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The Government Perspective: Effects Upon Present Competition Policy

Deborah K. Owen*

I. INTRODUCTION

I appreciate the opportunity to participate in this program, and to follow so many distinguished and thought-provoking speakers. Our competitive relations with our neighbor to the north are of great interest to me. One of the first cases that came before me at the beginning of my tenure on the Federal Trade Commission was the proposed acquisition of Connaught Biosciences of Canada by the Institut Merieux subsidiary of Rhone-Poulenc1—a transaction that involved overlapping sales by both companies in U.S. markets. It was the first of several matters during the past year that required notification of, and cooperation with, Canadian antitrust authorities, and it provided me with the opportunity to become better acquainted with my Canadian counterparts, and the various challenges that confront us together as markets become increasingly global.

I also wish to commend the members of the previous panel for the excellent comparative study of Canadian and U.S. law;2 it is a very useful document on which to begin discussions concerning policy proposals, and the need for any changes.

Before proceeding further, I am obliged to make the usual disclaimer that my remarks today are my own, and do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

My disclaimer goes further than usual today, since this forum deals with some issues, specifically those in the area of policy, that are outside the legal jurisdiction of the Federal Trade Commission,3 and hence, beyond my own portfolio. The issues covered by today’s discussions are of great political interest in the United States and Canada; accordingly, they are issues that ultimately must be resolved, if at all, by the policy-making agencies of our government that deal with a vast panoply of competing interests, going beyond the concerns of competition alone — the Com-

1 Institut Merieux, S.A., Docket No. C-3301.
2 Feltham, Salen, Mathieson, and Wonnacott, Competition (Antitrust) and Antidumping Laws in the Context of the Canada-U.S. Free Trade Agreement, A Study for the Committee on Canada-United States Relations of the Canadian Chamber of Commerce and the Chamber of Commerce of the United States (Exposure Draft) (Dec. 19, 1990). (Hereinafter “Comparative Study”).
3 Under 19 U.S.C. § 1334, the FTC may participate in proceedings before the International Trade Commission. Examples of such intervention are mentioned later in these remarks.
merce Department, the U.S. Trade Representative, the State Department, and, most of all, the Congress.

II. DUMPING AS A FUNDAMENTAL ISSUE

Those who believe as a basic premise that antitrust policy, as it is currently understood and applied, should replace current antidumping regimes should direct their persuasive powers to the political branches of government. Dumping regimes may result in costs to consumers that, as a matter of public policy, their society has decided to bear. As one of the participants in this program, Doug Rosenthal, wrote a couple of years ago on this subject:

When trade relief is granted, consumers pay more for a product, but the loss is less immediate and less intense, and it is shared more broadly throughout the population. . . . The additional cost of clothing resulting from the Multifiber Arrangement, for example, rarely threatens family security as does a job layoff. I suspect there is also a strong component of Judeo-Christian ethics in play: there is the sense that it would be self-indulgent to focus excessively on consumer interest when the basic well-being of established enterprises, their employees and their surrounding towns, is at stake.  

Accordingly, any views that I may have in this area, coming from a purely competition perspective, may not necessarily be the same as those who ultimately make the final policy decisions, based possibly on other considerations. However, we all acknowledge, I believe, that, within the political realms in which this matter must ultimately be resolved, this is a fundamental issue which will require policy-makers to engage in both long-term, and short-term, thinking about what is in our best economic interest.

When antitrust law is discussed as a replacement for, or complement to, the dumping laws, the focus is generally on predatory pricing and price discrimination. Because of time constraints, and the greater relevance of the former, let me share with you some of my thoughts on current Commission enforcement policy in the area of predatory pricing. I would also like to share my experience thus far with the Canada-U.S. Cooperative Agreement in the hope that it would be generally instructive with respect to any suggestions to expand and improve transborder antitrust enforcement.

III. CURRENT FTC ENFORCEMENT POLICIES ON PREDATORY PRICING

A. General Principles

Trying to divine a central purpose from a body of statutes and case

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law that has evolved over 100 years can be intellectually hazardous; nevertheless, the goal of antitrust policy as conducted by our antitrust enforcement agencies is maximizing consumer welfare. In most circumstances, unfettered competition among rival firms in a free market is the best means to achieve this objective. Anti-competitive behavior among market participants may cause less than optimal performance of the market. To maximize consumer welfare, antitrust law seeks to maintain competition by preventing anti-competitive behavior in any given market.

Antitrust law does not, however, seek to safeguard the welfare of any particular firm or group of firms in the market. If the competitive process causes one firm or group of firms to lose market share or even exit the market, antitrust law focuses on the overall benefit to consumers. Mitigating the short-term, harsh effects that the competitive process may have is a social policy question, not an antitrust matter.

These are, admittedly, fairly elementary principles. But, they need to be repeated from time to time, particularly when antitrust policy — or the agencies which enforce it — are criticized when, for example, foreign direct investments, or leveraged buy-outs, or price increases dictated by supply and demand are not challenged by antitrust enforcers.

Antidumping and countervailing duty law appears, in theory, aimed at preventing and punishing the same predatory or discriminatory pricing practices in international trade that antitrust law aims at preventing and punishing domestically. However, antidumping laws may prevent certain practices that antitrust laws do not because of differences in the statutory definition of the condemnable practices and their economic underpinnings. At the bottom line, predatory pricing, in antitrust terms, certainly would be found to be dumping, while aggressive, but not predatory, pricing could also be found to be dumping.

B. Predatory Pricing

The basic concept of predatory pricing can be stated fairly simply. A firm (or group of firms acting together) lowers price to below cost in order to drive competitors out of a market. Once the competitors exit, the remaining firm (or firms) can raise price above cost and reap supranormal profits.

Predatory pricing has long been held as illegal anti-competitive behavior under American antitrust law. In United States v. Grinnell Corp., the Supreme Court found that Grinnell, a manufacturer of plumbing supplies and fire sprinkler systems, and three of its subsidiaries, which provided centralized burglary and fire detection service, willfully monopolized the national market for such detection services in violation of Section 2 of the Sherman Act. That section outlaws monopolization or

attempts to monopolize interstate trade or commerce. The Court found that Grinnell's subsidiaries had engaged in predatory behavior, reducing their minimum basic rates to meet competition, and renewing contracts at substantially increased rates in cities where Grinnell enjoyed a monopoly.

The Federal Trade Commission (FTC) has dealt with a number of predatory pricing cases. In *International Telephone and Telegraph Corp.*, the Commission reversed an initial finding of an administrative law judge that Continental Baking, one of ITT's subsidiaries, had attempted to monopolize the sale of white bread in five geographic areas through predatory pricing. The Commission had previously defined the elements of attempted monopolization in *E.I. Du Pont de Nemours & Co.*, to include:

1. specific intent to control prices or destroy competition;
2. exclusionary or anticompetitive conduct; and,
3. a dangerous probability of success.

Based on this definition, the Commission went on in the *ITT* case to state that proving the first element of the attempted monopolization offense requires establishing a specific intent to control prices or destroy competition. The Commission noted that any successful business strategy will injure competitors to some degree; such a strategy satisfies the specific intent requirement only if it contemplates doing so by means of anticompetitive conduct.

Proving the second element of attempted monopolization offense requires a thorough evaluation of the conduct employed by the firm involved. The Commission noted that the difficult question is, of course, how to define predatory pricing. It is crucially important to distinguish prices that are perfectly consistent with competitive behavior, from prices that are not.

To make that distinction, the Commission set out two criteria that an ideal predatory pricing rule must satisfy. “First, it must distinguish predatory intent from competitive intent.” Second, it must “distinguish pricing behavior that is likely to injure competition in the generality of cases from pricing behavior that is not.” The Commission concluded that both of these criteria are addressed by a rule defining predatory pricing as selling “at a price below long-run average variable costs for a significant period of time.”

One effect of healthy competition is to redirect production and sales

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8 96 F.T.C. 653, 725 (1980).
9 104 F.T.C. at 400-01.
10 Id. at 402.
11 Id. at 403. There is, however, some debate concerning the appropriate cost standard for price-cost comparisons. See id. at 451 (Commissioners Patricia Bailey and Michael Pertschuk, concurring in part and dissenting in part); ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984) at 125.
from less efficient firms to more efficient rivals. Only when a firm’s pricing forces an equally efficient competitor to sell at a price below an appropriate definition of cost for a significant period, causing that competitor to shut down and injure competition, can the firm be said to be engaged in predatory pricing.

The Commission uses the average-variable-cost rule to distinguish presumptively legitimate prices from presumptively predatory prices as follows:

1. Sales at prices that equal or exceed average variable cost should be strongly, often conclusively, presumed to be legal.
2. Sales at prices below average variable costs for a significant period of time should be rebuttably presumed to be anticompetitive.
3. Sales at price that equal or exceed average total costs should be conclusively presumed to be legitimate.¹²

This brings us to the third, and final, element of the offense defined by the Commission. “Proving the attempted monopolization offense finally requires establishing that the conduct at issue created a dangerous probability that the firm involved would acquire ‘power to control price or exclude competition in the relevant market(s).’ ”¹³ The first step in evaluating “dangerous probability” is delineating the relevant product and geographic markets with which monopoly power may be acquired. The next step is to determine whether the conduct at issue created a dangerous probability that the alleged predator would acquire monopoly power within those markets. In the Commission’s words:

A successful predatory pricing strategy depends on the following scenario: once competition has been injured, the predator will be able to raise prices to supracompetitive levels long enough to recoup losses incurred during the predatory period and to earn greater overall profits that would have been possible from pursuing a competitive strategy.¹⁴

Let us bring this down to specifics. Continental had a market share of 20 percent or less in each of the relevant geographic markets, well below the 40 percent threshold that courts have generally concluded must be shown before a dangerous probability of success can be established. The Commission concluded that “[i]n this case, the record evidence indicates that it is highly unlikely that Continental could have acquired monopoly power in any of the relevant markets.”¹⁵ The Commission based its decision on a lack of market power, and did not perform any detailed analysis of whether price was below cost.

The Commission’s approach to resolving liability is generally consistent with the method employed in the Supreme Court’s decision in Mat-

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¹² Id. at 403-04.
¹³ Id. at 408 (Citation omitted).
¹⁴ Id. at 411.
¹⁵ Id. at 412.
sushita Electric Industrial Corp. v. Zenith Radio Corp., which was decided two years after the ITT decision. The plaintiffs, two American electronics firms, alleged that Matsushita and six other Japanese electronics firms had engaged in a massive predatory pricing conspiracy, lasting two decades, to drive American producers from the television set market. The alleged strategy had two components: (1) charging monopoly prices in Japan through price-fixing arrangements, and (2) using the monopoly profits to subsidize below-cost predatory pricing on exports to the United States. The District Court ordered a summary judgment in favor of the defendants, but the Court of Appeals ruled in favor of the plaintiffs, rejecting the motion for summary judgment.

The Supreme Court ruled that where the defendants have established a factual basis showing that plaintiffs' claims were "implausible - [i.e.] the claim is one that simply makes no economic sense," the plaintiffs must offer more persuasive evidence to support their claims than would otherwise be necessary to survive a motion for summary judgment. The Court found that the alleged predatory pricing conspiracy would require the conspirators to sustain substantial losses to recover uncertain gains. Since the alleged conspiracy had not succeeded in two decades, the Court found the conspiracy implausible, the evidence on profits in Japan having little relevance, and the plaintiffs' evidence unconvincing. The Court reversed and remanded the Court of Appeals' decision, warning that such cases can chill conduct that the antitrust laws are designed to protect.

The authors of the Comparative Study conclude that the U.S. Government takes predatory pricing seriously. It does. The information contained in the Comparative Study comes from the Federal Trade Commission's most recent semi-annual report to Congress on investigations of predatory pricing complaints. As stated in that report, "[t]he Commission therefore considers carefully each allegation of predatory pricing it receives." But, in the interest of full disclosure, I must add that the Commission's most recent Annual Report also states:

...Commission staff considers all complaints it receives alleging predatory pricing, although such complaints seldom entail violation of applicable legal standards.

Nevertheless, in a recent article, Rick Rogers, of the Ford Motor Company, asserts that "in the 'real world', real judges and real juries are assessing real treble damages against companies perceived to have engaged in unlawful predatory pricing." Thus, predatory pricing cases

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16 475 U.S. 574 (1986).
17 Id. at 587.
18 Comparative Study at 13 n.16.
are not common; but, neither are they as rare as unicorns.

C. Antidumping and Countervailing Duty Law

By contrast, antidumping and countervailing duty law has been interpreted to protect domestic competitors as well as competition. In USX Corp. v. United States,21 the Court of International Trade remanded to the International Trade Commission (ITC) a petition by USX Corporation, a domestic steel producer, requesting a countervailing duty on cold-rolled carbon steel plates and sheets from Argentina. The ITC's initial decision denying the duty stated that the U.S. "antidumping statute is intended to protect U.S. industry only from unfair price discrimination in the form of predatory pricing."22 The Court reasoned:

The problem with this position is two-fold. One flaw is that this view necessarily makes the intent of a foreign producer the focus of the ITC causation inquiry. Another, but not unrelated flaw, is that this view seems to assume that the purpose of the antidumping statute is to prevent a particular type of 'injury to competition' rather than merely material 'injury to industry.'23

The 'injury to industry' standard focuses explicitly upon conditions in the U.S. industry. In effect, Congress has made a judgment that causally related injury to the domestic industry may be severe enough to justify relief from less than fair value imports even if, from another viewpoint, the economy could be said to be better served by providing no relief. Thus, any causation analysis must have at its core the issue of whether the imports at issue cause, in a non de minimis manner, the material injury to the industry which has been found.24

Hence, antitrust law may be only a partial substitute for antidumping and countervailing duty law. As long as detailed price and cost information is available from foreign firms, antitrust law can confront "injury to competition" problems through the enforcement of the prohibition on predatory pricing. On the other hand, antitrust law does not address the "injury to competitors" issues that is an apparently important aim of the antidumping statute for many constituents of our policy-making agencies.

22 USX initially challenged the ITC's final negative determination regarding Argentine steel. The Court of International Trade (CIT) remanded. 655 F. Supp. 487 (Ct. Int'l Trade 1987). On remand, the Commission again made a negative determination. Challenge was again filed. The CIT reversed and remanded again. 682 F. Supp. 60 (Ct. Int'l Trade 1988). On subsequent remand, the ITC found that the United States industry was not materially injured or threatened. USX filed another challenge and moved for a judgment on the record. The CIT denied this motion. 698 F. Supp. 234 (Ct. Int'l Trade 1988).
23 682 F. Supp. at 65.
24 Id.
25 Id. at 65-67.
D. The Role of the FTC in ITC Proceedings

The importance of the impact of competition concerns on trade matters should not be underestimated, however. The Federal Trade Commission may intervene in antidumping cases before the International Trade Commission on behalf of consumers to protect competition. The Tariff Act of 1930, as amended, provides that the FTC “shall fully cooperate” with ITC “for purposes of aiding and assisting its work.”26 Consistent with this responsibility, the FTC has intervened in a number of antidumping cases before the ITC to craft remedies that maximize consumer welfare.27 For example, in OKI Electric Industry Company, Ltd. v. United States,28 the FTC argued in an amicus curiae brief that it is a normal business practice to sell 64K DRAMS (dynamic random access memory computer chips of 64 kilobits) below their total average cost when there is an unanticipated slowdown in demand for 64K DRAMS and when an older generation of DRAMS is being replaced by newer generations. The FTC recommended that this case be remanded for reconsideration of an antidumping duty that had been imposed by the International Trade Commission. The Court of International Trade granted the plaintiff’s request for injunctive relief from the antidumping duty.

E. Conclusions

We might conclude that the predatory pricing doctrine has evolved to reflect economic reality in the marketplace. It clearly does not proscribe and punish as much pricing behavior as the dumping laws. Presumably, the dumping laws are intended to achieve other public policy goals, and the debate will need to focus on whether those goals remain in the public interest of the United States and Canada.

IV. THE COOPERATIVE AGREEMENT BETWEEN CANADA AND THE UNITED STATES29

I would like to turn now to the Cooperative Agreement between

27 Since 1984, the FTC filed interventions before the ITC in antidumping cases involving apple juice, ball bearings, copper, electric shavers, fish, footwear, lumber, specialty steel, toner, and vertical millings.
28 669 F. Supp. 480 (Ct. Int’l Trade 1987). In 1985, Micron Technologies, Inc. filed petitions with the Department of Commerce and the International Trade Commission alleging imports of 64K DRAMS from Japan were being sold at less than fair value (LTFV) and these imports were threatening material injury to the domestic industry. The Commerce Department found that 64K DRAMS were being sold at LTFV (April 29, 1986), and the ITC found material injury because of Japanese imports (June 11, 1986). Consequently, an antidumping duty of 35.34 percent was ordered. OKI challenged the lawfulness of this order, claiming that the Commerce Department made numerous errors in calculating costs and sales prices of 64K DRAMS in Japan, and sought to remand the case and receive a preliminary injunction against enforcement of the duty.
29 Memorandum of Understanding Between the Government of Canada and the Government
Canada and the U.S., providing for notification, consultation, and cooperation in the enforcement of our respective antitrust laws. There are many fairly routine notifications during the course of a year, and, this year, a couple of matters requiring notifications resulted in enforcement recommendations that came before the Commission. Our deliberations on those matters raised some interesting questions about implementation of the agreement that could prove pertinent in a predatory pricing context.

The first issue is the question of what triggers a notification. Section 2 of the Cooperative Agreement lists situations that require notification. They include investigations likely to inquire into activities carried out in the other country; investigations where it is expected that information to be sought is located in the other country; and investigations that may reasonably be expected to lead to enforcement action likely to affect a national interest of the other country. Clearly, these are all scenarios that might arise in a predatory pricing context.

What is in the respective national interests of our two countries is certainly open to interpretation. If the Free Trade Agreement has the desired effect upon Canada-U.S. trade, I expect that the competition authorities will see more and more matters where the geographic market will be defined as Canada and the U.S. If that is the case, we must be prepared on both sides to make notification second nature. It is my view that, if anyone is to err, it is better to err on the side of notifying; put more simply, "When in doubt, notify."

By way of further interpretation, I believe that "enforcement action," as the term is used generally and in this Agreement, ought to include consent agreements between an enforcement authority and a party charged with illegal conduct, such as predatory pricing.

There are at least two types of settlement provisions that arguably could be viewed as at least potentially affecting the national interest of the other party. The first type involves injunctive provisions or provisions that require or prohibit conduct in the other country. The second type of settlement provision includes requirements for the production of documents of information from the other country generally for the purpose of securing compliance with the substantive provisions of the settlement.

Although consent agreements and other settlements are not expressly mentioned in the Agreement, it seems to me that it would be at least within the spirit of the Agreement to provide notification and opportunity to consult in cases that are settled without litigation. Nevertheless, I recognize that the dynamics of the negotiation process make it
difficult to establish precise criteria for the timing of such notifications and consultations.

Having said that, we are then confronted with the question of what information can be shared with the other party under Section 9 of the Cooperative Agreement. U.S. Competition authorities may share information obtained in our investigations with state and local law enforcement authorities, with the exception of information contained in premerger notifications provided under the Hart-Scott-Rodino Act.

Whether the laws, such as Section 21 of the FTC Act, which allow for the sharing of investigative information with state and local law enforcement authorities, should be amended to include governments, such as Canada, with whom we have cooperative law enforcement treaties or agreements, is something that will have to be decided by the Congress. It is clear to me, though, that such a grant might not be completely unprecedented. As the Comparative Study points out, 30 the Canada-United States Income Tax Convention provides for the sharing of law enforcement information, and, as clarified by Congress in the 1988 tax bill, 31 that information includes tax return information which is considered to be some of the most sensitive information maintained by the government, and is otherwise tightly withheld. 32 I am also aware that the Commission has provided investigatory information to Canadian authorities pursuant to the Canada-U.S. Treaty on Mutual Legal Assistance in Criminal Matters, or MLAT. I am certainly open, as I have been in the field of state-federal relations, to facilitating the sharing of investigative information, if our respective governments will agree to authorize it, and there is full protection for the confidentiality of sensitive business documents.

Sharing of investigative information between governments suggests that some business transactions or practices may fall within the subject matter jurisdiction of both countries. Where more than one authority has subject matter jurisdiction over a matter, and personal jurisdiction can be had in either locale, it seems that it is in the best interests of the parties, as I have observed particularly in the merger context, that they cooperate with both authorities. Some, including myself, 33 have talked about using conflict of law principles and principles of comity to resolve differences where concurrent jurisdiction exists. I am content, for the time being, to stick with the case-by-case approach to resolving such matters that fall within concurrent jurisdiction.

What I have attempted to do here is to give you an overview of how the Federal Trade Commission has approached the type of anti-competitive conduct that is of greatest relevance in the context of an antidump-

30 Comparative Study at 152-154.
31 P.L. 100-647, § 1012(aa).
ing debate, and to provide some highlights of our cooperative working relationships with our Canadian counterparts. As one whose legal career has spanned service to the Congress, the Executive Branch, and the business community, I hope that you will understand my repeated deference to the policy-makers involved in this area. Antitrust law currently complements our antidumping laws — whether it will subsume them will be decided after a weighing of views from different constituencies, including those of us with competition portfolios. This program has provided an invaluable focusing of the debate, and I appreciate the opportunity to be a part of it.