THE CASE FOR REPLACING ANTI-DUMPING WITH ANTI-TRUST

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I Introduction

In a recent article in this publication,[1] John Kazanjian argues strongly that whatever the merits in principle of the case for replacing anti-dumping law with anti-trust law, it is entirely outside the bounds of political feasibility, largely because the U.S. is so strongly committed to its various trade remedy laws, including anti-dumping laws, and that for Canada to persuade the U.S. to forego the use of its anti-dumping laws in the bilateral context, the "price" that we would be asked to pay in terms of trade and related concessions would make such a move unacceptable to us as well. In contrast, in this article, I will argue that there are strong economic and non-economic justifications in principle for replacing anti-dumping laws with harmonized anti-trust regimes in international trade, and that at least in the bilateral Canada-U.S. context, such a move is politically feasible.

Anti-dumping laws have a long history. In that, Canada has the dubious distinction of having enacted the first anti-dumping law in the world, when it amended its *Custom's Tariff* in 1904 to provide for the imposition of anti-dumping duties. The current provisions are set out in the *Special Import Measures Act* of 1985.

The first specific U.S. anti-dumping statute, which is still in force, is known as the *Anti-Dumping Act* of 1916. This Act has almost never been invoked, in part because it requires proof of an intent by foreign exporters to monopolize or injure an American industry, i.e. proof of predatory intent. In 1921, the U.S. Congress enacted legislation which was much more expansive in scope. The current American legislation is embodied in Title VII of the *Tariff Act* of 1930.

While there are differences of detail between the two countries' regimes, in most important respects the regimes operate on similar principles. In the U.S., the International Trade Administration of the Department of Commerce, and in Canada, the Deputy Minister of National Revenue, make determinations of dumping. In the U.S., the International Trade Commission, and in Canada, the Canadian International Trade Tribunal make determinations of material injury. The critical elements in these determinations in both countries are (1) dumping, (2) causation, (3) material injury, (4) to a domestic industry producing like products. All these elements in anti-dumping determination are problematic. However, I want to focus on what it is that constitutes the objectionable conduct against which anti-dumping duties are directed.

II The Rationales for Anti-dumping Legislation

The rationales for anti-dumping legislation can in part be deduced from the definition of dumping that both Canada and the U.S. adopt in their legislation. One strand of the definition focuses on differences between export market prices and home market prices. Drawing an analogy to domestic anti-trust laws, this strand of the definition clearly focuses on international price discrimination, more specifically international primary-line injury price discrimination. Another element of the definition of dumping in both countries relates to constructed costs. This element entails a divergence between export market prices and the constructed costs of the foreign exporter, whereby if the latter exceeds the former, dumping is presumed to have occurred. The domestic anti-trust analogy for this form of dumping is predatory (below-cost) pricing.

The only other economic rationale that has been offered for anti-dumping laws was advanced by Jacob Viner[2] who argued that in some contexts "intermittent dumping" could be welfare reducing in the importing country. What he had in mind by intermittent dumping was non-predatory, below-cost sales of goods into export markets by foreign producers, where these foreign producers were unlikely to maintain a long-term presence in the export market. If this form of intermittent dumping led to domestic producers withdrawing from the market and perhaps re-entering later, exit and re-entry costs, along with the higher level of risks and thus costs of capital entailed in this form of volatility, might raise domestic prices on average over the long-term. However, nothing in the definition of dumping in either the Canada or U.S. anti-dumping regimes focuses on this phenomenon, i.e. the temporal aspect of dumping.

Non-economic rationales that have sometimes been advanced by anti-dumping laws pertain to distributive justice and communitarian values. Here, it is argued that low-priced imports may impact adversely on some of the least advantaged members of the importing country, in particular low-skilled, low-paid workers, and that whatever the benefits to consumers in the importing country of access to low priced imports, these distributive impacts may out-weigh the gains in consumer welfare. Similarly, it is sometimes argued that low-priced imports may have a negative impact on the welfare of industry-dependent communities e.g. one-company or one-industry towns, and may undermine the social and related networks and infrastructure upon which the ongoing vitality and integrity of these communities depend.

However, there is nothing in the definition of dumping in either the Canada or U.S. anti-dumping regimes that suggest that these concerns are a significant focus of the present regimes. Moreover, to the extent that distributive justice or communitarian impacts from low-priced imports are a valid concern, it is not at all clear that a divergence between export market prices and either home market prices or costs of production have anything to do with such impacts. In other words, to the extent we should be concerned about these impacts, the concerns have little or nothing to do with allegedly unfair trading practices.

In a recent empirical study[3] of 30 Canadian anti-dumping cases that resulted in positive duties being imposed between 1984 and 1989, none of the 30 cases involved predation, and, at most, four out of the 30

cases (involving agricultural imports) involved intermittent dumping. These same four cases arguably engaged distributive justice and communitarian concerns. At the most, two out of the 30 cases engaged distributive justice concerns alone and, at most, five out of the 30 cases engaged communitarian concerns alone. Thus, out of the 30 cases reviewed, on the broadest view of defensible normative justifications for intervention, only 11 cases engaged any of the normative rationales identified above, i.e. almost two-thirds of the cases lacked any coherent normative rationale for intervention at all, and in the 11 cases where normative justifications were arguably present, we argued that anti-dumping duties were not the optimal choice of policy instrument in any of them. Either safeguard actions or domestic adjustment assistance policies would have been more appropriate responses.

III The case for replacing anti-dumping with anti-trust

To return to the two primary economic justifications most commonly advanced for anti-dumping laws, i.e. international primary-line price discrimination and predatory pricing, both I in previous writings[4] and a former student of mine, Presley Warner,[5] in a recent extensive analysis of the issues, argue that international primary-line price discrimination is not a valid justification for domestic anti-dumping laws. Unlike domestic price discrimination, whose prohibition under domestic anti-trust laws is itself controversial, in the case of international price discrimination the importing country derives all the benefits from the low price products, while whatever adverse impacts are associated with the higher prices are felt in the exporting country. Why these latter effects should be of any concern whatever to the importing country remains one of the more impenetrable mysteries of international trade law.

In contrast, below-cost pricing by foreign exporters as part of a predatory pricing strategy designed to drive domestic and other foreign producers out of the importing country's market and then to raise prices to supra-competitive levels does have the potential for reducing consumer welfare in the importing country. However, as with domestic anti-trust laws that prohibit predatory pricing, identifying circumstances in which such a strategy is likely to prove successful is likely to be a highly problematic exercise. Some anti-trust commentators argue that the exercise is so problematic that in a domestic context we would be better simply to repeal our prohibitions against domestic predation. However, for present purposes, I accept that there may be a case for such laws in a domestic context, and that to this extent such laws should extend to similar behaviour if engaged in by foreign firms. This is the core of the case for replacing anti-dumping laws with harmonized domestic anti-predation laws.

In undertaking such an exercise, an important point must be noted here: Warner and I would restrict the scope of the harmonization exercise to harmonizing anti-predation laws as they might apply to cross-border trade. Unlike other commentators, we would <u>not</u> harmonize price discrimination laws as they might apply to cross-border trade. The price discrimination provisions in s. 50 of the Canadian *Competition Act* do not apply to primary-line injury even in a domestic context, although the price discrimination provisions of the

U.S. *Robinson-Patman Act* do, but have been interpreted as not having extra-territorial effects. To extend primary-line injury price discrimination laws to cross-border trade would simply risk resurrecting the incoherence associated with present anti-dumping laws to the extent that they attempt to penalize international price discrimination.

IV The political feasibility of replacing anti-dumping with anti-trust

Despite Kazanjian's arguments that this policy shift is not politically feasible, I remain unpersuaded for several reasons.

First, in sharp contrast to utilization rates by country of countervailing duty laws, there is much greater symmetry in utilization rates of anti-dumping laws between U.S. and Canadian producers. Between 1980 and 1988, U.S. producers brought 22 anti-dumping actions against Canadian exporters, while Canadian producers brought 50 actions against American exporters. Canada imposed anti-dumping duties in 23 of the 50 actions, while the U.S. imposed anti-dumping duties in 14 of the 22 actions. Between 1988 and October 1993, Canadian producers initiated 23 anti-dumping actions against U.S. exporters, while U.S. producers initiated 12 actions against Canadian exporters, suggesting that the Chapter 19 binational review process under the FTA has had little or no chilling effect on the invocation of anti-dumping laws on either side of the border. While the binational panels have remanded domestic agency determinations in a majority of cases appealed to them, the underlying domestic laws on dumping are unaffected by the FTA. Thus, it is clear that both countries would stand to gain substantially from restraining the utilization of each other's anti-dumping regimes. By contrast to utilization rates for anti-dumping laws, between 1980 and 1988 U.S. producers initiated 11 countervailing duty (CVD) actions against allegedly subsidized Canadian exports, resulting in the imposition of final duties in eight cases. Between 1989 and October 1993, U.S. producers initiated 6 CVD actions against Canadian exporters. Over the entire period from 1980 to 1993, Canadian producers initiated only one CVD action against U.S. exporters, which resulted in the imposition of final duties. Thus, in evaluating the political feasibility of replacing anti-dumping with anti-trust, the very different patterns of country utilization of anti-dumping laws relative to countervailing duty laws are of central importance. Subsidies and countervailing duties are the hard case, while anti-dumping duties are the easy case, both economically and politically.

Another reason for believing that the political feasibility of such a move is not as tenuous as Kazanjian claims is that two other regional trading blocs with which the Canada-U.S. FTA and now NAFTA have substantial affinities have already made this move. In the European Community, anti-dumping actions between members states are prohibited, and complainants are remitted to seeking redress for their complaints under EC competition law, primarily laws related to predatory pricing, and more arguably laws relating to primary-line price discrimination. However, much more to the point is the Protocol executed between Australia and New Zealand in 1988 under the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), which came into effect on July 1, 1990. Under this Protocol, both countries agreed

to amend their trade legislation in order to abolish anti-dumping actions between the two countries, and to suspend all anti-dumping duties then outstanding. Between July 1980 and June 1988, 16 anti-dumping actions were brought in Australia against New Zealand exports, and 10 in New Zealand against Australian exports. Both countries also agreed to amend their abuse or misuse of dominant position provisions in their competition legislation, so as to permit complainants in one country to initiate complaints about the conduct of producers in the other country. At the same time, a series of procedural innovations was adopted, which permits a court sitting in one country hearing a complaint by domestic producer interests in that country pertaining to the conduct of producers in the other country to hold hearings and take evidence in the latter country and to have subpoenas and other orders enforced in the latter country. The relevant substantive amendments to the competition legislation in both countries clearly focus on predatory behaviour by firms based in one country and exporting into the other country's markets.

As Warner sets out in some detail in his recent article,[6] parallel amendments to trade and competition legislation in Canada and the U.S could readily achieve the same end. First, Canada and the U.S. would need to amend their trade legislation to prohibit anti-dumping actions between the two countries and to suspend all duties then outstanding. Second, competition legislation in each country would need to be amended so as to permit producers in one country to initiate complaints in that country with respect to predatory conduct of producers in the other country. Again, procedural innovations would be required to permit courts in the first country to receive evidence in the second country and to enforce subpoenas and other orders in the latter country. Warner sets out the required amendments in quite precise form. They are not complicated, and they largely replicate the strategy adopted by Australia and New Zealand.

V Conclusions

This strategy is not only economically principled but politically feasible. We should not succumb to the temptation, proposed by Kazanjian and others, of settling too quickly for distant second or third-best policy options. Compared to the issue of subsidies and countervailing duties, which is the hard case that does warrant the expenditure of considerable intellectual and political energy, anti-dumping regimes are one of the most transparent but enduring intellectual hoaxes in all of international trade law. To recognize this, as almost every serious analyst does, is not a symptom of religious fanaticism or political naiveté (as Kazanjian claims), any more than rejecting flat-earth theories or theories that deny the law of gravity, however upsetting this may be to proponents or beneficiaries of these theories. To temporize with the truth by technical ("scientific") tinkering with the existing anti-dumping regimes is (in the words of the Mikado) to risk providing "artistic verisimilitude to an otherwise bald and unconvincing narrative".

Notes

[1] John A. Kazanjian, "Competition Law and Trade Policy: Honk if you love Competition Policy" (1993) 14:3 Can. Comp. Rec. 71.

[2] Jacob Viner, *Dumping: A Problem in International Trade* (N.Y.: A.M. Kelly, 1966)

[3] Susan Hutton and Michael Trebilcock, "An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for Normative Rationales" (1990) 24 J. World Trade 123.

[4] Michael Trebilcock and John Quinn, "The Canadian Anti-Dumping Act" (1979) 2 Canada-U.S. Law Journal 101; Trebilcock, "Throwing Deep: Trade Remedy Laws in a First-Best World", in Trebilcock and York, eds., *Fair Exchange: Reforming Trade Remedy Laws* (Toronto: C.D. Howe Institute, 1990) 235.

[5] Presley Warner, "Canada-United States Free Trade: The Case for Replacing Anti-dumping with Antitrust" (1992) 23 Law and Policy in International Business 791.

[6] *Ibid.*