

5. Counterpoint

Our limited capabilities make us want to retain flexibility, to treat anti-trust more as an art than a science, while on the other hand, we want to project and provide certainty to the public.

The only way out of this dilemma is to concentrate on what we can do best and then stop...as our understanding of markets and how they work has expanded, the perceived scope for anti-trust has shrunk.³¹

Efforts are underway to reform antidumping practices within the North American free trade area. This is undeniably important work. The considerations outlined in section 4, however, suggest that eventual success in this area might also oblige us, over the medium to long term, to initiate a companion process of developing a set of binding criteria, at least within the North American context, to ensure that the operation of competition policy is not subsequently hijacked by the very special interest groups that presently aid and abet the misuse of trade remedy law. I do not suggest that this is an issue requiring immediate attention and resolution. Rather, it is an early indication that we should undertake the necessary further research and discussion needed to develop a balanced position.

What might such binding criteria encompass? In this regard, we should take into account that competition policy has been criticized most recently for its alleged lack of certainty, especially as it (correctly) has moved away from market concentration analysis and per se prohibitions. The economic realities explored are complex, requiring a careful case-by-case approach. Yet, while economics teaches the necessary lesson that competition policy should focus on dynamic efficiency gains, it does not provide many useful tools to measure such gains, especially on an ex ante basis. While recognizing that modern competition policy must be as much art as science, and that this is superior to a more dogmatic, mechanistic reliance, for example, on the Herfindahl-Hirschman Index, can we nonetheless devise a set of criteria that could be incorporated into a North American agreement, thereby establishing clearer guidance for regulators, clear limits on the ability of legislators to

³¹ Frederick R. Warren-Boulton, "Implications of U.S. Experience with Horizontal Mergers and Takeovers for Canadian Competition Policy", in Mathewson et.al, *Law and Economics*, p.360.