United States - Mexico Law Journal

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

Article 8

3-1-1996

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THE VIEW FROM NORTH OF THE BORDER: A CANADIAN PERSPECTIVE ON TRADE AND COMPETITION VIEWS IN NORTH AMERICA

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The North American Free Trade Agreement is up and running and is, in fact, outperforming our expectations. The agreement has facilitated major changes in the conditions of competition on this continent by giving businesses the economic benefits of trade and investment liberalization, along with the confidence to organize their operations on a continental basis. NAFTA has allowed our enterprises to take advantage of the gains brought by increased economic efficiencies and the enhancement of their position not only on this continent but across the globe. The North American economy as a whole has reaped the benefits. Evidence points increasingly to the fact that these changes in the conditions of competition and the level of economic integration in North America are happening at a much greater rate than anticipated by the NAFTA governments. A number of factors have caused this result, factors which complement and accentuate the objectives of NAFTA.

These catalysts include the increasing intensity of international competition and the incredibly rapid technological change which are sweeping the globe. Furthermore, the private sector in North America is developing corporate strategies to take advantage of the trade liberalization and losing little time in putting those strategies into action. Trade statistics prove this point. Since the start of the free trade area between Canada and the United States six years ago, Canada's merchandise exports to the U.S. have leaped 77% in value. Not surprisingly, U.S. exports to Canada have jumped by an equally impressive 72%. These figures are doubly impressive given the fact that the trade took place during a period of extended recession in both economies. Last year 22% of all United States exports were destined for Canada and the U.S. sold nearly twice as much merchandise to Canada as it did to Japan. In fact, one Canadian province, Ontario, buys more from the United States than does Japan.

What about the NAFTA context? Trade by Canada with our Mexican partners has more than doubled over the past four years, soaring from about 2.5 billion Canadian to 5.5 billion between 1990 and 1994. U.S. - Mexico trade has shown equally impressive increases, jumping from about 68.4 billion Canadian to 137 billion in 1994.

Free trade in North America has built successfully on the already solid trading relationships that existed between our neighboring economies and has vaulted the continent to global importance as a trade area. Evidence

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also shows that business is up to the challenge of the new North American Free Trade Area. Many companies in North America have taken a North American focus in their strategy and structure, and are seeking to become more competitive globally by creating continental organizations. Such rationalization has allowed firms to reduce overcapacity, adopt new forms of production, and meet the competitive challenges of non- NAFTA businesses. We have together made great strides to remove tariffs and non-tariff barriers within North America. However, the question we must continue to ask ourselves in this quest for global competitiveness is: have we gone as far as we can in removing government from the business of business? With the continued existence of current trade remedy regimes in each of the NAFTA countries, I think the answer must clearly be "No!"

Despite the conclusion of the Uruguay Round, the successful entrenchment of NAFTA and the birth of the World Trade Organization, we must deal head-on with this issue. As the ABA Task Force Report on Competition Dimension of NAFTA correctly points out, we need to re-examine the applicability of trade remedies in the increasingly integrated marketplace which we have created in North America.[1] Canada invented the concept of antidumping when national borders were clearly recognizable and when there were sound reasons and practical methods to exclude products which were unfairly priced. But that was in 1904, and I think we've come a long way since then to today's trading network. Not only have firms within NAFTA begun re-orienting their strategies to take into account the North American reality of a new integrated market, but producers outside that market approach it as a single integrated market. I believe, therefore, that it is really time for governments to reflect these new realities and adjust their legal frameworks to deal with inappropriate pricing behavior.

Here are some very concrete examples of how antidumping clauses and regulations can affect or distort modern North American markets. It is common business practice to offer a product for sale at a standard price no matter where it is delivered within a country. Business regularly takes account of transportation costs in overall pricing strategies, so that the price of a box of detergent, or a coffee table, is the same in Santa Fe as it is in New York. This is considered an acceptable business practice in Canada, the United States and Mexico. Yet, what happens when government regulations are applied at the international border? Assume that your client, a detergent company, is in Santa Fe and its customers are in Montreal and New York. Since the freight costs to Montreal are higher than to New York, if the vendor of detergent tries to sell its products at the same price in both cities, it could become the target of an antidumping charge in Canada. Make no mistake about this, the result is the same whether it is the Canadian, United States or Mexican

1. American Bar Association; Task Force Report on the Competition Dimension of NAFTA (1994).

border that your client is trading across. That is just the nature of the antidumping law. We've been unduly successful in developing technical criteria for unfairness at our borders which we do not necessarily recognize within our own borders.

Consider a second example of a cyclical industry. Market downturns often mean that price discounts must be introduced in order to maintain customer demand in certain markets. The choice for your client is rather easy: you cover only marginal costs or you shut down completely. Since a company is dealing in a highly integrated continental market, prices usually fall in both export and domestic markets. As a result there really is no price discrimination between sales to either market, but if you cross an international border, your client is dumping.

Thirdly, let's consider a piece of a business in which your client has managed to cultivate customers over a number of years in a particular market. When suddenly prices in that market fall, in order for your client to keep its hard-earned customers, it is forced to cut its own prices to compete. In effect your client is pricing to meet the competition in the marketplace. If the market is in your client's domestic market, this would be considered normal business practice. But if the trade is occurring across a NAFTA border, your client is dumping.

These sorts of examples are played out daily in North America and lead to some very perverse results. A company that I was talking to recently said it made a large shipment from Canada to the Southern United States and that the shipment was damaged in transit. The customer claimed that the price for that merchandise really should not be the going price for prime rate merchandise since it was damaged. Under normal business circumstances, they would come to some arrangement: there would be a discount in the price and the goods would be maintained in that marketplace. In fact, what happened in this instance, because the client was fearing antidumping complaints is that the whole shipment was shipped back to Canada.

These examples demonstrate that, in fact, these laws are having greater effect on North American trade than overseas trade. As markets integrate, long-term contracts, just-in-time deliveries, and large land borders lead to a multitude of transactions across our borders. Furthermore, manufacturing processes will see a particular product cross a border a number of times before it turns into its final form.

Steel is a good example because the steel industry in all three countries has used antidumping laws quite efficiently. In one month alone, there are approximately 150,000 truckloads of steel crossing the Canada-U.S. border. Each one of these is a separate transaction for antidumping purposes and the antidumping laws will have to be used to verify each one of these sales. Furthermore from iron ore to a finish auto part, the same steel may cross the border five times. Any administrative mechanism which attempts to deal with this volume of transactions will sooner or later begin to collapse under its own weight. In addition, each time the steel product crosses the border, we add 10% antidumping duty to it. It's no wonder that a company like General Motors advised the U.S.

International Trade Custom office the company believed it is necessary to apply antidumping laws in a judicious manner to minimize possible economic harm to U.S. industries that are downstream from the ones involved in the unfair trade proceedings. We continued in the present manner, these practices will result in higher input costs, reduced outputs, higher product prices and more uncertainty in investment decisions for North American firms. But it gets worse than that: these problems combine to make NAFTA countries less competitive in other international markets and will ultimately reduce and nullify the rationale for an integrated free trade area in the first place.

Our overseas competitors have already grappled with this problem. I will not attempt to deal with the European Union which is a somewhat different case, but the case of Australia and New Zealand, which have also entered into a free trade agreement is a good example. Those countries have decided to eliminate dumping laws within their jurisdictions. They have chosen to rely on competition policy and antitrust law for unfair pricing disciplines. This clearly seems to be the route suggested by the ABA report. The report suggests that in order to attain the economic logic and integrity expected of the NAFTA free trade area, we must not rely on technical grounds of antidumping to control anti-competitive prices; we must turn instead to our existing anti-competition and antitrust regimes. The Canadian Bar Association has produced a commentary on the ABA's report which largely supports its conclusions. Unfortunately, the Canadian Bar Association report did not comment on the interrelationship between the antidumping and antitrust laws.

It is not clear to me whether the international law practitioners of the ABA share the views of their antitrust colleagues. However, it is clear in reading Mr. Stewart's article that there is not necessarily any unanimity in this regard. At present the competition antitrust law disciplines in the NAFTA countries do not specifically address cross-border anti-competitive activity. But anti-competitive cross-border pricing can be addressed by competition law provisions in each NAFTA country dealing with predatory pricing, price discrimination, abuse of dominance, or monopolization. While the competition law treatment of such conduct may be less extensive and less interventionist than that afforded by trade remedy laws, competition law may well lead to a more efficient outcome. Economists underline the fact that competition law does not carry with it the negative economic outcomes which result from application of anti-dumping laws. The enforcement of antitrust laws does not result in higher input costs, reduced output or the higher product prices and uncertainty in investment decisions which currently plague the North American market thanks to the trade remedy regimes.

Competition law and policy can act in a number of ways to ensure the consolidation of gains from free trade liberalization. First, competition law and policy can ensure that any gains from trade liberalization are not compromised by private anti-competitive activity, especially when such activity seeks to segment recently liberalized markets.

Secondly, efforts can be made to be sure that the competition or antitrust laws themselves do not impede opportunities for pro- competitive business activity. However, reliance on competition disciplines in any regional arrangement like NAFTA requires assessment of at least two critical variables: 1) the degree of economic integration in the area, and 2) the degree of policy convergence in the domestic competition law regimes.

Clearly, we have demonstrated that a rapidly increasing degree of economic integration is taking place within NAFTA. Although there exists a fair level of similarity in the competition and antitrust law standards and principles which apply in each NAFTA country, there are also very significant differences. The right of private action in the United States is far more prevalent than in Canada or Mexico. Furthermore, some of the remedies provided in U.S. law are not replicated in the other two countries. Canada and Mexico tend to rely more on the concept of the rule of reason than on per se violations. Most importantly, although there exists between Canada and United States bilateral cooperation agreements, there is great reluctance among our antitrust authorities to contemplate any international dispute settlement mechanism. The American Bar Association concludes that replacement of antidumping law by competition law for transactions among NAFTA nations is infinitely more consistent with our goal of free trade.[2] It is not, however, a simple task that they have set for public policy officials like myself. Having invented antidumping laws, it is not surprising that we Canadians have become quite skillful at using them. In fact, although it is little known, Canada has brought more antidumping actions against the United States than vice versa. Yet I believe that Canada is prepared to bring its trade remedy laws to the NAFTA bargaining table so that we may all reap the greater benefits that we intend through the creation of free trade areas. We do not believe that it would be contrary to our international obligations, and I certainly think that we need to get on with this task.

2. *Id.*