United States - Mexico Law Journal

Volume 4 *United States and Mexican Competition and Trade Law*

Article 6

3-1-1996

# Some "Heretical" Observations on the Interaction of U.S. Trade and Competition Laws: A Defense of U.S. Antidumping and Countervailing Duties

Terence P. Stewart

Timothy C. Brightbill

# SOME "HERETICAL" OBSERVATIONS ON THE INTERACTION OF U.S. TRADE AND COMPETITION LAWS: A DEFENSE OF U.S. ANTIDUMPING AND COUNTERVAILING DUTIES

TERENCE P. STEWART*
TIMOTHY C. BRIGHTBILL**

## I. INTRODUCTION

Competition policy and trade policy are often viewed as having different objectives and different justifications. In the simplest terms, competition laws protect "*competition*, not *competitors*"[1] while trade policy is often viewed as concerned with protecting domestic competitors in certain circumstances.[2]

As the world has become more integrated, as free trade areas have increased in number and general tariff levels have declined, there have been calls from certain quarters to explore the relationship between trade and competition laws. Many of those recommending such examination have proposed the elimination of antidumping law by competition policy. Since the Canada-U.S. Free Trade Agreement (FTA),[3] Canada has actively advocated the elimination of trade laws between the countries. The issue has resurfaced as part of the North American Free Trade Agreement.[4] Article 1504 of NAFTA established a Working Group on Trade and Competition, which will report within five years after the North American Free Trade Agreement's entry into force on issues concerning "the relationship between competition laws and policies and trade in the free trade area." Even within the United States, there are groups and agencies[5]

---

* Managing Partner, Stewart & Stewart, Washington, D.C.
** Associate, Stewart & Stewart, Washington, D.C.

1. Brown Shoe Co. v. U.S., 370 U.S. 294, 320 (1962) (emphasis in original).

2. House Comm. on Ways and Means, Trade Agreements Act of 1979, H.R. Rep. No. 317, 96th Cong., 1st Sess. (July 3, 1979) at 44-45 (summarizing the goals of U.S. antidumping duty law); Senate Comm. on Finance, Trade Reform Act of 1974, S. Rep. No. 1298, 93rd Cong., 2d Sess. (Nov. 26, 1974) at 3 & 18-19 (summarizing the purposes of the act).

For more on the evolution of antidumping and countervailing duty law in the United States and other countries, see JACOB VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1966); THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1986-1992 (Terence P. Stewart ed. 1993).

3. Canada-United States Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 (1988) [hereinafter FTA].

4. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. (effective Jan. 1, 1994), 32 I.L.M. 605 (1993) [hereinafter NAFTA].

5. Pitofsky, *Antitrust Policy in a Clinton Administration,* 62 ANTITRUST L.J. 223 (1993) ("The most challenging task for the next few years is somehow to put trade policy in some coherent relationship to antitrust. . . ."); Economic Report of the President (Feb. 1994) 239-40 (international trade and competition policy); Economic Report of the President (Feb. 1995) 245-48 (competition policy and trade).

that favor or believe in the superiority of competition policy for dealing with the problems caused by dumping. Indeed, a recent report by an ABA Antitrust Section task force has recommended that the North American Free Trade Agreement parties:

> consider the replacement of antidumping with antitrust law as the option most consistent with the concept of free trade. Alternatively, the Working Group might consider applying antitrust/competition principles in antidumping analysis as an intermediate step toward coordinating the competing goals of antitrust and antidumping laws.[6]

It is the view of these authors that the debate to date has failed to examine all of the relevant issues and that, at least with regard to the issues of price discrimination and sales below cost, trade law principles could be usefully used in competition policy (as a supplement, not a replacement) — *not* the other way around. Indeed, the existing limitations of competition policy in these areas results in significant economic inefficiencies within nation-states and promotes economic concentrations at the expense of entrepreneurs and successful single-product companies. Those who worship at the holy grail of "consumer interests" ignore the business realities that there are no free lunches. Stated differently, any temporary benefit to one consumer is almost certainly being paid for by another consumer. The rest of this paper presents the basis for these "heretical" views.

## II. Rational Allocation of Resources

Behind both competition policy and trade policy is the pursuit of rational allocation of resources in the economy, whether national or international.[7]

The United States has established antidumping and countervailing duty laws to see that domestic industries are not harmed — i.e., that resource allocation does not move U.S. businesses out of the U.S. market, with a resulting loss in U.S. jobs — due to "false" disadvantages (price discrimination or actionable subsidies). While antidumping law is first

---

6. REPORT OF THE TASK FORCE OF THE ABA SECTION OF ANTITRUST LAW ON THE COMPETITION DIMENSION OF NAFTA (July 20, 1994) [hereinafter THE COMPETITION DIMENSION OF NAFTA], at 15 & 146-48.

7. *See, e.g.*, P. Samuelson, *Economics* 626-637 (11th ed. 1980) (international trade and the theory of competitive advantage) and 651-661 (protective tariffs, quotas, and free trade); CHARLES P. KINDLEBERGER, INTERNATIONAL ECONOMICS 17-21 (5th ed. 1973); Richard Blackhurst, Nicolas Marian, and Jan Tumlir, TRADE LIBERALIZATION, PROTECTIONISM, AND INTERDEPENDENCE, GATT Study No. 5 (Geneva: General Agreement on Tariffs and Trade, 1977) 21-42 (discussing the benefits of trade liberalization); Kaysen & Turner, ANTITRUST POLICY 11-20 (1959) (antitrust policy seeks "the attainment of desirable economic performance by individual firms and ultimately by the economy as a whole"); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 4 (1976); H. Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985); PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 401 (1995) (stressing the economic efficiency rationale for antitrust).

and foremost about injurious price discrimination,[8] the law also covers injurious pricing which is not sustainable (i.e., below cost). As noted in 1916 by then U.S. Assistant Attorney General Samuel Graham,

> generally accepted principles of political economy hold that it is not sound policy for any Government to permit the sale in its country by foreign citizens of materials at a price below the cost of production at the place produced, for the reasons that such a system, in its final analysis and on a sufficient scale, spells bankruptcy.[9]

Indeed, one of the underlying tenets of liberalized trade is that the restructuring of resource allocation will reflect underlying economic efficiency and not be generated by artificial advantages. Similarly, section 301 is the major trade law available for addressing artificial market barriers abroad that prevent U.S. companies from reaping the benefits of comparative advantage.[10] Section 337 covers various unfair trade practices in import trade, including many matters covered by competition laws.[11] Only section 201 of the Trade Act of 1974 (the so-called escape clause) differs in orientation.[12] The escape clause has been part of trade policy since the mid-20th century as a means of permitting rapid or unexpected adjustments to be accepted by industry and workers as trade liberalization occurs.

With regard to price discrimination and sales below cost — the area of significant interest in the literature and in the ABA Antitrust Task Force paper — antidumping law promotes rational allocation of resources much more clearly than competition law. To understand why, one needs to consider both business economics and the differences between both the laws and their remedies.

### *(a) Business economics*

Where a market is functioning properly, companies will enter, remain, expand or withdraw based on the perceived ability to generate an ac-

---

8. As noted in THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1986-1992, *supra* note 2, at 1389, "Jacob Viner defined dumping in his classic study *Dumping: A Problem in International Trade* as 'price-discrimination between national markets.'" (quoting VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE, *supra* note 2, at 3).

> Price discrimination between markets is typically possible when the traded goods cannot be economically reexported to the country of origin (which is to say that price arbitrage is unavailable). Such may be the case, for example, when the home market is covered by trade restrictions, when the exporter is in a position of elevated market power in his home market (the extreme example being a monopoly position), where there is imperfect information, or when the product has limited shelf life.

THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1986-1992, *supra* note 2, at 1389.

9. The GATT Uruguay Round: A Negotiating History 1986- 1992, *supra* note 2, at 1390 (quoting N.Y. Times, July 4, 1916 (letter to the editor written by Samuel J. Graham)).

10. Trade act of 1974, 19 U.S.C. § 2411 (1994).

11. Tarriff Act of 1930, 19 U.S.C. § 1337 (1994).

12. Trade Act of 1974, 19 U.S.C. § 2251 (1994).

ceptable return on investment.[13] While the return "hurdle rate" facing a company will vary based on factors such as national interest rates, risk profile of the company and the particular project and debt/equity ratios, no company can expand or remain a significant factor where, overall, it is not generating an acceptable return on capital employed. This means that companies can be driven out of markets even where competitive prices are not below fully developed costs, but merely below fully developed costs and a reasonable profit. Such events happen every day. Where competitors' prices are flowing not from superior cost structure or product characteristics but rather from external subsidies or intracompany cross-subsidization, the decision of the subsidized company takes place not due to economic efficiency but because of false market signals. Such decisions result in economic inefficiencies, both in domestic and international markets.

The same reality is obviously true where sales prices are below fully developed costs. Indeed, where a competitor is selling below cost, one of three situations *must* be occurring: (1) the competitor is in a non-sustainable position (i.e., the pricing is either temporary or will result in the company going out of business); (2) the competitor is being subsidized by a government or (less likely) third party; or (3) the competitor is cross-subsidizing its losses with what competition lawyers would call "supracompetitive" profits. To the company or companies competing with such pricing practices, each of the three scenarios is equally harmful, although the first scenario is not sustainable in the long-term and so *may* be survivable by other competitors.

Any of these scenarios can and do result in companies that are economically efficient being rendered inefficient or being driven from the market for reasons other than economic efficiency. Moreover, the "benefit" to consumers from prices below cost are never free but come at an expense of at least comparable magnitude to other consumers. The consumers harmed under scenario one are shareholders and/or creditors. The consumers harmed under scenario two are taxpayers and, more indirectly, businesses and consumers who may face higher interest rates. The consumers harmed under scenario three may be other purchasers of the same product or different products in the same or different markets.

Finally, false signals from price discrimination or selling below cost can create cascading misallocation of resources as users of particular products may enter or expand into products or markets where the underlying competitiveness should signal non-entry or non-expansion.[14] Sim-

---

13. Samuel L. Hayes, *Capital commitments and the high cost of money, Harvard Bus. Rev.*, May-June 1977, reprinted in *Finance: Part V* (Harvard Business Review reprint series) at 41, 43; EDWARD ALTMAN, FINANCIAL HANDBOOK 31-5 (5th ed. 1981). For a table showing capital cost as measured by the cost of medium to long-term debt for the United States and its trading partners, see THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1986-1992, *supra* note 2, at 1564. *See generally id.* at 1553-65 (calculation of administrative, selling, and other costs and profits).

14. Terence P. Stewart, *Administration of the Antidumping Law: A Different Perspective*, in

ilarly, the false signals may lead companies to fail to improve manufacturing productivity on the basis of the artificial price for key inputs. There can be, and often are, multiple levels of economic inefficiency caused by the false signals. If and when competitive prices return, the inefficient allocation of resources may self-correct, but only after the waste of capital and human resources in both the competing industries and downstream industries.

As a general matter, competition law does not address selling below cost, except in extreme cases and then only where "recoupment" can be demonstrated.[15] Where goods are imported, however, the antidumping law provides a possible remedy.

Consider the saga of the U.S. bearing industry. During the 1980s, significant price discrimination from a range of foreign bearing manufacturers in the United States had the effect of sending the false market signal that U.S. producers were not competitive. United States bearing facilities closed by the dozens, and the asset base was reduced by roughly $1 billion. There were significant job losses and secondary effects in the cities and towns where these facilities closed. Antidumping duty cases were brought in the second half of the 1980s.[16] The Commerce Department established dumping margins, and the International Trade Commission found that the domestic industry was injured. A Commerce Department study released in 1993 indicated that with the introduction of the antidumping duty orders, investment had been made or was planned in the industry of about $1.08 billion.[17] The country lost the efficiency of the previous investment, communities suffered substantial losses because of reduced profitability and employment, shareholders lost large amounts of equity, and consumers in foreign countries paid higher prices to support the price discrimination. As the price discrimination was partially neutralized through the issuance of antidumping duty orders, the investment dollars returned, reflecting the underlying competitiveness of the U.S. industry. Indeed, restoration of investment and improved competitiveness of domestic producers resulted in improved domestic pricing on some products, thus actually reducing effective prices on some items from the domestic suppliers.

None of the above results would have been achievable under U.S. antitrust laws. Moreover, the bearings industry is hardly an isolated case:

---

DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS (R. Boltuck & R. Litan, eds., 1991), 290-91, 298-99. *See also* Alfred E. Eckes, *The Interface of Antitrust and Trade Laws—Conflict or Harmony? An ITC Commissioner's Perspective,* 56 ANTITRUST L.J. 417, 423-24 (1987); John D. Ong, *The Interface of Trade/Competition Law and Policy: A Businessman's Perspective,* 56 ANTITRUST L.J. 425, 429-30 (1987).

15. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, 195-97 (1993).

16. Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed. Reg. 18,992 (1989); Final Determination of Sales at Less Than Fair Value: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, 52 Fed. Reg. 30,700 (1987).

17. U.S. DEP'T OF COMMERCE, BUREAU OF EXPORT ADMINISTRATION, NATIONAL SECURITY ASSESSMENT OF THE ANTIFRICTION BEARINGS INDUSTRY (February 1993).

similar incidents have taken place in a variety of domestic industries, including high technology (e.g., semiconductors), telecommunications equipment, metals, chemicals, consumer electronics, and agriculture.[18]

*(b) What competition policy does not capture*

The ABA Antitrust Task Force Report states that "antitrust/competition law, in particular below cost (predatory) pricing law, focuses on consumer welfare effects of anticompetitive conduct emanating from any source, private, domestic or foreign in origin."[19] However, antitrust law imposes civil penalties (treble damages) and/or criminal liability. It does not follow from the structure of the remedies available, from the standard applied (which may be rational in light of the liability for past actions, including possible criminal liability) or from the construction of the law by the federal courts that antitrust law maximizes either economic efficiency or consumer welfare.

For example, any time a more efficient producer exits the business because of false market signals, economic efficiency is harmed. It is hard to believe that there can be any argument on this prong of the analysis. Similarly, consumer welfare is "enhanced" by price discrimination *only* if the term "consumer welfare" is narrowly defined. Where cross-subsidization is occurring within a company (same or different product, same or different market), some consumer (potentially the *identical* consumer) is paying the difference. While the profit pockets used to pay for the below-cost pricing *could* be reached under certain circumstances by competition laws, case law often shows that such profit pockets are not pursued by private parties or the government.

In *Brooke Group Ltd. v. Brown and Williamson Tobacco Corp.*,[20] a cigarette manufacturer (Liggett) charged that a competitor (B&W) attempted to limit price competition among generic (or "economy") cigarettes. B&W did so, according to Liggett, by introducing a line of generic cigarettes and selling them below average variable cost for an eighteen month period.[21]

Despite evidence of B&W's below-cost pricing[22] and what the court termed supracompetitive profits on branded cigarettes throughout the period,[23] the Supreme Court found no violation of the antitrust laws.

---

18. *See, e.g.*, Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, USITC Pub. 2034, Inv. No. 337-TA-242 (final) (Nov. 1987); Certain High-Capacity Pagers from Japan, 48 Fed. Reg. 37,058 (1983); Certain Small Business Telephone Systems and Subassemblies Thereof from Japan, 54 Fed. Reg. 50,789 (1989); Steel Wire Rope From Japan; Final Determination of Sales at Less Than Fair Value, 38 Fed. Reg. 14,972 (1973); Certain Fresh Cut Flowers From Colombia, Final Determination of Sales at Less Than Fair Value, 52 Fed. Reg. 6842 (1987).

19. THE COMPETITION DIMENSION OF NAFTA, *supra* note 6, at 138.

20. 125 L. Ed. 2d 168 (1993).

21. *Id.* at 182.

22. *Id.* at 191. The Court said there was "sufficient evidence in the record from which a reasonable jury could conclude that for a period of approximately 18 months, Brown & Williamson's prices on its generic cigarettes were below its costs . . . ."

23. *Id.* at 183.

The court did not discuss the economic distortion potentially caused by B&W's ability to cross-subsidize losses on the sales of its generic cigarettes with profits from its branded cigarette lines. Instead, the court held that predatory prices are only unlawful when the competitor has a reasonable prospect of recouping its earlier losses in the relevant market. Limiting its recoupment analysis to the generic cigarette market only, the court found inadequate evidence of supracompetitive pricing or tacit price coordination.[24]

The case demonstrates by its facts that the supracompetitive profits of branded cigarettes were well able to cross-subsidize the losses incurred on discount cigarettes. Where is the net consumer benefit in such a situation? It does not exist.

By contrast, antidumping law in the United States provides an indirect tool to get at some of the profit pocket in the home market which permits low-priced exports. Foreign producers can reduce (and in some cases eliminate) any dumping exposure for their customers by lowering home market prices (a fairly common experience in antidumping cases) without changing export prices to the United States.

Moreover, antitrust law in the predatory pricing area encourages economic concentration by permitting the elimination of competitive single product producers by less competitive but horizontally broader companies.[25] By contrast, the antidumping law provides some hope for single product companies that they will survive if they are in fact competitive in their product.

*(c) What competition law can learn from trade law*

Unlike antitrust law, which provides for treble damages or criminal liability for past conduct, the antidumping law serves to correct false market signals going forward only. Antitrust law looks for wrongful conduct by the actor, but establishes high thresholds for such conduct. If conduct is rational to a business person (e.g., unloading excess capacity below full cost but above marginal cost; cross-subsidizing from profit pockets to secure high profit margins on other products in the future), it often will be not actionable under the antitrust laws. What is "unfair" about dumping is *not* that all companies would not do it if they could and it were profitable, but that international trade is distorted by reason of the false pricing signals in the marketplace. United States antidumping law does not in fact care whether at the end of the day the U.S. industry wins or loses when price discrimination does not exist. The law is concerned that industries not be harmed — that resources not be misallocated — by the false market signal of price discrimination.

---

24. *Id.* at 195-97. Three justices dissented, arguing that the evidence was sufficient to support the jury's finding that B&W's pricing strategy "had a reasonable possibility of injuring competition." *Id.* at 204.

25. THE COMPETITION DIMENSION OF NAFTA, *supra* note 6, at 149-150 (noting that the circuits remain divided over what constitutes predatory pricing: below variable cost or below fully allocated costs).

The prospective nature of the remedy coincides with the statute's essential protection against market distortions and promotion of the rational allocation of resources. If conduct is harmful, companies are required to stop sending the false market signals or, if they continue, to have their importing customers pay the amount of the discrimination found. As noted earlier, such a system does not mandate that export prices to the United States increase *at all.* Indeed, the authors are aware of situations where cases did not result in any upward price movement as foreign producers either reduced home market prices (i.e., eliminated some or all of the price discrimination) or exported to their own subsidiaries, which did not change their resale price in the United States. It is up to the foreign producers whether home market prices will be reduced, export prices increased, or some combination of the two.

Competition law would be *improved* by adding a remedy, prospective in nature, that would permit the same adjustment of the marketplace to maximize economic efficiency and rational allocation of resources and that would indirectly pursue some of the profit pockets that generally support price discrimination. Indeed, the failure of competition law to provide a timely, cost-effective remedy against price discrimination and sales below cost has placed great pressure on trade laws to expand coverage to activity within the domestic market where imported components are involved.

### *(d) Differences trade law does not need or that are contrary to World Trade Organization (WTO) rights and obligations*

Some papers on the subject of trade and competition policy have argued that existing competition law standards, procedures and remedies are superior to those contained in the antidumping law.[26] Such allegations are not borne out in the trade context.

Where penalties are being imposed or possible criminal liability is involved, the availability of full due process rights is undoubtedly warranted and important, but it is also time consuming and terribly expensive. It is not uncommon for large antitrust cases to take a decade or more to litigate.[27]

---

26. *See, e.g.*, Diane P. Wood, *'Unfair' Trade Injury: A Competition-Based Approach,* 41 STANFORD L. REV. 1153 (1989); Harvey M. Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective,* 56 ANTITRUST L.J. 409 (1987); Harvey M. Applebaum, *Relationship of the Trade Laws and the Antitrust Laws, in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT: UNDERSTANDING THE FUNDAMENTAL CHANGES (Practicing Law Institute, 1995). For a list of other articles exploring the trade/antitrust "conflict," see Wood, *supra,* at 1154 n.5.

27. *See, e.g.*, Zenith Radio Corp. v. Matsushita Electric Industry Co., 513 F.Supp. 1100 (E.D.Pa. 1981) (filed in 1970, defendants' motion for summary judgment granted in 1981). Just as common are lengthy antitrust suits that are dropped before reaching a conclusion. Examples include the federal government's monopolization case against IBM (filed in 1969, dismissed by government stipulation in 1982) and the FTC's monopolization case against cereal manufacturers (filed in 1972, dismissed with prejudice in 1982). For further discussion, see *National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General* (1979); McAllister, *The Big Case: Procedural Problems in Antitrust Litigation,* 64 HARV. L. REV. 27 (1950).

Under Article VI of the GATT, offsetting duties (i.e., elimination of the price discrimination) on entries after a preliminary determination of both dumping and injury is the only permissible remedy. Treble damages and criminal liability could not be imposed. Moreover, under the Uruguay Round Agreements, antidumping investigations must be completed within twelve to eighteen months. Thus, the structure of the WTO/GATT rights and obligations would not permit the types of remedies or due process rights common in antitrust cases.

Similarly, the Antidumping Agreement of the World Trade Organization[28] defines the key antidumping terms involved, including material injury, like product, domestic industry and causation. Those who suggest modifying antidumping law in a regional agreement setting, ignore the WTO rights and obligations of countries within and outside of the region. Moreover, some of the differences that exist in competition law flow at least in part from the penalty nature of the remedies, rendering the differences unworthy of consideration in an antidumping context.

*(e) Nothing about a regional free trade agreement supports elimination of trade law remedies*

The ABA Antitrust Task Force argues that a regional free trade agreement carries with it assumptions that "national treatment" rights are expanded. This novel theory, at least as far as Article VI is concerned, is neither supported by WTO principles,[29] by the nature of the NAFTA nor by the bulk of precedent.

i) GATT 1994

Nothing in Articles I (most-favored nation), III (national treatment), VI (antidumping and countervailing duties) or XXIV (regional arrangements) of the GATT 1994 supports the notion that the creation of a free trade area requires a modification in rights or obligations under Article VI.[30] The requirements of Article III are not affected by whether a country is part of a regional grouping under Article XXIV. The practice of most countries, including, *inter alia,* the United States, Canada, Mexico, Brazil, and Argentina confirms that there is no perceived requirement that countries that are members of an free trade area remove application of Article XXIV to modify Article VI. Similarly, a review of recent GATT Working Party decisions on free trade areas does not reveal any concern about the continued use of Article VI against member countries.[31]

---

28. Agreement on Implementation of Article VI of GATT 1994, MTN/FA II-A1A-8.

29. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN/FA, Dec. 15, 1993, arts. III, VI and XXIV.

30. *See* Articles III, VI, and XXIV of GATT 1994; GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE (6th ed., 1994) [hereinafter GATT ANALYTICAL INDEX.]

31. *See, e.g.*, Working Party on the Free-Trade Agreement Between Canada and the United States, Report of the Working Party adopted on Nov. 12, 1991, L/6927, *reprinted in* B.I.S.D. 38S/47 [hereinafter GATT Working Party Report].

Indeed, over the years Member countries have expressed greater concerns that the *failure* to apply a trade remedy uniformly to countries within and outside of a free trade area or customs union constituted a violation of Article I of GATT (most favored nation obligations).[32]

For example, both the FTA[33] and the NAFTA[34] contain special provisions regarding GATT Article XIX safeguard actions, requiring that a party taking action under Article XIX exclude the other party (or parties), unless imports from that party (or parties) "are substantial and are contributing importantly" to the injury.

In a "questions and replies" discussion of the FTA, the two parties suggested that other GATT members had, in past practice, exempted free trade area or customs union parties from safeguard actions.[35] Several members of the Working Party on the Canada-U.S. FTA took issue with this interpretation in their report, and claimed that "selective non-application of safeguards measures to the other party was not consistent with the provisions of Article XIX."[36] In particular, one Working Party member felt that failure to apply a safeguards measure diluted the GATT principles of non-discrimination and MFN treatment.[37] Since there have been no safeguards measures taken by either the United States or Canada since the FTA, there has not been a concrete dispute presented.

Similarly, while no country is required to have a law implementing Article VI (indeed, Mexico did not have such a law until the 1980s), nothing in GATT practice or the logic of Article I would appear to authorize the use of a different antidumping or countervailing duty standard against certain countries. While countries wishing to discriminate between free trade area members and non-members may turn to the language of Article XXIV:8 for support, the argument of other parties of discrimination contrary to Article I would appear equally relevant. Thus, a WTO challenge would be likely if NAFTA countries discriminated against non-NAFTA countries in the applicability of antidumping or countervailing duty laws or in the standard applied.

---

32. *See* GATT ANALYTICAL INDEX, *supra* note 30, at 779-781 and various GATT documents referenced therein. Basically, the controversy revolves around whether the exceptions in Article XXIV:8 are exclusive, such that articles not mentioned (neither Article VI nor XVI are mentioned) can be construed to apply to non-Free Trade Area or non-customs union countries only. While the European Union and the NAFTA countries have taken the position that they may apply safeguard measures under Article XIX without affecting customs union or Free Trade Area members, Japan and many other countries have taken the opposite position. To date, while the issue has been raised in many documents, there has been no panel decision on the subject. The issue remains a live controversy, as can be seen from note 1 to the Agreement on Safeguards, which ends with the following sentence: "Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."

33. FTA, *supra* note 3, art. 1102.

34. NAFTA, *supra* note 4, art. 802.

35. GATT Doc. L/6739, at 36. However, as noted in the *GATT Analytical Index*, *supra* note 30, there have also been instances where countries which were members of a Free Trade Area applied safeguard measures against all other countries, including those within a Free Trade Area. *Id.* at 781 and n. 240 (citing L/7194, non-discriminatory surcharge by Finland on pantyhose (tights)).

36. GATT Working Party Report, *supra* note 31, at 74.

37. *Id.* at 74-75, para. 90.

Challenges could arise from either (1) the policy of not applying antidumping law at all to NAFTA countries or (2) situations where injury and causation standards applied against NAFTA countries make relief more difficult where dumping is by NAFTA countries. Such challenges would be based on violations of MFN treatment by countries *not* receiving the treatment. Similarly, if antidumping law were modified to adopt antitrust principles that were somehow broader than Article VI rights (e.g., standing,[38] like product,[39] or geographic market[40]), countries ad-

---

38. In an antidumping action, an "interested party" may initiate an antidumping petition or seek judicial review by the Court of International Trade. 19 U.S.C. § 1673a(b) (initiation of investigation by petition); 19 U.S.C. § 6a(a)(1) & (2) (review of determinations). Interested parties may include manufacturers, exporters, importers, producers, and unions or associations whose members fall into one of these categories. 19 U.S.C. § 1677(9) (defining "interested party").

In an antitrust action, consumers and non-commercial plaintiffs may also sue if they are direct victims of the defendant's antitrust violation. *See, e.g.,* BLUE SHIELD OF VIRGINIA v. MCCREADY, 457 U.S. 465, 474-75 (1982) (health plan subscriber who was denied reimbursement for psychologist's fees held to have standing to sue for conspiracy to exclude psychologists from psychotherapy market); REITER v. SONOTONE, 442 U.S. 330 (1979) (consumers paying higher prices for goods held to have sustained injury to property and thus have standing to sue). Suppliers and other remote parties all potentially have standing to bring suit. *See* Clayton Act, 38 Stat. 731, § 4 ("Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . ."); AREEDA ET AL., *supra* note 7, ¶ 360 (standing of private plaintiffs). The Supreme Court has repeatedly given the phrase "any person" its "naturally broad and inclusive meaning." MCCREADY, 457 U.S. at 473, *quoting* PFIZER INC. v. INDIA, 434 U.S. 312 (1978). Adoption of the antitrust standing test among the NAFTA nations could significantly expand the pool of those able to bring antidumping lawsuits.

39. In an antidumping case, domestic and foreign like products are defined by statute. "Domestic like product" means a product which is like, or most similar in characteristics and uses with, the article under investigation. 19 U.S.C. § 1677 (10). "Foreign like product" is defined as merchandise in the first of several possible categories: identical merchandise produced in the same country by the same person, like merchandise of approximately equal value, and merchandise of the same general class or kind. 19 U.S.C. § 1677 (16). These provisions are in accordance with the GATT Agreement on Implementation of Article VI, which interprets like product to mean

> a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration.

Agreement on Implementation of Article VI, *supra* note 27, art. 2.6. *See also* GATT ANALYTICAL INDEX, *supra* note 30, at 209.

Under antitrust law, products are defined in terms of a "product market," which includes identical products, products with negligible physical or brand differences, and close substitutes. AREEDA ET AL., *supra* note 7, ¶ 562a. "A product or group of products constitutes a market when its producers, united in a hypothetical cartel, could maximize profits by charging significantly supra-competitive prices." *Id.* If cross-elasticity of demand is such that a significant increase in the price of product A will cause producers of product B to enter the product A market, then products A and B are part of the same product market. The adoption of this antitrust concept could increase the scope of antidumping cases.

In an antidumping case, domestic and foreign like products are defined by statute. "Domestic like product" means a product which is like, or most similar in characteristics and uses with, the article under investigation. 19 U.S.C. § 1677 (10). "Foreign like product" is defined as merchandise in the first of several possible categories: identical merchandise produced in the same country by the same person, like merchandise of approximately equal value, and merchandise of the same general class or kind. 19 U.S.C. § 1677 (16). These provisions are in accordance with the GATT Agreement on Implementation of Article VI, which interprets like product to mean

> a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product

versely affected could bring challenges against U.S. law as violative of U.S. obligations under Article VI.

(ii) North American Free Trade Agreement

As discussed above, Article 1504 of the NAFTA established a working group to report on the relationship between competition laws and trade among NAFTA countries. That working group report has not yet been developed and released. While some participants may enter the working group discussions with certain objectives, the mere existence of Article 1504 does not create a mandate to eliminate certain portions of national trade law. Indeed, as demonstrated above, a proper analysis of the functioning of trade laws should reveal that they are highly supportive of rational allocation of resources within the countries that should be maintained regardless of whether a regional free trade area exists.

The North American Free Trade Agreement's stated objectives are to "eliminate barriers to trade in, and facilitate the cross border movement of, goods and services" and to "promote conditions of fair competition in the free trade area."[41] To this end, Chapter 19 specifically reserves the right of each party "to apply its antidumping and countervailing duty law to goods imported from the territory of any other Party."[42] Each country retains the right not only to apply its antidumping and countervailing duty laws, but also to modify them in a manner consistent with the GATT. The United States and Canada have recently modified their laws to reflect the obligations undertaken as a result of the Uruguay Round Agreements. In Mexico, international agreements have the force of law when adopted.

---

under consideration.

Agreement on Implementation of Article VI, *supra* note 28, art. 2.6. *See also GATT Analytical Index*, *supra* note 30, at 209.

Under antitrust law, products are defined in terms of a "product market," which includes identical products, products with negligible physical or brand differences, and close substitutes. *Areeda et al.*, *supra* note 7, ¶ 562a. "A product or group of products constitutes a market when its producers, united in a hypothetical cartel, could maximize profits by charging significantly supracompetitive prices." *Id.*

If cross-elasticity of demand is such that a significant increase in the price of product A will cause producers of product B to enter the product A market, then products A and B are part of the same product market. The adoption of this antitrust concept could increase the scope of antidumping cases.

40. Under antidumping law, geographic markets are defined in terms of countries (or, in limited cases, regions of a country). The U.S. antidumping code was amended to permit regional industry investigations, in accordance with the Uruguay Round. 19 U.S.C. § 1677 (4)(c). In a regional industry investigation, Commerce is directed to assess antidumping duties only against companies which exported to that particular region. 19 U.S.C. § 1673e(d).

Under antitrust law, geographic markets are determined by price relationships and trading patterns among regions. Correlated prices and price movements indicate a single geographic market, while different prices and uncorrelated price movements indicate separate geographic markets. AREEDA ET AL ., *supra* note 7, ¶ 550 -¶ 556 (geographic market). Imports from other countries are factored into the analysis, although in the past the courts have been more likely to include actual imports than potential imports in a total market estimate. *Id.* ¶ 555 (foreign competition).

41. NAFTA, *supra* note 4, art. 102 (1)(a) & (b).

42. *Id.* art. 1902 (1).

The ABA Antitrust Task Force Report suggests that the North American Free Trade Agreement's creation somehow undercuts U.S. antidumping law. The report lists three "areas in which the objectives of antidumping law are affected by the creation of a free trade area."[43] However, a review of the three assertions show that they do not support the elimination of trade law remedies:

1) "[T]o the extent a free trade area is created, artificial barriers to trade are reduced or eliminated." This is certainly the goal of a free trade area, although, as U.S. trade relations with Japan and Europe have demonstrated over the years, significant barriers may remain even when various formal barriers are eliminated.

2) "[T]he lowering of artificial trade barriers . . . may make dumping less likely." To the extent artificial barriers are reduced, there will likely be fewer trade cases. Moreover, margins of dumping will likely decrease over time as barriers are reduced. Accepting that this claim is true (in general, Canada and Mexico face less U.S. trade litigation than many other countries) it does not support elimination of trade laws. Where relevant, the laws currently serve and will continue to serve a critical role.

3) "[T]he concept of a free trade area implies that foreign and domestic producers should be given the same legal treatment." In fact, Article 301 of the NAFTA specifically frames the treatment of this issue in terms of *national treatment,* as defined in the GATT. As discussed earlier, "national treatment" under the GATT (dealing with internal taxes and charges) does not affect domestic antidumping duty laws. Except when specified, the NAFTA does not (nor did it intend to) expand or enhance the concept of national treatment.

(iii) Precedent

The ABA Antitrust Task Force cites two examples of regional agreements where the countries have decided not to apply antidumping law among the members, relying instead on antitrust and competition law principles. However, these two examples — the European Union and the Australia-New Zealand free trade area (ANZCERTA) — stand as exceptions, not the rule.[44] For example, the nations of Europe have agreed to maintain their antidumping duties with respect to Central and Eastern Europe.[45] Antidumping laws also remain in effect throughout many nations in Central America and South America that participate in free trade areas.[46] In addition, the United States, Canada and Mexico currently maintain their laws against each other.

---

43. THE COMPETITION DIMENSION OF NAFTA, *supra* note 6, at 141.

44. For a list of 97 preferential trade agreements notified to GATT under Article XXIV between 1948 and 1994, see GATT ANALYTICAL INDEX, *supra* note 30, at 797-808.

45. *See, e.g.,* EFTA-Czech and Slovak Federal Republic Free Trade Agreement, reproduced in GATT Doc. L/7041/Add.1 (3 July 1992); Free Trade Agreements Between Sweden and Estonia, Latvia and Lithuania, reprinted in GATT Doc. L/7036 (3 July 1992).

46. *See, e.g.,* Southern Common Market (MERCOSUR) treaty, reprinted in GATT Doc. L/7044

The ABA Report argues that a free trade zone such as the NAFTA provides an ideal location for "experimenting" with the replacement of trade law with competition law principles. As reviewed above, such experimentation is both incorrect as a matter of policy and raises serious WTO issues.

Moreover, in the rare cases (such as the EU nations or Australia and New Zealand) where countries have agreed to modify their antidumping/countervailing duty laws, a significant degree of harmonization exists between the economies involved. This is simply not the case between Canada, Mexico, and the United States. Indeed, concerns in all three countries during and after the NAFTA debates have centered on differences between the economies.[47]

## III. Conclusion

This paper has analyzed the potential interaction of trade and competition laws from a different perspective than that of many of the previously published papers and reports on the subject. Properly evaluated, trade laws serve to enhance economic efficiencies and the rational allocation of resources. While competition laws obviously serve useful purposes, they are presently too limited to serve as a useful substitute for trade laws. Instead, competition law proponents should consider the adoption of various trade law concepts as a means of supplementing the current arsenal of antitrust-based remedies.

---

(9 July 1992) (members include Argentina, Brazil and Uruguay); U.S. International Trade Commission, The Year in Trade: Operation of the Trade Agreements Program, 46th Report at 163 (antidumping cases in 1994 by Argentina against Brazil).

47. *See, e.g.*, GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT (Institute for International Economics, 1993) 3-5 (implications for Mexico, the United States, and Canada) and 11- 31 (trade and employment); Asra Q. Nomani & Dianne Solis, *Nafta Is Facing Difficult Trial In the Congress,* WALL ST. J., Aug. 16, 1993, at A3; Bob Davis, *White House Walks the Nafta Tightrope,* WALL ST. J., March 15, 1993, at A1; Tim Shorrock *Mexican Labor Leader Denounces Trade Pact,* J. COMM., Feb. 22, 1993, at A1; David E. Sanger, *Reopening Old Battles,* N.Y. TIMES, Jan. 20, 1995, at A1.