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*by Calvin S. Goldman**

1. INTRODUCTION

I am pleased to have the opportunity to address such a distinguished audience. The issues which are being discussed at this conference are of great importance, in the context of the current bilateral trade negotiations, and I would like to congratulate the organizers of this conference for an excellent and timely choice of topics.

Trade has always played an important role in the long and fruitful relationship which has developed over the years between our two nations. Today this trading relationship is more important than ever. Approximately one quarter of Canada's GNP is accounted for by exports to the United States, while Canada remains the United States' largest trading partner. One can expect that the successful completion of the ambitious and historic trade negotiations currently underway will foster further trade between our two nations and contribute to increased economic growth.

Trade liberalization can be expected to have important implications for the laws and policies of the two countries. The increasingly important relationship between domestic markets and international trade will create pressures for greater compatibility between international trade policies and domestic economic policies. Moreover, if there is gradual elimination of barriers at the border under a bilateral agreement, it will shift the focus of attention to differences in domestic laws and policies which are not traditionally associated with trade, and to the need to bridge existing differences between them.

This effect of multilateral trade liberalization has already been felt, as indicated by important legislation adopted or discussed in our two countries in recent years. For example, the new *Competition Act* which came into force in Canada in June 1986 recognizes the role of international trade in a number of fundamental respects. For instance, the new purpose clause makes reference to the importance of creating opportunities for Canadian participation in world markets, and recognizes the role of foreign competition in Canada. As well, the new merger law, the specialization agreement provision, and the export exemption are other ex-

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† This article was compiled from a transcript of the speech delivered at the conference. Questions regarding the assertions in this article should be addressed directly to the author.

amples of the consideration of international factors in the new competition legislation. Similarly, foreign competition has been given more prominence in the application of some U.S. antitrust laws, as for instance in the 1984 merger guidelines, the recent Supreme Court decision in the *Zenith* case, as well as the Reagan Administration's 1986 legislative proposals in the bill to establish the *Foreign Trade Antitrust Improvements Act*.

Competition policy is probably one of the areas of public policy most influenced by changes in the trading environment. When trade policy fosters trade liberalization it tends to strengthen the competitive process at the domestic level and it compliments the enforcement of domestic competition law. On the other hand, trade measures which deny or impair market access to foreign competitors inhibit competition and work at cross-purposes with domestic competition policies.

From this perspective, the growing conflict between competition law on the one hand, and the contingency protection laws on the other, notably anti-dumping, is particularly troublesome and raises at least three important issues in the trade negotiations.

(1) Is the maintenance of the existing anti-dumping regime compatible with trade liberalization under a bilateral agreement?

(2) Does competition law provide a more suitable alternative?

(3) Assuming that it does, what particular competition regime should be put in place to govern pricing practices between our two countries?

In what follows I shall explore these issues and attempt to identify some of the considerations which in my view, are important from a competition policy perspective in relation to transborder pricing practices in the context of a free trade agreement.

2. Historical Perspective on Dumping, Price Discrimination and Predatory Pricing

Historically, concerns over the possibility of using price differentials in the exercise of market power were first expressed in the international trade context. So far as I am aware, Canada, in 1904, was the first country to introduce a statute aimed at dumping. (The United States did so in 1916). The Canadian legislation was implicitly governed by a motive to prohibit "predatory dumping" i.e., dumping designed, in the words of the then Minister of Finance, "to crush out the native Canadian industry." However, the legislation did not contain, at that time nor in any subsequent form, a requirement that there be evidence of predation or intent to destroy a domestic industry. It became quickly recognized that showing predatory intent in international trade would raise serious evidentiary problems, mainly because of the extraterritorial dimension implicit in the investigatory process. As a result, the predatory element was quickly forgotten and antidumping law increasingly focussed on the pro-

tection of domestic producers from particular unfair and injurious imports.

By way of comparison, price discrimination and predatory pricing laws were enacted in Canada in 1935 following the conclusions of the report of the Royal Commission on Price Spreads that the pricing practices of certain firms tended to foster the survival of the powerful rather than the efficient. The Commission was of the view that certain practices were so definitely unfair that they warranted complete prohibition. The new law included provisions regarding discriminatory discounts, which is now section 34(1)(a), geographic price discrimination now section 34(1)((b), and predatory pricing now section 34(1)(c). However, compared to other provisions of the statute, these provisions have not been as actively enforced until recent years. One of the main reasons has been their criminal nature. By requiring proof beyond a reasonable doubt, the law has imposed a difficult legal test to deal with alleged unfair pricing practices. This was done in Canada because of earlier decisions which limited the constitutional jurisdiction for combines law to the federal criminal law power. Recent court decisions, however, have opened the door to the federal trade and commerce power. I'm hopeful the Supreme Court of Canada will soon keep it permanently open through a case now before it on the constitutionality of the civil damages remedy in the *Competition Act*.

The geographical price discrimination provision of the *Competition Act* has the greatest overlap with anti-dumping laws, since both are aimed at pricing practices which occur over separate geographical markets. The main difference is that in the former the markets are delineated domestically while in the latter they are delineated internationally. However, despite these similarities, these two laws are widely divergent in application.

3. The Compatibility of Anti-Dumping with Freer Trade

One of the primary goals of free trade is to remove barriers to trade that shelter domestic industries from international competition. By providing freer access to markets, a free trade area would enhance the free play of market forces and thereby promote economic growth and prosperity. Anti-dumping is fundamentally incompatible with this objective of free trade to the extent that it results in a differentiated treatment between domestic and foreign firms. A major condition for effective competition in a free trade area is the establishment of a level playing field. Furthermore, the empirical evidence on the application of anti-dumping laws strongly suggests that they have often been used to protect domestic producers from foreign competitive pressures. By retarding the adjustment process, it is well recognized that anti-dumping laws prevent the economy from enjoying the full benefit of trade.

It is worth pointing out that the EEC has recognized this incompati-

bility of anti-dumping in their economic arrangement, and member states do not maintain independent national anti-dumping laws against other member states.

Anti-dumping is not only incompatible with freer trade, but becomes largely unnecessary in a free trade environment, even in terms of its narrow objective of protecting domestic competitors. This is because the scope for market segmentation between the home and export markets, a necessary condition for dumping, is significantly reduced by the removal of trade barriers. Any price differential which may arise between two open economies will be rapidly arbitraged away, assuming the competitive process is allowed to work. While some firms may find other ways to segment markets at the border, their pricing practices are likely to resemble those experienced at the purely domestic level.

4. Competition Law as an Alternative to Anti-Dumping

If anti-dumping law appears to be inappropriate to deal with pricing practices in a free trade area, can competition law provide a better alternative? I believe it can, and I intend to show you why by comparing the two laws in terms of first, the nature of the offense and the way it is determined; second, the injury test; and third, the remedies that are applied.

Under the Canadian anti-dumping law, the determination that dumping is taking place requires showing: that the goods are being imported into Canada at prices lower than the normal value in the exporter's home market, the so-called margin of dumping, and that the goods being dumped are causing, or are likely to cause, material injury to, or retard the production in Canada of, like goods.

Measuring the margin of dumping falls short of what is usually required under competition law to establish geographic predation. Evidence of dumping is established by comparing two sets of prices: the export price and the normal domestic price. The element of cost, the length of the period for which a price differential has been reported, and, more fundamentally, the state of competition in the import and export markets are not an explicit part of the analysis. In addition, anti-dumping laws act as an incentive for foreign exporters to charge export prices, which are usually higher than their total cost of production, as otherwise anti-dumping duties may follow since normal value is generally at or above the cost of production.

In contrast, the establishment of predatory pricing under competition law requires evidence of sales at prices unreasonably low. Although no conclusive definition of unreasonably low has been established in Canada, it is generally accepted today that a price above average variable cost would not be considered as unreasonably low or predatory in a case where there is overcapacity and the firm is minimizing losses by setting a price that still makes a contribution to its fixed overhead. Hence, the

predatory law standard imposes a much higher burden of proof than the normal value price standard adopted in anti-dumping laws. Moreover, in competition law the low pricing must be part of a policy, and this avoids interfering with isolated or sporadic acts undertaken for legitimate business reasons such as meeting aggressive spot competition. General economic conditions of the industry, such as declining demand and large excess capacity, may also be taken into consideration in the determination of whether prices are set with a predatory intent.

The material injury test in antidumping law usually involves the production of evidence showing loss of sales, decline in profits, decrease in capacity utilization, lowering of return on investment, and the loss of employment in domestic industries. All these factors have one common element: they focus on injury to domestic competitors and *not injury to the process of competition*. (emphasis added) In competition law, unreasonably low pricing policies directed against competitors are prohibited when they are designed for, or have the effect of, substantially lessening competition or eliminating a competitor. Relevant evidence will focus on various elements of market structure, conduct, and performance. While antidumping law has the effect of protecting domestic competitors whether they are efficient or not, competition law is aimed at the protection of the competitive process. As such, it does not protect competitors against lower prices that are achieved through enhanced economic efficiency via economies of scale, lower labor costs, or superior technological expertise. Rather, a major benefit of competition law is the enabling of the market place to operate in as efficient a manner as possible. This overall objective has now been incorporated by Canada's Parliament in its statement of the purpose of the new *Competition Act*.

A further distinction between antidumping and competition law relates to the remedies available under each regime. Antidumping law is designed to provide summary relief for domestic industries threatened by imports. In the normal case, the remedy applied is a special duty which offsets the effect of the price differential. In some instances, however, an antidumping investigation may be suspended at an early stage if foreign suppliers agree to give an undertaking to cease dumping or otherwise eliminate the injurious effects of dumping. In all such instances, such undertakings amount to the elimination of competition and may even encourage collusion in the relevant industry. By contrast, remedial orders and undertakings in competition matters are premised on preserving or enhancing the competitive process. In the case of a criminal matter, punitive sanctions can be imposed to further deter harmful conduct.

This brief sketch of the major differences between the trade and antitrust law approaches to price discrimination suggests that competition laws provide a more rational standard than antidumping laws for dealing with the injury which may be caused by price differentials. Moreover, focusing upon the effects of the practice on competition, the stricter requirements for the application of the competition law provisions make it

more unlikely that they can be abused by complainants seeking relief from legitimate competition. Overall, the competition law standards foster the broader objectives of economic welfare and growth which, of course, are the underlying rationales for the current bilateral trade negotiation exercise.

5. The Competition Regime Under Freer Trade

The third question I posed earlier arises, namely, what particular competition regime should be instituted in relation to pricing practices in a freer trade arena. From my earlier comments it would appear that the preferable way to deal with abusive pricing practices in a free trade area would be to apply existing domestic competition law to such practices. While this solution may appear attractive at first blush, it has to take into account the major differences which exist between Canadian and U.S. law in regard to the substantive provisions, notably price discrimination, as well as in regard to enforcement procedure, notably the scope for private action and the recovery of damages. These differences are significant enough in my opinion to raise questions about the viability of this option. It could result, for instance, in the creation of an unbalanced regime in which firms in one jurisdiction may be given an advantage over firms in the other. This might not only result in inefficiencies but also in growing pressure for the reimposition of special measures of protection.

In view of these differences in our respective competition laws, a greater degree of compatibility between Canadian and U.S. law would be warranted. This would not be an easy task. Indeed, it will require a significant amount of goodwill on both sides since many of the issues which arise may be politically sensitive and could have profound implications for the legal systems which currently prevail in the two countries.

Nonetheless, the suggestion of compatible standards has some merit, particularly where such standards introduce improvements in existing antitrust provisions so as to foster the objective of the free trade area. To this end it would be important for the new regime to reflect the current state of the art in antitrust thinking about price discrimination and predatory pricing, so as to ensure that only truly anti-competitive pricing practices are deterred.

The new regime could also provide for a reasonable degree of predictability so as to develop a hospitable business environment. If economic efficiency and growth is going to be fostered, it is important that businesses make decisions on the basis of an accurate understanding of the institutional environment in which it operates. This would imply the need to establish clear rules to ensure a consistent interpretation of the relevant law in both jurisdictions.

Furthermore, the new regime should carefully define the appropriate rules governing jurisdictional issues, enforcement activities, and the application of remedies. Particularly relevant in this regard would be

rules pertaining to enforcement and cooperation between antitrust agencies and the enforcement of judgments and directives made in the other jurisdiction. This would provide a better method of dealing with conflicts of law or jurisdiction than the current, largely *ad hoc*, approach to solving extraterritoriality principles that apply to matters arising between the United States and Canada.

While all these considerations deserve careful attention, I will now focus my remarks on what might be desireable competition objectives in a new price discrimination regime and examine how competition considerations can impact on the selection of an appropriate system to govern transborder price discrimination and predatory pricing practices.

With regard to the substantive provisions, the exercise could begin by abstracting for a moment from the existing national law provisions and asking how price discrimination and predatory pricing could best be treated in light of current antitrust thinking on the question.

Price discrimination is defined as a situation where a particular supplier sells the same commodity or service at more than one price. More generally, price discrimination arises whenever like products are sold at different price/cost ratios. Three necessary conditions must hold for price discrimination to be a rational pricing strategy for the firm: the seller must have market power, the buyers must have different elasticities of demand for the product, and various buyer elements must be capable of being kept separate.

The question of how competition law should deal with price discrimination has been the object of considerable debate in the literature over the years. While a populist, relatively hostile, view prevailed in earlier years, a much more permissive Darwinian attitude has become the vogue. This is reflected in the very limited public enforcement of price discrimination provisions in our two jurisdictions in recent years. Several reasons underlie this more liberal approach. First, it is recognized that although price discrimination generally redistributes income from high-price consumers to low-price consumers and producers, it may allow the production of goods or products which are socially beneficial but would not exist otherwise. Moreover, price discrimination typically enhances allocative efficiency by allowing firms to produce a level of output which is closer to the competitive level than under simple monopoly pricing. Finally, price discrimination may also foster competition, for instance by undermining oligopolistic cartels.

On the other hand, there are situations where price discrimination may in fact be anti-competitive. This is the case, for instance, when such pricing practices reflect price fixing agreements or are used in a predatory manner to drive a competitor from the market, or prevent his entry if they result from and contribute to a firm's anti-competitive exercise of its market power.

Predatory pricing can be considered as a special form of price dis-

crimination which involves a temporary price cut with the intent of eventually restricting supply. Rational predation typically requires that reasonable prospects exist for the predator to recoup its losses after the predatory campaign. In other words, the market must be relatively protected from entry so that it is not readily contestable. The predator must also have a deep pocket, or at least a deeper pocket than the rivals he wishes to eliminate. I might just add that one potential benefit of a freer trade area is to reduce barriers to entry, making markets more contestable and therefore reducing the ability of a firm to engage in predatory conduct.

There are typically three main reasons for predation: driving a competitor out, disciplining an uncooperative competitor, and deterring entry of a would be competitor. Although examples of these three forms of predation can be found in the literature, true predation is believed to be a rather rare phenomenon. In many cases the firm cannot really expect to recoup its losses after predation because either the barriers to entry are relatively low, or because there are less costly ways for the firm to achieve or preserve a position of dominance in the market.

True predatory pricing is clearly harmful to competition and can, therefore, be justifiably prohibited. In Canada, predation is dealt with as a criminal matter in two sections of the *Competition Act*. In practice, it is often very difficult to distinguish predation from vigorous competition. Too stringent an approach to predatory pricing may stifle rather than enhance competition. An examination of the intent of the firm which engages in the pricing practice could possibly provide a way to distinguish between the two situations. This is difficult in practice, but the courts have inferred intent by the application of cost rules which attempt to relate the alleged predatory price to various measures of cost (e.g., the well-known Areeda-Turner test) as well as to relevant structural factors—notably whether the firm is indeed in a dominant position and whether it might reasonably be expected to be able to recoup its losses after the predatory campaign. On the basis of these tests, relatively few cases of predation have resulted in conviction.

In contrast to this approach, predation can also be dealt with as a non-criminal matter, as it is in the United States, and as in the new civil provision on abuse of dominant position in the *Competition Act*. In adding these abuse provisions to the legislation, Parliament has required that a practice of anti-competitive acts be shown. Evidence of an anti-competitive purpose is required in each of the listed examples of anti-competitive acts contained in section 50. Price discrimination and true predatory pricing are not part of the non-exhaustive list of anti-competitive acts set out in the abuse of dominance provisions, although one listed act is very close to predation. It is arguable, however, that any abusive pricing conduct engaged in for the purpose of preventing entry, or disciplining or eliminating a competitor, falls within the other kinds of anti-competitive acts covered in the abuse provision.

It should be noted that in addition to the finding of an anti-competitive act, there are a number of other requirements in the section that must be shown before the Tribunal could make an order prohibiting the conduct. First, the abuse provision applies only to a practice of anti-competitive acts and not to a temporary aggressive strategy aimed at legitimate marketing objectives. Second, evidence of dominance among a class or species of business must be shown. Finally, the end result of the practice must be an actual or likely substantial lessening of competition in the relevant market. These elements are certainly consistent with current views that any abusive anti-competitive practices can only harm competition if they are engaged in by a dominant firm in a market. It is worth noting that the Treaty of Rome, which established the European Economic Community, contains a provision dealing with abuse of dominant position which provides for uniform antitrust treatment of pricing practices between member states.

In the context of today's discussion, I don't have time to elaborate on each of the differences between Canadian and U.S. price discrimination and predatory pricing provisions, as a great deal of study would have to be done in that regard. I do, however, suggest the new abuse of dominance provision may provide a good starting point for that study.

Another fruitful area for study is that of procedural differences between the two countries. It is in terms of procedures that the Canadian and U.S. price discrimination laws display the strongest divergence. Despite similarities in the frequency of public enforcement actions, a large number of price discrimination cases in the United States come from private parties who, presumably, are motivated by the possibility of recovering treble damages. In Canada, the scope for private enforcement and the recovery of damages is limited. Under section 31.1 of the *Competition Act*, private parties can seek to recover damages and the cost of proceedings incurred in an action alleging conduct contrary to the criminal provisions of the *Competition Act* or for a failure to comply with an order of a court or the Competition Tribunal in a civil proceeding. In such actions, it is not necessary that there be prior convictions before proceedings can be instituted. This means that private enforcement is possible as long as the plaintiff is prepared to meet the burden of proof that he has been the victim of price discrimination and has consequently suffered damages. The use of this provision is still limited as its constitutionality remains subject to challenge pending the decision of the Supreme Court (of Canada) in two cases. One of the cases, *City National Leasing v. General Motors of Canada*, involves an alleged violation of the price discrimination provision of the *Competition Act*. It is important to note further that the recovery of damages in Canada is limited to actual or single damages. Moreover, there is no direct right of private action for the recovery of damages based on conduct which may be contrary to the abuse of dominance provisions of the new legislation. It should be noted, how-

ever, that any breach of an order made by the Tribunal, would carry a right of civil action.

Support for private actions has been expressed on both sides of the border. Such actions have been viewed, in the United States, as a valuable compliment to public enforcement in achieving compliance with the antitrust laws. The U.S. Supreme Court has characterized the private suit as a bulwark of antitrust enforcement which furthers the overriding public policy in favor of competition. In addition to their perceived compensatory and deterrent benefits, private civil actions are also considered to offer potential safeguards in cases where government officials do not proceed vigorously with the detection and prosecution of suspected violations. Support for private actions has also been expressed in Canada. In their important 1976 report, *Dynamic Changes and Accountability in a Canadian Market Economy*, Skeoch and McDonald noted that private actions are an integral part of the total law enforcement apparatus. They provide compensation for injured persons and prevent the unjust enrichment of those who breach the law, thereby inducing compliance with the law by strengthening the deterrence element.

In addition to differences concerning the right of private action, a further major procedural difference is the availability of treble damages in the United States. Some observers believe that such trebling may in fact be a vehicle by which antitrust laws can be used to subvert competition. For instance, Scherer points out that the proliferation of treble damage suits in connection with alleged violations of some U.S. antitrust laws, particularly in price discrimination and monopolization cases, may have encouraged more conservative, less aggressive business behaviour. Scherer also notes the strong temptation for nuisance suits to be filed in the expectation that the target companies will offer an out-of-court settlement—including an appreciable fee for the plaintiff attorneys who often act as entrepreneurs in initiating the case—rather than bear the costs and risks of litigation. Similar concerns have been expressed by Baumol and Ordover who equate the protectionist use of antitrust to a form of rent-seeking behaviour. This behaviour imposes substantial costs on the economy, not only because of the valuable resources which are dissipated in the proceedings (e.g., the time of judges, court officials, lawyers, and expert witnesses) but also because it contributes to resource misallocations and creates disincentives for internal operating efficiency.

It would appear that some degree of consensus may be emerging among many antitrust practitioners that private actions are a useful and important element of the enforcement mechanism, but that the use of treble damages may be more questionable, at least in some circumstances. This emerging consensus among experts may be reflected more clearly in the future in our respective laws and could be a useful starting point in an attempt to build a new regime. For instance, I have noted with interest the amendment to the U.S. law proposed by the Reagan Administration which is designed to reduce the use of treble damage

remedies in certain circumstances. In Canada, the upcoming decision of the Supreme Court on the constitutionality of section 31.1 in the *Rocois Construction* and *City National Leasing* cases will have a decisive effect on the use of private actions in Canada. The decision could move Canadian practice closer to the U.S. model.

6. CONCLUSION

In conclusion, I would like to come back to the three main questions which I raised in the beginning of my presentation.

The first question was whether anti-dumping was compatible with a freer trade environment. My answer here is clear: I believe it is not. Anti-dumping laws tend to protect competitors, rather than the competitive process, and represent a serious impediment to the play of market forces in a free trade area. In addition, removal of trade barriers reduces the possibility that anti-dumping price differentials would persist.

The second question was whether competition law provides a more suitable alternative. My answer here is yes. Reliance on the price discrimination and predatory pricing laws is preferable, I suggest, for two main reasons. First, it is consistent with the intent of a freer trade agreement to eliminate barriers at the border and ensure predictable and secure market access. Second, it enhances competitiveness and the efficiency of the market place. It precludes actions against pricing practices which have little or no effect on the competitive process.

The third question is what particular competition regime should be put in place in a freer trade environment. This is a much more difficult question, and one to which I certainly do not have the answer. There are significant differences in both the substantive and procedural provisions of the competition laws of our two countries. Nevertheless, in relation to the substantive laws it is my view that the abuse of dominance provision recently adopted in the new Canadian *Competition Act* provides a useful building block. Moreover, there appears to be some movements in procedures toward greater compatibility between the two legal systems. Procedural differences, however, still remain as the greatest challenge in trying to use competition laws to discipline transborder pricing practices.

If a freer trade environment does arise, a great deal of study is going to have to be devoted to this complex set of issues pertaining to what kind of antitrust regime should be put in place. In addition, I am fully aware that there are numerous other issues that require careful attention, particularly the conflict resolution mechanism, and the perennial issue of extraterritoriality. I am confident, however, that these questions will not remain unanswered since we have in the audience several distinguished experts who have devoted a lot of thought to these issues.

I want to make one further point, and is that there has to be a good deal of study done in any transitional period on the issue of whether the replacement of anti-dumping laws between our two countries by antitrust

laws would leave any significant gaps that warrant specific attention. Those who are experts in both fields are going to have a good deal of work ahead of them if the trade discussions are successful.

Thank you.