ANTIDUMPING AND COMPETITION LAW IN CONFLICT[1]

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In its broadest conceptualization, competition policy is defined as a collection of legislation, polices and regulations reflecting the Government's attitude toward the organization of commercial trade within and across its borders.[3] The main component parts of competition policy are: competition law; antidumping law; privatization policy; economic deregulation; intellectual property rights; and national industrial policy.

Competition law reflects the Government's attitude toward goods and services ('products') supplied and consumed by market participants located within national borders. Antidumping law addresses commercial trade arising from trading across national borders. A Government's privatization policy reflects Government's policy towards transferring ownership/control of productive resources from the public sector to the private sector. Economic deregulation, also referred to as liberalization, divests from the Government to market participants, control of key economic parameters such as prices (including interest rates and foreign exchange rates) and quantities. Intellectual property rights convey to the creators of novel products and ideas, the authority to exclusively exploit the product/idea for

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[3] In its narrow definition, competition policy is used synonymously with competition law.

commercial gain. National Industrial Policy refers to the Government's strategies to offer preferential treatment to specific sectors of the economy. The objective of competition policy is to ensure that businesses do not unduly hinder the competitiveness of the environment in which products are traded within and across its borders. The justification for promoting competitiveness as the primary means of organising economic activities stems from the fact that competition, when compared to other forms of markets, provides the greatest level of public benefits.

1. Competition as an Ideal Target of Government Policy

As mentioned above, the goal of competition policy is to promote and preserve the competitive environment in which products are traded within and across national borders. To assess the legitimacy and feasibility of pursuing this goal, one need to understand what is meant by a "competitive market" and appreciate the public benefits generated by competitive markets, relative to benefits generated by alternative environments in which products are traded. The theory of perfectly competitive markets has been rigorously developed by economists since as early as the eighteenth century. The most common way of defining a competitive market is to refer to its structural characteristics. Standard economic texts define a perfectly competitive market as one in which there are (i) numerous sellers and buyers; (ii) homogenous products; (iii) fully informed consumers; and (iii) no barriers for sellers entering and exiting the market. See (Carlton and Perloff 2005, Chapter 1) for an excellent description of variously organized markets.

For the purpose of designing public policies, however, a competitive market is a desirable goal more for its performance than for its structural characteristics. Specifically, the level of economic surplus generated by competitive markets is unsurpassed by any other means of organizing commercial trade. Consumer surplus arise from the fact that the value consumers attribute to consuming a product generally exceed its price; the lower the price, the greater the consumer surplus. In competitive markets, price is set to cover only the (marginal) costs of production as competition removes the incentive for suppliers to increase price above these costs.

Competition therefore allows more individuals to consume the product and offers with the maximum level of surplus, relative to other markets. For purposes of this discussion, we describe such market results as the “competitive outcome.” Similarly, producer surplus arise from the fact that the revenue generated from sales is often at least as great as the economic costs associated with making the products available for sale.[4]

Seminal research published by economist Joseph Bertrand has demonstrated that there are markets with characteristics which differ from the competitive market structure but which nonetheless results in the competitive outcome. This is to say that there are markets which do not have the structural characteristics of the competitive market which nonetheless generate the same level of surplus.[5] Since we are interested in the performance of markets and not the characteristics of the markets themselves, we henceforth use “competitive markets” to describe markets which result in the competitive outcome. In competitive markets, products are supplied at lower prices, higher quality and in greater quantities and varieties, relative to non-competitive markets. Competition provides suppliers with the proper incentives to meet consumers’ demand for affordable, high quality products using the least possible amount of productive resources.

2. Implementing Competition Policy

Implementing competition policy is inherently problematic since the policy encompasses numerous legislation, polices and regulations which are implemented by various agencies with distinct expertise. Such a scenario has implications for the success with which any of the component parts can be enforced without compromising the enforcement of other component parts. For example, legislation governing intellectual property rights authorizes the inventor of a novel product/idea to exclude other individuals from using the product/idea for

[4] Economic costs refer to the opportunity costs of supplying the product.
[5] Specifically, Bertrand shows that in markets where there are only two suppliers of identical goods, and suppliers compete on prices, then the price will reflect only the (marginal) cost of supplying the product.

commercial gain. Such authority conflicts with the enforcement of competition law which seeks to remove barriers to entering or leaving any market. Competition law in Jamaica resolves this issue by exempting conduct pursuant to the exercise of intellectual property rights from the scope of competition law enforcement. See (Lee and Harriott 2006) for a discussion on the conflict between intellectual property rights and competition law in Jamaica. We now describe the divergent philosophy governing antidumping and competition legislation.

2.1 Competition Law

Competition law restricts the conduct of enterprises engaged in commercial trade within national borders. The types of conduct prohibited by competition law are generally classified into two broad categories: competition protection and consumer protection.

Competition protection

Competition protection provisions indirectly safeguard the welfare of consumers by protecting the competitive environment from conduct which have the demonstrable effect of substantially lessening competition of individual enterprises. Conduct of individual enterprises is reviewable under abuse of a dominant position provisions while conduct by more than one enterprise is reviewable under merger review provisions and collusion provisions. Merger review differs from the other two provisions in the sense that it allows the competition authority to block an economic transaction (namely merger) based on anticipated conduct, while the other two provisions review conduct after the fact.[6] It is instructive to note that, without more, some conducts are prohibited only if they are likely to hinder the competitive environment.[7] To establish a breach under these provisions of competition law, therefore, the competition authority must demonstrate that competition is likely to be substantially lessened. Given the direct correspondence between the competitive

[6] Merger review is said to be an *ex ante* provision whereas abuse of dominance and collusion provisions are said to be *ex post*.

[7] I make reference to rule of reason conduct. There is another class of conduct, known as per se conduct, which is prohibited without need to establish its effect on competition.

outcome and consumer welfare, effective enforcement of competition law, by extension, also safeguards consumer welfare.

Consumer protection

Consumer protection provisions directly safeguards consumer welfare by preventing consumers from deceptive practices of enterprises which may not necessarily hinder the competitive environment. The types of conduct prohibited under these provisions include misleading advertising, bait-and-switch, double-ticketing, etc.

2.2 Antidumping Law

Antidumping law is limited with respect to the scope of conduct prohibited. It prohibits only conduct defined as “dumping.” In antidumping law, dumping is said to occur when a manufacturer exports its product at a price (i.e. the ‘export price’) which is below the price at which the product is sold for in the market of origin (i.e. the ‘normal value’).[8] Dumping, without more, is not prohibited. It is prohibited only if it is deemed to cause “material injury” to market in which the product is exported (i.e. the ‘domestic market’). Further, in the application of antidumping law, injury to domestic market is synonymous with injury to domestic producers. To establish a breach under antidumping law, therefore, the authority needs to demonstrate injury only to domestic producers. Accordingly, enforcing antidumping law safeguards the welfare of domestic producers and not necessarily that of consumers.

[8] The use of the term “value” in antitrust law differs significantly from how the term is used in economics. To be clear, what is described as “normal value” by antidumping law is simply the price of the good in the country in which production occurs. In economics, the value of a product to a consumer refers to the maximum price that the consumer would be willing to pay to acquire a product whereas the price refers to the money that the consumer actually pays. Although consumers may pay the same price for a good, its value to each consumer may differ substantially. Notwithstanding, a rational consumer will purchase a product only if its price does not exceed its value to him.

3. The Divergence between Competition and Antidumping Laws

It is clear that competition and antidumping laws determine the legitimacy of a given conduct using different standards (tests). Under competition law, conduct is prohibited only if it lessens competition or otherwise leads to a loss of consumer welfare. Under antidumping law, conduct (specifically, dumping) is prohibited only if it injures domestic producers. The problem with having different standards for competition and antidumping law becomes apparent when one realizes that the conduct described as dumping is identical to the conduct reviewed by the competition authority known as "price discrimination". Specifically, price discrimination entails charging a higher price to customers who are willing and able to pay the higher price, and a lower price to customers who are either unable or unwilling. Under some conditions, without price discrimination some customers would not otherwise have access to the product. Price discrimination is practiced in many industries such as the airline industry whereby passengers travelling in the first class section of the aircraft are required to pay a significantly higher fare than passengers travelling in the economy class section; further, the difference in fares does not reflect only the difference in the cost of providing the service to these groups of passengers. The effects doctrine is a guiding principle in competition law enforcement which dictates that conduct which have similar effect on the market should be treated similarly. Based on this principle, therefore, we have the untenable position in competition policy whereby price discrimination on the part of domestic suppliers is regulated differently from price discrimination on the part of foreign suppliers.

This points to a need to harmonize competition and antidumping law, at least to the extent that it relates to scrutinizing price discrimination. In this regard, there are three alternative ways to harmonize the legislation: (i) amend antidumping law to conform to competition law; (ii) amend competition law to conform to antidumping laws; (iii) develop new standards and amend both competition and antidumping laws accordingly. A discussion on the merits of the third option is beyond the scope of this paper. We will restrict the discussion therefore, to the merits of the first two alternatives.

Recall from earlier in the discussion that antidumping law has the effect of promoting the welfare of domestic producers whereas competition law has the effect of promoting the welfare of consumers. A decision of how to harmonize the treatment of price discrimination is essentially a determination of which legislation produces the more desirable effect. One useful means of making such a determination is to identify the overarching purpose of any government policy. We can think of no better explanation of the purpose of government than that offered in the American declaration of independence:

"...We hold these truths to be self-evident, that all men are equal, that they are endowed by their Creator with certain unalienable Rights; that among these are life, liberty and the pursuit of Happiness- That to secure these rights, Governments are instituted among Men..."

This is to say that government policy should serve the interests of the governed. To the extent that promoting the welfare of the many consumers, rather than the welfare of the few domestic producers, is more consistent with serving the interests of the public, harmonization should involve amending antidumping law to conform with competition law. Such harmonization will involve a redefinition of two key concepts in antidumping law: (i) market definition and (ii) dumping.

3.1 Defining "Markets"

Antidumping legislation implicitly identifies the domestic market to comprise only of domestic producers- to the exclusion of current and future importers which are presumably seen to operate outside of the domestic market. This view is inconsistent with how markets are identified in competition law.

For the purpose of evaluating the competitive effects of any challenged conduct (including dumping), a market is defined to identify the set of products which could be affected by the conduct. Market definition is a fundamental concept in competition law because if the market is not correctly identified, one is unlikely to accurately identify the competitive effect of the challenged conduct.

A formal definition of this concept was first advanced by the competition authorities in the United States of America (U.S. Department of Justice and the Federal Trade Commission 1997, 4):

"...A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test..." (emphasis added)

This definition, and the test used to identify the market, has been used by competition authorities in most, if not all, jurisdictions in which competition legislation is enforced. An important observation arising from this definition is that both importers (existing and potential) and producers are equally legitimate participants in defining the market; and neither party is given prominence over the other. In this manner, the definition of the market is consumer-oriented in that it seeks to identify the set of products which consumers perceive to be substitutable in satisfying a specific desire or need. What matters to the consumer is that the product is capable of satisfying her need. All other things being equal, the technology used to make the product is of little significance. For example, consider someone deciding on whether to purchase mangoes grown by Farm K or by Farm L. It is of little value to the consumer that the operations on Farm K use mainly machinery; and that the operations on Farm L use mainly labourers. What matters to the consumer is the value for money (based on factors such as taste, price, etc.) offered by each farm. By similar reasoning, one should understand that the only difference between producers and importers is that they utilize different technologies. In this sense, importation should be viewed as an alternative method (i.e. technology) of making the product available to consumers rather than as a necessarily inferior method. Indeed, the benefit of importation is seen in industries such as automobiles where domestic production is infeasible in Jamaica. But even in industries where domestic production is feasible, importation could still be useful to consumers in the sense that very few individuals could deny that Jamaicans have benefitted from the importation of brands such as Clarks, Nike, Reebok, Puma, Adidas, etc.

This is not to say that importation is always best for Jamaica and therefore should never be challenged. Rather, the extent to which importers prevail in the Jamaican market should be determined only by the market forces and not by the undue influence of the Government by way of the application of misguided public policy. To convey to one group of suppliers, a greater right to participate in the market would be to distort the market incentives for suppliers to become efficient; which would ultimately deprive consumers of the potential surplus which could be realized.

If importation is more efficient than production, with respect to supplying the product to consumers, then the competitive market would favour importation; otherwise it would favour production.[9] In so doing, each competitively organised market would meet the needs of consumers using fewer productive resources and thus allow more resources to be available for use in other markets.

3.2 Defining "Dumping"

In antidumping law, "dumping" is said to occur whenever the export price of a product is less than the price of the product in the home market. Further, dumping is prohibited only if it injures the domestic market. This conduct, as described, is referred to in competition law as price discrimination and known to be beneficial to consumers under some conditions, and detrimental to consumers under other conditions (Carlton and Perloff 2005, Chapter 9). This means that it is appropriate to challenge the conduct as it has the potential to have adverse effects on the industry. Presumably, the test used to prohibit the conduct should be sufficient to identify the conditions under which the conduct would be beneficial; unfortunately, this is not the case under existing antidumping law. Specifically, the current

[9] Another alternative is that the market is served by a mix of importation and production technologies; this would occur if importation was equally efficient as production.

application of antidumping law will successfully challenge conduct which is unlikely to harm the domestic market. This over-deterrence will ultimately discourage legitimate competitive conduct, to the detriment of consumers.

To harmonise antidumping law with the principles of competition law, one would have to improve the tool used by antidumping law to filter conduct which is potentially harmful from that which is unlikely to be harmful. To show that the existing tool is inadequate, we use competition law analysis to expose the fundamental flaw in the conceptual framework on which antidumping law is predicated. As mentioned earlier, dumping occurs when the foreign producer price discriminates between customers in the home market and customers in the export market. Based on received research into price discrimination, we know that the price will be lower for the customer group whose demand is more sensitive to price increases.[10]

To determine which customers are likely to be more sensitive to price increases, we need only compare the characteristics of customers in the home market with the characteristics of customers in the export market. One important distinguishing characteristic between the two groups is the difference in transaction costs associated with the acquisition of the product.[11] Specifically, the transaction cost for customers in the export market (i.e. the 'importers') is considerably higher than the transportation cost for customers in the home market. The transaction cost for importers comprise shipping (insurance and freight) the product to, and clearing (tariff, duties and fees) the borders of, the importing country. Importers have what is said to be a derived demand for the product; that is, the product is desirable only to the extent which it could be profitably resold to consumers in the domestic market. If importers which face significant transaction costs compete with domestic producers which do not incur said cost, then in most circumstances foreign

[10] Economists would say that prices will be lower for the customer group with the more elastic demand. See (Carlton and Perloff 2005, 5) for discussion on the effects of transaction costs on market participation and performance.

[11] Transaction cost refers to all non-price costs associated with acquiring a product.

producers must offer discounts to stimulate the (derived) demand from importers.[12] Accordingly, importers are likely to be more sensitive to price increases, than domestic customers. It is reasonable, therefore, to expect that the price in the export market will be less than the price in the home market. This is the first of two important arguments used to support the convergence of competition and antidumping law: dumping is necessary, in most cases, to stimulate demand in the export market and consequently facilitates competition in the domestic market.

3.3 Demonstrating Material Injury

Section 12 (2) in the Regulations of the Customs Duties (Dumping and Subsidies) Act states that:

"The effect of the dumped or subsidized imports on prices shall be assessed by reference to-

(a) whether there has been significant price undercutting or depression in the price of like goods produced in Jamaica; or

(b) whether there has been to a significant degree, a prevention of price increases which would otherwise have occurred in the price of like goods produced in Jamaica."

It is well-established in competition economics that, all other things constant, the price charged in a monopoly market exceeds the price charged by other market structures. This is to say that the price charged when there is only one current or future supplier of the product tends to be higher than the price charged when there are at least two suppliers in the market. If there is entry in a previously monopolized market, then the following changes will result:

i. *Price will decline*. The intuition behind this result is that when additional enterprises enter, consumers' demand will be more sensitive to price increases of

[12] With the exception being cases where the domestic producer is considerably less efficient than the foreign producer in manufacturing the product.

the incumbent since they have at least one other source from which to obtain the product. When entry occurs, it is in the best interest of the incumbent to lower prices below the monopoly price level, to stem the flow of its customers to rival suppliers. The extent to which the price declines will depend primarily on the capacity of the entrants to serve the market. It has been shown that the incumbent will lower its price to the competitive level even if only one enterprise enters, so long as the entrant has the capacity to serve the entire market and enterprises compete on prices;

ii. *Incumbent's share of the market will decline*. This result is trivial as the incumbent held 100 percent of the market as a monopoly but less than this percentage when entry occurs;

iii. *Incumbent's profit will decline*. This result stems from the decline in the incumbent's price;

iv. *Total amount sold by the market will increase*. The reduction in price will stimulate additional demand from two groups of individuals. Firstly, individuals ('marginal consumers') who could not afford the product at the monopoly price would now be able to afford the product at the lower price. Secondly, individuals ('infra-marginal consumers') who could have afforded the product at the monopoly price would be able to afford even greater quantities at lower prices. This result is consistent with the law of demand which states that all other things constant, greater quantities will be demanded at lower prices;

v. *The volume supplied by the incumbent may decline*. The entry will have an ambiguous effect on the volume supplied by the incumbent. If the supply capacity of the entrants exceeds the additional demand stimulated by the lower price, then the volume supplied by the incumbent would decline. Similarly, if the supply capacity of the entrants is less than the additional demand simulated by the lower price, then the volume supplied by the incumbent would increase, barring any production capacity constraints of the incumbent; and

vi. *Total surplus will increase*. Monopolists are able to profitably sustain prices above competitive levels by restricting the volume of products supplied to the market. Although the surplus enjoyed by the incumbent will decline upon entry, the total economic surplus generated by the market will increase as there will be an improvement in the surplus accruing to the entrants and consumers which participate in the market at lower prices.

It is evident, therefore, that the tests for material injury is crafted more to protect the domestic producer (i.e. the incumbent) than it is to protect the domestic market. The very conditions that can be used as evidence of material injury under antidumping law coincide with outcomes [identified as results (i) through (vi.)] which reflect that competition is being enhanced. This is a telling provision as it suggests that antidumping law is sterile with respect to safeguarding competitive markets and hence consumer welfare.

We now state the second of two important arguments: Evidence sufficient to establish "material injury" in antidumping law, is consistent with competition being enhanced in the industry.

The two arguments lay the foundation for encouraging a revision of antidumping law. Taken together, the arguments state that dumping is not a useful tool for screening harmful conduct and the tests for establishing material injury is not an accurate means to demonstrate that consumers are likely to be harmed by dumping.

4. Realizing Convergence

To harmonise dumping with the principles under competition law, one would have to make three fundamental revisions: (i) redefine the domestic market to include all current suppliers or potential suppliers of the product- regardless of whether the product is imported or domestically produced; (ii) revise the circumstances under which the conduct is challenged; and (iii) revise the evidence required to establish a breach.

4.1 Redefining Markets

The domestic market should be redefined to conform to the concept of relevant markets in competition law. Using the concept of relevant market definition is likely to clarify the likely effect of dumping on the public's welfare.

4.2 Revising the Filtering of Potentially Harmful Conduct

The purpose of defining the conduct described as dumping is to filter conduct which authorities believe could be harmful to the domestic market. Under antidumping law, offering a product in the export market at a price which is lower than the normal value is sufficient to trigger an investigation. We argue that the filter seems arbitrary at best in that in section 3, we have shown that whenever transaction costs are higher for importers, price must be lower in the export market to stimulate competition in, and therefore improve the performance of, the domestic market.

Competition law offers a more useful benchmark for challenging a given pricing strategy. The price of any good is determined by the characteristics of the market in which the product is sold. All other things being constant, prices tend to be higher in markets in which consumers' demand is less sensitive to price increases. For example prices tend to be higher in markets where consumers have more disposable income. The fact that the export price is lower than the normal value is no more indicative of potential harmful effects in the domestic market, than if the export price was greater than the normal value. A more useful benchmark for challenging a conduct is the extent to which the domestic price is below the cost of making the product available to consumers in the domestic market. This conduct is referred to as resale below cost (RBC) in competition law. A useful discussion on the conduct is presented by the Organisation for Economic Co-operation and Development (OECD 2006).

4.3 Revising Evidence of Breach

To establish a breach, one would have to demonstrate that the RBC is likely to injure competition in the domestic market and not the domestic producers. Establishing injury to competition would require demonstrating harm to consumers and equally efficient suppliers (Salop 2000, 192).

5. A Case Study: The Jamaican Cement Industry

In the previous section, we argue that protecting competition in the domestic market is a more desirable goal than protecting domestic producers. We justify this position by arguing that when competition prevails, consumer welfare is preserved. We also argued that competition law is a more effective tool than antidumping law to safeguard consumer welfare. In this section we seek to quantify the benefits to consumers from encouraging competition within the domestic cement industry.

Background

Carib Cement Company Limited (CCCL), the incumbent supplier, has been the sole producer of cement (Ordinary Portland Grey cement) in Jamaica since 1952. Due to the small size of the domestic cement market, relative to the minimum efficient scale of production, it is unlikely that a second production plant could be profitably operated in Jamaica. This means if the domestic industry is to be competitively organised, it must be done by way of facilitating the importation of cement. It is important to know that if the barriers to importing cement are sufficiently low, consumers will benefit from the credible threat of competition; even if no entry actually occurs. This result is known from the theory of contestable markets. See (Carlton and Perloff 2005, 6) for an explanation of the concept.

Importers entered the market for the first time in the late 1990s. In October 2003, CCCL submitted a request to the Antidumping and Subsidies Commission (ADSC) for relief against imported OPC cement. CCCL claimed that imported cement was causing serious injury or threat to the domestic industry. The subsequent ADSC's investigation substantiated the claims of the CCCL. Accordingly, in 2004 the Jamaican government accepted the recommendation of the ADSC to impose a tariff of 25.83 percent on OPC imported from Argentina, China, Egypt and Russia for four years in addition to the 15 percent Common External Tariff. The recommended measures of the ADSC meant that importers faced a 40 percent tariff which effectively shielded CCCL from competition since the tariffs proved to be prohibitively high for the feasible importation of cement. By 2006, it was clear that the domestic producer of cement was unable to produce sufficient volumes of cement to meet the demand of the industry when the construction and installation sector was virtually crippled due to an acute shortage of cement locally. In March 2006, the Government waived the 40 percent tariff and importation resumed.

Since then CCCL successfully filed four antidumping cases (Titus 2010). The success with which the domestic producer has filed antidumping cases is consistent with our argument that dumping is necessary to stimulate competition in the domestic industry.

Empirical Research in the Domestic Industry

The Jamaican cement industry was the subject of two separate but complementary empirical research conducted by the Fair Trading Commission in 2009. The first study presented evidence of the effects of the importers' entry on the performance of the market (Fair Trading Commission 2009). The study reports that competition from importers discouraged CCCL from setting prices which would have been approximately 3% higher if CCCL was not restrained by the competitive environment. Based on data sourced from the CCCL, the study estimates that over a 25-month period, the competitive environment facilitated by the imported cement resulted in an additional consumer surplus of $694 million, relative to a market in which competition was hindered. These findings are consistent with the comparative statistics outlined in Section 3.3 of this report.

The purpose of the second study was to identify the minimum level of tariff which would make the importation of cement economically infeasible and therefore shield CCCL from competition (Harriott 2009). In carrying out the analysis, we estimated non-recoverable costs of making imported cement available for commercial distribution in Jamaica. A sample of Customs Entries for cement imported in 2009 was used in the estimation. The costs comprise purchasing the cement in the export market; shipping the cement to Jamaica; clearing customs; Bureau of Standards Jamaica inspection fees; wharfage; stevedoring; delivery to the domestic warehouse; and cost of funds. The study was very informative as it shows that after the cement is landed, the additional costs associated with making the cement available for distribution (assuming no tariff) represents approximately 18% of the cost incurred in landing the cement.[13] This draws attention to an important implication for encouraging competition from imported products: unless foreign producers are substantially more efficient than the domestic producer, the export price must be below the normal value.

The costs to the importers are then compared to the costs of the domestic producer, as reported by CCCL. The study concludes that without any tariff, the costs associated with making imported cement available for distribution in Jamaica is comparable to domestic production costs. Accordingly, the imposition of any tariff would place the importers at a cost-disadvantage and is therefore likely to discourage importation and unduly hinder competition. This confirms that an equally efficient supplier of cement (i.e. one that could supply the product at a comparable cost) would not be harmed by the dumping of the cement. This finding, coupled with the earlier finding that consumers benefitted from the participation of the importers, suggests that dumping is not likely to have had the effect of substantially lessening competition in the market. Based on the results of the FTC's study, it is unlikely that the challenged conduct (i.e. dumping) would have contravened competition law despite the fact that it was found to contravene antidumping law.

[13] (Harriott 2009, 3) estimates that the cost of landing 12,000 tonnes of cement was approximately USD 1,252.50 whereas the total cost in making it available for distribution was USD 1,477.00.

Conclusion

It is clear that antidumping law is at odds with competition law. The application of antidumping law appears to benefit domestic producers, to the detriment of Jamaican consumers. Commercial activity should be organized solely on efficiency considerations and not on the technology (such as whether to produce or to import) used to deliver the products. To ensure that consumers benefit from the application of antidumping law, two fundamental changes must be made. Firstly, it must be recognized that importers are as legitimate as domestic producers regarding participation in the domestic market; and it should be made clear that it is competition in the market which must be protected and not the market itself. Secondly, the conditions which trigger a breach must be revised to compare the domestic price with the cost of making the product available in the domestic market. Revising antidumping legislation to conform to competition law would not necessitate the development of new tools as scrutinizing the conduct can readily be integrated within existing competition law.

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APPENDIX

The Customs Duties (Dumping and Subsidies) Act, 1999.

Definitions: Section 2(1)

"dumped" in relation to goods, means that the export price of those goods is less than-

(a) the price at which like goods are sold in the ordinary course of trade for domestic consumption in the exporting country; or

(b) the cost of production of those goods in the exporting country including any subsidy provided in relation to such production;

"material injury" means, in respect of the dumping or subsidizing of any goods, material injury to the production in Jamaica of like goods;

The Customs Duties (Dumping and Subsidies) (Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations, 2000.

Section 12. –(1) Where a complaint of material injury is made, the Commission shall examine such facts as it considers relevant under circumstances, and shall give due consideration to-

(a) the volume of the dumped or subsidized imports as assessed in absolute terms or relative to the production or consumption of like goods in Jamaica;

(b) the consequent impact of the dumped or subsidized imports on the industry which produces like goods as assessed by reference to all relevant economic factors and indices having a bearing on the state of the domestic industry, including actual or potential-

i. decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity' or

ii. negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital, th8e magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods.

(2) The effect of the dumped or subsidized imports on prices shall be assessed by reference to-

(c) whether there has been significant price undercutting or depression in the price of like goods produced in Jamaica; or

(d) whether there has been to a significant degree, a prevention of price increases which would otherwise have occurred in the price of like goods produced in Jamaica.