advanced as a justification for ADD law, CVD law, and safeguards as a means by which low-skill, low-wage workers can avoid dislocation costs. This theory argues that where distributive justice values are violated as a result of international trade the protection of these values should take priority over concerns for economic efficiency.

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78. Alan O. Sykes, *Protectionism as a 'Safeguard': A Positive Analysis of the GATT 'Escape Clause' With Normative Speculations*, 58 U. CHI. L. REV. 255, 264 (1991).

79. For a more detailed discussion of these theories, see TRADE AND TRANSITIONS, *supra* note 42.

80. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

Even if this theory is accepted, a Canadian study found that distributive justice concerns possibly justified a policy response in only six of thirty Canadian cases in which ADDs were imposed.[81] In the remaining twenty-four cases, the wages paid to workers in the industry receiving the protection of ADDs were found to be well above the average national industrial wage.[82] Where the workers protected are not within the group of least-advantaged persons which the distributive justice perspective seeks to protect, there can be no justification for providing them with special compensation at the expense of consumers, many of whom may themselves fall within this group of least-advantaged persons.

Even in the six cases where the workers could be considered among the least-advantaged members of society, trade remedy law responses were inappropriate. No principled reason exists for providing special treatment to the least-advantaged members of society harmed by foreign competition without extending the same treatment to the least-advantaged members of society harmed by domestic competition. Thus, the distributive justice ethical perspective cannot be used as a normative justification for the retention of ADD law, CVD law, or safeguards.

Communitarian theory posits that, to a significant extent, individuals derive their identities from their roles and relationships within the community.[83] As with distributive justice, proponents of this view argue that communitarian values should take priority over concerns for economic efficiency. In the context of trade impacts from international competition, the communitarian view would seek to protect workers and others from disruption of long-standing community ties and social networks. Allowing firms to fail and compensating the employees for the loss of their jobs or otherwise providing adjustment assistance may not be an acceptable alternative for the communitarian, as this may involve the severance of community bonds. At the least, ties to workplace colleagues would be severed. In some cases, relocation may be required, which would lead to the severance of extended family and neighborhood ties. In short, the communitarian would consider a severe disturbance of these community attachments to involve the loss of a significant part

81. Hutton & Trebilcock, *supra* note 11, at 133.
82. *Id.* at 132.
83. *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

of one's human identity, which may not be fully compensable with money.[84]

Even if the communitarian theory is accepted, the Canadian study found that communitarian concerns could potentially justify some form of policy response in at most nine of the thirty Canadian cases because the domestic firms involved were major employers in small communities.[85] In the remaining twenty-one cases, any potential dislocation of labor as a result of low-priced imports would have occurred in major industrial centers able to absorb into similar or alternate employment the typically small number of workers at risk.[86]

Even in those cases where communitarian concerns may call for a policy response, ADD law is still inappropriate. There is no principled reason for providing special protection of the community attachments of workers facing displacement as a result of trade impacts caused by foreign competitors, when there is no similar protection of the community attachments of workers facing displacement as a result of trade impacts caused by domestic competition. Thus, while communitarian values may justify some form of assistance to displaced workers, it cannot justify the retention of ADD law, CVD law, or safeguards.

G. THE POLITICS OF PROTECTIONISM

In developing a regime to replace the current system of trade remedy laws, it would be futile to simply assume a one-dimensional world in which the dictates of economic efficiency reign supreme. As has been shown, if economic theory were determinative, current trade remedy laws would be abandoned. Nor is it sufficient to supplement an economic analysis of trade remedy laws with other normative theories, such as distributive justice and communitarianism. The consideration of these theories is equally unconvincing in terms of providing a normative justification for the existence of trade remedy laws. Reform proposals must recognize the policymaking processes that have created the current trade remedy law regime. In reality: "While economic theory can be useful in analyzing the consequences of protection, explanations of why protection comes about, why it

84. TRADE AND TRANSITIONS, *supra* note 42, at 12.

85. Hutton & Trebilcock, *supra* note 11, at 137. Four of the nine cases may also have engaged distributive justice concerns. *Id.*

86. *Id.*

takes particular forms, and why it continues, would often appear to be more in the realm of political economy."[87]

The best explanation for why troubled industries successfully convince governments of their entitlement to protection through the application of trade remedy laws is provided by public choice theory. This theory is an economic model of politics which holds that the supply of public policies will be such as to maximize political parties' or representatives' prospects for election or re-election.[88]

In the trade policy context, domestic producers facing import competition are the interest group with the greatest influence. This group typically has a greater incentive to organize, lower mobilization and lobbying costs, and a greater ability to avoid free riders than the more widely dispersed consumers and other bearers of the costs of trade protection. Thus, under public choice theory, "economically irrational policy choices are explicable as inevitable responses to rent-seeking behavior by concentrated interests."[89] Such rent-seeking behavior results in substantial costs being borne by the society as a whole, in terms of reduced economic efficiency.[90]

In theory, the imposition of such costs on society should face serious opposition from consumer interests, as is made clear by a substantial body of empirical evidence on the relative costs and benefits of trade protection. For example, in 1984, protection of the U.S. specialty steel industry through voluntary restraint agreements cost U.S. consumers $1 million per job saved, at a time when the average annual salary for specialty steel workers averaged less than $60,000.[91] In 1980, footwear quotas and tariffs cost U.S. consumers $77,714 per job saved, at a time when the annual wage averaged only $8340.[92] In 1983, protec-

87. W. MAX CORDEN, PROTECTION AND LIBERALIZATION: A REVIEW OF ANALYTICAL ISSUES 12 (International Monetary Fund Occasional Paper No. 54, 1987).

88. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

89. TRADE AND TRANSITIONS, *supra* note 42, at 171.

90. For a more detailed discussion, see Jagdish Bhagwati, *Directly Unproductive, Profit-Seeking (DUP) Activities*, 90 J. POL. ECON. 988 (1982); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); G. Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).

91. *See* GARY C. HUFBAUER ET AL., INST. FOR INT'L ECON., TRADE PROTECTIONISM IN THE UNITED STATES: 31 CASE STUDIES 154 (1986).

92. Murray L. Weidenbaum & Michael C. Munger, *Protection at Any Price?*, 7 REG. 14, 17 (1983).

tion of the U.S. automobile industry through the imposition of import restrictions cost U.S. consumers $160,000 per job saved, while the annual compensation of U.S. auto workers averaged less than $40,000.[93] In Canada, trade restrictions in the footwear industry annually cost consumers between $53,668 and $69,460 per job saved, where average annual earnings were $7145; trade restrictions in the textile and clothing industry annually cost between $40,600 and $50,942 per job saved, where annual earnings averaged $10,000; trade restrictions in the automobile industry annually cost consumers between $179,000 and $226,394 per job saved, where earnings averaged between $29,000 and $35,000.[94]

The absence in practice of intense consumer opposition to trade protection is largely explained by the higher mobilization and lobbying costs faced by consumers. Each consumer will typically have a small stake in any given trade dispute. Consumers have a reduced incentive to overcome information and transaction costs in organizing for political action, as well as the free rider problem which adversely affects the organizational efforts of such a large and widely dispersed interest group.[95]

Another convincing explanation for the frequent success of protectionist over anti-protectionist interests is the traditional conceptualization of trade issues. For example, those bearing the costs of protection often mistakenly believe that it results in a redistribution from foreign to domestic producers. In reality, there is a loss in both consumer and net societal welfare, and any redistribution taking place is from domestic consumers to

93. Robert W. Crandall, *Import Quotas and the Automobile Industry: The Costs of Protectionism*, 2 BROOKINGS REV. 4, 8 (1984).

94. *See* TRADE AND TRANSITIONS, *supra* note 42, at 76.

95. *Id.* at 173; Charles K. Rowley & Robert D. Tollison, *Rent-Seeking and Trade Protection*, Aussenwirtschaft 303 (1986); *see also* MICHAEL J. TREBILCOCK, THE POLITICAL ECONOMY OF ECONOMIC ADJUSTMENT: THE CASE OF DECLINING SECTORS (1986). Some constraints on the ability of industries to obtain protection from import competition are provided by the presence of domestic interests opposing such protection. For example, large importers of intermediate inputs can be expected to oppose protection of higher cost domestic producers of such inputs. Export oriented domestic industries, concerned over the potential for retaliation against their exports, can also be expected to oppose the imposition of trade barriers against foreign trading partners. Finally, domestic distributors and large retail chains who often rely extensively on the availability of low-priced imports, provide further opposition to protectionist domestic policies. The combined political influence of the above interests provides some important checks on the rent-seeking ability of domestic producers. *See* I.M. DESTLER & JOHN ODELL, INST. FOR INT'L ECON., ANTI-PROTECTION: CHANGING FORCES IN UNITED STATES TRADE POLITICS (1987).

domestic producers.[96] In effect, consumers are the victims of an enduring mercantilist myth, a myth which is deliberately nurtured by its beneficiaries.

This suggests that the economic costs of protection are largely unknown to those who bear them. More political ground can be gained by imposing ADDs or CVDs, with their "hidden" costs to domestic consumers, than by embracing some other policy response which may increase net social welfare but entail more concentrated costs for domestic producers, and transparent costs for voters.

H. CONCLUSION

This section demonstrates that there is no normative rationale for the retention of ADD law, CVD law, or safeguards. An economic analysis shows that the imposition of these trade remedies results in a reduction in net social welfare. Non-economic theories, such as distributive justice and communitarianism, are equally incapable of providing a normative rationale for trade remedy laws. The primary explanation for the use of trade remedy laws is provided by theories of political economy. This analysis sets the stage for the reform proposals presented in the following section.

III. A FRAMEWORK FOR REFORM OF TRADE REMEDY LAW

The development of a politically attainable solution to the problem of trade remedy laws which Canada and the United States might be willing to adopt will be based on the following premises. First, the underlying goal behind any reform must be the achievement of a greater degree of economic integration, which will increase net social welfare in each country and within the free trade area as a whole. Second, the attainment of this degree of economic integration must not require an unacceptable loss of political sovereignty to either Canada or the United States. While economic integration should be promoted, political considerations constrain the degree of integration which is achievable. Any solution which fails to recognize this constraint is of little practical value. Third, any suggested solutions must attempt to minimize perceptions of the need for drastic change. The following recommendations will attempt to build upon familiar institutional structures in place under the FTA and

96. *See* Finger, *supra* note 59.

NAFTA, as well as trade liberalizing policies which have been implemented in other regions.

A. DUMPING AND THE USE OF DOMESTIC COMPETITION LAW

Our discussion of the economic rationales for ADD law led to the conclusion that of the three perceived evils ADD law sought to address, the only evil worthy of some form of policy response on economic grounds was predatory pricing. ADD law, however, was found to be an inappropriate response. To address instances of international predation, we recommend an extension of predatory pricing provisions in domestic competition statutes to predatory practices engaged in by foreign competitors. A model for such reform is presented by Australia and New Zealand, where there exists a trade relationship similar to that of Canada and the United States.[97] As barriers to the free flow of goods between these two countries were progressively reduced, the relevance of ADD law decreased.

In 1988, a protocol to the Australia-New Zealand Closer Economic Relations Trade Agreement was executed, under which both countries agreed to abolish ADDs with respect to goods originating in the other country and to terminate existing duties.[98] The application of competition law to the problem of predation was accomplished through an amendment to Section 46 of the Australian Trade Practices Act 1974,[99] and Section 36 of the New Zealand Commerce Act 1986.[100] These provisions define "market" in relation to the offense of abuse of market dominance. Both definitions of "market" were amended to include the "trans-Tasman market," which in turn is defined as including any market in Australia or New Zealand. Both countries amended their "abuse or misuse of dominant position" provisions to permit complainants in one country to initiate complaints about the conduct of producers in the other country.

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97. *See* Geoffrey Palmer, *International Trade Blocs—New Zealand and Australia: Beyond CER*, 1 PUB. L. REV. 223 (1990) (discussing the trade relationship between Australia and New Zealand). In 1966, New Zealand and Australia executed a bilateral Free Trade Agreement. New Zealand-Australia Free Trade Agreement, Aug. 31, 1965, 554 U.N.T.S. 169. In 1983, these two countries executed the Closer Economic Relations Trade Agreement. Australia-New Zealand Closer Economic Relations Trade Agreement, Mar. 28, 1983, 1983 Austl. T.S. No. 2, 1983 N.Z.T.S. No. 1.

98. Protocol to the Australia New Zealand Closer Economic Relations Trade Agreement on Acceleration of Free Trade in Goods, Aug. 18, 1988, art. 4, 1988 Austl. T.S. No. 18.

99. AUSTL. C. ACTS No. 51, art. 46 (1974).

100. N.Z. Stat. No. 5, art. 36 (1986).

At the same time, a series of procedural innovations were adopted, authorizing a court sitting in one country to hear a complaint by domestic producer interests in that country against producers in the other country. These changes permit a court in the first country to hold hearings, take evidence in the other country, and to have subpoenas and other orders enforced in that country. The relevant substantive amendments to the competition legislation in both countries clearly focus on predatory behavior by firms based in one country exporting to the other country's markets, and not on price discrimination.

Such a solution is readily transferable to Canada and the United States.[101] The substantive trade law and competition law provisions in the two countries would require only minor adjustment. Canada would need to amend the Special Import Measures Act[102] to prohibit ADD investigations and the imposition of ADDs with respect to goods originating in the United States, and to provide for the revocation of all existing ADD measures against U.S. products. In addition, Canada would need to amend the Competition Act[103] to allow provisions dealing with predatory pricing, primarily Section 50(1)(c), to be invoked against the producers of goods originating in the United States. This would require re-defining the term "market" to include the United States, following the Australia-New Zealand model.

The United States would need to amend the Tariff Act of 1930[104] to prohibit ADD investigations and the imposition of ADDs with respect to goods originating in Canada, and to provide for the revocation of all existing ADD measures against Canadian products. The Sherman Act[105] needs no amendment as it already prohibits predatory pricing by foreign sellers through the prohibition of attempted monopolization. The definition of "attempted monopolization" includes attempts to control prices or to destroy competition through predatory or anticompetitive

101. *See* Presley L. Warner, *The Canada-United States Free Trade Agreement: The Case for Replacing Antidumping with Antitrust*, 23 LAW & POL'Y INT'L BUS. 791 (1992) (advocating the replacement of antidumping law with competition law for the purposes of predatory pricing); *see also Report of the Task Force of the Antitrust Section on the Competitive Dimension of NAFTA*, 1994 A.B.A. SEC. ANTITRUST 252-55.

102. R.S.C., ch. S-15 (1985) (Can.).

103. R.S.C., ch. C-34 (1985) (Can.).

104. Pub. L. No. 71-361, 46 Stat. 590 (1930).

105. 15 U.S.C. § 2 (1988).

conduct which has a dangerous probability of success.[106] The substitution of predatory pricing complaints under the Sherman Act for antidumping law, therefore, is not a novel idea.[107]

Some amendments would be required in terms of harmonizing the procedural and remedial aspects of each regime's response to the problem of predatory pricing.[108] A procedural mechanism would need to be developed to allow for the enforcement of the domestic regimes against foreigners. This could be done by following the Australia-New Zealand model outlined above, which allows, for example, an Australian court to sit in New Zealand and enforce subpoenas, injunctions, and sanctions in the foreign state.[109] In terms of private remedies, there is a key difference between Canada and the United States. The Clayton Act provides for the award of treble damages,[110] while the Competition Act only provides for the award of single damages.[111] One solution is an amendment to the Competition Act providing for the award of treble damages against an American firm whose activity within Canada is successfully challenged. This may, however, violate the National Treatment principle contained in Article III of the GATT[112] which has been incorporated in the FTA[113] and NAFTA.[114] If so, the converse reforms to U.S. law would need to be considered, or alternatively, Canadian firms would have to resign themselves to asymmetric liability.

The competition law solution greatly reduces the degree of protectionism in both countries. It narrows the scope of pricing practices considered unfair to those which can truly have an adverse effect on economic efficiency, such as the elimination of competitors through predation. It also applies the same set of rules to both domestic and foreign competitors. Objections to the extra-territorial application of foreign competition laws to domestic industries, however, are to be anticipated. Such objections are not valid for there is simply a substitution of one do-

106. *See* Swift and Co. v. United States, 196 U.S. 375 (1905); Thurman Industries v. Pay 'N Pak Stores, 875 F.2d 1369 (9th Cir. 1989).

107. *See, e.g.*, John J. Barceló III, *The Antidumping Law: Repeal It Or Revise It*, *in* ANTIDUMPING LAW: POLICY AND IMPLEMENTATION (John H. Jackson ed., 1979).

108. *See* Warner, *supra* note 101.

109. Palmer, *supra* note 97, at 229-30.

110. 15 U.S.C. § 15 (1988).

111. R.S.C. ch. S-15, § 36(1) (1985) (Can.).

112. GATT, *supra* note 2.

113. FTA, *supra* note 5, art. 501.

114. NAFTA, *supra* note 6, art. 301.

mestic regime for another, in this case, competition law for ADD law. The concern with respect to extra-territoriality could be further alleviated by providing a binational mechanism for the review of domestic decisions made by antitrust authorities which affect foreign interests. For example, the mandate of the binational panels, established under Chapter 19 of the FTA[115] and Chapter 19 of NAFTA,[116] could be extended to include the review of decisions made by domestic authorities charged with the implementation of competition law where these directly affect foreign interests.

On a more basic level, it has been suggested that the United States would not be willing to give Canada an exemption from the application of ADD law, or that such an exemption would come at an unacceptably high price in terms of reciprocal concessions.[117] This argument is also unpersuasive. As noted earlier, in sharp contrast to CVD law where the United States is clearly the dominant user, there is much greater symmetry in Canadian and U.S. utilization rates of ADD law.[118] This evidence makes it clear that the United States, as well as Canada, would stand to gain substantially from restraining the utilization of the ADD regime. Further, the political feasibility of this proposal is bolstered by the fact that it draws upon the existing arrangement in the Australia-New Zealand regional trading bloc. As well, it should be noted that in the European Union, neither ADD nor CVD actions can be brought between member states, and issues of cross-border pricing and government subsidization are dealt with as aspects of competition policy.[119]

Perhaps the most important aspect of the competition law proposal is shifting the focus from protection of domestic producers to protection of domestic consumers. Competition law, as its name suggests, seeks to promote effective competition in the domestic economy with the result tending to be enhanced economic efficiency, and increased consumer welfare. In contrast, ADD law protects domestic producers from foreign competition, usually to the detriment of consumers and with a net reduction in social welfare.

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115. FTA, *supra* note 5, Annex 1901.2.

116. NAFTA, *supra* note 6, Annex 1901.2.

117. John A. Kazanjian, *Competition Law and Trade Policy: Honk if You Love Competition Policy,* 14 CAN. COMPETITION POL'Y REC. 71, 74 (1993).

118. *See supra* text accompanying notes 9-11.

119. Warner, *supra* note 101, at 855; TREBILCOCK & HOWSE, *supra* note 1, at chs. II and VI.

B. A NEW APPROACH TO COUNTERVAILING DUTIES AND SUBSIDIES

Our preferred approach accepts as a starting point the general taxonomic approach embodied in the new Uruguay Round Subsidies Agreement.[120] The Agreement classifies subsidies as "prohibited,"[121] "actionable"[122] and "non-actionable."[123] However, in our approach, the regime would consist primarily of supra-national dispute resolution panels (Track II). Unilateral application of countervailing duties (Track I) would be restricted to a narrow class of prohibited export subsidies, perhaps defined as subsidies where at least eighty percent of the output of subsidized foreign firms is exported. Track II would be the exclusive avenue of recourse for addressing actionable subsidies, considered countervailable as specific subsidies under the Agreement, and no remedy of any kind would be available in the case of non-actionable subsidies, which would largely reflect the Agreement's definition as including non-specific subsidies and some specific subsidies for research, environmental protection and alleviation of economically disadvantaged regions.

If a subsidy has some adverse trade effects but is also serving legitimate non-trade related domestic policy goals, remedial action should only be taken following investigation by a supra-national panel. The panel would determine whether the subsidy is actionable and would mandate appropriate remedial or retaliatory action. In formulating the standards to be applied by subsidies panels, the experience of review panels established under Chapter 18 of the FTA may be helpful. In recent cases involving disagreements about the legitimacy of government policies influencing trade, the panels have adopted a "least restrictive means" test.

In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring[124] is an example of the least restrictive means test.[125] Canada argued that the domestic landing requirement was an essential component of resource conserva-

120. *See* Final Act, *supra* note 73, Agreement on Subsidies and Countervailing Measures, at 229.

121. *Id.* art. 3, at 231.

122. *Id.* art. 5, at 233.

123. *Id.* art. 8, at 237.

124. Panel No. CDA-89-1807-01, Oct. 16, 1989, 1989 WL 250302, 1989 FTAPD LEXIS 6 [hereinafter *Landing Requirement*].

125. T.L. McDorman, *Using the Dispute Settlement Regime of the Free Trade Agreement: The West Coast Salmon and Herring Problem*, 4 CAN.-U.S. BUS. L. REV. 117, 179 (1991).

tion and exempt under GATT Article XX(g)[126] from the prohibition on export restrictions under Article XI.[127] Because the objectives of the policy could have been achieved through landing and other monitoring requirements less restrictive of trade, however, the panel did not sustain the policy.[128]

The paradigmatic formulation of the least restrictive means test is found in the case law under Section 1 of the Canadian Charter of Rights and Freedoms.[129] In order to sustain a limit on a Charter right, the limit must have a valid objective. In addition, the means chosen to reach that objective must be rationally connected to the objective and be the least restrictive means, or the means that least impairs the right in question. This approach should be adopted to deal with the indeterminate class of reviewable or actionable subsidies. If a subsidy is rationally connected to a legitimate non-trade related policy objective, such as those previously set out in Article 11 of the Tokyo Round Subsidies Code[130] or Article XX of the GATT,[131] and is the least trade restrictive policy instrument available to achieve that objective, it should be sustained, but not otherwise. This test should encourage governments to seek out domestic policy instruments with minimum trade distortions.

Thus, we envision that an international subsidies regime could feasibly aspire to define a category of subsidies that are immune from challenge either unilaterally or bilaterally, along the lines of "non-actionable subsidies" in the Uruguay Round Subsidies Agreement.[132] Another category of subsidies, principally subsidies that are de jure or de facto pure export subsidies, would be per se objectionable both unilaterally and bilaterally. For the wide array of intermediate subsidies that do not fall into either of these two categories, we envision only a supra-national dispute resolution route. This regime would entail panels applying a least restrictive means test, with an adverse panel determination required before retaliation could be undertaken. Invocation of domestic countervailing duty regimes would not be

126. GATT, *supra* note 2.

127. *Id.* art. XI:1.

128. *Landing Requirement*, *supra* note 124.

129. *See* R. v. Oakes, 26 D.L.R. 4th, at 200 (S.C.C. 1986) (Can.).

130. GATT, *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT*, April 12, 1979, 31 U.S.T. 513, *reprinted in* 26th Supp. BISD 56 (1980).

131. GATT, *supra* note 2.

132. *See* Final Act, *supra* note 73, Agreement on Subsidies and Countervailing Measures, art. 8, at 237.

possible unless and until such an adverse determination had been made. Even here we would retain the Chapter 19 binational review mechanism under the FTA and NAFTA to monitor domestic margin and injury determinations.[133] We believe that this approach recognizes the complex welfare judgments entailed in evaluating the economic effects of subsidies. Additionally, this approach is respectful, within reasonable limits, of the domestic sovereignty of member states to pursue a wide range of non-trade related domestic policy objectives of their choosing without risking unilateral punitive measures from other countries with divergent perspectives on the wisdom of those policies.

C. SAFEGUARDS AND THE ADJUSTMENT COST ISSUE

As is always the case where trade liberalization occurs, there will be adjustment costs borne by certain sectors of society. The most effective response is through the implementation of worker adjustment assistance programs which are equally available to workers displaced as a result of international or domestic competition. Such a solution, while compelling in a world where the policymaking process is exclusively driven by economics, is unlikely to prevail once political considerations are taken into account. Absent countervailing pressures from the producers whose product is to be restricted, which would exist in a purely domestic context, pressure from domestic firms faced with losses will in many cases make import restrictions politically expedient, despite their negative effect on net social welfare. We recommend that such import restrictions take the form of a well-conceived safeguards regime that focuses on the nature of trade impacts rather than the causes of trade increases.

As discussed above, the safeguard action which results in the protection of a domestic industry at the expense of net social welfare is no more defensible than ADD or CVD law from an economic perspective.[134] Economic efficiency would prescribe a binding commitment to a policy of free trade without any corresponding right to resort to safeguard relief. The retention of a safeguards regime in this proposal, however, has as its basis the need to accommodate political realities.

In approaching negotiations on trade liberalization, politicians will tend to be concerned that trade concessions may have future adverse political consequences. This concern can create

133. *See* FTA, *supra* note 5; NAFTA, *supra* note 6.
134. *See supra* part II.E.

an unwillingness on the part of elected officials to embrace trade liberalizing measures to the extent suggested by the dictates of economic efficiency. The safeguard measure can play a key role in alleviating such concerns. The measure's existence may encourage cautious countries to accept greater trade liberalizing initiatives than would otherwise be the case.[135] This explanation for the retention of safeguards was recently summarized by Sykes:

> [U]nanticipated changes in economic conditions may create circumstances in which the political rewards to an increase in protection (or the political costs of an irrevocable commitment to reduce protection) are great. Consequently, in the absence of an escape clause, trade negotiators may decline to make certain reciprocal concessions for fear of adverse political consequences in the future. But, with an escape clause in place the negotiators will agree on a greater number of reciprocal concessions, knowing that those concessions can be avoided later if political conditions so dictate.[136]

Thus, the recognition of political realities makes the retention of a safeguards regime an essential element for increased trade liberalization.

Chapter 8 of NAFTA provides for a safeguards regime.[137] A major concern is that the elimination of ADD law and the proposed limitations on CVD law will lead to an increase in the use of other trade restrictions such as safeguards. Chapter 8 of NAFTA is more responsive to this concern than is Article XIX of the GATT.[138] For example, safeguard relief, which is restricted to tariffs, is only available in the bilateral or trilateral context for three years on a non-renewable basis, although the new Uruguay Round Safeguards Agreement now incorporates similar, albeit rather more permissive, time limits.[139] In addition, Article 802 mitigates the problem of "side-swiping" which characterizes the GATT as a result of the principle of non-discrimination.[140] NAFTA exempts from multilateral safeguard action by one party imports from the other that are not a "substantial share of total imports,"[141] and which do not "contribute importantly to the serious injury"[142] of the importing party. Imports from a party do not account for a substantial share of total imports if

135. KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 99 (1970).
136. Sykes, *supra* note 78, at 279.
137. NAFTA, *supra* note 6.
138. *See* GATT, *supra* note 2.
139. *See generally* Barceló, *supra* note 68.
140. *See* NAFTA, *supra* note 6.
141. *Id.* art. 802(1)(a).
142. *Id.* art. 802(1)(b).

that party is not among the top five suppliers of the good measured in terms of import share in the most recent three-year period.[143] They shall not be considered to contribute importantly to serious injury if the growth rate of that party's imports is appreciably lower than the growth rate of total imports over the period of injury.[144] Binational panel arbitration can be invoked in the event of disputes over the proper applications of the safeguards regime.[145]

An aspect of the regional safeguards regime which might be addressed is the injury test, which currently focuses on serious injury to domestic producers. Investors have no compelling normative claim to protection from the risks which accompany increased trade liberalization. The economic, distributive justice, and communitarian ethical perspectives, however, all provide normative justifications for the protection of displaced workers through some form of policy response. If safeguards are to be employed to address this concern, it is recommended that a new definition of "serious injury" be developed, focusing not on "domestic industries" but rather on the trade impacts which accrue to those employed by such industries. If this definition of injury is adopted, invocation of the safeguards regime should extend beyond cases of injury caused by prior trade concessions to any case where trade impacts cause or are likely to cause serious injury to domestic workers. Implicit in the proposal is that the safeguard regime under NAFTA should be permanent and not limited to the transitional period for implementation of tariff concessions. In order to facilitate the adoption of alternative forms of longer-term adjustment assistance, safeguard relief should be confined to tariffs, as under NAFTA,[146] or auctioned quotas, rather than other forms of quantitative restrictions. This restriction on safeguard relief in part would enhance the transparency of the measures, and in part would provide new sources of revenue out of which to finance worker adjustment programs.

Other aspects of the current bilateral and multilateral safeguards regime in need of reform are the requirement that compensation be paid in the form of new trade concessions of equivalent value, and the permissibility of retaliation in the absence of compensation. The Uruguay Round Safeguards Agree-

143. *Id.* art. 802(2)(a).
144. *Id.* art. 802(2)(b).
145. *Id.* art. 803(2).
146. *Id.* art. 801(1).

ment retains the obligation to compensate, but if the safeguard measure lasts less than three years, the right of exporting countries to suspend concessions of equivalent value is withheld.[147] Where legitimate safeguard actions are taken in accordance with the conditions outlined above, it is not clear why compensation should be required or retaliation allowed. The role of the safeguards regime is the provision of a limited form of risk sharing in the event of unforeseeably disruptive import surges, a role which is analogous to the doctrine of frustration or impossibility in domestic contract law. Such a view of the role of safeguards is consistent with the concept of safeguards as a means of encouraging greater trade liberalization by reducing the risks associated therewith.[148]

Access to safeguard protection should also be subject to the proviso that less trade restrictive forms of adequate adjustment assistance are not available. The protection of workers, a legitimate concern from various ethical perspectives, should be attained through the least costly and least trade distorting policy. Such a proviso would put the onus on the government to tailor assistance to the needs of those who deserve it. Often the best solution is worker adjustment assistance, in that it facilitates the movement of labor to its higher valued use while at the same time satisfying distributive justice and communitarian concerns.[149]

For example, even in small communities dependent on a single firm or industry, a careful mix of policy instruments could often be crafted to be less distortive of allocative efficiency and less prejudicial to consumer welfare than trade protection. Facilitating conversion of a physical plant to other uses, assisting worker buyouts, early retirement packages for older workers, plant-closing laws, and relocation and retraining assistance for younger workers can provide a principled response to communitarian and distributive justice concerns.

In contrast, safeguard measures may harm the workers in assisted industries, for example, in cases where the protected firm seeks to achieve rationalization and improved productivity through the substitution of capital for labor. In addition, safeguards may adversely affect other domestic industries and their workers where those industries import lower priced inputs from foreign producers and would face higher prices as a result of the

147. Barceló, *supra* note 68, at 784.
148. *See* DAM, *supra* note 135; Sykes, *supra* note 60.
149. *See* TREBILCOCK, *supra* note 95.

safeguard measure. Thus, safeguards should only be resorted to in cases where adequate domestic adjustment assistance programs cannot be designed to offset, at lower cost, the adjustment costs borne by workers in affected industries.

Finally, the provision of safeguards relief should no longer be a matter of political discretion. Where the conditions outlined in this section have been met, we recommend that safeguards relief be available as a matter of right, following appropriate administrative determinations.

IV. TRILATERAL IMPLICATIONS

Our main focus has been a discussion and analysis of the trade remedy law regime in Canada and the United States, and the presentation of a framework for reform. Any discussion of the trade remedy law regime in North America would be incomplete, however, without more thoroughly addressing the implications of the inclusion of Mexico in the free trade area under NAFTA.

A. MEXICAN HISTORY, TRADITION, LAWS AND INSTITUTIONS

During most of the twentieth century, the role of government and the approach to trade in Mexico have not paralleled the experience in Canada and the United States. Rather, Mexican governments assumed a central role in economic regulation, and in trade matters tended to pursue import substitution policies to promote domestic industries by protecting them from foreign competition.[150] While these policies generated some degree of industrialization, the protected industries which developed typically lacked the incentive to become efficient.

The goal of developing a strong industrial base has now led to a rejection of the protectionist policies of the past and the pursuit of increased trade liberalization. The process of change began in 1983 with the implementation of changes to tariff, import license, and official import price policies.[151] One of the major aspects of this process was Mexico's accession to the GATT in August 1986.[152] Currently, the Mexican government recognizes

150. Rudy Sandoval, *Mexico's Path Towards the Free Trade Agreement with the U.S.*, 23 INTER-AM. L. REV. 133, 134 (1991).

151. Richard G. Lipsey, *The Case for Trilateralism*, *in* CONTINENTAL ACCORD: NORTH AMERICAN ECONOMIC INTEGRATION 165 (Steven Globerman ed., 1991).

152. GATT, *Protocol for the Accession of Mexico to the GATT*, 33rd Supp. BISD 3 (1987).

the importance of international trade to the country's future economic growth and prosperity.[153]

In the context of trade remedy laws, Mexico has enacted ADD and CVD regimes with basic similarities to the United States and Canadian regimes.[154] This follows from the fact that GATT membership requires Mexican ADD and CVD laws to be in conformity with the same GATT requirements that provide the basis for the Canadian and U.S. regimes. Certain aspects of the Mexican regime, however, differ significantly from the Canadian and American regimes. To a large extent, NAFTA addresses this problem through required amendments to Mexico's trade remedy law regime, which Mexico must implement in order to enhance procedural fairness.[155]

Even where ADD and CVD laws are similar, this does not ensure their application in a manner consistent with administrative practices in the United States and Canada. This regime has existed in Mexico for less than a decade, and Mexican lawyers and economists have little experience in the application of such laws in a market-based economy. Given that the Mexican economic perspective is shaped by a long history of government control, attitudes with regard to issues such as government subsidization are likely to differ substantially from those that prevail in Canada and particularly the United States.[156]

The Mexican approach to competition law provides more evidence of differing national traditions. Under Article 1501 of NAFTA, each country commits itself to adopt or maintain effective competition laws.[157] While both Canada and the United States have a long history of fostering the competitive process through antitrust laws, Mexico has only in the past year enacted its first comprehensive competition law. Mexican market struc-

153. Sandoval, *supra* note 150, at 135.

154. THOMAS M. BODDEZ & MICHAEL J. TREBILCOCK, UNFINISHED BUSINESS: REFORMING TRADE REMEDY LAWS IN NORTH AMERICA 265-66 (1993). Between 1980 and 1990, 18 of the 27 CVD actions initiated by the United States against Mexico resulted in positive final determinations. Over the same period, 4 of the 8 ADD actions initiated by the United States against Mexico resulted in positive final determinations. Between 1980 and 1990, Mexico initiated no CVD actions against the United States. Over the same period, 6 of the 14 ADD actions initiated by Mexico against the United States resulted in positive final determinations. The Mexican trade remedy regime has never been applied to Canadian products. Canada has initiated only one ADD action, and no CVD actions, against Mexican products. *Id.*

155. NAFTA, *supra* note 6, Annex 1904.15 (Schedule of Mexico).

156. PETER MORICI, NATIONAL PLANNING ASS'N COMM. ON CHANGING INT'L REALITIES, TRADE TALKS WITH MEXICO: A TIME FOR REALISM 74 (1991).

157. NAFTA, *supra* note 6, art. 1501(1).

ture has been premised on government control and regulation of the economy. A number of major Mexican industries are controlled by government-sanctioned monopolies and duopolies.[158] This has important implications for any reform of ADD law which is premised on the substitution of competition law principles.

B. BILATERAL REFORM PROPOSALS IN THE TRILATERAL CONTEXT

An important feature of our proposals is the replacement of ADD law with domestic competition law. In particular, the predatory pricing provisions in each country would be applied against foreign exporters. The main problem confronting the implementation of such a proposal in the trilateral context is the absence of any antitrust tradition in Mexico. Within Canada and the United States, similar legislative approaches have been adopted, making the extra-territorial application of foreign competition law to domestic industries a matter which is within the realm of political feasibility.[159] It may be, however, that neither Canada nor the United States would be willing to replace ADD law without some significant body of credible experience developing under the new Mexican competition law, especially with respect to predatory pricing and abuse of dominant position. Concerns over the implementation of this law could have been partially alleviated if NAFTA had provided for the appeal of domestic antitrust decisions affecting foreign interests to a supranational panel, as suggested above in our bilateral proposal.[160] While the replacement of ADD law with antitrust law may not be politically feasible in a trilateral context, this should not impede continued attempts to secure the bilateral adoption of this proposal by Canada and the United States, thereby facilitating the elimination of ADD law between these two countries.

Our proposals also call for removal of the determination of what constitutes a countervailable subsidy from unilateral control beyond the prohibited per se category. This determination would be made by a supra-national institution, such as a Chapter 20 panel under NAFTA,[161] prior to the unilateral application of CVD law by domestic administrative agencies. This proposal would appear to be one which is at least as politically acceptable

158. MORICI, *supra* note 156, at 75.
159. *See* Warner, *supra* note 101, at 859-88.
160. *See supra* text accompanying note 116.
161. NAFTA, *supra* note 6.

to Mexico as it is to Canada. Mexico has a vested interest in reducing the degree to which the United States can unilaterally countervail Mexican subsidization practices. Where, however, the supra-national institution is composed of an equal number of representatives from each country (as Mexico and Canada would likely demand), at least where the subsidy practice in question affects all three markets, the United States may have serious reservations. The possibility of Canadian and Mexican representatives joining together to allow certain subsidization practices that the Americans consider countervailable may be sufficient to render this proposal politically infeasible to the United States. The fact that this proposal faces greater barriers in the trilateral context than it does bilaterally should not act as a deterrent to its bilateral acceptance and implementation.

We also have proposed the adoption of a permanent safeguards regime, the invocation of which would be subject to the proviso that adequate domestic adjustment assistance programs are not available to offset labor adjustment costs in a more cost-effective manner.[162] This permanent safeguards regime would be similar in nature to the temporary regime established in Chapter 8 of NAFTA.[163] Additional features of this regime would include the absence of a right to receive compensation or engage in retaliation when faced with a safeguards action, and the right to invoke safeguards through appropriate administrative procedures, rather than being subject to political discretion.

The adoption of certain aspects of this proposal in the trilateral context are not contentious. Other aspects of the recommended regime, however, may face more significant political difficulties in the trilateral context. For example, the requirement that more cost-effective domestic adjustment assistance programs be invoked before the imposition of safeguard measures may raise greater problems trilaterally than bilaterally in that the Mexican government may be less able to fund such programs.

Overall, the addition of Mexico to a North American free trade area gives rise to some difficulties in reforming trade remedy laws which are not as severe in the bilateral Canada-United States trading relationship. Political constraints in Mexico may diminish the feasibility of some of our proposals, as will Canadian and U.S. reservations regarding Mexican laws and institutions. Some of the proposed reforms might still be realized in

162. *See supra* text accompanying notes 148-49.
163. *See supra* text accompanying notes 137-45.

trilateral negotiations. In addition, political infeasibility in a trilateral context should not be an impediment to the adoption of our policy proposals in the bilateral context.

V. CONCLUSION

We have sought to present trade remedy reform proposals which would increase trade liberalization and net social welfare in Canada and the United States (and potentially Mexico), while at the same time being sensitive to political realities. The proposals build on familiar institutional structures in a manner which does not infringe the political sovereignty of either country to a degree which would clearly be unacceptable. While it may be excessively optimistic to expect that all of our recommendations will garner the necessary political support in both Canada and the United States, we would hope that at least serious discussion of these policy options will prove possible in ongoing trade negotiations between the two countries. In 1988, through Articles 1906 and 1907 of the FTA, both countries committed themselves to developing a substitute trade remedy law regime within five to seven years. Furthermore, under the Agreement, failing to develop a substitute trade remedy law regime could lead to termination of the FTA by either party, provided six months notice is given.[164] This commitment has been partially revived in a NAFTA side agreement.[165] It is time for both countries to take this commitment seriously.

164. FTA, *supra* note 5, art. 1906.

165. *See Canadian Government to Implement NAFTA After Receiving Assurances on Concerns*, *supra* note 22.