The Legal Perspective: Anti-Dumping Remedies and Competition Regimes, Similarities and Differences

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Douglas Rosenthal*

In the United States and Canada, predatory pricing law in the antitrust area has been referred to as discredited. In a U.S. Supreme Court case involving Matsushita Electric and others, the Court said that in a market, where for over twenty years we have seen no increase in prices, after a sustained period of below cost sales, we find it very hard to believe that one can establish a theory of predation. The theory of predation depends upon the notion that once these big powerful Japanese companies have driven all of the American companies from the market they will be able to recover monopoly profits, having at that point established for themselves a monopoly position. The Supreme Court said the evidence for predation was not there.

The dumping by the Japanese industry, viewed through a slightly different prism, in the colored television antitrust case was in fact, I suspect, an instance of successful global competition. This is because the true winners of the Japanese strategy, undoubtedly seeking to knock out the U.S. television industry, were the Koreans and the Taiwanese. Prices were not recouped, because the Koreans and the Taiwanese came in with effective, quality, low cost products which prevented the Japanese from raising their prices. In some important sense, the predatory pricing theory was found to be discredited there because there was a broader view of what global competition entails. One of the things that we ought to understand that is going on in this debate between dumping and antitrust, is that some of the commentators are speaking from a philosophical background that says there is something dangerous and suspicious about consumerism; that you cannot trust the market, nor can you trust consumers. In fact, “rank consumerism” is the evil which is used to justify the dumping laws, namely, that we are going to destroy our industry if we try to acknowledge consumer sovereignty. However, that is an attitude which is antithetical to the thinking expressed in the antitrust laws. There is a second reason why this argument that the antitrust laws are discredited is a serious admission vis-à-vis U.S.-Canadian trade. It may be true that the U.S. Supreme Court was wrong in the Matsushita case. It may be true that one should have looked at the Japanese strategy with color televisions as predation. Perhaps one should have concluded that injury should have been found because the intervention by the Koreans

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and the Taiwanese was accidental; but the intent by the Japanese to pre-date was clearly there and this below cost pricing strategy is what actually destroyed the U.S. television industry.

Recently I held a discussion with a distinguished U.S. antitrust expert, one of the key intellectual architects of the antitrust reforms of the last twenty years. These reforms are supposed to lead to the abandonment of Chicago School predation as a meaningful remedy in the antitrust laws. This man stated, “I have no difficulty at all in finding predation in the Matsushita case, if the facts as they have now come out are true about what the Japanese industry did in a coordinated way to attack the U.S. color television market.” The U.S. Supreme Court was probably confused by unfocused advocacy by plaintiffs in that case. There were several alternative ways to have pled that case that might have led to a different result.

However, the more important point about predation is that it cannot take place in a competitive marketplace. It only works where there are entry barriers which make it possible for one firm to keep monopoly power after others have been driven out. We now have a Free Trade Agreement (“F.T.A.”) between the United States and Canada which, by the end of this century, should mean no tariff barriers at all between the two nations, and the groundwork should be in place for a second stage for the F.T.A. where a truly open market between the United States and Canada will exist in virtually all economic sectors. We all know that there is not an open market in Japan and we all understand therefore that there is a structural basis for using predation laws to attack Japanese sales in the United States at prices which are far below what the Japanese consumer pays in the Japanese market. The American people would not countenance what the Japanese consumer has tolerated since 1970. By 1970, the Japanese people had become quite prosperous, and more consumer welfare could have easily been fostered. My hunch is that this “unfortunate” “rank consumerism” is going to develop more and more, even in Japan. Soon it is going to be the Japanese consumer who is not going to tolerate a continuation of Japanese economic protectionism. If one of these days we open up the Japanese market it is primarily going to be because of rank consumerism.

A few of those who have a legitimate fight with Japan do not see the advantages in that fight to getting rid of the dumping law where there is, as in Canada-U.S. trade, a virtually open and competitive market. It would seem to me to fit naturally into the strategy of those who, like many of their clients, are worried about protecting jobs and other opportunities in the U.S. against unfair predatory foreign competition to say:

Our beef is with you Japan, because you do not open your market. If you were to open your market, we would have no trouble in opening our market to you to show you that we mean business. We are opening our market to Canadian goods because Canada has opened its market to our exporters. We are not protectionists as you say. We are
committed to a reasonable free trade. We do not like dumping laws in principle; we only accept them in reality when you rig things to exclude us from your markets.

If those who now champion dumping were to adopt that position there would be a true opportunity for consensus between antitrust and trade lawyers. The misguided idea that ending the use of dumping laws only where true international free trade is found, will mean an end to the dumping laws where markets are still protected, would dissolve like sugar tablets in the rain.

I was asked to speak about what the prospects are for getting rid of the dumping law in U.S.-Canadian trade. I would have to agree that to date the debate has hardly been joined in the United States. In fact, Canadian academics and government officials, and some industrial leaders like Mr. Phillips, are really the first ones who are beginning to speak up on this. However, they are beginning to find an audience in the United States. The Emergency Committee for American Trade ("ECAT") is listening. The Canada-United States Committee of the U.S. Chamber of Commerce is listening. And we are getting to get an emerging sense that there may be two different sets of industrial interests in the United States (and probably in other developed states as well).

Those two sets are, first, those companies which are looking into the next millennium, and are looking at the global market and export opportunities, and secondly, those companies which are concerned about a continued status quo of home market dominance. They are recognizing a couple of things. One is that increasingly U.S. dumping laws are being used by foreign manufacturers. The foreign manufacturers have seen the benefits of a defensive use of dumping laws, and now that they have entered the U.S. market by acquisition, they have become eligible to exploit these laws as U.S. domestic producers against some of their more vigorous foreign competitors from other markets. There is something wrong about that in the interests of global competitiveness and job opportunities worldwide. The other thing we are seeing, as Gary Horlick has pointed out, is that all of a sudden countries like Argentina are buying the argument and are saying "well, dumping laws are perfectly reasonable laws and we certainly believe in competition but we are going to have an aggressive and strong dumping law which we are going to apply in our home markets." Against whom are those dumping laws going to be applied? They are going to be applied against you if you are trying to export to Argentina. When they say, as Mr. Horlick says, "we are going to have a strong dumping law," they are not talking about setting up a strong import trade regime to see where the consumer interest and market interest in Argentina lies. That is not ever what anybody means by a strong dumping law. They are talking about substituting legal process barriers as they reduce tariff barriers.

We do not have a dumping law in the United States between Kentucky and Washington. Although, there are sometimes market imperfec-
tions between Kentucky and Washington and occasionally it is possible to have price discrimination between firms in Kentucky and firms in Washington, but would that be an excuse for a dumping law? As we begin to move more and more closely towards a truly open North American market, should we not start to think of the Canadian provinces, (even if Canada goes the unfortunate direction of fractionalization) as increasingly analogous to American states? As to subsidies, it is ironic that we give the Japanese the advantage of beggaring us in the United States by negotiating for subsidy concessions from Ohio against Tennessee when they want to build an automobile plant in the United States to get behind the barrier of our trade laws. If we truly look at an open market, we might begin to think about subsidies in all of North America as of the same piece as subsidies in the United States. Why not discourage targetland state subsidies within the United States like the Rome Treaty does in the European Community?

My own view is that the larger goal of free trade ought to be to get rid of the subsidies within the U.S. domestic market with the same sense of urgency with which we have explored getting rid of subsidies between the United States and Canada. That brings me to inquire as to why commentators are focusing on dumping when there are so many more compelling issues in terms of their impact on the economy? I guess my answer would be because we are trying to develop a revolution in thinking; we are trying to get people to think a little differently than they have been thinking in the past, for everyone’s good. If we can get across to people that protective trade laws may have their justification when markets are protected but may lose their justification where markets are open, that kind of thinking can have a salutary effect and can assist us in moving on in trade reform deliberations beyond the dumping laws — e.g. with subsidies. Subsidies are a much more intractable problem. The issue of resolving subsidies, as we saw in the F.T.A., was much more the resistance point against which trade reform dialogue broke down than was the issue of dumping. The point about dumping reform, is you have got to start somewhere.

Some argue that a problem with following the approach that I am proposing is that the U.S.-Canadian F.T.A. has many imperfections and is not truly a free trade agreement. And others say we ought to look at the practicalities, not just at the theory. When Lawson and I began to talk about these issues ten years ago, we found very few people willing to listen to us. You have to understand, those of you who are discouraged now, that for Lawson and me to get a room full of people like this to discuss this issue for one day is enormous progress. Ten years ago nobody would listen about this issue at all.

In the interim of the last ten years we have seen something remarkable in Oceania—in the trade relationship between Australia and New Zealand. We have actually seen a free trade agreement which started out more protectionist, that is more restrictive than the U.S.-Canadian
F.T.A. We have seen it flower over a ten year period into just the kind of replacement regime that we are talking about today. As of July 1, 1990, there is a replacement regime where the dumping laws, and in fact in that case, the subsidy laws and all laws creating or maintaining trade barriers between New Zealand and Australia have been removed. Some argue that if you get rid of the dumping laws in trade between two nations, you are inevitably going down a slippery slope and opening your markets and producers to being exploited by all other third countries, especially those with protected markets. Australia and New Zealand both have continuing trade laws which apply to third countries, particularly Japan, and they have been able to entirely open their respective markets to each other, and they have done so in an evolutionary way over a ten year period. In fact, the process started in 1965 when they began their first significant tariff reductions. The commitment to tariff reductions was put in place in 1980, but it was not until 1990 that virtually all non-tariff barriers were removed, and then the Australians and the New Zealanders went even further and dropped the dumping and subsidies laws between them. The job is not completed. They have had to put in place a commission to continue negotiations because there are always a few less visible non-tariff barriers which arise which will need to be smoothed out. But the commitment built to the point where now the whole logic of the process is to remove all such barriers between the two nations.

However, over the last ten years there have been different circumstances between Australia and New Zealand than those that existed between the United States and Canada. Although, I am not sure that the political atmospherics, while they are different, reflect all that great a difference. Basically, in Australia and New Zealand, it was protectionism that was discredited. The problem was the Australian and New Zealand economies were being strangled by not enough consumerism. And those who had preserved the status quo were preserving a status quo of protection. That gave the Australian and New Zealand governments the opportunity to say that things cannot get worse, that productivity cannot be any lower, and at this point we have very little to lose by trying free trade as an alternative.

There is one analogy that is quite important in the U.S.-Canadian context. Relative to Canadian businessmen, New Zealand businessmen and sheep farmers had much more to fear by the threat of being overwhelmed by a neighbor that was roughly the same in population proportion greater than New Zealand, as the U.S. population is greater than Canada's. Of course, there were also concerns about national sovereignty and national interest. Furthermore, I am told, that as a result of the Trans-Tasman F.T.A. there have been more Australian firms acquiring New Zealand firms and developing those investment opportunities. But what has that meant? It has meant investment in New Zealand and, for the first time, New Zealand manufacturers are producing several globally competitive products.
Please do not misunderstand me. I am not suggesting by analogy that kind of competitiveness does not go on in the Canadian market. I am talking specifically about the New Zealand context. New Zealand has probably benefitted more from the Trans-Tasman F.T.A. than have the Australians. It has not had the same impact on Australia, just as this reform of dumping the dumping laws would not have the same impact on the much larger American market.

The final point I would like to make is that I think there is a red herring in what has been argued by commentators in their admonition to you not to replace the dumping laws with the antitrust laws. What we are really talking about is not a replacement regime. As Ivan Feltham indicated, but as I would like to underscore, the antitrust laws in both our countries are basically in place right now. You do not need major legal modification to give companies the protection that they are concerned about, the protection that some of them think they need in the antidumping laws. You do not need new laws to do that. The same companies that are bringing dumping cases against you today could also be bringing antitrust cases against you. One of the reasons the U.S. Supreme Court did not allow the antitrust case against Matsushita to be tried, is that there had already been fifteen years of rather deep anti-dumping margins applied to the Japanese color TV industry. There had already been a successful section 337 action. There was some feeling, I think, with the Supreme Court that enough was enough. How many times do you kick somebody against whom you have been given your day in court? I reiterate that there is still a debate about whether the Matsushita case was correctly decided.

That case was decided at what I think may have been the high water mark of the Chicago School’s discrediting of predatory pricing theory. I need hardly point out to you that the Chicago School thinks that dumping is a joke, and thinks that the dumping law is indefensible even in trade with Japan. Therefore, when they sought to discredit the predation law, the law making it a violation to attempt to monopolize by selling below average variable cost, they were also thoroughly discrediting the dumping laws. But that high water mark has been passed. Today the lower courts are moving away from Matsushita. Summary judgment is not being granted so freely in many of these cases and the Robinson Patman Act is being revived in enforcement. However, attempts to monopolize many of these cases are still being won for the plaintiffs very rarely.

That is why we should not be worried that there is this supposedly a terrible new weapon out there that is going to be used to unfairly beat up Canadian industry. The thing about attempts to monopolize in the antitrust law is that unlike the quasi legal process of the trade law, which has much less law and much more politics than any other discipline of law that I have ever seen, the antitrust laws put the burden of proof on the plaintiff. You have to prove liability by a preponderance of the evidence. The causation standard is proximate cause. Consequently, you will not
bring a case unless there has been substantial injury. You do not have just fifteen minutes in court and a post trial brief that has to be written in two days in a preliminary investigation. You have got the time to be heard, to make a fair case, to do fair investigations and fair discovery. Because you have all those things, plaintiffs who bring predation cases only win them when there has been a serious injustice. That is not what happens when the dumping law is applied.