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Discussion

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## Discussion After The Speeches of Douglas Rosenthal and Calvin Goldman

*QUESTION, Professor King:* Mr. Rosenthal, do you see the political will here to substitute the antitrust law for the trade law in restraining certain practices? Do you think it's realistic that we can hope for or anticipate that this will happen?

*ANSWER, Mr. Rosenthal:* No, I don't see the political will, further I don't see even the beginnings of any effort to educate the American people, even the enlightened American community, to the opportunities that exist here. It seems that even the pro-antitrust people themselves don't fully appreciate this opportunity. All I can say is that you start with what you have.

If we can get American antitrust people to appreciate this as an opportunity, then they can help non-antitrust people appreciate that this is a chance to really justify America's trade law when we are dealing with nations that aren't willing to open their markets the way Canada is offering to. Then maybe we can begin to develop it. Maybe we can't develop it in time for a trade agreement this time, or we can't develop it in time for a trade agreement which comprehends competition law rationalization of the kind about which I'm talking; but unless we begin to discuss it, unless we begin the process, we are not even going to accomplish it in ten years and it seems to me so intellectually right and sensible and compelling that I see no alternative but to start right now.

*QUESTION, Mr. Herman:* We seem to be talking about replacing antidumping remedies with competition-type remedies because the Canadian government has decided it is a negotiating objective. I believe the Canadian government has said in these talks that one of the objectives is to get behind U.S. antidumping remedies, which we find to be harassing to Canadian companies. If the net effect of replacing antidumping remedies with predatory pricing, discriminatory pricing-type remedies in the context of a trade agreement, is to increase the exposure of Canadian companies to legal action brought by U.S. companies, then what have we gained?

*ANSWER, Mr. Rosenthal:* First of all, I don't believe that there will be a dramatic increase in actions brought under an attempt to monopolize law or the Robinson-Patman Act, because those cases are very hard to prove. They are expensive and they generally don't work, so I don't see what is in it for an American company to bring those cases.

Now, if you are talking about a suggestion in a board room, "Let's bring a Robinson-Patman Act case, I know we don't have a cause of

action here, but we can sure bleed Canadian industry;" I guess I have two answers to that. First, Terry Calvani has expressed the position that he would love to bring an antitrust case against anybody who tries to use U.S. legal process in that way. Second, and more importantly, the federal judges have expressed the view that Rule 11 of the Federal Rules of Criminal Procedure makes that an unethical practice and you can be sanctioned. The courts are increasingly imposing heavy sanctions for totally nonmeritorious complaints to which attorneys sign their names.

*ANSWER, Mr. Goldman:* I think it largely depends on how you define the objectives. If one accepts the objectives of the free trade discussions at the moment as being to remove barriers and to enhance overall the efficiency of the marketplace in North America, I don't think that you can have it both ways. I subscribe to what Mr. Rosenthal said. I'm not in a position to comment as to the incidents in the United States of any such predatory pricing actions. I do suggest that if Canadian firms are able to put themselves in a position to compete fairly and operate in an efficient marketplace, that's a great improvement over a situation where they may have some protection, but the protection is only short term. It is short-lived and, in any event, there are going to have to be adjustments down the road. I suggest that it may be time to make those adjustments in the short run rather than wait for the long run.

*QUESTION, Mr. Hudec:* I would like to address the question of replacing the antidumping laws with the antitrust laws. We have had two antitrust lawyers consider the question of whether the antitrust laws might be better than the antidumping laws. That is a little like asking two doctors what they think of malpractice litigation.

If I might, I would like to expand the discussion a little bit by talking a little more about the antidumping laws and what is behind them. Why is there an attraction to antidumping laws as a matter of policy? Protection may be a reason and it may be inappropriate, but why does antidumping have this particular appeal? It seems to me that it is because the element of foreignness supports the idea that there is something going on in the other country. There's some advantage that the producer in the other country has that is being expressed through the lower prices.

Now, as a political matter, if an attempt is being made to replace the antidumping laws with something else, you have to be able to say that we have attacked that something else, that advantage that the other foreign producer has. This free trade agreement is going to have to say that the conditions on which the Canadian manufacturer is shipping into the United States are the same for the U.S. manufacturer who is shipping into Canada. Both speakers have addressed (and I would agree with them) the fact that tearing down tariff barriers is going to increase the impossible incidence of reverse dumping.

Two other things need to be considered quite seriously. One is subsidies. The other is countervailing duties. I don't think that counter-

vailing duties are separate from the antidumping issue, but subsidies are separate.

What this agreement says about subsidies, in terms of what subsidies can be given by what government, is going to be a very important ingredient in the political situation of the antidumping issue. There is also this sense that by some sort of resale price maintenance, foreign producers are able to shield themselves from reverse dumping. The easy comfort of saying that once we tear down the trade barriers, the prices are going to level out in the two markets may not be as persuasive as it sounds at this conference. I wonder whether you think that there is something that can be done, or ought to be done, in the negotiations on the antitrust side to attack this particular last problem?

*ANSWER, Mr. Goldman:* I think you have made a fair comment. Mr. Rosenthal and I are two antitrust practitioners and perhaps we could use some comment from the antidumping bar. At the same time, I suggest to you that the EEC has found—again, I'm not an expert in the dumping field by a long shot—but they have found themselves able to operate without antidumping laws between member states.

The EEC members recognize the incompatibility of the objectives of free trade with antidumping provisions and I raise the question as to whether there is any significant reason why the same kind of regime could not be put in place in the North American context. Having said that, I do suggest that we ought to engage in a very intensive study, by members of both the antitrust and antidumping bars, of the question of what gaps, if any, might arise and might not be cured by replacement of the antidumping laws with the antitrust laws; and if there are any such significant gaps, in what manner ought they best be dealt with in the context of a freer trade regime.

*ANSWER, Mr. Rosenthal:* In response to Mr. Hudec's comment, I think we can deal with the subsidies problem while we get rid of the dumping laws. They do have certain common foundations, but they can be dealt with separately.

In response to your point about foreignness as a problem, the only reason—and I think I would say this even if I were a dumping lawyer and not an antitrust lawyer—for the dumping laws is the perception, for example, about Japanese markets, that if you sell in the United States at or below the cost you sell in Japan, the goods can't find their way back into Japan to compete with you. There are a variety of non-tariff barriers that make it impossible. That is why you need a dumping law.

It is this rationale which Canada is offering to take away and which the exigencies and the congruencies of the two geographic markets and the comparable states of economic development and high-level transportation in the two countries take away. My own view on subsidies is that if, twenty years down the road, we could reach a reasonable point where we could have a full free flow of capital between the two nations and a

full free flow of labor without immigration laws between the two nations, the existence of a subsidy law between the two nations would be hard to justify.

The frustration would be similar to that which the State of Tennessee might have at industrial revenue bonds offered by the State of Kentucky, at a much more advantageous level, to industry coming into Kentucky versus Tennessee. There isn't a legal remedy for the State of Tennessee, and generally the U.S. economy benefits from the subsidy, by the taxpayers of Kentucky, to the industry.

Other social policy questions are raised as, for example, with the flight of industry from New England to the Sunbelt in the 1950s and the 1960s. However, the net welfare benefit to the United States due to the flight of capital cannot be ignored.

The goal here is to take away the foreignness of Canada and Canadians, and the United States and Americans, from each other. We have a better chance of accomplishing that goal than either of us do with any other nation.

In response to Mr. Hudec's question, I'm happy to say that the answer is antitrust enforcement. If there is behavior where people do frustrate distribution of goods which are resold into the foreign market, that behavior is actionable under both Canadian and U.S. antitrust law.

*QUESTION, Professor King:* I would add one comment. Antitrust matters have historically been quite political in the United States. Do you think you need more protections in your antitrust laws to make sure that it isn't enforced only in certain areas and not in others, depending on the political context? Do you think there are any additional strengths of the antitrust laws that anticipate that?

*ANSWER, Mr. Rosenthal:* Professor King, you have put your finger on precisely why it will be impossible to ever get rid of the private remedy in antitrust law in the United States. Furthermore, it will be difficult to find a single antitrust lawyer to agree, even among those who see the harm that the automatic blanket treble damage remedy causes. However I am one of those.

I'm not one of those that would abolish the treble damage remedy and it is largely for the reason that Professor King stated: administrations come and go. They have different enforcement policies. The antitrust laws are an important part of our legal system. They do have quasi-constitutional status. The basis goes back to our views of economic and political democracy and the views that were articulated, for example, by Brandeis and others; the view that is skeptical about concentrations of power, whether they are economic or political. We have a private remedy to give people the chance to exercise rights in their own self protection. You may come to it eventually, because you share some of those concerns. Ultimately, that's why I'm not unduly troubled; because the government officials can enforce the antitrust laws in political ways.

*QUESTION, Mr. Magnus:* On the subsidy issue, at the same time as there may be no remedy as between states, there is, in fact, a remedy as between the two jurisdictions. Perhaps that goes to aspects of political sovereignty. Do you really think it is realistic that one would give up that political sovereignty? The same issue exists with respect to safeguards.

*ANSWER, Mr. Rosenthal:* It is not realistic at the present time. But I do think that safeguards is an issue to be examined deeply because safeguards aren't even defensible in terms of a fairness standard. I think it should come under a great deal of scrutiny. I agree that it is unrealistic today and I refer to some suggestions. There are ways of dealing with it today, notwithstanding that abolishing it is unrealistic, but we are talking about longer term trends. If we could make this process work, I think it is something that would be useful to discuss down the road.

*QUESTION, Mr. Magnus:* I don't want to sound overly pessimistic, but it hasn't been realistic, with respect to subsidies, for over twenty years. An example is the issue of textiles in the United States. Between Canada and the United States, there are certain political realities in terms of regional disparity that may never be overcome.

In Canadian and American antidumping laws, the second major element in both statutes is salable low cost of production. How would you see dealing with the second element, paralleling antidumping law with competition law?

*ANSWER, Mr. Rosenthal:* It's something that may be discussed at the table and may not be appropriate to negotiate in public. It is however an important element. In an integrated market where barriers to trade have been reduced or removed, anything erected to impede the flow of trade should depend on sound analysis which is oriented toward market competition. Thus your test is not the mere technical fact of the salable low cost of production, but rather its impact on the marketplace.

Mr. Goldman's final question that he left with all of us, which is a valid question for us to take home, is to the extent that a competition or market-oriented test does not cover the entire universe which is currently covered by antidumping, how important to business, industry, and those who are actually engaged in the marketplace, is that remaining five, ten, or twenty percent of the pricing universe that would not be covered under a new world of competition administration? To the extent that it may represent significant distortion, then maybe that would be required.

One other point is that we still may end up with some antidumping, as well as antitrust, because antidumping, as we heard today, is in rem and antitrust is directed to the firm. What do you do with a Canadian firm that is exporting 100% foreign goods to the United States? Is the exemption or the replacement of antidumping exclusive to all trade between Canada and the United States or to all Canadian-origin goods and U.S.-origin goods going back and forth? If it is the latter, then an-

tidumping is still available against a Canadian or U.S. firm for foreign goods which do not meet the rule of origin test.

*COMMENT, Mr. Feltham:* I would like to speculate that, for the time being at least, it won't have any effect if we just leave antidumping the way it is. It seems to be a hot issue and an emotional issue. If we said that we are not going to talk about antidumping for the time being and just left that the way it is, would that have an adverse impact on an otherwise comprehensive agreement that might be achieved and which took care of the problems that are associated with subsidies and, therefore, countervailing duties?