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Interface Between Trade Law and Competition Law in the North American Context

*by Douglas Rosenthal**

There is a surprising paucity of careful analysis of the interrelationship between competition and trade law. There is a great deal of analysis relating to competition policies and free trade versus protectionism, but how can and should competition and trade law interrelate?

Almost no American analysis has focused on that interrelationship, except at a very superficial level. I would suggest to you that there are three views which can be found, none of them very carefully articulated. The first view is reflected in a case some 20 years ago that involved imported shoes from Southeast Asia, the so-called sneaker circus case. There was trade relief provided under the trade laws which led inevitably, as trade relief often does, to escape clause relief: safeguard trade relief, which led to joint action. The argument was made that under the Sherman Act—as the Magna Carta of economic liberty and all of the other rhetoric, the quasi constitutional status that all of you are excessively familiar, and excessively skeptical about—the trade laws are to be narrowly construed as exceptions to the antitrust laws.

That is an antitrust lawyer's view of the trade law. It is an overly optimistic view by antitrust lawyers. Congress did not intend the trade law to be a minor exception to the Sherman Act, but nonetheless that is a view reflected in the answer in the sneaker circus case.

The second view is that the Sherman Act has nothing to do with trade policy. In fact, when important matters of trade policy are on the table, the antitrust laws and the antitrust enforcers should go quietly away and leave the diplomats to do their work in the International Trade Commission and the Commerce Department. That view is reflected in the position taken by the State Department in the Consumers Union litigation. That position was that the President had considerable authority to enter into trade agreements under his foreign policy power and that the antitrust laws were not intended by Congress to cut back that power, at least not constitutionally. Notwithstanding that the antitrust laws regulate commerce under the legislative competence of the Congress, they could not cut back the powers. That view seems to be somewhat parochial and is a view that is taken robustly only at one's hazard.

The third view, which I would like to explore and which is implied in what others have said, is that it should be an aspiration of legislators,

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law enforcers, and executive policy makers to seek to rationalize and harmonize the two bodies of law as much as possible. This was, indeed, a goal of the negotiators after the Second World War in their bold attempt at a new international economic order, and in their attempt to involve antitrust as part of the new international economic order of which the GATT was the keystone of the framework.

There is now more consensus than ever among informed businessmen, scholars, government officials, and professionals in both the United States and Canada that the competition fostered by law and policy should be the ultimate goal of international economic commerce and trade. The protectionism reflected in trade law is a necessary accommodation, but not the principal goal. It is a necessary accommodation to avoid perceived unfairness. It is necessary as a safety valve for undeniable social and political pressures which build up in times of national economic difficulty and in times of general prosperity, where there are individual distressed economic sectors.

One would have expected U.S. antitrust enforcers and free trade academics to promote this goal of rationalization in which the commitment to competition is more enduring than an expansive regime of trade protection. One would have particularly expected it in the Reagan Administration, which purports to be committed to free trade. This should be especially expected from antitrust officials in that administration who have been weaned on the mother's milk of Chicago School economics.

To some extent, the Federal Trade Commission (FTC) under Jim Miller and Dan Oliver deserve some praise for speaking out on competition policy issues, such as in the softwood lumber case. But the antitrust division has been disappointingly silent, and the FTC does not act well enough or often enough on a number of major challenges to competition law, nor on addressing competition policy.

The Canadian government is offering the United States a bold and important opportunity to further this third approach to rationalizing trade and antitrust. I am willing to tread where officials, and those who are probably more prudent, are reluctant to do so, and begin to take on Calvin Goldman's third question; because I do think that it is more than just abstractly possible. The development of a legal regime should be feasible within the next few years, if we really attend to it; a legal regime where there would be no need for dumping or safeguard or unfair trade practice laws between the United States and Canada. Trade between those two nations, and the long-term fundamental goals reflected in the trade laws, could be protected by competition laws, by patent and intellectual property laws. In the case of piracy, which is one of the concerns that supposedly justifies the new trade legislation, the trade could be protected through laws against piracy and fraud and deceptive practices.

As we are hearing again today, Canada is willing to meet the U.S. concerns about a level playing field. They are willing to negotiate to open up Canadian markets to U.S. goods on an equal footing, to offer the

very things which the sponsors of current U.S. protectionist trade legislation say they are seeking as the goals of such legislation. That is perhaps the answer to Carl Beigie's question, "What is in it for the United States?"

There are two things in a free trade agreement with Canada for the United States, particularly in the context of open markets. First, the United States, through the Reagan and Carter Administrations, has basically justified protectionist action on the grounds that other nations are not letting us play on a level playing field.

We have repeatedly said that if they allow us into their markets on a free and open basis, we do not need to apply these laws. We are ready, willing and able to compete with anybody who is willing to let us compete. The problem is that these other nations are not willing to let us compete. Here Canada is offering to the United States a chance to come in and do the very thing that the United States says is the justification for putting an end to the enforcement of trade laws.

The United States can not accept that challenge without opening itself up to serious criticism that all of this rhetoric about level playing fields is hypocrisy and is a cover for the basic fact that the United States is afraid of competition.

Second, I see something symbolic and important which follows in the U.S. tradition of having a frontier. This may impress some Canadians as patronizing, but I don't mean it as such. For Americans it is very important to believe that there are frontiers, to believe that there are new markets and new opportunities; and even though the Canadian market is one-tenth of the U.S. market, Canada's rich, plentiful resources in a number of areas are significantly greater than one-tenth of the resources that the United States has.

It strikes at a cord in the American imagination—and obviously this is a literary point which I cannot prove—but it seems to me that it strikes at a responsive cord which has historical roots in the American imagination to see the potentialities of a partnership with the Canadian people, who are land rich and resource rich and a highly-skilled work force, but have not populated their land as fully as the United States has populated itself. That in itself, that goal, the ideal of what this North American, this enormous North American market, geographically can do, could have a tremendous energizing impact in the United States, as well as in Canada, and could restore the sense that many of us have that we are capable of competing, for example, with the Japanese and the others in the ASEAN League.

You will see, in the published conference proceedings, a paper that Lawson Hunter and I jointly authored, and from which much of Lawson's presentation was taken. We do offer the proposition that the dumping laws could be abandoned in favor of predation and attempt to monopolize in the United States and the Robinson-Patman Act. I don't

see any basic need to change either pieces of legislation in the United States and I think it will be difficult to get major legislative change in the United States.

The change may be required in Canada, as Lawson indicated, to provide for primary line discrimination suits and a meeting-competition defense, which I think are more economically rational as substitutes for the antidumping laws. I would like to go still one step further and suggest that not even the problems of procedure need be insurmountable, although clearly they are difficult.

There are various ways in which U.S. antitrust law is more aggressive and the procedure would be very difficult for Canadians to accept. Let me offer this as a thought. What if we had a trade treaty provide for a choice of law; a choice of forum analysis to be applied by either a U.S. or a Canadian court; and provide that the principles to be applied under this choice of law, choice of forum analysis, are the principles used in choice of law today in both jurisdictions.

The jurisdiction which had the predominant context would be the forum jurisdiction for hearing and resolving the trade dispute and its law would be applied. That means that if Canada had the predominant context, the treble damage remedy would not be applicable. The problems of a private suite might be sufficient to frustrate most challenges, but in the United States, if the United States had the predominant context, U.S. law procedurally would proceed as it is today. The point being, the Canadian firms that are substantially engaged in commerce in the United States have shown themselves very able to compete with American firms knowing how to do business under the U.S. legal regime, including the U.S. antitrust regime.

The basic problems between Canada and the United States in the antitrust area are cases where the Canadian government had an official governmental policy directly in conflict with U.S. antitrust enforcement. The issue was that the United States, from Canada's view, was failing to respect the elementary principle of international law, the principle of the sovereign equality of states, and was unwilling to give sufficient regard to Canada's sovereign right to control conduct within Canadian territory.

I have always felt, and this is a parenthetical observation, that for Canada to help educate Americans about what is offensive to Canada about U.S. antitrust laws, maybe it should consider amendments to Canadian antitrust laws. It strikes me, that if you had extraterritorial antitrust jurisdiction and if the U.S. Congress was to reimpose a uranium import embargo in the future, Canada might bring an antitrust action against those American companies which had induced the Congress to pass the legislation imposing that embargo.

That, of course, is what the U.S. government did in 1920 when it brought the size and sales case against Americans who lobbied the Mexican and Yucatan legislatures to give a size monopoly to people in Mex-

ico. If American companies were hauled into Canadian courts and subjected to treble damages for lobbying the American Congress, there would be screams of outrage about American sovereignty and the United States would begin to understand what Canada was concerned about. Frankly, since the Canadian import embargo was a blatantly anticompetitive act, it seems to me that if you could ignore what we would call the Nora Paddington (sic) defense, it seems that you are on very sound antitrust grounds in proceeding with such a prosecution.

The most difficult problems will be in coordinating on trade problems vis-à-vis the outside world. If we do have free trade regime between Canada and United States, we don't want Canada being too liberal in allowing imports which violate our standards of fairness. Then the goods could come through Canada and flood into the United States. Neither do we want one nation to be out ahead of the other, if it is at all possible, in how aggressively it is trying to promote its own exports in foreign markets by challenging various trade practices of other nations. Those are things, it seems, that bear a great deal of thought.

As to the problem with dislocation; given deregulation in transportation in North America, as is increasingly happening, and given the increasing geographic expansion of markets in North America, as is increasingly happening, and given the increasing geographic expansion of markets in North America, it strikes me that it is going to be very, very difficult for there to be effective dumping with any significant dumping margin between two different markets: the United States and Canada. I also think it's pretty difficult today for any serious kind of effective price discrimination between one part of the American market and another part of the American market.

Resales back into the market, if the price differential is too great, will be a better cure for the dumping and the price discrimination than legal action. I'm skeptical of Lawson Hunter's concern that Canadian industry will be subjected to a great deal of bashing by American companies frustrated because they can't bring dumping actions and inclined to bring price discrimination or predation actions.

Lawson gave you the batting average in those actions in recent years. They are not very good. Litigation is very expensive in our federal courts, as well as in the Commerce Department and the International Trade Commission. While there may be some risk of it, it strikes me that complaining about that as a risk is like complaining or worrying about getting somebody to stop hitting you on the head with a baseball bat and worrying that they are going to start hitting you on the behind with a baseball bat. Of the two kinds of bashing, those involved in the enormous industry-wide dumping cases are far more costly and far more troublesome than these ad hoc price discrimination cases would be.

My final point is that I'm genuinely concerned about the behavior of my colleagues in antitrust, in the official antitrust agencies in the United States today. I don't know why they are not seizing the initiative, both

within the administration and to the extent they can—and Dan Oliver can to a considerable extent—outside the administration, why they are not pushing for this free trade agreement and for antitrust trade rationalization as a great step forward in implementing Chicago School Economics. I'm particularly puzzled by this problem in the Reagan Administration, because the antitrust officials involved and others in the Reagan Administration have praised themselves up, down, and sideways on their fidelity to Chicago School principles; and yet here is Canada, providing a ready-made opportunity to try to take a giant step forward in implementing those principles, in a relatively safe way, in the international trade environment and the administration still hesitates.

It is nonsense for the United States to say, to seriously believe, and for the antitrust officials to stand-by while they say, that we will not consider modifications of U.S. trade law in negotiating a free trade agreement with Canada. Then again there are lot of things today that are troubling to somebody who is committed to antitrust and to competition. I'm troubled, for example, by the way the Secretary of Commerce and the Secretary of Defense are able to stop a potential acquisition by a Japanese company of an American microchip subsidiary of a French company, not because it is a violation of the antitrust laws, which it's not, not under the Defense Production Act, which is the only legal alternative to the application of the antitrust laws that I'm aware of on national security grounds, but because the government feels that something needs to be done to show that we are tough in the fight with Japan on the Japanese semiconductor case.

Where was the antitrust division when this issue was being run to ground so effectively by Baldrige and Weinberger? In 1982 Baldrige and Weinberger tried to torpedo the break up of AT&T and the then head of the antitrust division, Bill Baxter, was extremely effective in making sure they were unable to do so. I notice that now, six years later, the Defense Department is still able to let bids for a new sophisticated defense communication system which will probably meet all of its needs and be obtained at a considerably cheaper price than if the only negotiation could have been held with AT&T.

I don't understand why this administration is supporting new legislation, S-752, which seems to be consistent with the Administration's view that the active state and foreign compulsion defenses are no defenses to actions brought by the U.S. government. They are only defenses to actions brought in private cases. I'm concerned because that legislation specifically says that foreign relations considerations are not to be taken into account by courts.

I can understand that a foreign relation consideration could be that we want to have good relations with Mexico, and at the moment our relations with Mexico are a little uneasy, so we ought to go in and dismiss an antitrust action against the American subsidiary of a Mexican parent. That kind of an argument ought to have no place in the applica-

tion of the antitrust laws. I question whether the government can be trusted to act in the public interest.

If that argument were made by a Democratic administration, I would submit to you that the conservative Republicans would say, here's another example of that reckless, big-spending, government-can-solve-all-problems mentality. For the Reagan Administration to say that I'm from the government, I'm here to help you and, therefore, trust me and don't subject me to the same standards of fairness and constitutional review that you would subject private parties, I find remarkable.

In sum, I'm excited by a vision of what can happen for both the United States and Canada with a free trade zone. I can't think of a better spur to innovation, entrepreneurship, investment and net employment in both nations. I think the Chicago School is basically correct, though they have no monopoly on this insight, that competition spurs economic growth and development.

I'm afraid that if we lose this opportunity, it will be lost for many more years and we will all be the poorer. I hope that in the next months, my former U.S. antitrust enforcement colleagues will appreciate this opportunity and start working to bring it to success. Thank you very much.

