THE INTERFACE OF THE TRADE LAWS AND THE ANTITRUST LAWS

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INTRODUCTION

The relationship between international trade law and antitrust-competition law has been addressed often in the past, but now arises in a different atmosphere. It is universally regarded as an important topic that deserves attention: the subject has been raised in the World Trade Organization (WTO), in the Organization for Economic Cooperation and Development (OECD), in the context of the North American Free Trade Agreement (NAFTA) and its Working Groups, and in the American Bar Association (ABA). The recent formation of the WTO Working Group on Trade and Competition is the latest confirmation of global interest in this subject. The growing and continuing interest on the part of these institutions suggests that it is conceivable that some form of international agreement or approach that accommodates these two different bodies of law may eventually emerge.

The interest in this subject tends to fall principally into two categories. The first issue concerns foreign barriers to market access where private sector restraints are involved. The question is whether trade law or antitrust law provides the best mechanism for opening foreign markets. The second issue concerns the antidumping law and whether it can, to some or any extent, be replaced by the antitrust laws or at least be revised to accommodate competition law concepts. Many observers in the trade community believe that much of the overall interest in the trade-antitrust interface is stimulated by those who would like to displace or at least revise the antidumping laws.

The general objective of U.S. trade law is to protect domestic produc-

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Courts of Appeals, whether the appeal is from a DOJ suit or a private suit in federal district court, or from an administrative decision of the FTC. The Supreme Court regularly reviews antitrust cases but only very rarely accepts a trade law case for review.

Another important difference between the two bodies of law is in the relief and remedies they provide. Trade law remedies generally involve increased or special duties or quotas on imports. Antitrust relief can include single or treble damages, injunctions, divestiture or restructuring, or criminal penalties.

III. DIFFERING INJURY AND PRICING STANDARDS IN U.S. TRADE AND ANTITRUST LAW

The most debated and controversial difference between the trade laws and the antitrust laws concerns their contrasting standards for the demonstration of injury and the demonstration of unfair pricing in "predatory" pricing or price discrimination cases.

A. Injury Standards

The two most important and most frequently invoked trade laws, the antidumping and countervailing duty laws, require a showing only that the dumping or subsidies "contributed" to material injury. Material injury is defined as "harm which is not inconsequential, immaterial or unimportant." The antitrust laws manifestly have much higher standards of injury and causation. In general, they require a showing of an unreasonable restraint of trade (which is per se in some situations) or a substantial lessening of competition, and a showing that the antitrust violation caused the injury or at least was a material cause of the injury. In price discrimination cases, the Robinson-Patman Act provides "meeting competition" and cost-justification defenses which are not available in antidumping and countervailing duty proceedings.

Section 301 of the Trade Act of 1974, which is generally used to
challenge barriers to foreign market access, requires a showing only of an unjustifiable burden on U.S. commerce by a foreign government. In contrast, an antitrust case brought to challenge foreign market access requires a showing of a conspiracy to restrain trade which has injured the affected U.S. industry's ability to compete.

Section 337 of the Tariff Act of 1930, which bans unfair methods of competition by importers, does require a showing that the unfair method injured a competing U.S. industry. Although among the trade laws this statute's language is the most similar to the antitrust laws, it has been invoked primarily in intellectual property cases, particularly those concerning patent infringement. There is no requirement of an injury showing in such intellectual property cases. Further, it is important to observe that Section 337 was declared to be in violation of the General Agreement on Tariffs and Trade (GATT) by a GATT panel, and corrective legislation was included in Congress' Uruguay Round implementing legislation.

Section 201 of the Trade Act of 1974 concerns only fair imports. It requires a showing of serious injury that has been substantially caused by increased imports. Substantial cause is defined as a cause which is no less than any other cause. Section 201 is intended to provide temporary relief from fair import competition and has underpinning in the WTO Agreement on Safeguards. Section 201 relief can ultimately be provided only by the President, following an affirmative recommendation from the ITC. Section 201 has been used infrequently in recent years.

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11 See SECTION OF ANTITRUST LAW, AMERICAN BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST (1991) (discussing the considerations involved in determining whether a foreign market access challenge is best pursued in an antitrust action under the Sherman Act or in a trade action under Section 301).
13 See id. § 1337(a)(1)(A).
19 In addition to the fact that Section 201 requires a Presidential decision and is therefore very political, the statute requires the petitioning domestic industry to present a detailed plan on the adjustments the industry would undertake during the period of temporary import relief. See 19 U.S.C. § 2251(b).
B. Pricing Standards

One of the most controversial elements of the antidumping law is the methodology used by the Department of Commerce to determine discriminatory or unfair pricing as compared to the much more strict requirements of the antitrust laws. In particular, it is well established that the antidumping law does not require any showing of predatory intent, even though it is often referred to as a predatory pricing statute. At the time it enacted the Omnibus Trade Act of 1988, Congress was so concerned that it might be argued that predatory intent had to be shown that it amended the antidumping injury provision in order to clarify that predatory intent was not required. In contrast, the Robinson-Patman Act and Section 2 of the Sherman Act, under which pricing strategy directed at competitors can be challenged, generally requires a showing of predatory intent.

The garden-variety antidumping case involves price-to-price comparisons between sales in the United States and sales in the foreign competitor’s home market (or third countries). In such cases, there is no requirement that the sales in the United States are below cost. Accordingly, there can be dumping (sales below normal value) even if the sales in both markets are profitable and even if the sales in the United States are above average variable cost. A severely criticized element of antidumping enforcement is that when there is a need under the law to determine whether sales are at prices below the cost of production (in the home market), the Commerce Department uses average total cost as the standard.

In antitrust cases where there are allegations of predatory below-cost selling, there is not a single standard, but most Courts of Appeals generally use marginal cost or average variable cost as the test. It is clear from the Supreme Court’s *Brooke Group* case that below-cost selling will not be

20 AMERICAN BAR ASS’N, Antidumping and Antitrust, in THE REPORT OF THE ABA ANTITRUST SECTION TASK FORCE ON THE COMPETITION DIMENSION OF THE NORTH AMERICAN FREE TRADE AGREEMENT ch. 6 (1994) [hereinafter TASK FORCE ON COMPETITION OF NAFTA].

21 See Applebaum, An Antitrust Perspective, supra note 1, at 412.

22 The ITC had previously been directed to, among other things, consider whether the dumped imports were “undercutting” the U.S. market prices. Congress evidently believed that undercutting might connote predatory intent. It therefore changed the term from “undercutting” to “underselling” and included a statement in the legislative history to clarify that predatory intent was not required. See 19 U.S.C. § 1677(j)(2)(J); H.R. CONF. REP. NO. 100-576, I.C.2.17.b (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1650.


24 See, e.g., Henry, 809 F.2d at 1346; O’Hommel, 659 F.2d at 352. But see McGahee, 858 F.2d at 1496 (holding that “average total cost [is] the cost above which no inference of predatory intent can be made”).
sufficient for antitrust law purposes unless it can also be shown that the
defendant was capable of eventual recoupment of its lost profits. Thus
there is a stark contrast between the antidumping law tests for sales below
normal value and below-cost selling, and the predatory pricing require-
ments of the Brooke Group case.

IV. OVERLAP OF U.S. TRADE LAW AND ANTITRUST LAW CONCERNING
FOREIGN GOVERNMENT TOLERATION OF SYSTEMATIC
ANTICOMPETITIVE ACTIVITIES THAT RESTRICT MARKET ACCESS

In the Omnibus Trade Act of 1988, Congress attempted to blend some
trade law and antitrust law concepts through an amendment to Section 301
of the Trade Act, which provides a cause of action when a foreign
government tolerates systematic anticompetitive activities by foreign firms
that restrict market access. Although this provision drew considerable
attention at the time of its enactment, it had not been fully invoked until
1996 in the Section 301 proceeding initiated in Eastman Kodak’s action
concerning access to the Japanese market for photographic film and pa-
per. The delay and infrequency of its use may have been because it
requires a showing of “toleration” by a foreign government and the fact
that the provision does not permit a direct challenge to a private foreign
cartel or other private restraints. Moreover, the legislative history of the
provision indicates that foreign (rather than U.S.) law should control
determinations of whether there has been a toleration of anticompetitive
practices.

The very limited use of the “toleration” provision may explain in part
the Uruguay Round implementing legislation’s provision that requires the
USTR’s annual National Trade Estimate report to include a “section on
foreign anticompetitive practices, the toleration of which by foreign

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25 See Brooke Group, 509 U.S. at 224.
27 The provision makes actionable “the toleration by a foreign government of systematic
anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect
of restricting, on a basis that is inconsistent with commercial considerations, access of United States
28 See William H. Barringer, Competition Policy and Cross Border Dispute Resolution: Lessons
Learned from the U.S.-Japan Film Dispute, 6 GEO. MASON L. REV. 459 (1998) (discussing the Kodak
Section 301 case and the WTO case filed by the United States).
29 See H.R. REP. NO. 100-576, I.C.1, Actionable Foreign Acts, Policies, or Practices (e)
(1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1603 (stating that the “intent is not to regulate business
practices of foreign firms or to enforce upon foreign governments U.S. concepts of antitrust law . . .
the USTR may continue to take into account, among other things, whether the anticompetitive foreign
private activities are inconsistent with local (not U.S.) law . . . .”.

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governments is adversely affecting exports of United States goods or services. The implementing legislation continues to define a foreign government's toleration of systematic anticompetitive activities that restrict U.S. market access as an unreasonable act under Section 301. The amended provision clarifies that this is applicable to both goods and services and changes the reference to anticompetitive activities by or among private firms to by or among "enterprises."

The Sherman Act can be invoked to challenge private foreign cartels, boycotts, or restraints that restrict the access of U.S. exports. The International Antitrust Enforcement Guidelines confirm that the DOJ and FTC may take action against anticompetitive conduct that restrains U.S. exports if the conduct has a direct, substantial, and reasonably foreseeable effect on U.S. exports and the U.S. courts can obtain jurisdiction of the parties engaged in such conduct.

V. OVERLAP OF TRADE AND ANTITRUST LAW CONCERNING SYSTEMATIC DUMPING WITH AN INTENT TO INJURE A U.S. INDUSTRY

The Antidumping Act of 1916 makes foreign producers' systematic dumping with an intention to injure a U.S. industry a crime and provides treble damage actions as a remedy to these activities. This very old statute thus represents an early mixture of antidumping and antitrust concepts. There have, however, been no fully adjudicated cases under it, presumably because the scienter requirement is very difficult to meet. In fact, the statute has been invoked in only a handful of cases. The constitutionality of the statute was upheld in the Zenith litigation, but the claims there were dismissed due to an absence of comparable products. There have been continuing efforts to amend the statute to make it more accessible and practicable, but these efforts have so far been unsuccessful.

There is one important recent development under the Antidumping Act of 1916. In a 1997 case before the U.S. District Court of Utah con-
cerning carbon steel plate, the court found that the Antidumping Act of 1916 “is not limited only to antitrust injury or predatory price discrimination. It is also designed to protect U.S. industry.” Accordingly, the court ruled in response to a motion to dismiss that the plaintiffs did not have to satisfy antitrust predatory intent standards in pursuing relief under the Act. This decision is expected to stimulate additional interest in and support of the European Union’s position that the Antidumping Act of 1916 is contrary to the WTO Antidumping Code since it provides a form of relief from dumping (treble damages) other than the special duties provided by the Code.

VI. LEGISLATIVE ATTEMPTS TO COMBINE (OR DISTORT) U.S. TRADE AND ANTITRUST LAW CONCEPTS

There have been some relatively recent congressional attempts to combine (or, as critics claim, distort) trade law and antitrust law concepts. This effort has been driven in large part by members of Congress seeking to create an additional remedy where closed foreign markets arguably provide a subsidy or support for low priced imports into the United States. The most prominent legislation was Senator Metzenbaum’s (D-Ohio) bill entitled the “International Fair Competition Act of 1992.” A modified version of that bill was approved by the Senate Judiciary Committee (“the Committee”) but was not passed by the full Senate. The bill attempted to create a new “antitrust” treble damage remedy for U.S. sales by foreign producers at prices less than total average cost. The bill would have amended the Antidumping Act of 1916 to prohibit systematic dumping at prices less than average total costs if the effect is to destroy or injure U.S. commerce and the foreign home market “(i) lacks effective price competition among competitors; or (ii) is substantially closed to effective international competition.” The bill would have thus injected the Commerce Department’s average total cost approach in so-called antitrust legislation, despite the fact that, as discussed above, predatory pricing cases under the antitrust laws generally require a showing of sales below marginal cost or average variable cost. The proponents’ assertion that the bill merely extended the Robinson-Patman Act to imports was therefore not valid. Further, the bill did not contain the Robinson-Patman Act “meeting competition” and cost-justification defenses. Finally, the proposed remedy

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36 Id. at 1215.
37 See id.
39 S. 2610 § 3(b)(2).
for “destroying or injuring” U.S. commerce did not appear to be related to antitrust injury but rather similar to the protection of domestic producers in the antidumping law.

In approving the modified bill, the Senate Judiciary Committee stated that it was “needed to assure that foreign firms do not enjoy an unfair competitive advantage in our markets because cartels, which can charge supracompetitive prices, are tolerated in theirs.” The Committee’s bill would have provided a defense where defendants could show that “the lack of domestic or foreign competition in their home market was not a factor in their ability to charge a price below average total cost in the United States.” The Committee’s bill provided no guidance on how a private party could establish the absence of competition in the foreign market or that the foreign market was closed to import competition.

Senator Specter (R-Pa.) and others for many years introduced legislation to provide private actions under the Antidumping Act of 1916. Their proposed legislation was similar to the Metzenbaum bill, characterized as a response to market access problems. However, these bills too would have provided only a private remedy against dumping or international price discrimination. Such legislation would raise a number of WTO issues, particularly concerning the provision in the WTO Antidumping Code that limits the remedy for dumping to special dumping duties. It also would raise many of the same problems as the Metzenbaum bill in seeking to blend trade law and antitrust concepts.

In any event, neither of these approaches would have provided new remedies to obtain foreign market access. Rather, they would have provided an additional legal weapon enabling U.S. producers who believe that they were unfairly precluded from foreign markets to bring actions based on U.S. imports—and thereby against their would-be competitors in foreign markets. It should be observed that for the reasons discussed above and others, the ABA Antitrust Section opposed both types of legislation.

VII. NAFTA'S APPROACH TO THE RELATIONSHIP OF THE TRADE LAWS AND THE ANTITRUST LAWS

When the United States and Canada commenced the negotiations of a Free Trade Agreement in 1988, a major objective of the Canadian government was that antidumping and countervailing duty laws should not apply within the free trade area. The Canadian premise was that the competition laws could fill the vacuum. The Canadian objective was not
accomplished. As a compromise, the Free Trade Agreement created special bi-national panels to review antidumping and countervailing decisions in lieu of the judicial regimes of the two respective countries.\footnote{See Free Trade Agreement, Jan. 2, 1988, Canada-U.S., 27 I.L.M. 281, 386 (1988).} There were some early proposals by both Canada and Mexico for removal of the trade laws from NAFTA, but the United States again resisted and the bi-national panels were continued.\footnote{See North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 605 (1993).} However, the NAFTA parties did create three working groups—on subsidies and countervailing duties, on dumping and antidumping duties, and most interestingly, on the relationship of the competition and trade laws. This latter working group continues to meet.

VIII. THE ABA ANTITRUST SECTION’S NAFTA TASK FORCE AND OPTIONS FOR THE CONVERGENCE OF TRADE AND ANTITRUST LAW

The NAFTA Task Force of the ABA Antitrust Section ("the Task Force") considered options for convergence of the antidumping and antitrust laws in its report entitled "The Competition Dimension of the North American Free Trade Agreement."\footnote{See TASK FORCE ON COMPETITION DIMENSION OF NAFTA, supra note 20.} The Task Force’s preferred option was replacement of antidumping law with antitrust laws covering price discrimination, predation, and monopolization, and the consideration of a common legal standard for NAFTA parties. The Task Force concluded that this approach was most consistent with the concept of a free trade area because it would eliminate an artificial trade barrier between the NAFTA nations, achieve the same legal treatment among the nations, and make price differentials among the three countries less likely. The Task Force recognized that this replacement would reduce protection of domestic industries and workers from import competition from other NAFTA countries, but considered the approach more consistent with a free trade area. In the United States, the antidumping law would be replaced by reliance on predatory pricing cases under the Robinson-Patman Act and Section 2 of the Sherman Act. The Task Force concluded that consideration of a common legal standard was not necessary to ensure a level playing field but would further the goal of convergence and efficient allocation of resources in the free trade area. Such a consideration, of course, is complicated by state antitrust laws and the availability of private damage actions in the United States. The Task Force also recognized that the treatment of non-NAFTA imports and multiple-country cases would have to be considered.

The Task Force’s second-preferred option was to maintain separate
antidumping and antitrust laws (and their different objectives), but to use antitrust market definitions, predation concepts, and injury analysis in antidumping cases to the extent consistent with the protection of domestic producers. This option would raise the standard of proof in antidumping cases and make the common questions of market definition, causation, and the standard of actionable injury more consistent. Actionable injury could require direct causation and relief limited to the injury actually suffered. The antitrust law approach to determining below-cost pricing could be used in determining whether there was dumping. The “meeting competition” defense and the impact on downstream consumers also could be considered. The Task Force concluded that the convergence of legal standards would not be required and the outcome could still differ based on the different objectives of the two separate laws.45

IX. PRACTICAL CONSIDERATIONS IF ANTIDUMPING LAW IS “REPLACED” BY ANTITRUST LAW

It has often been proposed that the antidumping law should be replaced by or phased into the antitrust laws. This has, for many, been especially appealing in connection with NAFTA and other free trade areas as discussed above. However, those who have proposed such replacement have often done so without evaluating the practical consequences or difficulties in achieving this result. In fact, if antidumping law were simply to be repealed and the antitrust laws were their replacement for challenging import competition, antidumping remedies would, for all practical purposes, be eliminated.

The proposed replacement of antidumping law by the antitrust laws is normally presumed to be accomplished through use of the Robinson-Patman Act, which also condemns injurious price discrimination. That statute, however, currently does not apply to sales outside the United States. To cover international price discrimination, the plaintiff would need to allege a higher price in the foreign market (or that the U.S. price is below-cost). Accordingly, the Robinson-Patman Act’s current limitation to sales “for use, consumption or resale” in the United States46 would need to be amended.

Many larger problems also would have to be resolved. Proof of

45 The Task Force considered two other options but deemed them less desirable. One was expanded use of Section 201 of the Trade Act, the safeguards remedy. This would mean more effective use of that statute to provide temporary relief from import competition without regard to whether such competition is unfair or based on price. Finally, the Task Force considered improvements in the U.S. antidumping law through procedural and definitional changes, some of which were achieved in the Uruguay Round Agreements Act.

international price discrimination could be difficult for a plaintiff to obtain and present to a court. Access to substantial foreign market price and cost information would be necessary to establish the discrimination. It is doubtful that the present antitrust laws could adequately deal with the potential jurisdictional, discovery and evidentiary objections to be expected from foreign sellers. The typical submission of price and cost information by a foreign seller in antidumping cases (subject to Commerce Department verification) would be exceedingly difficult for a federal district court to admit as evidence under the existing rules. The replacement of the antidumping law might well be practical only if some international code or regime existed and was receptive to dumping challenges under the antitrust laws.

Assuming that these practical hurdles could be overcome, a traditional antidumping case would still have almost no prospect for success under current antitrust predatory-pricing criteria. The prosecution of a Robinson-Patman Act primary line case (equivalent to a dumping case), or possibly a Section 2 Sherman Act attempt to monopolize case based on below-cost sales, currently requires proof of predatory intent. As discussed above, the U.S. Courts of Appeals have held that in order to establish predatory intent, there must be a showing of below-cost selling, and they generally use marginal cost or average variable cost as the test for this purpose. And the Supreme Court in *Brooke Group* held that even where below-cost selling is established, predatory intent requires proof the defendant was eventually capable of recoupment of its lost profits. In addition to the difficulties of a dumping case satisfying the predatory pricing standards of the antitrust laws, there would also be the difficulty of the injury and causation standards discussed earlier.

Accordingly, the antitrust laws would need to be significantly amended to enable the prosecution of dumping cases. If that were in fact done, there may have been little accomplished in the "replacement" unless the requirements for prosecuting a dumping case were made more rigorous. Whether that approach has any clear advantages over harmonization or convergence of the two bodies of law is not clear.

CONCLUSION

The interface of trade law and antitrust law is often one of tension, of conflict, or of incompatibility. There is, as indicated, a growing recognition that an international approach to greater reconciliation of or harmonization of these laws should be considered. The subject has been raised in the

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WTO, OECD, NAFTA, and other multinational forums, as well as the ABA. Dialogue and efforts to accommodate the two bodies of laws should continue, and may possibly result in some eventual harmonization, melding or blending of international trade and antitrust rules. In any event, as free trade in goods and services expands, there may be less need for trade law protections, but a continued need for the antitrust-competition law guarantee of free market interplay.