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Panel Discussion: Comments on the Tension between Trade and Antitrust Laws

Authors

Jimmie V. Reyna, Harvey M. Applebaum, Gabriel Castaneda Gallardo, Eleanor M. Fox, John Gero, Terenca P. Stewart, and Michael W. Gordon

COMMENTS ON THE TENSION BETWEEN TRADE AND ANTITRUST LAWS

MODERATOR: JIMMIE V. REYNA*
PANEL MEMBERS: HARVEY M. APPLEBAUM,**
GABRIEL CASTAÑEDA GALLARDO,***
ELEANOR M. FOX,****
JOHN GERO,*****
TERENCE P. STEWART,*****
MICHAEL W. GORDON.*****

Jimmie V. Reyna: Articles on tensions between the conceptions and practical applications of laws regulating international trade and antitrust or competition laws have been addressed by the members of this panel on pages in the preceding articles in this volume of the *United States-Mexico Law Journal*. We have invited each of them to comment on the contributions of the other members of the panel.

Harvey M. Applebaum: Terry Stewart mentioned the obvious fact that one way that one can avoid a dumping charge, if you are caught dumping or charged with dumping and your price in the foreign market is higher than in the United States or Canada, is not by raising the price in the United States, Canada or Mexico, but by lowering the price in the home market. We both know there's a limitation on how far you can go in doing that. Many antidumping proponents and many companies and industries that bring antidumping cases and prevail are shocked and outraged when they see the prices go down in the home market rather than go up in the United States. He's absolutely right about that. It is an option that a foreign producer often has to avoid dumping by lowering the home market price. That option is not 100% available. To me that by and large communicates the problem with the statute. I'm not talking about competition versus antidumping. Let me note this: I have brought antidumping petitions for Motorola, AT&T and other companies. I'm like the Canadians - as long as the law is on the books, we'll use it. But this is not a law that makes any sense in the real world for the most part. Japanese, British, French, Canadian, American companies don't sit around if they're bored at directors' meetings and say we've got this surplus over here in our country; let's dump excess merchandise elsewhere. The markets usually are not intertwined. The reason that prices

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are higher in other countries compared to the United States often has nothing to do with cross-subsidies, the notion that we've got higher profits in the home market, therefore, we can sell at lower prices in the United States or wherever, or we're doing real well in product A, let's use those profits to subsidize low-priced sales of product B in the United States. My problem with the antidumping law is that it makes no economic sense. I think the fact that you can eliminate dumping in many cases by lowering the home market price rather than raising the United States price is a good indication of that.

Terry Stewart also raised the interesting question whether, assuming some of the proposals in the ABA Task Force Report were implemented, would that violate the GATT? The GATT does have a Code, which the United States has signed which prescribes how the antidumping law is to be operated. The GATT is intended to have minimum requirements in order to implement the antidumping law. If the United States, Canada and Mexico were to make it more restrictive or increase the severity of the standards and therefore make it more difficult to obtain relief under the NAFTA country trade remedy laws, I don't believe that would be considered a violation of the GATT.

John Gero gave three examples of how you can inadvertently wander into being exposed to dumping. The most common is the first one, which is uniform delivered prices inside the border of Canada, the United States or Mexico. Although it would not be a competition law problem, it could be an antidumping law problem. I think the normal answer to that is that there is a material injury requirement. It's a lot less than the antitrust law injury requirements. Nonetheless, many companies and industries do not file antidumping petitions even when they know there's dumping because of the material injury requirement. There's dumping either because the prices in the home market are clearly below cost or because of uniform delivered pricing policies or because the foreign companies are meeting competition in the United States which makes their price here lower than in the home market. But there is the material injury requirement. The companies can't show material injury even under the laws as they exist.

Finally, if the U.S. government adopted either of the approaches suggested by the ABA Task Force Report to replace antidumping law with competition laws, or to make the antidumping laws somewhat more akin to the antitrust laws, either of those approaches would make it much more difficult to prosecute an antidumping case. That is why I have said that NAFTA is the most attractive area in which to consider doing that; NAFTA is based on the concept of a free trade area, and the elimination of all barriers to trade.

Terry Stewart's comments were ingenious in suggesting that the debate is upside down and we ought to put the antidumping law principles into the antitrust laws, but I would like to hear whether he makes any exception for antidumping competition law in the context of the NAFTA.

Gabriel Castañeda Gallardo: I have four comments.

First, if the rule of the game is free trade, antidumping as we know it is really a barrier to entry. People have to think about it before entering a market. It's costly and, as a result, the market is not working properly. The analytical tools of antitrust are more objective; they make economic sense. There are gaps in antidumping theory that are not well explained in the economic sense or in a practical way.

Second, I think if we look at dumping the way it is, it strikes me that it looks just the other way around from competition. Someone who wants to enter a market is being challenged by someone or several people, who don't want that specific entrant into the market. Competition is the other way around. How do we guarantee people coming into the market? Market entry is a major thing in competition. In dumping it's the other way around; it's how we try to get people to not get into a specific market. In this case, Mexico, Canada and the U.S. could try to take this great opportunity, not to scrap the whole system altogether, but to change some of the analytical tools and see what happens. As I said in my previous presentation, there wouldn't be much harm to the U.S. interests and there certainly wouldn't be much harm to Canadian interests.

Third, I think the antidumping laws encourage collusive activity among companies. From my experience in antitrust I think it is a great problem. That is why the Mexican Competition Commission in its time looked at the antidumping cases closely and sometimes we found enough antitrust evidence to investigate.

Fourth, I think we certainly need higher standards for antidumping to make it more transparent and more economically valid. I think material injury tests have to be properly discussed and properly and transparently decided within enforcement agencies. It isn't clear to me what uniform rules exist in the U.S. and Mexico and whether those uniform rules are properly enforced. I think that's a major concern about the interaction of competition and antidumping mechanisms.

Now let's be honest about it. I don't think that antidumping laws will soon disappear. I think the main reason is that predatory pricing, which is the counterpart of antidumping under antitrust theory, is very hard to prove. So I'm sure government officials and politicians will argue that it's just not possible to substitute predatory pricing legislation for antidumping legislation as a trade remedy. Therefore, I think we must convince the protectionist side of the political decision making process that some high standards will have to be embedded into the antidumping laws.

Eleanor M. Fox: I have a few comments. Of course, I fully agree with Harvey Applebaum, Gabriel Castañeda and John Gero.

First of all, it seems to me true that antidumping laws are exclusionary restraints. Therefore, they should be subject to a really high degree of justification.

Second, the issue of antidumping versus antitrust is a national issue; not just an international issue. If the case against antidumping laws is correct, then each nation should look at the law and say for itself, "We

are shooting ourselves in the foot! We do not want to keep out the low-priced competition. We want price competition.” However, because of the political landscape, we seem unable to deal with the problem on our own turf without regard to what other nations do. One reason why we have been unable to deal with the problem on a national basis is: people hurt here and now by low price competition are ready to testify, lobby and pay, whereas the people who will be benefitted by competition and low prices are scattered and unidentified. Competition helps people and businesses in the longer run. But it is very hard to get that group together to lobby their representatives in Congress effectively.

Political support for reform might come from the intermediary buyers injured by the antidumping laws. There are always injured intermediary buyers of imports who want to get lowest price execution and compete in the international markets; these businesses may be hurt here and now by the antidumping laws. Apple Computer Company wanted lower priced chips in order to compete in world markets. Supporters of reform may find political allies among the community of intermediate buyers who engage in world competition.

Mr. Stewart made a couple of very interesting points. I agree with some, maybe even a lot, of his underlying sentiment.

However, with one point, I disagree. Mr. Stewart said that both the antidumping laws and the antitrust laws are designed to get a rational allocation of resources. But the question for a rational allocation of resources is distorted on the trade law side by the lobbying for protection of domestic business interests and whose oxen are being gored at the moment.

Mr. Stewart said that the antitrust laws should learn from the trade laws. He suggested that many competitors are faced with unfair competition and if they weren't faced with this unfair competition they would stay in business or they would newly enter business and they would do well; that it is the unfair competition, not their inefficiencies, that is hurting them. This was once the point of view accepted by U. S. antitrust law. We had a case called *Utah Pie*¹ which said that if a company is hurt by unfair competition, in the form of strategic low-price competition, it ought to have a remedy. *Utah Pie* was our law for a long number of years. We came to understand that this principle was protectionist. It coddled inefficiencies and inefficient firms, no matter how much one might say it merely prohibited unfairness. U.S. courts finally confronted the problem. Modern decisions recognize that price competition is at the heart of competition, and any principle of law that will stop people in their tracks from competing by charging sustainably low prices is perverse to the whole competition enterprise.

I agree with a number of specific things that Mr. Stewart said, including his reference to the *Brooke Group* case.² Brown and Williamson charged

1. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

2. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

a price below average variable cost for eighteen months. I agree with Mr. Stewart and not the Court that there was recoupment, concurrent recoupment. There was a low price that was actually below cost and actually there was recoupment, concurrent recoupment. Our Supreme Court has formulated some overly permissive rules in antitrust, as it did in *Brooke Group* and as it did in the *Matsushita*³ case. But while I think that both decisions suffer from serious flaws, their outcome may be right. In any case, I do believe that low pricing is so important to competition that we should have a prophylactic rule to protect it.

John Gero: Let me talk about a few points that have been raised in the conversation. One is the question of violation of World Trade Organization into agreements. There isn't any violation. Yes, you aren't allowed to have different regimes for different countries under the WTO. However, WTO does make provision for free trade areas which allow you to override the so-called most favored nation treatment. Therefore, having an inter-NAFTA arrangement is fully consistent with all three of our international obligations.

Two, the question of the double test, the requirement to prove both dumping and material injury. However, in any economic downturn, (particularly because U.S. laws are a little more lenient on causality than the Mexican or Canadian laws) an injury finding is almost automatic. That's why most dumping cases are brought in economic downturns rather than when things are good.

Three, I think it's worthwhile concentrating on the politics of this. I think Mr. Castañeda is right, the political situations in all three of our countries are such that it would be very difficult to make significant changes in the antidumping laws. Therefore, we need to look at the possibilities creatively and innovatively. I'm going to make all the lawyers and some of the antitrust people reading this feel a little uncomfortable. It seems to me the real crux of the question of whether you use antidumping laws within North America or not is how comfortable U.S. businesses are as to whether "their opposite numbers" in Mexico and Canada are really operating under the same business principles and the same business practices as they are doing in the States. To achieve that, do you really need litigation, or is there an alternative? In a number of fields in legal practice today, some kind of alternative dispute resolution is being considered in North America. Could commercial arbitration provide an alternative to the use of trade remedy laws? Is a possible solution to our problems in North America convincing North American industries that, in the context of North America, one shouldn't necessarily use antidumping laws, one should try to mediate rather than litigate? Of course in the context of competitors using mediation, this may make our antitrust colleagues feel somewhat concerned. Although I've been told this isn't true, my guess is that the minute antitrust authorities see two businessmen having lunch together, they will immediately think that

3. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

there is some collusion going on. Therefore if one heads toward some kind of mediation process, there is some concern that what they are really doing is setting up a North American cartel. I think there are innovative ways of getting around that without doing injury to our antitrust laws. These are the kinds of things we will need to focus on. Because the bottom line in all of this is that unless you make the folks that use antidumping comfortable that they are not being damaged by the practices of other companies within North America, the political realities are that in none of our countries are we going to be able to make major steps forward and achieve substantial changes.

Finally, I think it's worthwhile looking at the question of international progress in this regard. Governments have used interlinkages between trade and competition policies in the past to, in essence, balance out domestic political pressures. So therefore the fact that these issues are being discussed in an international context benefits all of us.

Terence P. Stewart: Let me take the issues in somewhat the order they were raised. Harvey Applebaum asked me whether my comments would be different vis-a-vis NAFTA than for the world at large. The answer would be no. First, there is a misconception that the general practice in free trade areas is to abandon trade remedies. That's not only not true in the United States but it's not true in the Mercasur. It's not true for the European Union or the former EFTA countries, all of whom have maintained dumping laws vis-a-vis Central and Eastern Europe even though they have association agreements with these countries which are proxies for free trade agreements. They have done this because both sides have concerns about significant differences between their economies and the need to have some internationally recognized mechanism for dealing with that. So, in my view, there is not a reason to distinguish NAFTA from the other associations.

With regard to WTO obligations, it is certainly true that if one were to eliminate globally the trade laws of any particular country, there would not be a WTO issue. You are not obligated to have a dumping law or a countervailing duty law or a safeguard law. The issue is far less clear, despite what my distinguished friend from Canada had to say, if you have different standards for different countries. There have been several challenges under Article 19 of the Canada-U.S. Free Trade Agreement that were scuttled before there was ever a panel decision, exactly because countries within an FTA are not subject to the requirements of the safeguard action. And I think that similar arguments could certainly be made if you had higher standards in dumping actions within NAFTA than you had elsewhere. It is at least not a foregone conclusion that you have a GATT consistency under Article 24 and there have been complaints within the old GATT system under Article 19.

The comment that the dumping law makes no economic sense seemed to flow from the fact that, if businessmen are not consciously cross-subsidizing; there ought not to be actionability. This objection results from looking for evil action or wrongful conduct by the actors versus misallocation of resources within the system. The reality is, whether or

not companies consciously intend to cross-subsidize (and I suggest that it is not uncommon that that may happen but I will certainly accept that it is not always the rule), the reality is that if you are unable to cross-subsidize yourself you will be driven out of business or sent the false market signal that clearly exists.

Professor Fox's comment about past practice in the United States seems to me to be contradictory. On the one hand she said that price competition is a good *per se* but then said it was a question about whether the prices were sustainable low prices. One has to look at whether one is talking about sustainable on its own merits, i.e., that you have rational allocation of resources. But I have been involved in many cases where companies which, at the start of the process had the best cost structure, were out of business by the time the process was over simply because they had no other pocket to dig into. If you look at the problems that the supercomputer industry is facing in the United States today, they are in large part due to a decline in defense demand, and also to the fact that all of our supercomputer companies are single product companies. The people they compete with internationally are horizontally broad electronic and computer companies. At the end of the day, if you are selling below cost or selling below the cost of your capital, you are going out of business. That is what has happened to virtually all of our supercomputer companies. That's what happened to our semiconductor companies back in the 70's. So, I think it is the concept of intent (which permeates the comments of Mr. Applebaum and seems to be the essence of Professor Fox's concern) that is wrong with the analysis that antitrust people bring to trade policy. They say if there is no intent, if there is no wrongful conduct by an actor, then it ought not to be action able. That ignores whether or not the underlying conduct results in a misallocation of resources. I understand that the University of Chicago School of Economics is certainly of the opinion that the only test, the only economic justification, for conduct at the end of the day is whether it promotes economic rationality. In my opinion, antitrust law as it is presently construed does not do that, at least in this one area.

Michael W. Gordon: This is for Mr. Stewart: It seems a little unusual that competitors in Vancouver and Seattle would have dumping actions as a possible remedy and the company in Seattle would not have that same remedy against a Miami enterprise. Vancouver would, of course have that against Miami but Seattle would not. Maybe there is an equal protection argument but we should leave that out. Since you are not willing to take Mr. Applebaum's suggestion that NAFTA ought to be treated differently, would you say that were Mexico not in NAFTA, NAFTA ought to be treated differently. In other words because of the greater similarities between U.S. and Canada do you think we would have been more likely to get rid of dumping had we not extended approval of free trade arrangements beyond the Canada-U.S. Free Trade Agreement?

Stewart: The gist of this question is whether there should be the same remedy between Seattle and Miami as between Seattle and Vancouver.

I think it is not up to trade law to provide that; it is up to competition law to provide it.

Gordon: Is there any place in between the competition law and the trade law where you would suggest we make modifications to the dumping rules in the NAFTA context, for example, by increasing substantially *de minimis* limits on less than fair value determinations, by increasing the causal relation test, perhaps by eliminating the mom and pop dumping cases: the woodwind reed case of the Italian company that comes to the United States having failed in Italy in competition there and then uses the dumping law in the United States to go after competition from the Italian reeds; the rose cases between Columbian and other rosegrowers. We seem to have placed enormous costs on smaller businesses. Should we look at dumping differently for the steel industry than the woodwind reed industry? Would there also be some way that might be tied into that to allocate cost differently rather than have this great burden which is often imposed on small foreign companies to pay their costs while the costs of the United States in bringing a petition is essentially a taxpayer-driven cost. Are there some fine tunings or some alterations that could be done in the NAFTA in a kind of experimental arena that at a later time could apply to dumping throughout the world?

Stewart: With regard to the assumption that somehow there need to be higher standards, the statistics out of the International Trade Commission indicate that in the last 15 years, over 60% of the cases filed have resulted in negative injury determinations either at the preliminary or at the final hearing. So if you were to ask domestic petitioners whether the standard is too high or too low, they probably would view them as too high.

With regard to taxpayers picking up the cost of petitions being brought, I certainly have clients who would love that if that were true. But it is every bit as expensive for U.S. companies to bring cases as it is for foreign companies to defend them. That is not true in Europe where there is a relatively low cost process for industries to prosecute cases because they do not enforce a lot of due process requirements. The United States does require due process and there are heavy standards in terms of the type of information that must be submitted, therefore it is an expensive proposition to bring a case in the United States.

With regard to types of cases, I won't comment on the woodwind case because I wasn't involved with it. Since we brought the roses case, we have a slightly different view of the market situation, particularly since over the last 15 years more than 80% of the flower growers in the United States, who were all mom and pop businesses, have been driven out of business. If there is one thing that could be experimented with in NAFTA, it is taking politics out of the cases. I would suggest to you that the outcome in the roses case was driven by politics and the politics wasn't that of the domestic industry.

There are, in my view, a lot of overly simplistic views about the trade laws and, with deference to all of you who are competition buffs and competition practitioners, if you start from the analysis that competition

policy is a *per se* good, and trade policy is a *per se* evil, you will, of course, come to the conclusions that keep being printed and keep coming back at me.

The problems with regard to allocation of resources are real. Many U.S. industries, Mexican industries, Canadian industries, go out of existence not because they weren't providing a highly competitive product at a competitive price, but because they did not have the ability to cross-subsidize. Steel is a particular sore spot globally. It is a particular sore spot globally, in my view, because there is no multi-lateral mechanism to deal with what has been long-term government supported structural excess capacity. That leaves critical industries like steel to fight it out periodically when the economy goes down. Canada, the European Union, Brazil, and many other countries have, for various policy reasons, supported very large steel industries that were not sustainable in and of themselves.

In terms of the prevalence of cases, there is a low incidence of dumping cases in the NAFTA area under the trade rules. The big disputes with Canada tend to be countervailing duty if you take steel out of the picture. The vast majority of the dollars that are caught up in cases involve countervailing duty claims. That's a question of government harmonization of policies in the subsidy area. It has nothing to do with the dumping law.

In the case of Mexico, that Mexico could conceive of giving up the trade laws suggests that they have a very poor understanding of where their own national interests lie. At the end of the day, we are all nation states. Although the European Union may have moved to a superstate and their nations may have agreed to give up lots of things, at the end of the day the legislators and administrators of those nations are supposed to be doing things for the welfare of the citizens of their countries. It is not the job of the U.S. Congress, nor I would say of the U.S. Commerce Department, to look out for the economic welfare of the Mexican citizen or the Canadian citizen. Rational resource allocation should be supported by both. At the moment the assumption of the antitrust lobby is that theirs is the only holy grail and that if you deviate from where antitrust is you are not dealing with what is good for economic rationality. I don't agree.

Applebaum: Let me say that I agree with two of the points made. One is that antidumping petitions are extremely expensive and the costs are growing all the time. The Uruguay Round amendments make the cases more complicated. I think it is fair to say that an original case going through the ITC and the Commerce Department is going to cost a U.S. petitioner or industry at least a million dollars. If you win the case, it's not over. Judicial review is automatic now in these cases, with two levels. And if you are interested in maintaining the antidumping order, you do this yearly. Mr. Stewart mentioned the bearings case order, which I believe is six or seven years old now, and the U.S. industry continues to prosecute them. Part of the reason for the expense is that the material injury requirement, low though it may be, is real. Many

cases aren't brought because the lawyers persuade U.S. prospective petitioners that they don't have a good injury case. Second, the question about whether 60% of the cases have resulted in negative injury determinations depends in part on how you view multi-country cases. But it's not an automatic. There are ITC preliminary injury determinations, and I'll give you two examples. The Big Three automobile manufacturers lost their mini-van antidumping case at the ITC final injury determination, and you may have read that when the big avalanche of steel cases came down about two years ago, the U.S. industry took a major hit in losses in a number of those cases. In fact many of the U.S. steel companies believed that overall they had lost. So determinations on the existence of material injury are not automatic.