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COMPETITION (ANTITRUST) AND ANTIDUMPING LAWS IN THE CONTEXT OF THE CANADA-U.S. FREE TRADE AGREEMENT

Executive Summary

The study, undertaken for the Committee on Canada-U.S. Relations of the Canadian and U.S. Chambers of Commerce addresses the mandate in the Canada-U.S. Free Trade Agreement (FTA) to develop a substitute regime to antidumping laws for the treatment of unfair pricing in trans-border commerce between the two countries (Article 1907). Inherent in the FTA, and in the realities of the day, is the recognition of the global competitive challenge. Improved industry efficiency, enlarged markets, and predictable rules of competition in North America are all necessary to meet that challenge.

By removing barriers to trade between Canada and the U.S., the FTA implies that competition/antitrust laws in both countries should be considered as a substitute regime for disciplining unfair transborder pricing.

In its mandated consideration of such a change, the Working Group should apply two tests:

One: Will those who have had recourse to antidumping laws in the past enjoy fair treatment under, and adequate access to, any new regime?

The study concludes that antidumping laws are not compatible in principle with the FTA. Examination of the purpose of competition laws, on the other hand, indicates that these laws are compatible.

In examining the key issues involved in eliminating antidumping laws and relying instead on existing competition laws, this study is divided into five sections.

Section 1 compares the purpose of the two sets of laws. One finding is that the continued use of antidumping laws would be inconsistent with the procompetitive intent of the FTA because these laws condemn discriminatory transborder pricing whether it is predatory and damages competition *or* nonpredatory and enhances competition. On the other hand, competition laws outlaw transborder discriminatory pricing only if it is predatory, but allow it if it is not predatory and promotes competition. Therefore, the transborder application of competition laws would be consistent with the FTA's goal of enhancing North American economic efficiency and global competitiveness. By eliminating their import tariffs, the two countries are already taking a major step in increasing competition and efficiency. It is important to build on this progress by

using competition laws, rather than compromise this progress by the continued use of antidumping laws that, in nonpredatory applications, represent undesirable barriers to trade and competition.

Moreover, this shift away from antidumping laws in order to rely on competition laws is not as big a change as it might appear. The reason is that the tariff removal under the FTA will reduce — though not eliminate — the ability of firms to dump and thus reduce the need for relief provided by the antidumping laws. Thus the FTA's tariff removal makes the switch to a competition law regime less of an issue than it would otherwise be.

Whereas section I examines the economic case for using competition laws rather than antidumping laws, the rest of this study examines the legal feasibility of such a change. Sections II and III explore the substantive and procedural provisions of Canadian and U.S. competition laws and determine that, in their present form, they can provide an effective, practical remedy for "anticompetitive" dumping.

Canadian and U.S. competition laws address predatory pricing in much the same way. Prices that are unreasonably low with the effect of, or designed to have the effect of, substantially lessening competition or eliminating a competitor are made illegal and may be the subject of criminal prosecution or private actions for compensation.

Under U.S. law, "unfair" or "predatory pricing" may be analyzed in the context of primary line effects of price discrimination under Section 2(a) of the Clayton Act (commonly referred to as the Robinson-Patman Act ("RPA")) or in the context of monopolization under Section 2 of the Sherman Act ("Section 2"). Although the tests for illegality under the RPA and Section 2 are not in all cases identical, both require injury to competition. Similarly, both also involve identification of an "improper" price, which requires the court to distinguish between procompetitive and anticompetitive pricing.

Under Canadian law, pricing is illegal (*i.e.* predatory) if it is part of a policy to sell at unreasonably low prices which has the effect (or is designed to have the effect) of substantially lessening competition or eliminating a competitor. Pricing also may be challenged by the Director of Investigation and Research on the basis that the seller substantially controls a market and has engaged in a practice of anticompetitive acts that substantially controls a market and has engaged in a practice of anticompetitive acts that substantially lessen competition. Canada's Competition Bureau had recently circulated a draft bulletin that sets out its enforcement criteria with regard to predatory pricing.

With respect to accessibility and efficiency, the study recognizes that there are concerns about these matters in relation to sales involving two national jurisdictions. Problems may arise in connection with discovery of information, official cooperation, confidential information, venue, service of process, personal jurisdiction, jurisdiction over subject matter,

remedies (enforcement of orders for compensation, penalties and injunctions) and time and cost. Following an extensive examination of these issues, the study concludes that, while effective procedures exist within and between both countries, it is desirable to clarify, and to establish to the extent necessary, appropriate rules to ensure efficient access and effectiveness of remedies for anticompetitive behavior. The study concludes that such an accord on these matters would be based on a well established foundation rather than being substantially innovative.

Section IV deals briefly with the related subjects of national treatment, equality of treatment and harmonization. It notes that the application of antidumping to transborder trade, while domestic trade is not subject to the same rules, discriminates against imported goods and denies national treatment *broadly defined* for those goods.

Competition laws in both countries apply equally to imported as well as domestically traded goods. It would not be necessary to harmonize Canadian and U.S. competition laws for the national treatment principle to be fully operative in Canada-U.S. transborder trade.

In the final section, the study examines several concerns that have been expressed especially from the Canadian side, including the potential increase in antitrust actions and the award of unreasonable damages, and determines, with respect to predatory pricing actions, that these concerns are for the most part unfounded.

CONCLUSIONS AND RECOMMENDATION

A practical view of Canada-U.S. trade in the context of this study results in the conclusion that:

1. Canadian and U.S. competition laws dealing with pricing practices that have a substantially detrimental effect on competition.
 - (a) are generally similar and compatible; and
 - (b) are applicable to pricing initiated in the other country.
2. Measures should be added to the FTA and implemented by legislation:
 - (a) to facilitate access to remedies by those alleging substantial detriment to competition, and
 - (b) to ensure effective enforcement of appropriate injunctions, penalties and compensation.

In the final analysis, replacement of the antidumping laws between Canada and the United States is the economically logical and legally feasible next step in the removal of barriers to trade and investment now underway in the FTA. Moving expeditiously to deal with this unfinished business will make both economies better able to meet competitive challenges from the Asia-Pacific region and Europe after 1992.

