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The Business Perspective: Cross Border Views

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Openness in discussion is a remarkable characteristic of the U.S. and Canadian business relationship. Although we do disagree from time to time, we are able to resolve a number of issues and agree to disagree on others. As an illustration of how remarkable such openness is in our business relationships, consider the following.

In the European Communities a few years ago, several countries wanted to increase duties against imported metals, and having experienced this same problem in the United States, we immediately went to our European customers and asked them whether they were aware of what NORANDA's competitors were planning to do to the clients' supply line. NORANDA suggested that the customers contact the European Commission with their concerns. This suggestion precipitated a flood of letters into the European Commission and a telephone call to NORANDA from one of its competitors, berating the company for its open approach to the problem—something that the competitor said should never happen in the European Community. It is, of course, a fairly common practice in North America.

A second illustration of how alien openness is outside North America comes from Japan. NORANDA was contacted by a Japanese firm that accused NORANDA of selling metal to Japanese industries at too low a price. This accusation was based on the fact that NORANDA was selling metals to three of the most prominent Japanese companies. This was a significant loss of face to the Japanese metal industry because in their view such companies could not possibly wish to buy from a foreign firm. In fact, each of the companies had sent delegations to Canada hoping for a strategic alliance with NORANDA because of their forward thinking and circumstances where metals might not always be available in Japan.

From the Japanese example, it is clear that people always think that a trade advantage is due to a company selling at a lower price and that strategic alliances or strategic decisions have no role in building business relationships. NORANDA has found that its practice of building strategic alliances with its customers and the use of consumer power with senators and congressmen in a trade confrontation was probably the reason that it preserved its U.S. trade access. Trade liberalization can only help this cementing of business relationships.

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The purpose of Chapter 19 is to provide a process that assures fairness and the avoidance of undue political pressure on either the Canadian or U.S. side in settling trade disputes. Simply defined, a trade dispute involves an injury. An injury means lost sales, reduced production, reduced employment, lost profits and bankruptcy in the ultimate sense. The instant reaction in this world of accelerated change has been to blame the injury on someone else. The most convenient entity for taking blame is a company sending imports into that particular country. Imports are defined as excessive imports, less than fair value imports, or subsidized imports. In the United States, experience has shown that a business being injured does not receive government attention until the import issue has been attacked.

Usually, an import can be alleged as the cause of injury because it may be lower priced, it may be increasing at a rapid rate, or because there is the perception that it comes from a subsidized industry. If the injury is industry-wide, then filing a trade action is the only way an industry is permitted to have a legal combination against importers under U.S. antitrust regulation. So the existing process, and this would be true both in Canada and the United States, is structured to force the use of trade remedy legislation as the first step for any business wishing to address the problem of injury with the government, whether or not it truly involves imports. In Canada-U.S. trade experience, imports have rarely, if ever, actually been the significant cause of a company or industry in either country being truly injured. In fact, in the trade actions NORANDA has been involved in, the softwood lumber issue is the only trade action that the company ever lost and this was due to the inability to realize that a trade action is always first and foremost a political action.

When a company is being injured, one must consider whether that injury is the result of its own short-sighted or poor management, whether it is the result of government policy which may have created an uneven playing field, whether in today’s global world the restriction on the ability to discuss a problem between competing companies because of competition law requirements is realistic, and whether the processes of discussion, mediation, conciliation, arbitration, might have a role in future trade relationships.

Chapter 19 provides an opportunity for a better process than the current one for trade resolution. The first step is for an injured company to have an opportunity to talk to someone about the issue in an informal manner like the Canada-U.S. Affairs Committee proposed. The Chamber of Commerce had a subcommittee that dealt with this. Concepts of mediation have the potential to depoliticize issues. There are well established procedures from both Canada and the United States for discussion, mediation, conciliation, and arbitration with compulsory arbitration available if necessary.

Getting in the way of dispute resolution is the situation of those
companies that do not wish to participate in a negotiated solution because they want to guard their patch. Competition law obstructs the ability to discuss a problem and find a solution. The Justice Department has always been on the importer’s side because they see the process before the U.S. International Trade Commission as anti-competitive. Trade liberalization is the route to follow to create a dynamic global competitive society.

For those companies that are being injured, there should be a process to permit the injured company to informally start a discussion that could lead to an arbitration process. It should be the first place a company goes. The process should, in effect, provide for bi-national review of the issue. It does not necessarily need to deny the company ultimate access to the conventional trade remedy process, but it must recognize that cross border competition issues between Canada and the United States so dealt with could be lifted out of trade issues with other countries. In that sense, part of a Canadian companies’ problem has been the fact that Canada is a major exporter to the United States, and as such, has a large import market share in the United States. Thus, whenever a trade action is being promulgated in the United States and Canada is always included. A legal adviser will tell the plaintiff, that if he leaves the Canadians out, the opposition will claim that it is the Canadian companies, with their import share that are at fault. So often Canada is involved without actually being the source of the problem.

Dumping results when an injured company can demonstrate that a competitor is selling at less than fair value, defined as a lower realization on an export sale at the FOB production point compared to a domestic sale, or a sale at a price below cost of the product. One must also show the less than fair value sale is the cause of injury.

In practice, this usually means that the import competitor is selling at a price below that of the domestic competitor. It is hard to claim injury unless someone has a better price. Although it is possibly due to a better service, or the domestic supplier has not offered a comparable quality or a comparable carrying for the customer. The difficulty lies in determining whether the different prices are a function of efficiency, productivity, superior service, superior products, the product of a government practice, a subsidy practice, or a protectionist practice that allows the domestic market to price at fifteen to twenty percent above the global market and use that extra revenue to sell at a direct cost into the export market. The latter is the Japanese model recognized by many other countries, although even that is changing in Japan. It is not a clear-cut case that a lower price is necessarily a subsidized trade threatening price, but it can be.

Today, trade policy awareness and the greater transparency in all these issues globally, makes it fairly easy for people examining the issue to ascertain the truth, whether or not the truth is politically acceptable. Historically, a predatory price usually involves a lower price. While
there have not been many convictions or even cases under competition law, one has to establish that the intention of that lower price was to put a company out of business, to limit competition in order to create a more secure market for the competitor. Ultimately, an Ontario company should be able to do business in Ohio on exactly the same terms and conditions as a company from Pennsylvania.

There has been much discussion about Canada's extensive system of government subsidies. Subsidies have to be reviewed to determine whether the subsidy is intended to create a competitive advantage, and if it is, it should be eliminated, regardless of whether it is intended to foster an important political initiative.

Subsidies are pervasive throughout all government levels in both Canada and the United States and there may be some that are so political that they have to be dealt with on an individual basis. Conversely, a subsidy generally means something that a government gives back to the industry and to determine competitive advantage, one must look at what the government takes away and then at what it gives back. One of the startling facts is that Canadian business is taxed significantly more heavily than U.S. business, and Canadian federal programs are significantly more pervasive than they are in the United States. Case studies show that a comparison of tax rates point up major differences.

Assuming that trade liberalization on a broad competitive base becomes bilateral, trilateral then global, this is a significant mechanism for economic growth. It is obvious that domestic competition, a principal focus for legislators, is not as important as it used to be. Competition is the basic need for thriving businesses that expand through competition for trade liberalization. Trade liberalization will make competition a global issue and that may be the trigger mechanism that allows some of the traditional mind sets to move forward. This requires a new set of rules. Chapter 19 is a remarkable opportunity for Canada and the United States. It provides the mechanism to create something truly new in the trade management processes and this will be extremely important. A hemispheric trading agreement could lead to an eventual global trading agreement.