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## Competition (Antitrust) and Antidumping Laws in the Context of the Canada-United States Free Trade Agreement\*

*Ivan R. Feltham,\*\* Stuart A. Salen\*\*\* Robert F. Mathieson\*\*\*\*  
and Ronald Wonnacott\*\*\*\*\**

### INTRODUCTION

1. **O**n January 1, 1989, Canada and the United States began the implementation of an historic agreement to establish a more stable, open and secure economic relationship. The twenty-one chapters of the Canada-United States Free Trade Agreement ("FTA") provide for detailed and balanced rules to cover the economic relationships between the two countries.
2. In many areas, the FTA introduced new rules governing the conduct of bilateral business from day one. For example, on that date the FTA began to phase out tariffs, provided new dispute settlement mechanisms and rules for more openness and stability in cross border investments, business travel, and access to services. In other areas, further study was mandated with specific time frames to break new ground in eliminating transborder barriers that impede the flow and predictability of commercial activity.
3. One important piece of "unfinished business," as contemplated under Chapter 19 of the FTA ("Chapter 19"), is the commitment of both countries to design a new bilateral regime to govern subsidies and dumping, which are now controlled through the unilateral application of domestic trade remedies.<sup>1</sup> The governments of both countries, with full parliamentary and congressional approval, established a bilateral work-

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<sup>1</sup> In its official synopsis, the Canadian Government commented as follows: "During the course of the current negotiations, the two sides recognized that developing a new regime was a complex task and would require more time. The goal of any new regime, however, will be to obviate the need for border remedies, as are now sanctioned by the GATT Antidumping and Subsidies Codes; for example, by developing new rules on subsidy practices and relying on domestic competition law. Thus the goal of the two governments remains the establishment of a new regime to replace current trade remedy law well before the end of the transition period."

ing group to expedite the negotiation and development of a substitute system.

4. The Committee on Canada-United States Relations, a fifty-seven year old bilateral committee of the respective country's national chambers of commerce, is participating in private sector consultation with the bilateral government Chapter 19 Working Group. In keeping with this support activity, the Committee on Canada-United States Relations commissioned this study to explore the feasibility of relying, in the context of the FTA, on each country's domestic competition/antitrust laws<sup>2</sup> in dealing with complaints of transborder unfair pricing.

#### *A. The FTA: Why Now?*

5. It is useful to summarize the forces that have led to the FTA. History ably documents that for over one hundred years, there have been failed attempts at fashioning a bilateral agreement that would allow citizens of both Canada and the United States to benefit from the efficiencies of an open Canada-U.S. market. In today's global economic environment, why have the FTA negotiations succeeded where past efforts failed or were aborted?

6. One apparent reason has been the concern that the General Agreement on Tariffs and Trade ("GATT") may not be a strong enough institution to build an open global economy. In addition, and to some extent as a result, countries are coalescing into regional units to maximize the economies of scale and scope that can be obtained through expansion of trade and investment links. For example, in the Far East, the ASEAN group and the bilateral Tasman FTA (made up of Australia and New Zealand) are in place. In the West, the twelve European Community countries ("EC") are driving toward a single market by 1992. The EC in turn is developing closer economic integration with EFTA, Central and Eastern Europe countries and the USSR. Thus, Canada and the United States may find in the future that they will have to negotiate with a more enlarged European bloc than now envisaged by the European Community of twelve. This larger and better integrated pan-European economy will generate a stronger competitive challenge to Canadian and U.S. businesses already facing growing competition from Asia.

7. A second contributing reason for the success of the Canadian-U.S. negotiations has been the threatened growth of unilateral trade actions; such actions by the United States have been of particular concern for Canada. On the U.S. side, there has been concern about Canadian investment restrictions — a concern that has been addressed in the FTA. Another problem faced by the United States has been the unreliability of traditional offshore sources of energy and raw material supplies, and in the FTA the United States has been able to increase the security and stability of its supply of these products. Moreover, there has been an-

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<sup>2</sup> Hereinafter referred to simply as "competition laws."

other strong incentive for the FTA. If, through economic integration and rationalization, Canada and the United States can become more efficient and competitive, then expanding markets in Europe, Asia and elsewhere will offer a highly profitable challenge for their exporters. Thus the objective is not just increased prosperity based on the U.S. and Canadian markets, but also an increased ability to compete in world markets beyond North American Shores.<sup>3</sup>

8. In the two years that have elapsed since the start of the FTA, world developments have reinforced the need to complete the rules of the Agreement. For example, difficulties in achieving liberalization in the GATT have become more evident, and the initiative of the United States in encouraging bilateral trade agreements with Mexico and other countries makes it important for the work of the Canada-United States FTA to be completed.

#### *B. What Must the New Regime Accomplish?*

9. During negotiation of the FTA, the governments of Canada and the United States acknowledged that, at least with respect to each other, their existing regime of trade remedy laws is seriously flawed and unnecessarily protective. By ratifying the FTA, both governments agreed that it is in their respective interests to replace protectionism with cooperation and to create a bilateral regime that allows sellers to engage in unfettered transborder competition: competition that will increase efficiency, consumer welfare, and global competitiveness.

10. There are two tests that should be applied in making any Chapter 19 mandated changes to the existing trade remedy laws, including antidumping:

1. Will any substitute regime have as its primary concern the objective of economic efficiency?
2. Will those who have had recourse to antidumping laws in the past enjoy fair treatment under, and appropriate access to, any new regime?

11. This study explores the key issues in eliminating antidumping laws and relying on existing competition laws in five sections. Section I compares and contrasts the “purpose” of antidumping laws with that of competition laws, and concludes that the application of competition laws to transborder price discrimination would be consistent with the FTA’s goal of enhancing North American economic efficiency and global com-

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<sup>3</sup> In the Letter of Transmittal to Congress, President Reagan explained that “with this agreement (FTA), we are tearing down the tariff walls that block the flow of free trade and generally eliminating the tangle of restrictions and regulations that inhibit our commerce and economic cooperation. As this agreement takes effect, Americans and Canadians will be more able to conduct business, invest and trade where they like . . . [pulling] together, as partners, toward a future of economic growth and prosperity.”

petitiveness.<sup>4</sup> Having concluded that competition law could provide an alternative framework for managing the bilateral regime, Sections II and III explore the substantive and procedural provisions of Canadian and U.S. competition laws to determine whether they provide in their present form an effective, practical remedy for “anticompetitive” dumping. We conclude that they do, although improvement in procedures for cooperation (government and judicial) may be prudent in certain areas. Section IV deals with issues related to national treatment, equality of treatment and harmonization. Section V includes a brief examination of concerns that (1) the elimination of antidumping actions may result in a disproportionate increase in the number of U.S. antitrust suits and (2) U.S. laws may expose defendants to recovery of the same damages in more than one lawsuit.

### I. ANTIDUMPING AND COMPETITION LAWS: PROTECTING COMPETITORS VS. PROTECTING COMPETITION

12 Antidumping and competition laws are not identical in either in purpose or application. Although concerned in many cases with the same conduct — “unfairly” low prices — they have different purposes; antidumping laws tend to protect competitors while the objective of competition laws is to protect competition.<sup>5</sup>

13. Competition laws are violated by predatory pricing, designed to eliminate competitors or make markets less competitive in other ways. On the other hand, antidumping laws are violated by discriminatory pricing (across a border), whether or not this pricing is predatory. True, in condemning discriminatory pricing, antidumping laws do cover some cases where the pricing is predatory, and in such cases these laws enhance competition. The problem is that antidumping laws also condemn cases in which discriminatory transborder pricing is not predatory, but instead reflects healthy competition among firms with no predatory intent. In such circumstances, the application of these antidumping laws damages competition. This then is the key issue: By condemning non-predatory transborder price discrimination, antidumping law may punish firms engaged in procompetitive, efficiency enhancing competition, in direct contravention of the goal of the FTA.

14. The distinguishing characteristics of “predatory,” as contrasted with “competitive” pricing are discussed in detail within. Suffice it to say by way of introduction that instances of anticompetitive predatory pricing can be amply remedied under existing U.S. and Canadian competi-

<sup>4</sup> In the context of this study, “transborder price discrimination” refers to the sale of goods by a firm at a lower price for use or consumption in the foreign market than in its domestic market.

<sup>5</sup> It may be somewhat oversimplistic to assert that the purpose of competition law is to protect competition and consumers, while the purpose of antidumping law is to protect producers (competitors). For example, antidumping laws may also be invoked for strategic reasons that are beyond the scope of this study.

tion laws.<sup>6</sup>

#### A. Competition Law and the FTA

15. The purpose of the FTA and the purpose of competition laws are in large measure similar. The FTA in Article 102 states as its objectives the elimination of barriers to trade in goods and services, facilitation of conditions of fair competition, and significant liberalization of conditions for investment. If the objectives are fully achieved, the result will be the creation of a single market in which goods and services are freely available and may be freely offered by all participants in the market. Purchasers of goods and services will then have freedom of choice among competing suppliers and those suppliers will have equal freedom to behave competitively. Thus, the FTA will promote efficiency<sup>7</sup> and global competitiveness.

16. So stated, the objectives of the FTA bear a remarkable similarity to the stated purpose of the Canadian Competition Act (“Competition Act”). The new purpose section added in 1986 states that it is the purpose of this Competition Act:

to maintain and encourage competition in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.<sup>8</sup>

17. Unlike its Canadian counterpart, the U.S. antitrust laws have no explicit “purpose” section. At the most general level the Supreme Court observed in *Northern Pacific Railway v. United States*:

18. [t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest price, the highest quality and the greatest material progress . . . .<sup>9</sup>

Although such a pronouncement may establish the profound social value of the antitrust laws, it does little to clarify the details of a practicable economic policy.

19. The debate on the *specific* purpose of the antitrust laws has gener-

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<sup>6</sup> In addition, the FTA itself eliminates one (but not the only) condition that may encourage predatory price discrimination — market distortions (e.g., segmentation) caused by tariffs.

<sup>7</sup> Although this is not necessarily true for all free trade agreements, since the cost of trade diversion may exceed the benefit of trade creation, all estimates indicate that it will be true for the FTA. Given the large amount of present trade between the two countries (as a percentage of their total trade), the domain of trade diversion is relatively small.

<sup>8</sup> Competition Act s. 1.1.

<sup>9</sup> 356 U.S. 1, 4-5 (1958).

ated a number of "concerns:" preserving small businesses;<sup>10</sup> preventing the accumulation of economic size and concomitant political power;<sup>11</sup> and maintaining a system of business ethics condemning certain commercial practices, such as predatory price discrimination<sup>12</sup> or pricing below cost.<sup>13</sup> During the last fifteen years, however, courts and commentators have focused their attention on the goal of maximizing welfare by the protection of competition. Although the debate goes on, adherents of an economic model of antitrust law concerned with protecting competition and maximizing efficiency and welfare seem to have carried the day (or at least the presently configured Supreme Court). Therefore, conduct challenged under the antitrust laws is to be analyzed by considering whether its effect:

facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or were instead designed to increase economic efficiency and render markets more rather than less competitive (Emphasis added).<sup>14</sup>

20. In a few words, competition law is designed to prevent abuse of market power and to promote efficiency by ensuring competition among rivals.<sup>15</sup> In so doing, the competition laws of both Canada and the United States base the legitimacy of their respective rules, tests and remedies on the theory of market systems. From this perspective, the Chapter 19 Working Group, in considering the efficiency of a competition law regime, operates from similar first principles.

### 1. Economic Efficiency

21. The importance of the test of economic efficiency can be readily seen in both the United States and Canada in the movement away from economic analysis that heretofore focused on industrial concentration. The question that used to be addressed was: how concentrated is an industry, *i.e.*, how much of its output is accounted for by its few largest firms? In contrast, the new test is: How competitive and efficient is an industry? This new test recognizes that even a highly concentrated industry may be very competitive if, for example, foreign competition makes it so. To illustrate: with the expansion of the U.S. sales of

<sup>10</sup> *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 323 (1897); *United States v. Line Material*, 333 U.S. 287, 309 (1947).

<sup>11</sup> *United States v. Von's Grocery Company*, 384 U.S. 270, 274-77 (1966); *Brown Shoe Company Inc.*, 62 FTC 679, 720 (1963).

<sup>12</sup> *Texaco v. Hasbrouck*, 110 S.Ct. 2535 (1990).

<sup>13</sup> *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

<sup>14</sup> *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 19-20 (1979); *see also Arco v. U.S. Petroleum*, 110 S.Ct. 1884 (1990); *Business Elec. Corp. v. Sharp Elec. Corp.*, 108 S.Ct. 1515 (1988); *cert. denied*, 108 S. Ct. 1727 (1988); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

<sup>15</sup> Under special circumstances such as pollution externalities, competition need not lead to efficiency. However, this problem is dealt with in another context.

Toyota, Honda and other foreign auto companies, no one talks about breaking up General Motors any more.

22. Central to promoting competition is the ability of individual sellers of products to increase sales by passing on greater efficiencies in the form of lower prices to the customer. Thus, price variability is the *sine qua non* of an efficient market economy. It is through the price mechanism that the efficient supplier is rewarded with increased sales and profits, while the inefficient supplier is encouraged by the “invisible hand” to “shape up or ship out.” With freely fluctuating prices, consumers are also rewarded. Many who could not otherwise afford to purchase are able to do so because of falling prices. Existing purchasers can buy more of the same good with the same budget, or use the unspent budget for other goods or to increase savings. Consumer welfare is thus maximized.

23. Rising prices also have their constructive role in a market system in signaling a “short-fall” between effective demand and existing supply. In this environment, if rising prices translate into higher profits, then increases in supply will follow until supply and demand are again in balance.

24. In summary, fluctuating prices are a mark of both economic efficiency and growing standards of living. If the FTA is to fulfill its promise of a stronger North American industrial base with rising levels in the standards of living, then transborder pricing must be variable. In particular, sellers of products and services on each side of the border should be encouraged to pass on cost efficiencies to all North American buyers in the form of lower prices and increased value.

## 2. Predatory Pricing

25. There are ground rules, however, as to how far a seller can go in gaining sales through lower prices. Both Canadian and U.S. competition laws outlaw predatory pricing.<sup>16</sup>

26. Simply put, predatory pricing involves the sale of products at artificially low prices, with the intent of driving otherwise efficient competitors out of business and charging a monopoly price in the future.<sup>17</sup>

27. Economic theory sharpens our understanding of the pricing tests that may be helpful in clarifying whether or not predation has taken place. To cite the simplest possible example in dealing with an issue that is infinitely more complex: a firm that is pricing above its average total cost—that is, a firm that is currently earning a profit—is not engaged in predation. It is not taking a temporary loss in order to drive a competitor out of business. But this is not an adequate guideline. The reason is that a firm pricing below its average total cost—and thus currently

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<sup>16</sup> By means of example, the U.S. FTC staff examined fourteen predatory pricing complaints in the first half of fiscal year 1990. In addition, its use of subpoenas and investigational hearings clearly suggests that the U.S. Government takes predatory pricing seriously.

<sup>17</sup> In some cases, plaintiff may be required to establish the feasibility of success as an element of establishing predatory intent. See *infra*, n. 20.



incurring a loss — may be engaged in a predatory attempt to eliminate a competitor, or it may not. It will not be if it is just trying to minimize its losses during a period of weak demand — as will be the case if it is pricing above its average variable costs. Even though it is not covering its total costs including its fixed cost (overhead) it is more than covering its variable (non-overhead) costs and is therefore able to cover at least some of its fixed costs.

28. One attempt to define predation more precisely is the Areeda-Turner test.<sup>18</sup> Under this test, a price is judged to be predatory if it falls not only below average total cost but also below short run marginal cost (or, the more easily calculated average variable cost).<sup>19</sup>

29. Although economic theory is very useful, it does not provide the last word. In particular, it may shed little direct light on the presence of predatory *intent*. Ultimately, there is no rule that can completely substitute for judicial common sense and wisdom. This point can be illustrated by an extreme case. In special circumstances even a price as low as zero may not be judged predatory, if it is a give-away promotion by a new firm entering a market with no chance of injuring competition.<sup>20</sup>

30. A final note on the competition laws as they might be applied in the Canada-United States Free Trade Agreement context: because economic theory does not differ across national boundaries, bilateral access to cost data, rather than any difference in economic theory, is the key element in determining whether competition law may be applied effectively in the Canadian-U.S. economy.

### B. Antidumping Law

31. Dumping is generally understood as selling at a lower price in one national market than in another. In international law, signed on to by both Canada and the United States, Article VI of the original GATT and subsequent agreements reached in the Tokyo Round negotiations (Antidumping Code), dumping is legally defined as selling a product:

into the commerce of another country at less than its normal value . . .  
for the like product when destined for consumption in the exporting  
country.

To be illegal, however, a second condition is required, namely proof of material injury to a domestic industry in the importing country.

32. When dumping can be established, the remedy is a special duty to offset the margin of dump. Implementation of this remedy necessi-

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<sup>18</sup> See Areeda & Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 HARV. L. REV. 697, 1975.

<sup>19</sup> A more detailed analysis of the U.S. "predatory pricing" law appears at *infra* ¶¶ 173-181.

<sup>20</sup> Some U.S. courts and tribunals examine structural conditions in the relevant market to determine the feasibility of monopolization and recoupment of losses sustained during the period of alleged predation as a prerequisite to a finding of predatory intent regardless of the price/cost relationship. Others focus solely on structural conditions, and ignore motive altogether. See *infra*, ¶¶ 177-180.

tates an elaborate set of rules to measure the margin of dump and an examination of the production of like goods to determine whether the dumping has caused or is causing material injury or has retarded the establishment of domestic production.

33. The underlying assumption of the antidumping laws is that dumping is justifiably prevented because its costs, *i.e.* the injury it causes to producers, exceeds its benefits to users who acquire low priced dumped goods. This assumption is reasonable enough if dumping is predatory and hence makes a market less competitive; but it is not if dumping is nonpredatory and enhances competition. The problem, as noted earlier, is that a law which condemns all dumping that causes injury to a domestic industry will invariably snag in its net both predatory and nonpredatory dumping.

34. An example of dumping (transborder price discrimination) that is nonpredatory and can enhance competition arises if a firm seeking to maximize short-run profits, as opposed to destroying competition, faces three conditions: (1) market segmentation (preventing arbitrage); (2) market power in its home market; and (3) different elasticities among buyers (buyers more responsive to price changes in some markets than in others). Price discrimination in this case can be just a rational response to competitive conditions and buyer elasticities in the segmented export market and need not involve unprofitable pricing intended to harm competition.

35. Prevailing economic theory supports the notion that this form of non-predatory price discrimination can enhance efficiency in several possible ways. First, it may allow production of goods or products which are socially beneficial, but would not exist otherwise. Second, nonpredatory discrimination may enhance allocative efficiency by inducing firms to produce a level of output which is closer to the competitive level. Finally, price discrimination could be the sign of healthy competition, for instance, if it undermines an oligopolistic cartel.

36. However, it is possible for price discrimination to be predatory. This could occur if the firm, rather than maximizing short run profits by charging discriminatory prices in response to buyer elasticities, charges an unreasonably (and unprofitably) low discriminatory price in an effort to drive efficient competitors out of business with the ultimate goal of charging a monopoly price high enough to allow it to more than recoup its original losses.

37. The reason that it is important to distinguish between predatory and nonpredatory price discrimination is that in the unique context of the FTA, both governments are promoting global competitiveness by encouraging firms in both countries to embrace regions in the other country as part of their larger market base. The risk of maintaining antidumping rules under the FTA is that this would defeat vigorous transborder price competition that is not predatory and would therefore inhibit vigorous competition among Canadian and U.S. players. Moreover, the risk of

having to face antidumping actions could inhibit rationalization by unilateral enterprises operating in the two countries. This would be counter to the goal of improving the global competitiveness of North America's industrial base.

38. As we look to the experiences of other countries that have entered into a bilateral Free Trade Agreement from a pre-existing condition of an already highly integrated regional trade relationship, we are struck with how Australia and New Zealand approached the fundamental issue of this report. They concluded that it would be appropriate to suspend the application of antidumping laws on goods of Australian and New Zealand origin traded between the two countries. Instead, situations of predatory trade across their border would be handled through provisions of their respective competition laws.

### C. Concluding Observations

39. Transborder price discrimination, *i.e.*, dumping, is not possible unless there is market segmentation based on such factors as tariffs and transport costs that prevent price equalizing arbitrage. Accordingly, tariff elimination under the FTA will reduce, but not eliminate, the ability of firms to dump and the need for relief traditionally provided under the antidumping laws. Thus the FTA makes a switch to a substitute regime of competition laws a less substantial change than it would otherwise be.

40. The healthier degree of price competition and hence efficiency in the Canadian-U.S. economy induced by the FTA can be augmented by the replacement of antidumping laws with a transborder enforcement of existing competition laws. These competition laws can provide a means for combatting anticompetitive predatory pricing without generating the risk under antidumping law of condemning nonpredatory, healthy price competition.

41. Given the economic case that can be made for dropping antidumping laws in favor of competition laws, the issue in the rest of this study is whether such a change may be legally feasible. Specifically, there are two basic questions:

1. Does the FTA require any changes in Canadian or U.S. competition laws, *i.e.*, are any provisions of those laws incompatible with the FTA or with each other?
2. Are the competition/antitrust laws adequate to support and reinforce the objectives of the FTA?

42. Competition law is a major element in the legal framework for business activity in both countries. Canada and the United States share a common heritage in this field which goes back to the enactment of the first Canadian antitrust law in 1889, the year before the enactment of the Sherman Act. Although specialists tend to emphasize differences in details of the law and enforcement policy and experience, the purpose and

basic principles of competition law are common to both countries. However, several issues do arise and improvements in the laws and procedures may be desirable to achieve as fully as possible the objectives of the FTA.

## II. ANTIDUMPING AND COMPETITION LAWS: SUBSTANTIVE PROVISIONS

43. The purposes of the competition laws of the United States and Canada are implemented by a variety of rules covering collusion, monopolization, predatory pricing, various marketing practices and mergers. In a study focusing on competition laws in the context of the existing antidumping laws of the two countries, it is often perceived that the laws on price discrimination, predatory pricing, abuse of dominance and monopolization are areas of particular “overlap” between the two sets of laws and are analogs. Competition laws are thus seen as the desirable “substitute systems of rules for dealing with unfair pricing” (FTA Article 1907). This study will therefore examine and compare the competition laws in the context of Article 1907.

44. This study does not purport to be an exegesis on competition law, but a focused examination and analysis of provisions dealing with (1) unfair pricing, and (2) price discrimination. We will also touch briefly upon the mechanisms by which an aggrieved exporter in either the United States or Canada may attack private exclusionary conduct in the other country.

### A. Antidumping Law - United States and Canada

#### 1. U.S. Antidumping Laws

45. The U.S. antidumping laws are designed to remedy injurious international price discrimination. Dumping, in essence, is the sale of foreign merchandise in the United States at a price that is less than its price in the home market. There are two pieces of antidumping legislation in the United States.

46. The Antidumping Act of 1916 (“1916 Act”) prohibits the systematic sale of imports to the United States at a price substantially less than their market value, where such imports are *intended* to destroy or injure an existing U.S. industry, prevent the establishment of a U.S. industry or restrain or monopolize commerce in the United States. A violator is subject to criminal sanctions in a suit brought by the Department of Justice<sup>21</sup> and private plaintiffs may sue for treble damages. It has been held that the 1916 Act complements the U.S. antitrust laws by imposing on importers essentially the same legal requirements imposed on American companies under the price discrimination provisions of the antitrust

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<sup>21</sup> The Department of Justice standard for determining whether to bring a criminal action is discussed *infra*, ¶ 204.

laws (i.e., the Robinson-Patman Act (“RPA”); see *Zenith Radio Corp. v. Matsushita Electrical Industrial Company*, 494 F. Supp. 1161 (E.D. Pa. 1980)). The merits of imposing the RPA’s primary line injury provisions, which require harm to the competitive process, on transborder price discrimination between Canada and the United States (in effect limiting U.S. industry to dumping actions under the 1916 Act) is discussed at *infra*, ¶¶ 138 *et. seq.*

47. The Antidumping Act of 1921 (“1921 Act”) was enacted, in large part, because of the stringent standard of proof under the 1916 Act and in part to match the less stringent administrative plans applied by other nations, in particular, Canada. Harm to competition (as opposed to a competitor), the *sine qua non* of a dumping violation under the 1916 Act, fell out of vogue. Furthermore, the injury test in the 1921 Act was quite vague and it provided little guidance on the degree of causation required before it could be held that injury to a U.S. producer was caused by the dumped imports.

48. The U.S. antidumping laws were revised by the Trade Agreement Act of 1979 (“1979 Act”) and are embodied in Title VII of the Tariff Act of 1930 (“Title VII”). Although the 1979 Act repealed the Antidumping Act of 1921, the substance of many of the provisions and the basic principles of the 1921 Act were continued. The major purpose of the 1979 revisions was to implement the U.S. obligations under the Tokyo round of the GATT. The U.S. antidumping law was again revised in 1984, by the Trade and Tariff Act of 1984 (“1984 Act”), and in 1988 by the Omnibus Trade and Competitiveness Act, but these statutory revisions were much less significant than that of the 1979 Act.

49. As with the 1916 Act, Title VII is designed to protect U.S. industry from unfairly priced imported merchandise. Unlike the 1916 Act, however, Title VII does not require predatory intent — an intent to harm competition or create a monopoly. All that is necessary is that “by reason” of unfair pricing, a U.S. industry is suffering, or likely to suffer, material injury.

50. Stated briefly, a good is dumped under Title VII if it is sold in the United States at less than fair value (“LTFV”), i.e., less than the amount charged by the foreign manufacturer in the home market or, when home market sales are not reliable, sales to third country markets (“foreign” or “fair market value” (“FMV”)). Unlike its competition law counterpart, a price may be “unfair” regardless of its relationship to cost. Furthermore, the requirement that the injury to U.S. industry be “by reason” of the dumped imports does not require that it be the principal, a substantial, or even a significant cause of the material injury, nor does Title VII contemplate that injury from the imports be weighed against other factors that also may be contributing to overall injury to an industry.<sup>22</sup>

51. If a violation of the antidumping laws is established, an an-

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<sup>22</sup> 19 C.F.R. § 207.27.

tidumping order will be issued establishing an antidumping duty (in addition to any other existing duty) against products that fall within the scope of the investigation, in an amount equal to the estimated dumping margin, i.e., the amount by which the FMV exceeds the U.S. price. Because an antidumping investigation is an *in rem* proceeding, all the goods of all foreign exporters who have not been investigated and exonerated will be subject to the duty.

52. Title VII is administered by two federal agencies. The International Trade Administration (“ITA”) of the Department of Commerce (DOC) is responsible for determining whether the imported merchandise is being sold at LTFV. The United States International Trade Commission (“ITC”), an independent agency, determines whether the LTFV sales are causing material injury to a U.S. industry. Consideration of the two issues by the two agencies goes on simultaneously.

#### (a) Initiation and General Procedure

53. The antidumping proceeding can be initiated by the DOC or by a petition filed by an interested party on behalf of a domestic industry.<sup>23</sup> In the vast majority of instances, antidumping investigations are initiated by an “interested party,” which may include a manufacturer, producer, or wholesaler (or association thereof) in the United States of products under investigation.<sup>24</sup> The scope of products under investigation (“class or kind” of merchandise), and thus subject to any final determination, is initially determined by the petition, but may be narrowed by the DOC on the basis of physical characteristics, expectations of the ultimate purchaser, channels of trade and ultimate use.<sup>25</sup> An article within the established class or kind may be subject to an antidumping order even if it is not specifically investigated.

54. Upon the filing of a petition, the ITC commences proceedings to determine whether there is a reasonable indication that the alleged dumping causes, or is likely to cause, material injury, or threat thereof, to an industry in the United States, or materially retard the establishment thereof. The pertinent U.S. industry consists of producers (whether for resale or internal use) of like products or, in the absence of like products, products most nearly similar in characteristics and use to the imported articles.<sup>26</sup> The ITC may exclude U.S. producers related to importers and also may define a regional industry. The ITC must make a preliminary determination within forty-five days from the date the petition is filed or the day it receives notice that the DOC has commenced investigation without a petition.<sup>27</sup>

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<sup>23</sup> 19 U.S.C. § 1673a. The petition must allege the elements necessary for the imposition of an antidumping type duty. These have been set forth by the ITA in its regulations, 19 C.F.R. § 535.12.

<sup>24</sup> 19 U.S.C. § 1677.

<sup>25</sup> See *Diversified Products Corp. v. U.S.*, 752 F. Supp. 883 (C.I.T. 1983).

<sup>26</sup> 19 U.S.C. § 1677.

<sup>27</sup> 19 U.S.C. § 1673b(a).

55. Simultaneously with ITC action, the DOC is required to review the petition and determine within twenty days of the date of its filing whether it meets certain statutory requirements.<sup>28</sup> These requirements, including that the petition be supported by a majority of the represented industry, are routinely met.<sup>29</sup> If not, however, the matter is terminated at both DOC and ITC. The entire proceeding is also terminated if the ITC makes a negative preliminary determination on the question of injury.

56. If the ITC makes an affirmative preliminary determination of injury, the proceeding continues, and the DOC must make a preliminary determination of whether there is a reasonable indication of LTFV sales of the merchandise in the United States, normally within 160 days of filing of the petition.<sup>30</sup> The period may be extended to 210 days in complex cases or shortened to 90 days if the parties so consent.<sup>31</sup> The DOC investigation will continue to a final determination regardless of whether its preliminary determination is negative or affirmative.

57. If a preliminary determination of sales at LTFV is made, the DOC will order suspension of liquidation of merchandise subject to investigation and require the posting of a cash deposit, bond or other security for each entry of subject merchandise.<sup>32</sup> Following an affirmative preliminary determination by the DOC, the ITC must make its final determination on injury before the later of the 120th day after the DOC's preliminary determination or the 45th day after the DOC's final determination. Following a negative preliminary determination and an affirmative final determination by the DOC, the ITC must make its material injury determination within seventy-five days after the date of the final determination.<sup>33</sup>

#### (b) Gathering Information

58. After the DOC initiates an investigation, it presents a questionnaire to all, or selected, foreign companies producing the merchandise under investigation. The questionnaire requests general information con-

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<sup>28</sup> 19 U.S.C. § 1673a(c).

<sup>29</sup> The DOC's position on industry support, that "it relies on petitioner's representation [of majority support] until it is affirmatively shown that a majority of the members of the relevant domestic industry approve the petition," has been rejected by the Court of International Trade as contrary to the clear language of the statute. *Suramerica de Aleaciones Laminadas C.A. v. U.S.*, No. 88-09-00726 (Slip. Op. 90-76, CIT 8/22/90). DOC's procedure also was rejected by a GATT panel in 1990 (*Swedish Stainless Steel Pipe*).

<sup>30</sup> 19 U.S.C. § 1673b(b).

<sup>31</sup> 19 U.S.C. §§ 1673b(b&c).

<sup>32</sup> 19 U.S.C. § 1673b(d). The DOC, if so requested by petition filed at least 20 days prior to a final determination, may make a finding of "critical circumstance," which allows for the retroactive suspension of liquidation and application of dumping duties. 19 U.S.C. § 1673b(e). This prevents foreign exporters from circumventing the dumping laws by increasing sales at dumped prices during process of the investigation.

<sup>33</sup> 19 U.S.C. § 1673d(b).

cerning the company under investigation, data to determine foreign market value (on a sale-by-sale basis), a listing of U.S. sales of the merchandise and the adjustments applicable to these sales, and, if the person responding to the questionnaires is a reseller and not a manufacturer, data on the reseller and its transactions and costs. The questionnaire also may seek information on the cost of production of the merchandise. This is because foreign sales below cost may be excluded from consideration in determining foreign market value, and, in the absence of comparable foreign sales, the DOC may substitute constructed value.<sup>34</sup>

59. The law requires the DOC to verify all information relied upon whenever possible. If the DOC is unable to verify the accuracy of information submitted, it is authorized to use the best information available. This may include information submitted in support of the petition. Similarly, whenever a party or any other person refuses or is unable to produce information requested in a timely manner or in the form required, or otherwise significantly impedes an investigation, the DOC may use best information available, again including information submitted in support of the petition.<sup>35</sup> The requirement to use best information available applies not only to the DOC but also to the ITC in its injury investigation. Given the nature of an antidumping remedy, the authority to use best information available is a powerful inducement to foreign companies to cooperate in the provision and verification of information.

#### (c) Termination and Suspension of Investigations

60. The DOC may terminate an investigation at any time upon withdrawal of the petition upon which it was based, provided that notice must be given to all parties to the investigation. Investigations may also be “settled” if the respondents enter into a Quantity Restriction Agreement. The 1984 Act sets forth standards for terminating an antidumping case on such basis.<sup>36</sup> There are a number of other bases under which an antidumping investigation may be suspended, each involving some form of an agreement on behalf of respondents not to engage in dumping in the future or to restructure prices to eliminate injurious effects of the dumping. Finally, the investigation is automatically terminated upon publication of any negative final determination of the DOC or a negative preliminary or final determination by the ITC, or where it is determined that the petitioner lacks standing to file the case.

#### (d) Calculation of Dumping Margins

61. Less than fair value sales occur when the U.S. price of merchandise is less than the foreign market value of identical or similar merchan-

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<sup>34</sup> 19 U.S.C. § 1677b(a&e).

<sup>35</sup> 19 U.S.C. § 1677e.

<sup>36</sup> 19 U.S.C. § 1677(c); 19 C.F.R. § 353.17, 353.18.



dise. This does not, however, involve a simple comparison of the price at which a product is sold in one market with the price at which the product is sold in the other. Many variables exist in the different markets, and similar, as oppose to identical, products might be sold in each market. The 1984 Act provides for a number of adjustments in order to account for these differences and ensure that the foreign market value and the U.S. prices are comparable.<sup>37</sup>

(e) Foreign Market Value

62. The FMV of the imported merchandise within the class or kind subject to investigation is usually the price at which "such or similar" merchandise is (i) sold in the home market; (ii) sold in a third country; or, (iii) constructed according to formula.<sup>38</sup> Generally a weighted average of adjusted foreign market value for each type of merchandise will be computed and, if any U.S. prices are below the weighted average, LTFV sales exist. A weighted average margin of less than one-half of one percent is considered *de minimis* and is not subject to antidumping duty.<sup>39</sup>

63. Foreign market value is calculated on the basis of wholesale price, after certain adjustments to ensure comparability, for sales in customary commercial quantities in the home market.<sup>40</sup> Normally, the DOC will exclude from considerations sales to related purchasers unless it can be established that the sales were made at arm's length. Sales through a related sales unit are calculated using the price charged by the related sales unit to the first unrelated purchaser.<sup>41</sup>

64. Adjustments to gross foreign market value include increases based on the cost of containers, coverings and other expenses incident to placing the merchandise in condition, packed ready for shipment to the United States. FMV may also be adjusted based on (i) differences in circumstances of sale in the two markets; (ii) differences in quantities of the merchandise sold in each market; (iii) differences in the levels of trade of the merchandise sold in each market; and, (iv) differences in the physical characteristics of the merchandise being compared.<sup>42</sup>

(f) U.S. Price: Purchase Price or Exporters Sales Price

65. The U.S. price is defined as the purchase price, or the exporters sales price.<sup>43</sup> Purchase price is the price for which the merchandise is purchased or agreed to be purchased before the date of importation into the United States. When a producer sells the merchandise to an unre-

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<sup>37</sup> See 19 C.F.R. § 353.43 *et. seq.*

<sup>38</sup> 19 U.S.C. § 1677(b).

<sup>39</sup> 19 C.F.R. § 353.6.

<sup>40</sup> 19 C.F.R. § 353.55.

<sup>41</sup> 19 C.F.R. § 353.45.

<sup>42</sup> 19 C.F.R. §§ 353.55-353.58.

<sup>43</sup> 19 C.F.R. § 353.41.

lated reseller for export to the United States and the reseller has sold the merchandise prior to its importation, the DOC will calculate the U.S. price as the price between the manufacturer and the reseller. When the U.S. importer and the foreign seller are related parties, and the first sale to an unrelated purchaser occurs after the goods are imported into the United States, the U.S. price is that at which the merchandise is first sold to an unrelated purchaser in the United States. The Tariff Act of 1930 (“1930 Act”) sets forth the types of relationships that will allow a sale by the importer to be imputed to the exporter.<sup>44</sup>

66. The U.S. price is adjusted upward (if not already reflected in the price) for packing costs, import duties or taxes imposed in the country of exportation which have been rebated or not collected by reason of the exportation of the merchandise to the United States, and the amount of any countervailing duty imposed under U.S. law to the merchandise to offset an export subsidy (to prevent double counting). Conversely, the U.S. price may be reduced (if not already reflected in the price) by the amount attributable to any additional costs, charges and expenses in U.S. import duties incurred in bringing the merchandise to the U.S. buyer, and the amount of any export tax, duty or charge imposed by the country of exportation on the export of the article. In addition, the exporter’s sales price may also be reduced by the amount of commissions for selling the merchandise in the United States, expenses incurred in selling the merchandise in the United States and any increase in value, including additional material and labor resulting from manufacture or assembly operations performed in the United States after importation and before sale to an unrelated party.<sup>45</sup>

(g) Injury to a U.S. Industry

67. The ITC’s task is to determine whether an industry in the United States (i) is materially injured; (ii) is threatened with material injury; or, (iii) is materially retarded in its establishment, by reason of imports of the merchandise or by reason of sales (or likelihood of sales) of that merchandise for importation.<sup>46</sup> The ITC issues questionnaires to the domestic industry to obtain necessary information. Response to the questionnaires is enforceable by subpoena from a United States District Court under 19 U.S.C. § 1333.<sup>47</sup>

68. The ITC has a relatively low threshold for making an affirmative preliminary determination. The ITC will apply a “reasonable indications” standard — an affirmative preliminary determination will be made if there are *any facts* raising the possibility of injury to the domestic industry.<sup>48</sup> In the final investigation, the ITC must find actual injury or

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<sup>44</sup> 19 U.S.C. § 1677(13).

<sup>45</sup> 19 C.F.R. § 353.41(d).

<sup>46</sup> 19 U.S.C. § 1673.

<sup>47</sup> 19 C.F.R. § 207.8.

<sup>48</sup> 19 C.F.R. § 107.12.

threat thereof and not merely a reasonable indication of injury.

69. U.S. industry is defined as domestic producers as a whole of a like product, or those producers whose collective production of a like product constitutes a major proportion of the total domestic production of that product. The ITC may divide the United States into two or more product markets and treat the producers within each market as a separate industry or may find regional industries.<sup>49</sup> The ITC is not limited by the ITA's determination as to the class or kind of goods under investigation when defining the U.S. industry for purposes of determining injury.<sup>50</sup>

70. Material injury is defined as "harm which is not inconsequential, immaterial, or unimportant."<sup>51</sup> The law requires the ITC in making its determination to consider, among other factors (i) the volume of imports of merchandise subject to the investigation; (ii) the effect of imports of that merchandise on prices in the United States for like products; and, (iii) the impact of imports of such merchandise on domestic producers of like products. The 1930 Act also provides, however, that the presence or absence of any of these factors is not necessarily controlling.<sup>52</sup>

71. The ITC is required to assess material injury to the domestic industry as a whole; a company by company analysis of the condition of the industry is not required.<sup>53</sup> The ITC also has significant discretion to determine the appropriate time period for which injury will be accessed.<sup>54</sup> Moreover, in considering the volume of imports and their effect on prices, the ITC *must* cumulatively assess the effects of imports from all countries subject to investigation if the imports compete with each other and with the like product made in the United States.<sup>55</sup> This enables the ITC to conclude that a domestic industry has been materially injured by imports in cases in which the evidence linking a particular country to the material injury is very weak.

72. Although the ITC may not assume that sales at LTFV were the cause of injury to a domestic industry, the requirement that the injury must be "by reason" of the dumped imports is rarely a bar to affirmative preliminary or final determination. In an Administrative Statement, the ITC explained that the causation requirement:

73. do[es] not involve a weighing of injury by reason of subsidized imports or sales at less than fair value against the effects of other factors which may, at the same time, also be injuring the industry. The

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<sup>49</sup> 19 U.S.C. § 1677(4).

<sup>50</sup> See *Algoma Steel Corp. v. U.S.*, 688 F. Supp. 639 (C.I.T. 1989), *aff'd*, 865 F.2d 240 (1989).

<sup>51</sup> 19 U.S.C. § 1677(7). This is essentially the same standard applied by the ITC under the 1921 law, which did not require that the injury be "material."

<sup>52</sup> *Id.*

<sup>53</sup> See *Copperweld Corp. v. U.S.*, 682 F. Supp. 552 (C.I.T. 1989).

<sup>54</sup> See *Renda Rubber Industrial Cor. Ltd. v. U.S.*, 630 F. Supp. 354 (C.I.T. 1986).

<sup>55</sup> 19 U.S.C. § 1677(7)(c)(iv). Under the 1988 Amendments, the ITC is not required to cumulate "negligible imports."

injury caused by subsidization or sales at less than fair value need not be the 'principle' or a 'major' or 'substantial' cause of overall injury to an industry. Any such requirement has the undesirability of making relief more difficult to obtain for those industries facing difficulties from a variety of sources, although these may be precisely those industries that are most vulnerable to injurious dumping.<sup>56</sup>

74. Although the ITC does take into account evidence presented to it that demonstrates that the injury suffered by the U.S. industry is caused by something other than the dumped imports, it exercises significant discretion and only rarely finds that sales at LTFV were not a sufficient cause.<sup>57</sup>

75. In sum, the U.S. antidumping laws afford petitioners a reasonably potent weapon for keeping low cost imports out of the U.S. market, without requiring petitioner to distinguish whether the low prices are harmful to competition. Unlike the notion of "unfair pricing" under U.S. competition law, there is no requirement that the administering authorities consider the relationship of price to cost, or the feasibility of acquiring market power and recouping lost revenue. Moreover, the *in rem* nature of the proceeding help assure foreign cooperation in the gathering of information and the nature of the remedy guarantees enforcement.

76. To recap, six points are of particular relevance:

1. There is no requirement that the dumping injure competition — material harm to an industry is sufficient;
2. Although the Act requires "material injury," this means only that the injury is not inconsequential, immaterial, or unimportant;
3. Although the injury must be "by reason" of the dumped imports, below priced imports need not be the principal, a substantial, or a significant cause of the material injury; nor does the Act contemplate that injury from such imports be weighed against other factors that also may be contributing to overall injury to an industry;<sup>58</sup>
4. In determining material injury, the ITC *must* cumulatively assess the effects of imports from all countries subject to investigation (thereby enabling the U.S. administering authority to conclude that the domestic industry has been materially injured by dumped im-

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<sup>56</sup> H. DOC. 96-153, Part II, pp. 434-35.

<sup>57</sup> One exception to this rule arises in the context of "technical dumping," the antidumping law analogue to a meeting competition defense, (*infra*, ¶ 151-153). Technical dumping refers to the sale at LTFV, but at a price not lower than necessary to make the product competitive. Such pricing has been held to "strongly suggest that there is no basis for concluding that the imports have adversely affected the prices of domestically produced [products]." *Snow Grooming Vehicles from Germany*, 2 ITRD 5344, 5347 (ITC 1980). *But see, Electrolytic Manganese Dioxide from Greece and Japan*, 11 ITRO 2481, 2490-91 (ITC 1989) (rejecting "technical dumping" defense after observing that "technical dumping as described in the legislative history of the 1974 Act, is largely superceded by the Trade Agreement Act of 1979 [which] for the first time defined material injury").

<sup>58</sup> Although the Commission takes into account evidence that demonstrates that the injury is caused entirely by something other than the dumped imports, the petitioner is not required to bear the burden of proving that material injury is not caused by the other factors raised by a respondent.

ports in cases in which the evidence linking a particular country to the material injury is very weak or non-existent);

5. A specific export or group of exporters need not be named in a complaint, imposing the burdens of the antidumping law on all suppliers from the countries named (even those not engaging in dumping); and
6. The ITC may, but it is not required, to render a negative decision even when the dumping price is roughly equivalent to domestic prices, or when the margins of underselling were substantially greater than margins of dumping.

## 2. Canadian Antidumping Law

77. Canadian antidumping law is based on the same principles as U.S. law, namely the application of a duty equal to the difference between the price of imported goods and the price of like goods sold in the country of export. It is set out in the Special Import Measures Act of 1984 (R.S.C. 1985, c.S-15) ("SIMA") as amended by the Canada-United States Free Trade Agreement Implementation Act of 1988 (Stats. of Canada 1988, c.65). SIMA implemented the GATT Antidumping Code of 1979 and replaced the Antidumping Act which had brought Canadian law into conformity with the GATT in 1969. Earlier versions of antidumping law in Canada date back to 1904.<sup>59</sup>

78. The procedure under SIMA involves two separate investigations. The first investigation is carried out by officials of Revenue Canada, Customs and Excise, who gather facts to calculate whether dumping has occurred and to determine whether there is a *prima facie* case of injury. This process is set in motion by a complaint from a domestic producer or producers representing at least a substantial portion of the Canadian industry. SIMA requires that Revenue Canada make:

- (i) a preliminary determination of dumping within 90 days (SIMA, s. 35(1)), or in exceptional circumstances, 135 days of commencement of the investigation (SIMA, s. 38(1)), and
- (ii) a final determination of dumping within 90 days of the preliminary determination (SIMA, s. 41(1)).

### (a) Margin of Dumping

79. Dumping is deemed to occur if the normal value of imported goods in the exporter's home market exceeds the export price of the imported goods (SIMA, s. 2(1)). The margin of dumping is expressed as a percentage of the normal value of the imported goods. The margin of dumping set out in the final determination of dumping may not exceed the margin contained in the preliminary determination.

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<sup>59</sup> For a full description of Canadian antidumping law, see Magnus, "The Canadian Antidumping System," in Jackson and Vermulst (Eds.), *Antidumping Law and Practice*, U. of Michigan Press, 1989.

(b) Like Goods

80. The normal value of imported goods is generally determined by reference to sales of like goods in the country of export by the exporter. Accordingly, the initial step in determining normal value is to identify those goods in the country of export which are like goods in relation to the imported goods. The concept of like goods is also crucial in the determination of injury to production of “like goods,” in Canada, *i.e.*, to the portion of Canadian industry affected by the dumped imports. (For definition of “like goods,” *see* SIMA, s. 2(1)). Generally, a functional similarity test is employed. (*See Sarco Canada Limited v. Anti-Dumping Tribunal*, 1979 (1) F.C. 247 (Federal Court of Appeal)).

(c) Normal Value

81. The primary method for determining the normal value of imported goods involves calculating the exporter’s preponderant or weighted average selling price of like goods for “qualifying domestic sales” made in the vicinity of the place from which the imported goods are shipped to Canada (SIMA, s. 17). If qualifying domestic sales do not exist by reason of the fact that the exporter sells like goods primarily for export, primarily to associated purchasers, or there are not sufficient sales made at a reasonable level of profit in the home market, Revenue Canada may deem another vendor making qualifying domestic sales in the country of export to be the exporter for the purposes of determining normal value. However, the method usually adopted in lieu of the primary method is the cost plus build-up or constructed cost. Under this method, the exporter is required to cover the total costs of production (including all overhead, general selling and administrative expenses) plus a reasonable amount for profit (SIMA, s. 19). The precise amount depends on profits generally earned in the industry for like or similar goods or, if none, eight percent. If normal value is determined by reference to sales of like goods (the primary method), the Special Import Measures Regulations (SOR/84-927) require that appropriate upward and downward adjustments to the selling price of the like goods be made to account for differences between the like goods sold in the country of export and the imported goods. Adjustments may be made, for example, to account for differences in conditions of sale, trade levels, warranties, physical differences, taxes and duties and for discounts.

(d) Export Price

82. The export price of imported goods is generally determined by reducing the lesser of the exporter’s sale price and the importer’s purchase price by the following (SIMA, s. 24):

- any additional costs in preparing the imported goods for export;
- charges and expenses incurred by the exporter in respect of the im-

- ported goods which are additional to those generally incurred on sales of like goods in the country of export;
- duties or taxes incurred by the exporter in shipping the imported goods to Canada, if any; and
  - all other costs, charges and expenses resulting from the exportation of the imported goods that are not applicable in respect of sales of like goods in the country of export.

83. If Revenue Canada considers the price of the imported goods to the importer unreliable by reason of an affiliation between the exporter and importer or any other arrangement that may affect the price, the export price is determined on a deductive or roll-back of the first arm's length sale price in Canada basis (the "deductive formula") (SIMA, ss. 25,26). As a matter of administrative practice, Revenue Canada tests intercompany pricing between affiliated parties by applying the deductive formula. This formula is complex in situations where the imported goods are further manufactured rather than resold in the same form as imported.

(e) Material Injury

84. The second investigation, which overlaps the Revenue Canada investigation, is carried out by the Canadian International Trade Tribunal ("Tribunal") and commences when Revenue Canada has made a determination that a margin of dumping exists which is not negligible and there is a *prima facie* case of material injury to the production of like goods in Canada (SIMA, s. 31). This inquiry determines whether the dumping is the cause of past, present or future material injury to, or material retardation to the establishment of, Canadian industry (SIMA, s. 42). The Tribunal's decision must be made within 120 days (SIMA, s. 43).

85. The type of material injury required to sustain a finding of injurious dumping or future likelihood of injury if the dumping were to continue includes an actual or likely decline in output, sales, profits, productivity, return on investment and the utilization of capacity (Canadian Import Tribunal Rules, SOR/85-1068). Other factors considered in the jurisprudence are the impact on domestic prices and the actual or potential negative effect on cash flow, inventories, employment, wages and growth (that is, "material retardation" of future expansion of plant capacity and/or output). The Tribunal tends to focus on price suppression, declining profitability and loss of market share. However, the ability or desirability of undertaking new production or of increasing productive capacity are also of significance.

86. There must be strong evidence of a causal link between the material injury or retardation and the dumping. The Tribunal relies on the domestic industry to bring before it information tending to establish the injury or retardation and the causal link to the dumping. The issue is whether the dumping was a significant contributing cause to the material

injury. There can be many reasons for a decline in market share, prices or profitability beside dumped imports. These include a lack of quality domestic production, delayed recognition of market changes, general recessionary times and internal competition between domestic producers. To show a causal connection, there must be evidence that the dumped product undersold the domestic product by a significant margin, taking into consideration the nature of the industry and the product. Statistics and financial information are not enough, even if they relate to the specific product and industry under consideration (Colour Television, Anti-Dumping Tribunal Inquiry No. ADT-4-75, 29th October 1975).

### 3. Comparison of U.S. and Canadian Antidumping Laws

87. The Canadian antidumping laws set out in SIMA operate under the same essential principles as the U.S. laws under Title VII. Both sets of antidumping provisions implement the GATT and GATT code and are compatible with them. There is, however, no Canadian equivalent of the United States Antidumping Act of 1916 that deals with predatory dumping. (The availability of Canadian competition laws prohibiting predatory conduct is discussed *infra*, ¶ 91 et seq.).<sup>60</sup>

88. We do not suggest that competition laws are substitutes for antidumping laws in the sense that they may be said to serve the same purpose or operate in the same way. Nor do we take a position on whether or not there are forms of unfair pricing that fall below the threshold necessary to support an action under the competition laws, which nevertheless generate sufficient adverse consequences to a domestic economy to justify a remedy. We do set out to examine the competition laws in substance and in practical application to transborder trade with a view to determining their effectiveness to deal with anticompetitive pricing activity in the context of the FTA. With this in mind, we now turn our attention the U.S. and Canadian competition laws.

#### *B. Competition Laws — United States and Canada*

89. In the context of Article 1907 of the FTA which contemplates the development of “a substitute system of rules for dealing with unfair pricing,” the laws in Canada and the United States against predatory pricing are the closest analogs.

90. Although often treated separately, “predatory pricing” and “price discrimination” will be discussed together in this study. This approach is designed to facilitate discussion of the essential relationships among price differentiation, effect on competition, and effect on competitors of the seller, purchasers from the seller and purchasers from those purchasers. This approach will also facilitate a comparison of the U.S.

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<sup>60</sup> Differences in details, such as timing and the test for material injury and causation, are not within the scope of this study.



and Canadian laws insofar as they do or do not reach primary line and tertiary line effects.

### 1. Canadian Competition Act

#### (a) Predatory Pricing and Price Discrimination

91. Canadian competition law is set out in the Canadian Competition Act (R.S.C. 1985, Chap. C-34, as amended: see in particular RSC 1985, 2nd supplement, Chap 19.) (the "Competition Act"). The provision most closely related to antidumping is the general prohibition against predatory pricing, as follows:

50(1) Every one engaged in a business who . . .

- (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect, is guilty of an indictable offence and is liable to imprisonment for two years.<sup>61</sup>

92. Among the several elements necessary to constitute the offense and give rise to a private right of action, the critical ones in the context of this study are:

- (a) there must be a policy;
- (b) products (goods or services) must be sold at unreasonably low prices;
- (c) there must be (1) the effect or (2) the tendency of:
  - (i) substantially lessening competition; or,
  - (ii) eliminating a competitor; or,
- (d) there must be the design to have such effect.

93. The concepts incorporated in the provision are not mutually exclusive. A policy evidenced by a practice over a period of time may be the best evidence of design if it is evident that the probable consequence (objectively ascertained) of low pricing is substantial lessening of competition or the elimination of a competitor. Also, if there is direct evidence of design, the implementation of the design by low pricing will surely constitute a policy. The issue of whether a seller will be presumed to intend the probable consequences of its acts is currently before the courts as an issue under the Canadian Charter of Rights and Freedoms.<sup>62</sup>

94. The paragraph uses the word "policy" in contrast to the use of the word "practice" in the provision prohibiting a practice of price discrimination (see below). Presumably, a policy may be evidenced by a practice, but in both cases, a key issue is whether a short burst of low

<sup>61</sup> Also under this and other provisions with the same reference to the penalty of imprisonment, a fine may be imposed in any amount in the court's discretion.

<sup>62</sup> See *The Director of Investigation and Research v. The NutraSweet Company*, (Competition Tribunal Dec'n of October 5, 1990) at p. 60. In a criminal prosecution, proof of intention to achieve the stated result may be required. *R. v. Nova Scotia Pharmaceutical Society et al*, Supreme Court of Nova Scotia, Trial Division, September 5, 1990.

price competition will constitute either a policy or a practice. Two cases have considered time periods, one of three days, (*R. v. Producers Dairy* (1966) 50 C.P.R. (2d) 265, (Ont. C.A.)) and the other of several months (*R. v. Carnation*, (1969), 58 C.P.R. 112; 4 D.L.R. (3d) 133, [1970] 3 C.C.C. 190; (Alta. C.A.)). Both time periods were rejected by the courts as evidence of a policy in the circumstances of the cases. *Carnation* was a case of geographic price discrimination (as to which see below). The Court focused on the intent to meet competition, albeit over a substantial period of time, and not on the amount of time itself. However, one court has ruled that a week-long sale constituted a practice in the context of the loss leading defense in relation to a charge of price maintenance *R. v. Coutts* (1966) 52 C.P.R. 21, 67 D.L.R. (2d) 88, (1968) 1 O.R. 550; *affirmed* 54 C.P.R. (2d) 60, 67 D.L.R. (2d) 57, [1968] 2 C.C.C. 221 (Ont. C.A.). In the context of the abuse of dominance provision (discussed *infra* at ¶ 120 et seq.), the Competition Tribunal accepted the Director's submission that a practice of anticompetitive acts is something "more than an isolated act or acts." *NutraSweet* at pp. 57-59 and p. 95).

95. The concept of "policy" and "unreasonably low" prices may be interdependent. In any particular circumstances, to constitute a policy it may be necessary to show that setting unreasonably low prices was designed to have the effect of substantially lessening competition or eliminating a competitor. A practice of setting low prices would not constitute a policy designed to achieve such an effect if it were shown to be intended only to be a reasonable response to aggressive competition pricing. Also, it might well be argued persuasively that a price cannot be unreasonably low if it can be justified for the purpose of (merely) meeting competition and not being based on the intention of eliminating a competitor, although that might be the result of low prices.

96. On the issue of what would constitute selling at unreasonably low prices, there is no statutory guidance and little judicial interpretation. In *R. v. Hoffmann-La Roche*, ((1980) 48 C.P.R. (2d) 145 and 53 C.P.R. (2d) 189; 119 L.R.D. (3d) 279; 53 C.C.C. (2d) 1 (Ont. H.C.J.); *affirmed* 58 C.P.R. (2d) 1; 125 D.L.R. (3d) 607; 62 C.C.C. (2d) 118 (Ont. C.A.)), Roche was charged with several counts of violating the section. The facts of the Roche case were complicated and reflected a pattern of strategic competitive pricing and give-aways for Librium and Valium including various price concessions (e.g., buy one or two, get one free), one dollar tenders to governments for Librium, and giving Valium to hospitals free of charge over a period of one year. Only in the case of the year-long give-away of Valium to hospitals did the Court find that all the elements of the offense were present.<sup>63</sup>

97. Dealing with the interpretation of "unreasonably low," the trial court stated:

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<sup>63</sup> It appeared that the aggressive pricing policy was not successful for either Roche or the complaining competitor because of the later expansion of so-called generic drug manufacturers.

Even if something is sold for a zero price, this is not necessarily an unreasonably low price. In one context a particular price may be unreasonably low, whereas in a different context that same price may not be.

48 C.P.R. (2d) at 181.

In determining the reasonableness or unreasonableness of a price, the Court should take into account *all* the economic costs, which include the direct production costs as well as any potential future savings or benefits. Thus, if sales in a related market will be facilitated, or if future market benefits will be gleaned by a sale below direct production cost, this should be considered in deciding whether price is or is not unreasonably low.

48 C.P.R. (2d) at 182.

In assessing whether a seller has sold for unreasonably low prices, the courts must examine all of the circumstances involved in the case. Reasonableness has a flexible meaning, depending on all of the facts. Parliament chose to enact that word in order to give the courts some latitude in making their decisions about the legality or illegality of the prices charged. There is nothing rigid about the concept of reasonableness. Business decision should not be condemned, unless Courts find that the price charged is unreasonable in all the circumstances.

48 C.P.R. (2nd) at 184.

98. However, the Court did not further define costs. It is evident from the extended reasons for the decision that the Court would require evidence of egregious protracted conduct to take low pricing beyond the bounds of aggressive competition to the point of constituting a policy designed to achieve a substantial lessening of competition or the elimination of a competitor. In the final analysis, the decision was not based on the effect of the policy but rather on the design of the alleged predator to lessen competition or to eliminate a competitor. The judge's conclusion was summed up in the following simple statement: "[I]f your competitor cuts prices, you may decrease yours too, but you cannot reduce them to zero for six months and expect the Court to find that your intention is other than to eliminate competitors or substantially lessen competition." The conviction was affirmed on appeal.

99. The cost/price relationship was subsequently addressed specifically in *R. v. Consumers Glass*, ((1981) 57 C.P.R. (2d) 1; 124 D.L.R. (3d) 274; 60 C.C.C. (2d) 481, (Ont. H.C.J.)). In that case, pricing practices designed to meet competitive prices of a new market entrant were held not to be unreasonably low because they were above the average variable cost in a condition of over capacity in the market.

The court stated: When there is chronic excess manufacturing capacity in regard to a particular product (here there was more than double the required capacity) competition and the desire to make as high a contribution as possible towards fixed overhead will naturally drive down the price of the product below the total cost of manufacturing that product

and towards but not below the variable cost of manufacturing the product. In short, it is better for a manufacturer to produce and sell at a loss, but still at a price that allows a contribution to be made towards fixed overhead, than to cease the production and suffer the loss of having to bear all the fixed overhead.

124 D.L.R. (3d) at 284.

100. The court went on to say:

I conclude however, that there is no evidence that the accused was not profit maximizing or loss minimizing, and where chronic excess capacity exists, an accused cannot be said to have sold at unreasonably low prices, regardless of its intent, if at all times it sold at prices above its average variable costs, there being no suggestion that such price was not also above its average marginal cost.

Id. at 300.

101. Although tending in that direction, the Court was apparently not prepared to adopt a firm rule that pricing below average variable costs would constitute an unreasonably low price. Nor does it follow from the decision that prices above average variable cost will be conclusively considered not to be unreasonably low.

102. The Competition Bureau has recently circulated a draft bulletin that sets out its enforcement criteria with regard to the predatory pricing section.<sup>64</sup> The enforcement policy is encapsulated in the following introductory paragraph:

In general terms, predatory pricing is the sale of products at prices so low as to cause injury to competition through the elimination of a competitor or the deterrence of entry or expansion of competitors. The premise of the Bureau's enforcement policy is that predatory pricing is considered to present a serious threat to the competitive process only in those situations in which the alleged predator has a reasonable expectation of recouping any foregone profits or incurred losses that result from selling at low prices. Where a firm can successfully engage in predatory pricing, the initial benefits enjoyed by the consumer from low prices are outweighed by the losses incurred from higher prices and reduced competition that will occur in the future. Predatory pricing is usually rare and is limited to markets demonstrating specific structural characteristics. More specifically, the probability of success depends on the ability of the alleged predator to unilaterally increase price without fear of encouraging effective entry. Therefore, the Bureau focuses its enforcement efforts on pricing conduct in markets displaying structural elements conducive to successful predation.

103. The bulletin draws attention to the statement of purpose in section 1.1 of the Competition Act (quoted *supra*, ¶ 16) and emphasizes that the purpose of the Competition Act is to protect competition and not competitors unless the two are consistent. Referring to the two cases, *Roche and Consumers Glass*, noted above, the bulletin concludes that:

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<sup>64</sup> Draft Predatory Pricing Bulletin, Bureau of Competition Policy, April 18, 1990.

the jurisprudence thus far has established that no single factor will be determinative but that a broad approach will be used in the examination of pricing behavior in the marketplace. The two-stage approach, discussed below, is consistent with the broad based competitive analysis set out in these decisions.

104. Under the two-stage approach, the Bureau first examines the market power of the alleged predator to be successful in creating a situation in which it can achieve supracompetitive prices and therefore profits. The Bureau has adopted a rule of thumb that the alleged predator must have a market share of thirty-five percent and be at least twice the size of its next largest competitor to have the necessary short run market power. Product and geographic market definition are obviously critical factors. In addition to market share and concentration, which are not conclusive, other factors suggesting the existence of short-run market power include the history and the practices of the alleged predator, its overall size and financial strength and any special advantages such as those resulting from government intervention in the market. A key element in determining capability of exercising market power is the determination of whether a rise in prices would encourage quick and effective entry into the relevant market. Speed of entry, the risk of sunk costs to a new entrant, the effect of existing economies of scale and scope, and other impediments to entry such as institutional barriers, established demand patterns and special cost advantages are also considered.

105. Only if the first stage analysis leads to the conclusion that substantial market power to be a successful predator is present will the Competition Bureau proceed to the second stage involving an evaluation of price/cost relationships. As noted above, the Competition Bureau has concluded that neither the statute nor judicial interpretation indicates that the examination should be limited to any single price/cost test. However, the Competition Bureau does state that a price set at or above the average total cost of the alleged predator is unlikely to be regarded as predatory, a price below the average variable cost of the incumbent firm is likely to be treated as predatory unless there is a clear justification such as a need to sell off perishable inventory, and that a price set below the alleged predator's average total cost but not lower than its average variable cost may or may not be treated as predatory depending on the surrounding circumstances. Relevant factors include those considered in assessing market power. Several factors are referred to in the draft bulletin but none are conclusive. Indeed, it is stated that "evaluation need not be restricted to static analysis" but may attempt to forecast future price/cost relationships resulting from changes in production capacity including the strategies of the alleged predator.

106. The draft is undergoing revision by the Competition Bureau, taking into account comments received and further consideration. In particular, commentators noted that the first stage as described fails to give effect to the words of the Competition Act stating that a *design* to

substantially lessen competition or eliminate a competitor constitutes the offense without regard to whether the predator is likely to be successful and has the market power to recoup losses at a later stage. Of course, the statute also requires that there be proven a policy of selling at unreasonably low prices. As noted above, one might infer that the necessary design element is proven from a finding that a policy existed of selling at unreasonably low prices.

107. In summary, it is sufficient for this study to note that there is in the Competition Act a remedy enforceable by both governmental and private action to deal with pricing that substantially harms the state of competition in a market. Although the Competition Bureau focuses on the protection of competition, the Competition Act does leave open the possibility that a plaintiff might be able to recover compensation on the basis that a particular low pricing policy was designed to eliminate that competitor. However, there is unlikely to be a situation in which a design to eliminate a competitor would be rational unless the result would also be a substantial lessening of competition. If there is no substantial lessening of competition, the elimination of a single competitor would not provide the opportunity to recoup the losses resulting from the low pricing policy.<sup>65</sup>

108. The Competition Act also has a section often described as the “regional price discrimination” section, which provides as follows:

50(1) Every one engaged in a business who . . .

(b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; is guilty of an indictable offence and is liable to imprisonment for two years.

109. It is notable that paragraph 50(1)(b) deals specifically with substantially lessening competition or eliminating a competitor in a part of Canada, or being designed to have such effect, and is in effect a predatory pricing section parallel to paragraph 50(1)(c) of the Competition Act discussed above. The provision involves the same issues with regard to policy, intent and effect of a pricing policy. The provision has not been the subject of significant judicial review. In *R. v. Carnation Co.*, (1969) 58 C.P.R. 112, 4 D.L.R. (3rd), 133 (1973) C.C.C. 190, the Alberta Court of Appeal upheld the trial judge’s conclusion that there was sufficient evidence that the accused’s price reduction over several months was resorted to as a “temporary expedient” to meet an aggressive competitor and that the accused had not therefore adopted a policy of selling goods at lower prices in that region to lessen competition.

110. It is sometimes perceived that this section is a parallel to international price discrimination as illustrated in a typical dumping situa-

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<sup>65</sup> Vendetta pricing might be properly considered on a theory of intentional tort.

tion. One might substitute for the words "elsewhere in Canada," the words "in any other area of the world" or "in his (the exporter's) home market" as appropriate to cover international price discrimination. Thus, a simple amendment to that paragraph could be used to substitute the effect-on-competition test of the Competition Act for the material injury test of the antidumping laws.

111. In the context of a comparison with antidumping laws, the key element in both paragraphs 50(1)(b) and 50(1)(c) is the effect-on-competition test. The test is both (1) objective, in that the pricing activity is measured by its objective effect or tendency of substantially lessening competition or eliminating a competitor, and (2) subjective, in that the activity is evaluated with reference to the intention of the seller by the use of the words "designed to have such effect." However, it is hard to imagine a situation in which a *policy* of selling at *unreasonably* low prices would not imply a design to substantially lessen competition.

112. It must be recognized that the test of those provisions of the Competition Act (and of the parallel provisions of U.S. law) require significantly different evidence from that required to show material injury under the antidumping laws. Price suppression, loss of profits, employment reduction, reduction of market share, etc., are usually sufficient to show material injury under antidumping law. However, more is required to satisfy the standard of the Competition Act.

113. There is nothing in either paragraph (b) or (c) of section 50 that would limit their application to a person who engages in such a policy being a seller in Canada as compared with a seller selling into Canada from the United States or any other source outside Canada. Nor is paragraph 50(1)(c) expressly limited to anticompetitive effects in Canada. However, that is surely implied in that the purpose of the Competition Act is to protect the competitive environment in Canada. (Subject matter jurisdiction is discussed *infra*, at ¶¶ 237-249.)

114. Although not an exact analog to antidumping law, the provision against discrimination in pricing among competing customers of a seller is often referred to in this context. The provision of the Competition Act declaring it a criminal offense to make a practice of discriminating in price among competing purchasers was first introduced into Canadian law in 1935. The provision is as follows:

115. 50(1) Every one engaged in a business who
- (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is avail-

able to such competitors in respect of a sale of articles of like quality and quantity;  
is guilty of an indictable offence and is liable to imprisonment for two years.

50(2) It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

116. The section is specifically and exclusively concerned with competing purchasers from a seller and does not address “price discrimination” as it usually occurs in the antidumping context. In the antidumping context, discrimination occurs between home market sales and target country sales. In a case in which two or more purchasers from a foreign exporter are in competition with each other, the question of whether prices to either customer or both customers constitute dumping is unconnected with the issue as to price discrimination between the two or more purchasers from the foreign exporter. There is nothing in section 50(1)(a) of the Competition Act (unlike its counterpart in the U.S. Robinson-Patman Act) that addresses the effect of price discrimination on competitors of the seller (in an international context, competitors of the exporter). Nor does this section address tertiary line effects in that the lower price purchaser may pass on some of the benefit of those prices to his customer.<sup>66</sup>

117. In the context of Canadian-U.S. trade, there might well be a situation in which, for example, a U.S. seller would have customers in Canada and customers in the United States who are in competition with each other and thus one would be disadvantaged in relation to the other by discriminatory pricing in the circumstances contemplated by this section. If the disadvantaged party were in Canada, the logic of the provision would appear to support his having a remedy against his seller in respect of the consequences of the disadvantage imposed upon him by the discriminatory pricing. However, the higher price sale being in Canada, this situation is not analogous to dumping.

118. There is a complementary provision, section 51,<sup>67</sup> prohibiting a

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<sup>66</sup> In its recently released draft bulletin on enforcement policy with regard to the price discrimination provision, the Bureau of Competition Policy has attempted through the use of the purpose section of the Act (section 1.1. noted above) to impose an effect-on-competition test as a gloss on the words of the section. However, this would tend to limit the application of the section rather than expand it to cover primary line effects. An analysis of this section and discussion of the draft enforcement guidelines is beyond the scope of this study.

<sup>67</sup> 51(1) In this section, “allowance” means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes and is collateral to a sale or sales of products but is not applied directly to the selling price.

(2) Everyone engaged in a business who is a party or privy to the granting of an allowance to any purchaser that is not offered on proportionate terms to other purchasers in competition with the



seller from granting promotional allowances disproportionate to the volume of sales to competing purchasers from the seller.<sup>68</sup>

119. On the face of the statute, it appears that section 50(1)(a) might be violated by anyone, wherever situated, who sells in Canada to two or more competitors at price differences that are not justified by differences in quantity. As noted, it might also be a violation where a Canadian purchaser is in competition with another purchaser from the same seller, which purchaser is located elsewhere in Canada. Section 51 (1) might also be violated by a seller wherever situated; and it also deals only with allowances to competing purchasers in Canada and not with the question whether the net price to a purchaser in Canada is lower than an equivalent sale price in the exporter's home market.

### (b) Abuse of Dominant Position and Monopolization

120. Since the amendments of 1986, there is no general monopolization section in the Competition Act. The following, little used, section of the predecessor statute was repealed by the amendments.

#### 121. Combines Investigation Act

33. Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years. . . .

2(f) "monopoly" means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers or

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first-mentioned purchaser (which other purchasers are in this section called "competing purchasers"), is guilty of an indictable offence and is liable to imprisonment for two years.

(3) For the purposes of this section, an allowance is offered on proportionate terms only if

(a) the allowance offered to a purchaser is in approximately the same proportion to the value of sales to him as the allowance offered to each competing purchaser is to the total value of sales to such competing purchaser,

(b) in any case where advertising or other expenditures or services are exacted in return therefor, the cost thereof required to be incurred by a purchaser is in approximately the same proportion to the value of sales to him as the cost of such advertising or other expenditures or services required to be incurred by each competing purchaser is to the total value of sales to such competing purchaser, and

(c) in any case where services are exacted in return therefor, the requirements thereof have regard to the kinds of services that competing purchasers at the same or different levels of distribution are ordinarily able to perform or cause to be performed.

<sup>68</sup> Both sections 50 and 51 reflect the basic principle that a seller may adjust his economic relationships with his customers to reflect sales volumes. This principle thus favors the larger volume purchaser over the smaller volume competitor. It may be therefore antithetical to one of the stated purposes of the Competition Act, namely "to maintain and encourage competition . . . in order to ensure that small and medium sized enterprises have an equitable opportunity to participate in the Canadian economy . . ." It does, however, facilitate competition by permitting lower prices to larger volume distributors and users, thus permitting them to respond better to competitive pressures, especially from imports, at their trade level.

others, but a situation shall not be deemed a monopoly within the meaning of this paragraph by reason only of the exercise of any right or enjoyment of any interest derived under the Patent Act, or any other Act of the Parliament of Canada. . .

122. The monopolization provision was replaced by a new provision headed “Abuse of Dominant Position.” Under this heading, Sections 78 and 79 of the Competition Act provide as follows:

78. For the purposes of section 79, “anti-competitive act,” without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor’s entry into, or eliminating him from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing his entry into, or eliminating him from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor’s entry into, or expansion in, a market; and

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

79(1) Where, on application by the Director, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of

preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Patent Act, Trade Marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

(7) No application may be made under this section against a person

(a) against whom proceedings have been commenced under section 45, or

(b) against whom an order is sought under section 92 on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

123. It will be noted immediately that one of the prerequisites to an order by the Tribunal under Section 79 is that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business. In circumstances where that prerequisite is satisfied, the Tribunal may make an order when it is shown that the person or persons have engaged in a practice of anticompetitive acts, *and* that the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market. Section 79(4) expressly recognizes that superior competitive performance is not anticompetitive. This fortifies an element of the illustrative list of anticompetitive acts set out in Section 78, almost all of which carry the

import of practices intended to eliminate a competitor from a market or substantially lessen competition. Like the criminal prohibitions of paragraphs 50(1)(b) and 50(1)(c), an essential ingredient of section 79 is the actual or likely effect on competition to the extent of preventing or lessening competition substantially in a market. Action under this new provision of the Competition Act is initiated by the Director of Investigation and Research and is adjudicated on “civil law” standards by the Competition Tribunal.<sup>69</sup>

124. The Tribunal released its first decision under this provision on October 5, 1990. On the complaint of a competitor of The NutraSweet Company (“NSC”) in the Canadian market for the sale of aspartame (there is no competition in the United States because the product is protected by a patent that expires in 1992), the Director challenged certain restrictive arrangements between NSC and its customers. The case is especially significant in the context of this study because it involved a U.S. corporation’s business activities in Canada and the import of the product from the United States as well as elsewhere.

125. Following the expiry of the Canadian patent in 1987, the company maintained a 95% share of sales in Canada for aspartame (held to constitute a distinct “class or species of business” (Section 79(1)(a)) as well as being the relevant product market (Section 79(a)(c))). (*NutraSweet* at pp. 11-31; 53-56) In the circumstances (reviewed by the Tribunal p. 31-35), Canada was held to be a “separate geographic market for the purpose of evaluating the effects of NSC’s marketing practices” (p. 35). The Tribunal reviewed entry barriers as a separate issue and concluded that “there are very serious barriers to the entry of new manufacturers of aspartame other than NSC” (*i.e.*, anywhere in the world) (p. 44). The Tribunal had little difficulty in concluding that the company substantially controlled a class or species of business.<sup>70</sup>

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<sup>69</sup> Prosecutions for the criminal offense of price discrimination and predatory pricing are brought before the ordinary courts. Investigations are undertaken by the Director, and prosecutions are usually initiated by a recommendation from the Director to the Criminal Law Branch of the Department of Justice; but the conduct of a case is in the hands of the officers of the Attorney General.

<sup>70</sup> The Tribunal’s observations on the relationship of “class or species of business,” “market power” and “control” are illuminating:

The respondent’s view is that “control” is most meaningfully treated as synonymous with “market power.” Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period. While this is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and entry barriers. The specific factors that need to be considered in evaluating control or market power will vary from case to case.

The Tribunal is persuaded that the respondent’s position is in keeping with the logic of the section and the Act. This finding is of little practical import because, ultimately, all relevant indicators of market power must be considered in determining whether there is likely to be a prevention or lessening of competition substantially. Furthermore, it is difficult to see how any definition of control, including the dictionary definition, could exclude a consideration of conditions of entry. The structure of the section does, however, raise a question regarding how far it is necessary to go into the

126. The Tribunal noted that “practice” is not defined and, after observing that some of the anticompetitive acts listed in Section 78 “certainly entail a course of conduct over a period of time,” concluded that:

the interpretation of practice must be sufficiently broad as to allow for a wide variety of anticompetitive acts. Accordingly, the Tribunal is of the view that a practice may exist where there is more than an isolated act or acts. For the same reasons, the Tribunal is also of the view that the different individual anticompetitive acts taken together may constitute a practice. It is important to stress, however, that this does not in any way relieve the Director of the burden of establishing an anticompetitive purpose for each of the acts.

(Pages 58 and 59).

127. It is difficult to elicit from the reasons of the Tribunal what principles are applicable to determine whether any particular practice is an anticompetitive act. The Tribunal did say, with reference to the anticompetitive acts illustrated in Section 78 of the statute, that “an anticompetitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient.” “The purpose common to all acts, save that found in paragraph 78(f), is an intended negative effect on the competitor that is predatory, exclusionary or disciplinary” (p. 57). However, in examining the alleged anticompetitive acts, the Tribunal appears to have cumulated the various contract restrictions, both with regard to their anticompetitive nature as well as with regard to their constituting a practice.

128. The Tribunal accepted the Director’s submission that evidence of subjective intent (through verbal or written statements of personnel of the respondent) or a consideration of the act itself (the premise that a corporation can be taken to intend the necessary and foreseeable consequences of its act) can be used to establish purpose. (p. 60) The Tribunal commented that “in most situations. . . the purpose of a particular act will have to be inferred from the circumstances surrounding it.” (p. 60)

129. The Tribunal concluded that various exclusive supply clauses, the use of substantial discounts for display of the NCS trademark, cooperative marketing provisions, “meet or release clauses” which enable a customer to enforce a “most favored nation” clause, were all part of the branded ingredient strategy of NSC to be the sole supplier of aspartame, enabled it to maintain the market that had been captured originally by the aspartame patent (which expired in Canada in 1987) and constituted a practice of anticompetitive acts. In response to the Director’s argument that each of the contract terms associated with exclusive supply

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evidence on control since it may include an examination of the alleged anticompetitive acts and their effects. If all of the evidence is taken up here then the three principal elements in paragraphs (a), (b) and (c) of subsection 79(1) may become melded in the evaluation of the first element. This is pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required.

should be considered a separate anticompetitive act, the Tribunal responded as follows:

The Tribunal sees little purpose in the context of the present case in determining whether each clause constitutes an anticompetitive act . . . . In the Tribunal's view, the issue is whether the agreements requiring exclusive supply, and all the contract terms related to it, have an exclusionary purpose. The Tribunal is persuaded that this is the case. (P. 73).

However, the Tribunal concluded that a contract under which a Japanese supplier had agreed not to contest the Canadian market was not an anticompetitive act within the meaning of the abuse of dominance provisions (p. 61).

130. An interesting aspect of the case that is applicable to trans-border selling is the finding of the Tribunal that the acquisition cost for the purpose of paragraph 78(i) in the case of imported articles is the price paid for the articles themselves and not the cost of distributing them. The Tribunal also decided that the concept is inapplicable to circumstances in which the respondent itself manufactures the product (p. 74).

131. The Tribunal dealt with the Director's argument that an anticompetitive act could be constituted by some other form of predatory pricing not specified in Section 78 and concluded that the term is broad enough to cover other predatory pricing. However, the Tribunal did not examine the issue extensively because it found that no compelling evidence had been presented to it as to whether there had been pricing below cost by NSC. Having said that, the Tribunal went on to "accept for present purposes" the Areeda/Turner test (average variable costs as a proxy for marginal cost) but noted that "AVC is only a valid proxy for MC when a firm is producing below capacity." "ATC [average total cost] rather than AVC is obviously the better proxy for MC for a firm producing at capacity. Capacity in this sense need not correspond to any notion of a physical limit to output since firms can often increase output by more intensely utilizing existing facilities. Doing this will cause MC to rise above AVC" (p. 76). Having found that NSC operated at capacity, and having taken the excursion through the thicket of pricing theory, the Tribunal concluded that because the Director did not ask for any remedy concerning prices other than that they be forbidden to fall below acquisition cost, "a concept we have found to be irrelevant in this case," a specific finding on selling below cost was not required in respect of any potential remedy (p. 78).

132. Another interesting aspect of the case was the Director's allegation that NSC had used its U.S. patent to gain a competitive advantage in Canada. In particular, contracts with Coca-Cola Company and Pepsico had been concluded on a multinational basis. The Tribunal concluded that the existence of the alleged leverage of the U.S. patent in causing Coca-Cola and Pepsico to agree to exclusive supply contracts outside of the United States did not constitute, nor was it part of, a separate an-

ticompetitive act. (p. 78, but compare the quotation from p. 80 below.) However, the Tribunal did conclude that a conditional rebate system, under which a Canadian importer would be given a rebate on imported products equal to the difference between NSC's U.S. and Canadian prices calculated in relation to the amount of aspartame contained in the imports, constituted an anticompetitive act. Competitors were thus placed at a large disadvantage because they had no way of knowing how much the rebates would amount to, although it might be assumed that the amounts were substantial because of the large difference between the price in the United States and Canada for aspartame. The Tribunal remarked, without making clear the relevance of the comment:

“This is a form of dumping in that NSC can in effect export its product at a price below that charged in the United States, without any risk to its domestic [i.e., U.S.] price which is protected by its exclusive patent rights (p. 80).”

The Tribunal concluded:

“The Tribunal accepts the Director's submission that use of a monopoly position (created by the United States patent) to obtain a competitive advantage for a dominant firm in another market is an anticompetitive act.”

[p. 80].

133. On the question of subject-matter jurisdiction, the Tribunal noted briefly that:

[W]e have been asked in effect to declare various contracts, some of them not even made in Canada, to be invalid in whole or in part.

Some questions have been raised in the pleadings as to our jurisdiction to make such declarations. Without addressing that issue, we find it preferable to confine ourselves to certain directions to the respondent both with respect to enforcing certain terms of existing contracts or entering into such terms in the future.

(p. 102-3).

134. Accordingly, the Tribunal's order was confined to NSC's dealings with its “Canadian customers” who were defined to include “any person or corporation entering into agreements whether inside or outside of Canada for the purchase of aspartame, *in respect of any aspartame to be delivered in Canada for use as a food ingredient.*” (p. 132, emphasis added) The Tribunal thus appears to be saying to NSC as a company operating in Canada that it is prohibited from certain practices with regard to its contracts as to their effects in Canada. However, the Tribunal does not address the question of whether it is an appropriate exercise of the jurisdiction of the Tribunal to purport to prohibit NSC from entering into contracts outside of Canada with companies that do not operate as such in Canada but which contracts could contain undertakings to control the operations of those corporation's subsidiaries in Canada.

135. Having concluded that NSC had engaged in a practice of an-

ticompetitive acts, the Tribunal went on to consider whether under the circumstances the restrictive clauses had the effect of preventing or lessening competition substantially in the market in Canada. The circumstances weighed by the Tribunal included the large market share (95%) of NSC, the difficulties confronting a potential entrant in terms of achieving adequate capacity to compete effectively, the criticality of being able to supply the major soft drink producers, plus the significant difficulties, costs and uncertain results that customers would face from switching from the NSC identification on their packaging. Various justifications for the exclusivity clauses were examined. However, the Tribunal had no difficulty in reaching the conclusion that NSC's "practices have had and are having the effect of preventing or lessening competition substantially" (p. 92).

136. The Tribunal also dealt with the Director's argument that the Tribunal should make an order under the provision of the Competition Act (Section 77) that defines exclusive dealing and tied selling and provides remedial power in certain circumstances. The Tribunal concluded that NSC's practices satisfied the definition of exclusive dealing and were likely to lessen competition substantially. Thus, the Tribunal was able to proceed under both Section 79 and Section 77 to prohibit NSC from enforcing or entering into terms which require a "Canadian customer" to purchase or use only NSC aspartame, which provide financial inducements to purchase NSC aspartame through trade mark, display advertising or similar allowances, meet or release terms, and most favored nation clauses, unless such MFN clauses are also inserted in supply contracts between NSC and any competitor of its Canadian customer (pp. 103 and 132-134).<sup>71</sup>

### (c) Collusion

137. Any of the anticompetitive activities and practices discussed above may be offenses under the general "anti-conspiracy" section of the Act if they involve collusion (Competition Act, s. 45). Succinctly stated, it is an indictable offense for two or more persons to conspire, combine, agree or arrange to prevent or lessen competition unduly. The offense is committed by any agreement that is likely to have the effect stated even though such intention of the parties cannot be proven. An agreement may be inferred from circumstantial evidence.<sup>72</sup> As in the case of the other provisions, there is nothing in the Act that would prevent the ap-

<sup>71</sup> The decision of the Tribunal is being appealed to the Federal Court of Appeal.

<sup>72</sup> A recent decision of the Trial Court of the Nova Scotia Supreme Court held that section 45 was invalid as being in violation of the Canadian Charter of Rights and Freedoms. *R. v. Nova Scotia Pharmaceutical Society*, supra. The decision strikes at the core of the Competition Act and is expected to be appealed through the Nova Scotia Court of Appeal to the Supreme Court of Canada. The Quebec Superior Court handed down a similar ruling on December 6, 1990 in *L'Association Québécoise des Pharmaciens Propriétaires*.



plication of the prohibition to collusive activity which occurs outside Canada but which has a significant effect in Canada.

## 2. U.S. Competition Law

138. Under U.S. law, “unfair” or “predatory pricing” may be analyzed in the context of price discrimination under Section 2(a) of the Clayton Act (commonly referred to as the Robinson-Patman Act (“RPA”) or in the context of monopolization under Section 2 of the Sherman Act (“Section 2”).<sup>73</sup> Unlike 50(1)(a) of the Canadian Competition Act, the RPA applies not only to secondary line competition, but also to primary line competition.<sup>74</sup>

139. As set forth below, both the RPA and Section 2 require injury to competition. Although unlike Section 2 there is no explicit requirement under the RPA of monopoly power or a dangerous probability of obtaining monopoly power, this is a largely irrelevant distinction. Both statutes involve identification of an “improper” price, which requires the court to distinguish between procompetitive and anticompetitive pricing. The definition of “anticompetitive” must remain uniform if the whole of antitrust law is to be reconciled. (See, e.g., *Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 347 (3rd Cir. 1981), cert. denied, 455 U.S. 1017 (1982)). Moreover, conduct that is harmful to competition, if it persists undaunted, necessarily raises a possibility of monopoly. The Ninth Circuit explained:

An injury to competition proscribed by Section 2(a) of the Robinson-Patman Act perhaps may be established without proof of predatory intent or predatory pricing. . . . Therefore, we do not hold that there exists a complete substantive synchronization of the Sherman and Robinson-Patman Acts. . . . [However], in *primary-line Robinson-Patman cases*, such as this one, the distinction between vigorous, but honest, price competition and predatory assaults on the competitive process is just as important as it is to Sherman Act cases brought under its Section 2. Under these circumstances the analytical standards should be no different. [Emphasis added].

(*William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1041 (1981), cert. denied, 103 S.Ct. 58 (1982)).

<sup>73</sup> Of less relevance is Section 3 of the RPA. Technically not part of the U.S. “antitrust” laws, *Nashville Milk Company v. Carnation Milk Company*, 355 U.S. 373, 382 (1958), Section 3 is an undeveloped criminal statute outlawing, *inter alia*, the sale of products at “unreasonably low prices.” (See *infra*, ¶¶ 182-186.) It should also be noted that agreements to set a uniform price at any level are actionable under Section 1 of the Sherman Act, which condemns collusive conduct in restraint of trade, but that a competitor of the alleged conspirators only has standing to bring an antitrust action when the fixed price is predatory. (See *infra*, ¶¶ 212-217.) The Department of Justice is not so restrained with respect to bringing a criminal action under Section 1, since price fixing at any level is still *per se* illegal.

<sup>74</sup> The RPA also applies to tertiary line competition and beyond, but these provisions are rarely invoked (even unsuccessfully) and are largely irrelevant in the context of dumping. (See *supra* ¶ 116.)

140. However, in what can only be characterized as a historical accident, the test for injury to primary line competition under the RPA and its counterpart under Section 2 are not in complete accord, with some U.S. courts applying a less stringent (and somewhat antiquated) injury test under the RPA,<sup>75</sup> particularly in cases of “geographic” price discrimination.<sup>76</sup> Furthermore, the standard for determining predatory pricing under Section 2 has not developed uniformly throughout the U.S. judicial system, although general principles are clear. These are discussed in detail under the Section 2 analysis.

141. Given that the RPA does not apply to transborder price discrimination,<sup>77</sup> it would seem logical to focus our immediate attention on predatory pricing under Section 2, which looks only to the competitive effects of the U.S. price. One may argue, however, that primary line price discrimination under the RPA is considered to represent domestic competition policy with respect to the harmful effects of price variations, and therefore its standards should also apply to transborder price variations. Our position is that the primary line injury test under the RPA, at least to the extent it has not been brought into line with recent Section 2 jurisprudence, is inappropriate. Although it is significantly more stringent than the material injury test under antidumping law (particularly when you include the RPA’s statutory defenses), it still may result in the condemnation of conduct with procompetitive effects, conduct that would not be condemned under Section 2.

142. This is particularly true with respect to the seemingly greater willingness of courts to infer predatory intent in cases of geographic price discrimination. Given that geographic price discrimination appears, at least facially, to be closely analogous to dumping, a brief digression is warranted.

143. According to its legislative history, the 1936 RPA amendments, which replaced the original Section 2 of the Clayton Act, were almost entirely concerned with the effects of price discrimination at the secondary level. The proper legislative history with respect to primary line effects of price discrimination is that of the original Clayton Act, which was aimed primarily at geographic price discrimination. Congress feared that nationwide concerns would lower prices in one locality — perhaps below the cost of production — with the intent of destroying local competitors and thereby acquiring a monopoly in that locality, while simulta-

<sup>75</sup> Compare *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1345 (8th Cir. 1987) (applying Section 2 test in RPA case) with *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1326 (1990) (refusing to apply Section 2 standard absent clear guidance by the Supreme Court).

<sup>76</sup> See *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 1990-2 Trade Cas. (CCH) ¶ 69,182 at 64,469 (M.D.N.C. 1990).

<sup>77</sup> See *Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, (3rd Cir. 1983) (construing the RPA to require two domestic sales and refusing to apply the RPA to the sale of consumer electronic products in the Japanese home market at prices significantly higher than those charged for products of like grade and quality in the United States), *rev'd on other grounds*, 475 U.S. 574 (1986).

neously “recouping” its losses by charging above fair market value prices for the same commodities in another region where it already exercised market power. This “recoupment” theory, which seems to assume that the discriminator forgoes monopoly rents in the closed market except when needed to cross subsidize predatory pricing in a localized competitive market is of dubious economic rationality. Furthermore, the proposition that geographic, as opposed to general or selective non-geographic, price discrimination is more likely to be driven by an “intent” to harm competition rather than to engage in it is likewise dubious. (See *Hommel*, 659 F.2d at 352 (discussing *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967)); cf. Areeda, *Antitrust Laws*, § 720(a) at 187-88 (1978)).

144. Nevertheless, as a result of (1) Congress’ historical concern for geographic price discrimination, coupled with (2) the Supreme Court’s populist approach to geographic price discrimination in the 1967 *Utah Pie* decision (discussed *infra*, ¶¶ 163-185), many courts electing to apply Section 2 analysis in a primary line price discrimination action have distinguished the case before them as non-geographic. (E.g., *Liggett Group*, 1990-2 Trade Cas. (CCH) ¶ 69,182 at 64,469; *Hommel*, 659 F.2d at 350).

145. Even if this type of geographic price discrimination is distinguishable in economic terms, which it is not, Canadian- U.S. transborder price discrimination does not seem to fit the mold of a “national concern” attacking local “ma and pa” American manufacturers. First, in most instances, the size of the investment required to drive and keep a small local competitor out of business is of a smaller order of magnitude than that required to capture the entire U.S. market. Even where the U.S. market is regional (as it may be defined, for instance, in an antidumping investigation), costs of predation likely will be high. Furthermore, the notion that a Canadian firm will be in a position to *raise* its prices above existing levels in the Canadian market to offset losses in the U.S. market (i.e., it was charging less than it could have prior to the dumping scheme) without suffering any adverse consequences in the Canadian market is counter intuitive. Although the ability to collect monopoly rents in the much smaller Canadian market may increase the predator’s staying power in that the overall concern may still be operating in the black, the rationality of engaging in this type of predation still requires the recouping of revenue that would otherwise have been realized but for the predatory activity.

146. Having preliminarily identified these discrepancies in the predatory pricing doctrine within U.S. competition law itself, it is safe to say they are of little consequence. For the most part, each of the tests take into consideration (1) the relationship of defendant’s prices to its production costs (i.e., the willingness to sacrifice immediately available revenue), (2) independent evidence of intent to drive out competition by foul means, as well as (3) the likelihood of successfully acquiring monopoly power and recouping losses incurred during the period of unprofitable pricing (requiring analysis of ease of entry and market structure). It

would not be a formidable task to discern a uniform set of rules for application in the U.S.-Canadian context, regardless of whether one chooses to analyze primary line injury under the price discrimination doctrine (which at present applies only to domestic sales) or general monopolization principles (which focus only at the alleged predatory conduct).

(a) Robinson-Patman Act

147. Price discrimination under U.S. law is governed primarily by the Robinson Patman Act (Section 2(a) of the Clayton Act), and reads in pertinent part as follows:

148. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchase[r]s involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who grants or knowingly receives the benefit of . . . such discrimination . . . .

15 U.S.C. § 13(a).<sup>78</sup>

149. Thus, to find unlawful price discrimination there must be (a) two sales, (b) by the same seller, (c) at different prices, (d) to different buyers, (e) of commodities, (f) of like grade and quality, (g) in interstate commerce, (h) for use, consumption or resale in the United States and (i) resulting in injury to competition with the seller, the favored buyer or their customers. Although the language of Section 2(a), as well as its legislative history, is pitched toward equalizing competition among buyers by restraining sellers from granting discriminatory prices, it is clear that consideration of competition at the primary level is also included in the law. Price cutting on a regional basis or in an entire trade area, done for reasons relating solely to the seller's business and without any direct harm to buyers anywhere, has been found to violate the RPA because it adversely affected competition at the price cutter's level.

150. There are several statutory defenses to price discrimination claims:

151. *Meeting Competition Defense.* Section 2(b) allows discrimina-

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<sup>78</sup> Sections 2(d) and 2(e) of the RPA prohibit any seller from paying for or providing services or facilities furnished in connection with the resale of product unless such payment or services and facilities are available on "proportionally equal terms" to all other competing resellers. It is important to note that it is not necessary to prove injury to competition under Sections 2(d) and (e); these sections are violated if the seller discriminates regardless of whether there is any injury to competition (although the plaintiff must still prove injury in fact).

Section 2(f) makes it illegal to knowingly receive a discriminatory price that independently violates 2(d). Some form of buyer liability may provide a useful enforcement mechanism under the new system.

tory prices offered “in good faith to meet an equally low price of a competitor.” This defense is quite flexible and is often available to justify price discrimination, provided the defense is documented when the discriminatory price is first granted.

152. The price discrimination must be offered in a good faith attempt to meet competition. (*Falls City Industries, Inc. v. Vanco Beverages, Inc.*, 460 U.S. 428 (1983)). This means that the seller must reasonably believe that it is necessary to offer a lower price to get the sale, (*Id.*), although the seller need not confirm (in fact should not confirm) the lower competitive price with the seller’s competitors or the seller may face horizontal price fixing charges under the Sherman Act. (*U.S. v. U.S. Gypsum Company*, 438 U.S. 422 (1978)). Instead, the existence of a competing lower price should be verified and documented through some other means, such as verifying through the buyer to whom the lower price was offered.

153. Sellers should also be aware that a seller may only “meet, not beat” the competing lower price. Undercutting the competing lower price may result in the defense not being available, (*Great Atlantic and Pacific Tea Company, Inc. v. FTC*, 440 U.S. 69 (1979)), although the court still must find that the lower price is injurious to competition. Finally, a seller cannot meet a price that the seller knows to be unlawful. (*Cadigan v. Texaco, Inc.*, 492 F.2d 383 (9th Cir. 1974)).

154. *Changing Market Conditions.* Section 2(a) of the Act also allows discriminatory prices to be offered due to “changing conditions effecting the market for or the marketability of the goods concerned, such as . . . actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process or sales in good faith in discontinuance of business in the goods concerned.”

155. *Cost Justification.* Section 2(a) allows price discriminations “which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities which such commodities are . . . sold or delivered.” Although at first blush it would appear that this defense would be of significant utility in structuring a price system, courts have severely limited the costs eligible for justification and require a very detailed cost study before the discriminatory price is granted. (See *U.S. v. Borden Company*, 370 U.S. 460 (1962)). For instance, volume (quantity) based discount schedules, which are generally illegal,<sup>79</sup> are rarely found to be cost justified. (*But see Hanson v. Pittsburg Plate Glass Ind., Inc.*, 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974)).

156. In order to assure that enforcement of price discrimination laws enhances rather than undermines the competitive process,<sup>80</sup> courts have liberally entertained evidence that the defendant’s behavior falls under

<sup>79</sup> Unless realistically and functionally available to all customers, big or small alike, volume discounts constitute price discrimination. See *FTC v. Morton Salt*, 334 U.S. 37, 42 (1948).

<sup>80</sup> *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir.) (on remand), *cert. denied*, 103 S. Ct. 212 (1982) (“Courts must be careful in each case to distinguish between price

one of the statutory exceptions to otherwise illegal price discrimination, most significantly the meeting competition defense. Even when no defense is available, courts have put plaintiffs to task in proving that their injury was caused by the anticompetitive effects of the alleged illegal discriminatory pricing.<sup>81</sup>

157. *Injury to Competition, Not Competitors.* In stark contrast to antidumping law, a discriminatory price is illegal, according to the statute, only if its effects may be substantially:

- “(1) to lessen competition or tend to create a monopoly in any line of commerce, or
- (2) to injure, destroy or prevent competition with any person who . . . either (a) grants or (b) knowingly receives the . . . benefit of such discrimination or with (c) customers of either of them.”

158. The first set of standards restates the ban against incipient restraints and monopolies not reachable under the Sherman Act. Although such a showing of injury to competition is sufficient to support injunctive relief, (*Fall City Industry, Inc. v. Vanco Beverage*, 103 S.Ct. 1282, 1288-89 (1983)), a private plaintiff seeking monetary relief under Section 4 of the Clayton Act (*see infra*, ¶ 211) is required to establish that he is injured in some measurable amount, and that the injury is caused by an improper effect “flowing” from the defendant’s antitrust violation. (*J. Truett Payne Company v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981)). In the case of secondary line injury, the actual injury claimed by the plaintiff is often the same as the claimed injury to competition. (*Alan’s of Atlanta, Inc. v. Minolta Corp.*, 1990-1 Trade Cas. (CCH) ¶ 69,071 at 63,916 (11th Cir. 1990)). However, given the risk in primary line injury cases that legitimate competition may also cause harm to a competitor, courts have been more stringent in requiring that plaintiffs “prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant’s act unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.” (*Brunswick Corp. v. Pueblo Ball-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

159. Generally, a plaintiff must show either a reasonable possibility of substantial injury to competition through (a) actual market analysis, or (b) a rebuttable inference based upon “predatory intent,” coupled with a showing of injury to a competitor. (*E.g., Henry v. Chloride*, 809 F.2d 1334 (8th Cir. 1987)).

160. Under the first approach, it is insufficient that individual sellers

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differences which cause anticompetitive effects and those which reflect ‘a desirable response to competition and considerations of efficiency’ ”).

<sup>81</sup> For instance, there can be no liability “when the injury is the result of the [plaintiff’s] own competitive shortcomings, rather than a merely coincidental discrimination in price.” *Richard Short Oil Company v. Texaco Inc.*, 799 F.2d 415, 416 (8th Cir. 1986).

have been injured or that some competitors have left the market. It is often the case that vigorous competition forces less efficient firms to exit the market. This is true even if the market contains very few or even two firms. Stated briefly, relevant factors include concentration in the relevant market, the ranking of competitors, overall rigor in the contest for business, changes in the number of competitors, trends of prices, barriers to entry, actual existence of market entry and how market positions of the victims have fared versus those of the price discriminators. (*E.g.*, *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 707 (1988)); *IT&T*, 104 F.T.C. 280 (1984)). Plaintiffs are rarely successful under the market analysis approach and must rely instead on establishing predatory intent.

161. The second approach allows the establishment of predatory intent either directly or by evidence of predatory conduct (such as predatory pricing). As a result, however, of the difficulty in distinguishing statements indicative of predatory intent from those of competitive intent, direct evidence of subjective intent is rarely dispositive.

162. Courts focus instead on the relationship of the defendant's prices to its production costs, inferring an intent to harm competition when a firm sells at a price that results in the loss of more money by continuing to operate than by shutting down altogether (*i.e.*, pricing below average variable cost),<sup>82</sup> and even then refusing to find an injury to competition (as opposed to an injury to a competitor) unless it can be rationally concluded that the alleged predator has a reasonable prospect of both obtaining market power and holding onto its advantage long enough to recoup initial losses and harvest some additional gain. (*E.g.*, *Liggett*, 1990-2 Trade Cas (CCH) ¶ 69,182, nn.32 & 33; *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1255-56 (5th Cir.), *cert. denied*, 109 S.Ct. 224 (1988)).

163. As noted earlier, the Supreme Court's decision in *Utah Pie* (a geographic price discrimination case) has driven some courts to limit application of Section 2 predatory pricing principles identified above to cases of non-geographic price discrimination. In *Utah Pie*, the Supreme Court sustained a verdict for plaintiff based on a brief period of local price cutting by large national concerns despite evidence that at the end of the relevant time period, the plaintiff still maintained the largest market share, had met and even beaten the defendant's prices, had doubled sales and its net worth and had continued to be profitable. Although the Court recognized the efficacy of some form of cost based rule as relevant to the existence of predatory intent, the Court had in mind a measure of total costs rather than variable or marginal cost. 386 U.S. at 698 (referring to "direct cost plus an allocation for overhead"). Furthermore, the

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<sup>82</sup> The underlying premise is that prices that cause revenue to fall below average variable cost could conceivably force equally efficient producers to shut down completely rather than sustain losses. Such a shut down would be caused by anticompetitive conduct rather than competitive conditions.

court also condemned the price leading defendants for contributing to a “drastically declining price structure.” *Id.* at 703.<sup>83</sup>

164. The *Utah Pie* decision has been strongly and cogently criticized by commentators,<sup>84</sup> virtually ignored by the Supreme Court, and rejected or severely limited by many lower courts, which have instead concluded that the test of primary line liability under the RPA should apply the standard that governs the intent and conduct component of monopolization and attempted monopolization under Section 2 of the Sherman Act.<sup>85</sup> The requirement that price discrimination “may . . . substantially . . . lessen competition or tend to create a monopoly, refers to consumers’ welfare, not producers’ comfort.” (*A.A. Poultry Farms*, 881 F.2d at 1404 (nevertheless refusing to apply Section 2 standard absent clear guidance by the Supreme Court)). Low prices do not harm consumer welfare unless they result in the creation of monopoly and the sustained collection of monopoly rents; “drastically declining price structure” may be a sign of “vigorous” competition.

165. Therefore, a complete presentation of the standard for establishing primary line injury under U.S. competition law requires consideration of the larger universe of cases under both the RPA and Section 2 of the Sherman Act, and rightfully ignores the small handful of *Utah Pie* cases. Before turning to that presentation, we provide a brief overview of Section 2 of the Sherman Act.

#### (b) Section 2; Monopolization and Attempted Monopolization

166. Section 2 of the Sherman Act states that:

every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000 or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

167. Section 2 may be enforced by the Department of Justice, the

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<sup>83</sup> Cf. *American Academic Suppliers, Inc. v. Beckely-Cardy, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,296 at 65,093 (7th Cir. 1991) (recognizing that the RPA embraces a philosophy more favorable to the protection of competitors than does the Sherman Act, but finding no evidence of a “drastically declining price structure”).

<sup>84</sup> See, e.g., Richard A. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 12-15, 38 (1976); Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 Yale L.J. 70 (1967); Cf. Kenneth G. Elzinga & Thomas F. Hogarty, “Utah Pie and The Consequences of Robinson-Patman,” 21 J.L. & Econ. 427 (1978); United States Department of Justice, Report on the Robinson-Patman Act (1977) (expressing doubt about the benefits of the Robinson-Patman Act as a whole).

<sup>85</sup> See ABA, *Antitrust Law Developments (Second)*, p. 233, n. 108 (1984 & 2d Supp.); Areeda, *Antitrust Law*, § 720 (1990 Supp.).



FTC (applying Section 2 principles under Section 5 of the FTC Act), and private parties (under Sections 4 and 16 of the Clayton Act).

168. The elements of monopolization under Section 2 are (1) possession of monopoly power in a relevant market, (2) willful acquisition or maintenance of that power, and, in the case of a private action, for damages (as opposed to injunctive relief) (3) causal antitrust injury. (*E.g.*, *Catlin v. Washington Energy Company*, 791 F.2d 1343, 1347 (9th Cir. 1986)).

169. Monopoly power is the ability to “control prices or exclude competition.” (*United States v. E. I. Du Pont de Nemours and Company*, 351 U.S. 377, 391 (1956)). The existence of that power could be shown by direct evidence of the exercise of control over price or competition; by evidence of a dominant market share in a properly defined product and geographic market; or by other evidence of market power, such as regulatory and nonregulatory barriers to entry, significant economies of scale or other cost advantages, and product differentiation. The requisite share to make out “monopoly power” often is determined by reference to Learned Hand’s statement: “[Over 90% is sufficient] to constitute a monopoly; it is doubtful whether 60 or 64% would be enough; and certainly 33% is not.” (*United States v. Aluminum Company of America*, 148 F.2d 416, 424 (2nd Cir. 1945)).

170. The intent/conduct element of monopolization is the “willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” (*United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). In other words, some predatory or anticompetitive “conduct” is required; monopoly, standing alone, is not illegal. (*See Berkeley Photo Inc. v. Eastman Kodak Company*, 603 F.2d 263, 275 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)).

171. The elements of attempted monopolization are (1) a specific intent to monopolize a relevant market, i.e., to control price or exclude competition; (2) predatory or anticompetitive conduct (directed at accomplishing the unlawful objective); and (3) a dangerous probability of success. (*See, e.g., Thurman Industries, Inc. v. Pay ‘N Pak Stores, Inc.*, 875 F.2d 1369, 1378 (9th Cir. 1989)). The “intent” may be shown directly, as by explicit statements of an intent to restrain trade or injure a competitor, or it may be inferred from anticompetitive conduct, “but only if the conduct is predatory or clearly in restraint of competition such as a per se violation under Section 1.” (*Id.* at 1378). The market share necessary to support a dangerous probability of success is not well-defined.

172. Following Judge Hand’s dictum, it would now seem to be well settled that a market share of 40-60% is sufficient (*ITT*, 104 FTC 280); a share as low as 30% might be sufficient (*Du Pont*, 96 FTC 650 (1980) [1979-83 transfer binder] Trade Reg. Reporter (CCH) ¶ 21,770 at 29,971 n. 16)); but at least one court has held that a share of 12% is not (*Air*

*Passenger Computer Reservation Systems*, 694 F.Supp. 1443, 1467 (C.D. Cal. 1988)).

(c) Determining Predatory Pricing

173. Courts have long recognized that “predatory pricing may be a means of obtaining or maintaining a monopoly position in violation of Section 2 of the Sherman Act.” (*Janich Brothers v. American Distilling Company*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978)). Although there are some commentators who have postulated that below cost pricing to drive out competitors is an irrational course of action for a dominant firm and that mergers or collusion will always be a more efficient means of monopolization, this view has been challenged by others, and the Supreme Court continues to recognize that below cost pricing is feasible and harmful to competition:

Although firms may engage in [predatory pricing] only infrequently, there is ample evidence suggesting that the practice does occur.

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Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. [Footnote omitted] It is a practice that harms both competitors and competition. In contrast [to] price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition.

(*Cargill, Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 117-18 (1986) (declining to adopt a per se rule denying competitors standing to challenge acquisitions, on the theory that the resulting firm might engage in sustained predatory pricing)).

174. Although the United States Supreme Court has steadfastly refused to determine “whether recovery should ever be available . . . when the pricing in question is above some measure of incremental cost [citation omitted] or whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation,” (*Id.* at n. 12), three general principles are clear:

1. “It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.” (*Id.* at 116);
2. “Price competition for increased market share, as reflected by prices that are below market price or even below the costs of a firm’s rivals, is not actively forbidden by the antitrust laws,” because “rivals cannot be excluded in the long run by [nonpredatory pricing] unless they are relatively inefficient.” (*Arco v. U.S.A. Petroleum*, 110 S. Ct. 1884, 1891-1892 (1990)); and,
3. “[In order for predatory pricing to be a rational course of action,] the conspirators must have a reasonable expectation of recovering, through later monopoly profits, more than the losses suffered [dur-

ing the price wars.]” (*Matsushita Electric Industrial Company v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)).

175. The reaction of the lower courts has been mixed. At one extreme courts have rejected as irrelevant evidence of subjective intent to harm a competitor because it has little to do with the essential inquiry of whether there is an intent to deliberately forego present profits in the hope of driving rivals out of business, obtaining a monopoly, and recouping losses by charging monopoly rents.<sup>86</sup> This position was articulated by Assistant Attorney General Rule during his tenure with the Justice Department:

176. Evidence concerning the intent of a firm and its managers is, in truth, very little help in distinguishing inefficient competition. Virtually all competitors, or at least those who are not fixing prices or lethargically holding a price umbrella over their fellow market participants, view their market rivals as the enemy in the war to win the hearts and minds of the consumers. And consumers benefit from that war in the form of low prices, new technology, and enhanced choices. It is not the competitive spirit that distinguishes the good from the bad; rather it is the effect of the conduct.

(Reprinted at 7 Trade Reg. Rptr. (CCH) ¶ 50,014).

177. Courts adopting this rationale focus instead on the relationship of cost to price and the feasibility of recoupment. One formulation of the objective price test, first proposed by Professors Areeda and Turner in 1975,<sup>87</sup> holds that a price at or above a reasonably anticipated average variable cost should be presumed lawful, while a price below average variable cost should be *conclusively* presumed unlawful. Although this static cost based test has been attacked as oversimplified, some courts have adopted it in its entirety.<sup>88</sup> Other courts have applied a modified (perhaps less draconian) version of this test; for instance, creating a rebuttable presumption of legality when prices are between average varia-

<sup>86</sup> See *A.A. Poultry Farms*, 881 F.2d 1396 (holding that intent is irrelevant and that feasibility of recoupment as determined by market structure is the threshold test); *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 370 (9th Cir. 1988) (“[Predatory] intent is not irrelevant to the inquiry . . . but a finding of anticompetitive intent will not sustain a Section 2 claim in the face of evidence of procompetitive effects”); *Henry v. Chloride*, 809 F.2d at 1345 (*Matsushita* “imports a rule of impossibility into predatory pricing cases: If the defendant could not have captured the market its conduct cannot be predatory, no matter what its intent.”); *Jay’s Foods, Inc. v. Frito-Lay, Inc.*, 653 F. Supp. 843 (N.D. Ill. 1987) (holding that non-cost factors did not overcome absence of cost data that prices were below average variable cost or long run incremental cost); *Gemini Supply Corp. v. Zeitlin*, 590 F. Supp. 153, 157 (E.D. NY 1984) (“Evidence of predatory pricing from which predatory intent may be inferred, is a crucial part of plaintiff’s proof”).

<sup>87</sup> *Supra*, note 17.

<sup>88</sup> *Northeastern Telephone Company v. AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) (adopting a marginal cost test); *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 789 (1989) (observing that ordinarily the measure of predatory price is below incremental cost); see also *Hommel*, 659 F.2d 340. Notably, strict application of the Areeda-Turner test was expressly rejected by the EC Commission in ECS/AK20, O.J. No. L 374/1 (Dec. 31, 1985).

ble cost and average total cost,<sup>89</sup> or requiring plaintiffs to establish predatory intent through a combination of price factors and direct and circumstantial factors unrelated to price.<sup>90</sup> Most courts hold as a matter of law that prices above average total cost cannot be predatory.<sup>91</sup>

178. Some courts ignore the alleged predator's price altogether, and under the assumption that predatory conduct will be undertaken only when success is plausible, instead examine existing market structure to determine the likelihood of successfully acquiring a monopoly, as well as the post-predation market structure, such as ease of entry and expansion, to determine the likelihood of maintaining monopoly power long enough both to recoup losses and harvest some additional gain.<sup>92</sup> The likelihood of success and recoupment may also be applied as a threshold objective test under the assumption that predatory intent, even coupled with injury to a competitor, does not harm consumer welfare unless it has at least the potential to create a monopoly.<sup>93</sup>

179. For example, in the (*ITT Continental* case, (104 F.T.C. 280 (1984)), predatory pricing (under Section 2) was found to be implausible,

<sup>89</sup> *Inglis*, 668 F.2d 1041; *Henry v. Chloride*, 809 F.2d 1334.

<sup>90</sup> *Instructional Systems Development Corp. v. Aetna Casualty and Surety Company*, 817 F.2d 639, 648 (10th Cir. 1987) (sales between average variable cost and average total cost do not preclude a finding of predatory pricing if other factors are present indicating "unreasonably anticompetitive behavior"); *International Air Industries, Inc. v. American Excelsior Company*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (prices above average variable cost may be found predatory if the plaintiff proves that the defendant "is charging a price below its short run profit maximizing price and barriers to entry are great enough to enable the [defendant] to reap the benefit of predation before new entry is possible"); *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 885 (5th Cir.), *cert. denied*, 469 U.S. 1160 (1985); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *see, also, McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2110 (1989); (prices between average variable and average total cost are circumstantial evidence of intent, but insufficient alone).

<sup>91</sup> *E.g., Arthur S. Largent, Inc. v. S.E. Jonson Co.*, 1984-1 Trade Cas. (CCH) ¶ 65,905 (6th Cir. 1984). *But see U.S. Philips Corp. v. Windmere Corp.*, 861 F.2d 695 (Fed. Cir. 1988), *cert. denied*, 109 S. Ct. 2070 (1989) (holding that a dominant firm may be subjected to Sherman Act liability if it lowers its prices with the intent and effect of eliminating a new entrant, regardless of whether the lower prices are below the defendant's cost); *Transamerica Computer Corp. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983).

<sup>92</sup> *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 599 (8th Cir.), *cert. denied*, 108 S.Ct. 707 (1988) (predatory pricing irrational where two substantial categories of potential competitors were "perfectly poised to expand their competitive presence in the market" in response to any "monopoly profits"); *Jay's Food Inc. v. Frito Lay Inc.*, 664 F. Supp. 364 (absent high entry barriers, plaintiff's mere loss of sales to defendant is insufficient).

<sup>93</sup> *Areeda, Antitrust Laws*, § 720(d), p. 622 (1989 Supp.); *A.A. Poultry*, 881 F.2d at 1401-03 (after observing that "making likelihood of [monopolization and] recoupment the initial hurdle avoids not only questions of cost but also questions of intent," the court found that persistent entry and expansion by other firms during period of alleged predatory pricing and unconcentrated market structure precluded recoupment); *see also Amercian Academic Suppliers*, 1991-1 Trade Cas. (CCH) ¶ 69,296. One district court has gone so far as to bifurcate discovery and limit the initial round to market share and entry barriers. *Rebel Oil Co., Inc. v. ARCO*, 1990-2 Trade Cas. (CCH) ¶ 69,258 (D.C. Nev. 1990).

given the market structure. The FTC concluded that sales below average variable costs might satisfy “specific intent” and “anticompetitive conduct” elements, but more is needed to satisfy the “dangerous probability of success requirement.” (*Id.* at 401-02). The FTC then concluded that “most courts have determined that market shares ranging from 40% to 60% prior to commencement of a predatory strategy ordinarily must be established to prove the requisite probability of successful monopolization.” (*Id.* at 412).<sup>94</sup>

180. Simply put, the clear trend in the U.S. law is in the direction of requiring (1) (a) pricing below some measure of incremental cost or (b) a combination of below total cost pricing and a *strong* showing of other subjective or objective indicators of predatory intent, irrespective of whether the plaintiff provides direct evidence of harmful intent, and (2) a reasonable possibility of successfully acquiring a monopoly and of recoupment.<sup>95</sup>

181. Regardless of the particular standard applied, courts have routinely incorporated a “meet competition” defense in predatory pricing cases. (*E.g., Xeta, Inc. v. AteX, Inc.*, 1988-2 Trade Cas. (CCH) ¶ 68,169 (Fed. Cir. 1988); *Morristown Block and Concrete Co. v. General Shale Products Corp.*, 1987-2 Trade Cas.(CCH) ¶ 67,713 (E.D. Tenn. 1987)).

(d) Robinson-Patman Act: Section 3

182. Section 3 of the RPA is a criminal provision declaring it unlawful, *inter alia*,

to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Although many of the early cases brought under Section 3 involved private suits, the United States Supreme Court held in 1958 that, technically, Section 3 was not an “antitrust” law and therefore could not form the basis of a private antitrust suit under Section 4 of the Clayton Act. (*Nashville Milk Company v. Carnation Milk Co.*, 255 U.S. 373). Since that time, Section 3 rarely has been invoked.

183. In the one reported federal prosecution, *U.S. v. National Dairy Products Corp.*, (372 U.S. 29 (1963)), the defendant challenged the Section 3 prohibition on “unreasonably low prices” as unconstitutionally vague and indefinite. The court held that, as applied to alleged sales made below cost with predatory intent, the statute passed constitutional

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<sup>94</sup> The FTC mistakenly failed, however, to apply the same threshold market structure analysis to the primary line Robinson-Patman claim, under the rationale that a “substantial lessening of competition” within the meaning of the RPA may occur even though predation could not result in monopolization. *Id.* at 435.

<sup>95</sup> Some commentators argue that there are forms of strategic pricing and nonprice conduct that may also be anticompetitive. For instance, an industry leader may engage in predation by establishing a reputation as a price predator or through the false signaling of costs. Predation also may be profitably accomplished through various relatively uncostly forms of raising rivals’ costs. Such tactics are not germane to providing a remedy for anticompetitive transborder pricing.

muster. The court did not decide whether below cost refers to direct or fully distributed costs or some other cost level, but observed that every sale below cost would not be a violation of the Clayton Act. For example, such pricing would not be illegal if made in furtherance of a legitimate commercial objective, such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor. (*Id.*)

184. On remand, the jury found the defendant guilty of violating Section 3. The Court of Appeals upheld the conviction even though the dairy company made no sales below direct cost (raw material, processing, and containers), holding that the predatory or competitive nature of the seller's price, rather than the theoretical cost considerations, is the real index of its legality, and that sales at prices below some level of cost with the intent to destroy competition or eliminate a competitor are sufficient to impose liability under Section 3. (350 F.2d 321, 330 (8th Cir. 1965)). The conviction was ultimately vacated on other grounds by the United States Supreme Court. (384 U.S. 883 (1966)).

185. As with many of the old primary line injury cases under the RPA, *National Dairy Products* is out of step with modern economic thinking. For certain, it no longer represents the position of the DOJ with respect to criminal prosecution of predatory pricing. (*See, e.g., Assistant Attorney General Charles F. Rule's Explanation of U.S. Views on Predation*, 7 Trade Reg. Reporter (CCH) ¶ 50,014).

186. In short, nothing would be gained by modifying § 2 of the Clayton Act (§ 1 of the RPA) to provide a remedy for the primary line effects of transborder price discrimination, or § 3 of the RPA in order to create a private cause of action for U.S. companies that believe that competition is being harmed by unreasonably low Canadian pricing in the U.S. market. Productive relief is available under Section 2 of the Sherman Act.

### 3. Comparison and Conclusions Re: Substantive Predatory Pricing Laws

187. Although we have gone to some lengths to carefully identify and describe Canadian and U.S. competition laws dealing with unreasonably low prices, our "comparison and conclusion" is short. U.S. and Canadian competition laws presently available to remedy unreasonably low transborder pricing in the form of predation are essentially the same in that each requires injury to *competition*, and each takes into consideration both objective evidence of below cost pricing and market structure and, in appropriate cases, evidence of subjective predatory intent. We refer specifically to the Canadian Competition Act, Sections 50(1)(c) and 78-79, and, under U.S. law, to Section 2 of the Sherman Act (and to a lesser extent Section 3 of the RPA and the 1916 Antidumping Act).

188. U.S. and Canadian price discrimination laws, in their present form, are not material to the issue of the effectiveness of competition laws to discipline anticompetitive transborder pricing analogous to dumping

because their jurisdiction is limited to the comparison of two domestic sales, not the comparison of a domestic sale with an equivalent sale in the exporter's home market. Reference here is to section 50(1)(a) of the Canadian Competition Act which is applicable only to discrimination as to pricing by a seller to two competing purchasers and to section 50(1)(b) which is limited to the primary line effect of regional price discrimination, and to section 2(a) of the Clayton Act which applies to the primary line effect of all forms of price discrimination. Even if the requirement with respect to section 2(a) of the Clayton Act that there be two sales in the United States were removed (making it applicable where there is only one sale in the United States and one in Canada) application of this section to such a situation would still require a showing of injury to competition. The same is true of section 50(1)(b) of the Canadian Competition Act. Section 50(1)(a) of the Canadian Competition Act could be applied to a situation where one competing purchaser is in Canada and the other in the United States, but the situation is not relevant to anticompetitive transborder pricing analogous to dumping.<sup>96</sup>

189. In sum, no changes are required to substantive U.S. or Canadian competition law in order to provide an effective remedy in both countries for anticompetitive transborder pricing.

190. The divergent purposes of the antidumping and competition laws are evident. Unlike primary line injury cases under Canadian and U.S. competition law, antidumping law provides none of the safeguards for assuring that the protection of domestic industry does not result in the undermining of efficient competition, the creation of higher consumer prices and ultimately the inability of domestic industries to compete globally. The implied goal of the FTA is to create a more efficient North American market and thus to reap the resulting benefits in U.S. and Canadian competitiveness, consumer welfare and efficient allocation of resources. Consistent with this goal, alleged transborder price discrimination should be analyzed on the basis of whether the export market price has a tendency to destroy competition.

#### 4. Opening Up The Exporter's Home Market

191. Having established the availability under competition law of an effective remedy to anticompetitive transborder pricing that arises in the context of transborder price discrimination, we turn our attention briefly to anticompetitive conditions in the exporter's home market that may serve to facilitate predatory pricing in the export market.

192. Predatory transborder price discrimination may be facilitated when the seller has the ability to limit competition in the home market

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<sup>96</sup> We note that a Canadian exporter who makes two sales in the U.S. that have primary line anticompetitive effects may be subject to an action by his competitor under the RPA, while a U.S. exporter would face such exposure under Canadian law only if he engaged in regional (geographic) price discrimination.

and thus secure monopoly rents. For instance, predation may pose a credible threat to the rival if the rival cannot retaliate in other markets where the predator has not employed this strategy. The elimination of tariffs and creation of a Free Trade Zone between the United States and Canada is a significant step in opening up geographic barriers, eliminating market segmentation and rendering potentially closed markets more contestable. Where market incontestability is the result of private anticompetitive behavior, it may be attacked directly under competition laws, provided all jurisdictional prerequisites are satisfied.

193. For example, a U.S. exporter who is being excluded from the Canadian market by the private anticompetitive conduct of one or more of its Canadian competitors (or by its customers in collusion with its competitors<sup>97</sup>) has two options. The exporter may be able to attack this conduct directly under U.S. law (in a U.S. forum) due to its effect on U.S. export commerce.<sup>98</sup> In addition, the exporter may, in the proper context, have standing to directly attack the exclusionary conduct under Canadian law (in a Canadian forum), or may report the conduct to the Canadian Bureau of Competition in hope of stimulating government enforcement.

194. By way of illustration, in the Japanese color television antitrust case, in which the United States Supreme Court rejected plaintiff's allegation that a cartel of Japanese television producers engaged in predatory pricing in the United States,<sup>99</sup> there was some evidence of the existence of a price fixing cartel of Japanese manufacturers *in the Japanese market* which operated, in part, to exclude foreign competition and enable its participants to charge monopoly prices to Japanese consumers. Although some of this conduct may have been pursuant to an articulated and supervised government policy, and thus insulated from scrutiny under U.S. antitrust laws by, for instance, the Act of State Doctrine,<sup>100</sup> it was also alleged that exclusion was facilitated by private collusion, including improperly acquired licensing standards that discriminated against foreign color televisions. Had the plaintiffs in *Matsushita* invoked

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<sup>97</sup> Although it is not immediately apparent why buyers would collude with producers to keep out foreign competition, it may be quite rational under certain circumstances. For one alleged example, see the complaint filed in *Union Carbide Co. v. Komatsu Electronic Metals, Ltd., et al*, No. 88-3852 (N.D. Cal. Filed October 3, 1988).

<sup>98</sup> See *infra*, ¶ 250.

<sup>99</sup> *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>100</sup> The extent to which the Act of State Doctrine (or its sister "sovereign compulsion" doctrine) will insulate the conduct of private actors from scrutiny under U.S. competition laws is unsettled. Cf. *Kirkpatrick v. Environmental Tectonics*, 110 S. Ct. 701 (1989) (in refusing to apply Act of State Doctrine to conduct involving bribery of a foreign official, the Court referred to the responsibility of Article III courts to decide cases whether or not foreign governments are embarrassed); *Lamb v. BAT, Ind.*, 1990-2 Trade Cas. (CCH) ¶ 69,209 at 64, 686 (6th Cir. 1990) (refusing to apply Act of State Doctrine where the claims merely questioned the motive and effect of the agreement, not the "validity" of any sovereign act).



U.S. competition law to attack this behavior directly,<sup>101</sup> rather than the alleged predatory pricing in the United States facilitated by this behavior, it may have forced open the Japanese market<sup>102</sup> and eliminated the cross-subsidization of low priced exports into the U.S. market.

195. Unlike a U.S. exporter harmed by exclusionary conduct in Canada who may seek a remedy in a U.S. forum under U.S. law, Canadian law may not reach such exclusionary conduct in the U.S. The stated purpose of the Canadian Competition Act is to promote and protect competition in goods and services available to purchasers in Canada (Section 1.1). The Competition Act is therefore not likely to be extended to collusive activity outside of Canada, the only effect of which in Canada is to limit export opportunities for Canadian exporters. However, a Canadian exporter harmed by exclusionary conduct in the U.S. probably would have standing to sue under U.S. Law, and collusive activity in the U.S. that has an adverse effect on import competition would be subject to prosecution in the United States.<sup>103</sup>

### III. ACCESSIBILITY AND EFFECTIVENESS

196. We have concluded that (1) the implicit goal of the FTA is to foster fair and efficient competition among U.S. and Canadian firms in the FTA market, and (2) the substantive provisions of existing U.S. and Canadian competition laws are consistent with this goal. We now turn to

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<sup>101</sup> Although recourse to Japanese law in an effort to open up the Japanese market is unlikely to have been successful (e.g., the Japanese naval base matter), it is reasonable to be more optimistic with respect to recourse to Canadian or U.S. tribunals and laws.

<sup>102</sup> For example, in *Daishowa Int'l v. North Coast Exp. Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982), a U.S. wood chip cooperative successfully challenged exclusion from the Japanese market by a cartel of Japanese buyers.

<sup>103</sup> There are numerous examples of unilateral and concerted anticompetitive behavior in the U.S. designed to prevent both domestic and foreign competition, many of which have been successfully challenged under Sections 1 and 2 of the Sherman Act. For example, in *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988), a manufacturer of plastic conduit brought an action under the Sherman Act alleging that petitioner, a leading producer of steel conduit, had unreasonably restrained trade in the electrical conduit market. Respondent contended that petitioner had conspired with others to exclude respondent's product from a code of industry standards, thereby causing respondent considerable commercial damage. The Supreme Court overruled the trial court's holding that the challenged activity was immune under the *Noerr-Pennington* doctrine, which insulates from antitrust scrutiny bona fide governmental petitioning or lobbying activity. The Court held that *Noerr-Pennington* immunity was inapplicable in attempts to influence a *private* standards setting organization notwithstanding that the organization's standards were widely adopted by local government bodies. The authors are aware of a similar suit being contemplated by a French manufacturer in a different industry, based on alleged collusive activity by a group of American manufacturers in developing U.S. standards that operated to exclude the French firm's products from the U.S. market. There are many other forms of illegal exclusionary behavior under U.S. law, including group boycotts, *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) foreclosing a competitor from an essential facility, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) and nonprice predation in the context of regulatory and adjudicatory abuse (including the filing of baseless antidumping petitions). *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

an examination of whether there are any significant practical constraints to the successful governmental or private application of the two countries' competition laws to predatory transborder pricing.

197. This subject involves considerations of jurisdiction over persons (individual and corporate) and jurisdiction over activities. In the latter connection, the question is, what is the appropriate forum for adjudication of factual and legal issues and what is the appropriate law to apply if the laws of two potentially applicable jurisdictions are in conflict? Another fundamental question involves the initiation of legal actions and the process of gathering relevant information. This question may arise in connection with government enforcement activities and in connection with legal actions initiated by private parties. And, after the appropriate facts have been established in a governmental or private action and the appropriate court or other tribunal has made a decision and issued an order, there remains the question of effective enforcement of the order, whether it be an injunction, an order to pay compensation or the imposition of a penalty. Furthermore, especially from the point of view of the private complainant, there is the major question of the cost of the process and the effectiveness of the result, in terms of the time taken to achieve the result. Time thus has two dimensions: namely, time implies cost; and delay implies weakened, if not lost, effectiveness.

198. In sum, the subject of "Accessibility and Effectiveness" requires consideration of five issues: (1) availability and nature of governmental and/or private actions; (2) personal and subject matter jurisdiction; (3) gathering of evidence; (4) enforcement of orders and penalties; and (5) time and costs.

#### *A. Enforcement by Government and Private Action*

199. The competition laws in both Canada and the United States provide for enforcement by government and by private litigation.

##### 1. Governmental Action

###### (a) Canada

200. (i) Under the Competition Act, the responsibility for enforcement is vested in the Director of Investigation and Research ("Director") who heads the Bureau of Competition Policy ("Bureau"). Subject to appropriate controls with regard to judicial supervision and civil rights, the Director is provided with wide power to investigate and take action with regard to any matters falling within the scope of the Competition Act. For activities that he concludes constitute a violation of the criminal provisions of the Competition Act, the Director is required to refer the matter to the Attorney General of Canada (the Federal Department of Justice) to proceed as the officials of that department deem appropriate. Although the official conduct of the matter is in the hands of the Department of Justice, there is close cooperation between the Department and

the Bureau. A prosecution may also be initiated by the Attorney General of a province. As noted above, these considerations apply to the sections of the Competition Act dealing with predatory pricing, discriminatory pricing and collusion. With respect to activities which may be the subject of enforcement under the abuse of dominance provision (and other sections dealing with tied selling, market restrictions and consignment selling), the Director has the responsibility to decide whether to initiate proceedings before the Competition Tribunal and the Director has the exclusive power to do so.

201. Investigation by the Bureau is initiated on the basis of complaints or information otherwise obtained by it or by formal complaint of six residents of Canada. (Sections 9 and 10). In sum, the Director of Investigation and Research is the "competition watch dog," as he is often described in the press. We conclude that, as relevant to this study, Canada has a complete and comprehensive system of enforcement by governmental action.

#### (b) United States

202. United States competition laws are enforced by the Antitrust Division of the Department of Justice ("Division"), and the Federal Trade Commission ("FTC"). Because the FTC and the Division exercise concurrent jurisdiction over the civil enforcement of the antitrust laws, they have entered into a formal liaison procedure whereby each agency notifies the other of any proposed investigation and a negotiated agreement is reached as to which will handle the matter.

#### (i) The Division

203. The Division has exclusive government jurisdiction to seek injunctive or criminal sanctions under the Sherman Act, as well as authority to enforce various provisions of the Clayton Act.<sup>104</sup> The Division may also seek monetary relief for injury suffered by the federal government by reason of violation of the antitrust laws, including treble damages.

204. Investigations may be commenced as a result of complaints or information from competitors, or information gathered by Division attorneys on their own initiative. If the preliminary inquiry, usually conducted by letters or interviews, indicates a need for a fuller investigation, the Division may elicit the assistance of Federal Bureau of Investigation or other federal agencies, or, if appropriate and authorized, by use of the civil investigative demand ("CID") or by a grand jury. At the close of the investigation, the staff will produce a fact memorandum recommending a criminal indictment, a civil enforcement action (in federal court) or no further action. Ultimately, the assistant attorney general must make a decision on what course to pursue. It has been the Division's policy to

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<sup>104</sup> *E.g.*, § 2 (RPA); § 3 (exclusive dealing); § 7 (mergers); and § 8 (banking).

initiate criminal actions only when it believes there has been a clear and purposeful violation, such as when the activity in question constitutes certain per se violations of the antitrust laws (e.g., horizontal price fixing or bid rigging).

205. The Division's basic precomplaint discovery tool is the CID; a general discovery subpoena. A CID may command the production of documents, oral testimony or answers to interrogatories. Its reach is concomitant with that of a subpoena in a grand jury investigation or otherwise available pursuant to discovery under the Federal Rules of Civil Procedure. The recipient of a CID may attempt to negotiate its scope and timing. Since CIDs are not self-enforcing, to compel compliance, the Division must obtain an order from a federal court where the recipient resides, is found, or transacts business.<sup>105</sup> The primary tool of a criminal investigation is the grand jury subpoena,<sup>106</sup> which may be used both to gather documents and command testimony. The grand jury subpoena may be served anywhere in the United States and will reach U.S. citizens residing in foreign countries. It will not, however, reach aliens residing outside the United States.<sup>107</sup> If a decision is made to proceed to litigation, the evidence may be obtained through traditional civil or criminal discovery techniques.

206. Relief in a civil action may include preliminary injunctions, consent settlements and monetary damages. Criminal remedies include fines<sup>108</sup> and incarceration.

## (ii) FTC

207. The Federal Trade Commission Act ("FTC Act") empowers the FTC to prevent unfair methods of competition and authorizes investigation of corporations engaged in commerce, including commerce with foreign nations. FTC Act §§ 4, 5, 6; 15 U.S.C. §§ 44, 45, 46. Although the FTC is empowered to enforce the Clayton Act and RPA directly, it may also proceed under Section 5 to prohibit conduct violative of those Acts, as well as conduct that violates the Sherman Act.<sup>109</sup> Although the FTC will "consider public values beyond those included in the letter or the spirit of the antitrust laws," *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), Section 5 jurisprudence is generally consistent with Sherman and Clayton Act precedents.

208. Investigations begin with informal staff inquiries and may culminate in the use of compulsory process, including subpoenas or

<sup>105</sup> 15 U.S.C. § 1314(a).

<sup>106</sup> Fed. R. Crim. P. 17(e).

<sup>107</sup> *U.S. v. Haim*, 218 F. Supp. 992 (S.D.N.Y. 1963).

<sup>108</sup> Recent legislation (Antitrust Improvement Act of 1990, P.L. 101-588) has increased anti-trust fines for corporations from \$1 million to \$10 million and for individuals from \$100,000 to \$350,000.

<sup>109</sup> Courts have consistently held that there is no private right of action under Section 5. E.g., *FTC v. Owens Fiberglass Co.*, 853 F.2d 458 (6th Cir. 1988).

CIDs under Sections 6, 9 and 20 of the FTC Act. A formal investigation may conclude with the execution of a consent agreement, the issuance of a complaint initiating an administrative adjudication (provided the FTC "has reason to believe" the prohibitions of the FTC Act have been violated<sup>110</sup>) or no further action.

## 2. Private Actions

### (a) Canada

209. The Competition Act provides that any person who has suffered loss or damage as a result of conduct that is contrary to the price discrimination and predatory pricing sections (and other criminal provisions) or the failure of any person to comply with an order of the Tribunal or a court may sue for and recover in any court of competent jurisdiction (in Canada) full compensation for the loss or damage proved to have been suffered by him together with any additional amount that the court may allow, not exceeding the full cost to him of any investigation in connection with the matter and of the proceedings (Section 36). A court of competent jurisdiction includes any of the superior provincial courts as well as the Federal Court of Canada.

210. Claimants also have available to them any of the principles of the common law in nine provinces or the civil law of Quebec, which may provide a remedy on the basis of conventional principles of the law of torts or delicts. For example, in *Beaubien v. Canadian General Electric et al* (1976) Cour Superiere 1459, the plaintiff, a former electrical distributor, was awarded damages on the basis of collusive activities which had been the subject of a conviction in a previous case (*R. v. Canadian General Electric, Westinghouse Canada and Sylvania*, (1976) 34 C.C.C. (2d) 489; 75 D.L.R. (3d) 664; 29 C.P.R. (2d) 1).

211. As noted above, only the Director of Investigation and Research has status to initiate proceedings before the Competition Tribunal in connection with an alleged abuse of dominance under Section 79 of the Competition Act. As with the other matters within the jurisdiction of the Competition Tribunal, the policy illustrated by the Competition Act is that the justification for the initiation of such proceedings should go through the initial screen of the Bureau of Competition Policy and be proceeded with only in cases where, in the judgment of the Director, there are grounds for the Tribunal to make an order. However, the Director is required to initiate a formal inquiry upon the petition of six residents of Canada and will do so on his own initiative upon receipt of a complaint or information that leads him to conclude that an inquiry is justified. There are suggestions from time to time that private litigants should have status to initiate such proceedings before the Tribunal. The argument has a particular force in cases of refusal to deal, or other situa-

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<sup>110</sup> Such determination is reviewable, if at all, only after the administrative adjudication concludes. *Standard Oil Co. v. FTC*, 449 U.S. 232 (1974).

tion involving redress of injury to a competitor or a customer. It probably has less force in connection with abuse of dominant position and other situations where substantial adverse impact on competition is the principal test.

(b) United States

212. Private actions are made available by Section 4 of the Clayton Act, which provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” Private parties may also sue under Section 16 of the Clayton Act for injunctive relief against threatened loss or damage by a violation of the antitrust laws. Although both sections 4 and 16 are on their face quite expansive, recent years have seen a dramatic increase in the willingness of courts to invoke the doctrines of “antitrust standing” and “antitrust injury” to dismiss private antitrust claims. Both doctrines limit the class of potential plaintiffs for antitrust violations, based on the nature of the relationship between the injury alleged and the violation asserted. These doctrines have been applied even where the plaintiff seeks only injunctive relief.

213. Simply stated, the “antitrust injury” doctrine requires that the plaintiffs allege “an injury of the type the antitrust laws were intended to prevent and that flows from that which makes a defendant’s acts unlawful.” *Brunswick Corporation v. Pueblo Bowlamatic, Inc.*, 429 U.S. 477, 489 (1977)). This doctrine has recently been applied by the Supreme Court to deny standing to a horizontal competitor alleging a per se illegal horizontal price fixing agreement, where the fixed price was not alleged to be predatory. (*Arco v. U.S. Petroleum*, 110 S.Ct. 1884 (1990)).<sup>111</sup>

214. The “standing” doctrine applies to deny those only indirectly injured by an antitrust violation (e.g., more than one level removed in the chain of distribution) the ability to bring suit, regardless of the nature or severity of their injury. The factors to be considered in determining standing are (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff’s alleged injury, including the status of the plaintiff as a consumer or competitor in the relevant market; (3) the directness or indirectness of the injury and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the antitrust violation. (See *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 537-43

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<sup>111</sup> This reasoning has been challenged by commentators who believe a rule requiring predatory prices, particularly in the context of private challenges to mergers, ignores other forms of non-price predatory behavior.

(1983)).<sup>112</sup>

215. The antitrust standing and injury doctrines generally will not bar suit by an antitrust defendant's immediate customer who pays more than the competitive price for the offered products as a result of the offense, (*Hanover Shoe, Inc. v. United States Machinery Corp.*, 392 U.S. 481, 489 (1968)), but it may act as a bar in a suit by a competitor to enjoin a merger, (*Cargill*, 479 U.S. 104), or in a suit by a competitor alleging nonpredatory price fixing, (*Arco*, 110 S.Ct. 1884). Most significantly, it will not bar competitors from bringing an antitrust action to remedy exclusionary conduct aimed at eliminating that competitor from the market.

216. Foreign governments, companies and citizens may sue in the United States under the U.S. antitrust laws provided that they meet the "effects" requirement for subject matter jurisdiction (*infra*, §§ 250-254), as well as the standing and antitrust injury requirements. The one caveat is that under the terms of Section 4(b) of the Clayton Act, the foreign governments seeking damages under the antitrust laws are limited to the recovery of actual damages, subject to certain exceptions.

217. Plaintiffs may also file suit in state court under state common or statutory law, including state antitrust, price discrimination and unfair competition laws.

### 3. Summary Re: Initiation of Actions

218. Both Canada and the United States provide for government and private enforcement of their respective competition laws. Although the right of private action under Section 4 and 16 of the Clayton Act appears broader than its Canadian Competition Act counterpart, in that it does not carve out an exception for claims of "abuse of dominance," in the absence of alleged predatory conduct the antitrust standing and injury doctrines produce the same effect when the action is initiated by a competitor (as opposed to a consumer) of the alleged monopolist.

#### B. Jurisdiction

##### 1. Jurisdiction Over Persons (Individual and Corporate); Service of Process; Venue

219. Since government enforcement actions and private actions for compensation are initiated in national courts or specialized tribunals (the Competition Tribunal and the Federal Trade Commission), a fundamental question is whether such courts and tribunals can effectively deal with persons who are not physically within the territorial jurisdiction of the

<sup>112</sup> The *Illinois Brick* doctrine 431 U.S. 720 (1977), which holds that indirect purchasers generally are barred from recovering treble damages, has not been applied to limit indirect purchasers from maintaining actions for injunctive relief under Section 16. However, the requirement of showing threatened "antitrust injury" applies to Section 16 to the same extent as Section 4. *Cargill*, 479 U.S. 104.

court or tribunal. This subject also encompasses venue and service of process.

(a) United States

220. Analysis of venue, service of process and personal jurisdiction in antitrust actions require reference to three statutes:

221. (1) Section 4 of the Clayton Act: Applies both to individuals and corporations. A lawsuit is possible in any district “in which the defendant resides or is found or has an agent.”

222. (2) Section 12 of the Clayton Act: A lawsuit against a corporation “may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, wherever it may be found.”

223. (3) 28 U.S.C. Section 1391(d): “An alien may be sued in any district.”

(i) Venue and Service of Process

224. Case law has established that Section 1391(d), which authorizes a suit against an alien in any district in the United States, includes suits brought under the antitrust laws, even when service of process in the case is effectuated under Section 12 of the Clayton Act.<sup>113</sup>

225. Section 12 of the Clayton Act allows extraterritorial service of process on a corporate defendant “in the district in which it is an inhabitant, wherever it may be found.” (15 U.S.C. § 22). The method of service is not defined in § 12 and therefore is governed by Rule 4 of the Federal Rules of Civil Procedure. Rule 4 provides the flexibility to use a host of methods, including those recognized under international conventions. In order to ensure judicial cooperation in the foreign state with respect to the gathering of evidence and enforcement of judgments, a method of service should be selected that comports with foreign law. Suffice it to say that service of process creates no obstacles in the Canadian-U.S. context.

(ii) Personal Jurisdiction

226. To determine whether personal jurisdiction could properly be exercised in the forum chosen by plaintiff, the court must first determine that a rule or statute potentially confers jurisdiction over the defendant and then conclude that asserting jurisdiction does not offend the principles of the fifth amendment due process.

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<sup>113</sup> 28 U.S.C. § 1404(a) permits the district court to transfer any civil action to another district “[f]or the convenience of parties and witnesses, in the interest of justice.” District courts have great latitude in deciding whether to invoke § 1404(a) and factors such as the judge’s desire to maintain a manageable docket and perception that the plaintiff is forum shopping are considered by many practitioners to trump other factors more directly related to convenience and fairness.



227. The fifth amendment requires that the defendant “have certain minimum contacts [within the territory of the forum] . . . such that . . . the suit does not offend ‘traditional notions of fair play and substantial justice.’ ” (International Shoe v. Washington, 326 U.S. 310, 316 (1945)). Foreign defendants (with the possible exception of foreign governments) are entitled to this constitutional protection of basic fairness. (See *Wells Fargo and Company v. Wells Fargo Express Company*, 556 F.2d 406 (9th Cir. 1977)).

228. In an antitrust suit, Section 12 both potentially confers jurisdiction, and, by affording extraterritorial service on an alien, authorizes the court to aggregate all contacts with the United States as a whole (rather than only with the forum state) to determine whether the defendant has met the minimum contacts due process requirement. (E.g., *Go-Video Inc. v. Akai Electric Company Ltd.*, 885 F.2d 1406 (9th Cir. 1989)).

229. Personal jurisdiction may also be predicated on the jurisdiction (“long-arm”) statute of the forum state. Not all states apply the same standards, with some requiring a greater nexus than constitutionally mandated. In appropriate cases, personal jurisdiction may also be established under an agency theory, which may allow the court to exercise personal jurisdiction over the foreign parent of a U.S. subsidiary on any cause of action, whether or not related to activities of the agent. Generally, the plaintiff must show that the agent carried on substantial activities for the benefit of the principal and that the agent performed duties sufficiently necessary to the corporation’s operations that if it did not have a representative to perform them, the corporation’s own officials would undertake to perform substantially similar services. (*Wells Fargo and Company v. Wells Fargo Express Company*, 556 F.2d 406). Finally, personal jurisdiction over an alien may be established by the presence of a subsidiary in the United States under an “alter ego” theory, which requires a plaintiff to establish that a subsidiary company is not an independent corporation, but is rather a “mere veil for its owner.” (Id.; see, also, *Bulova Watch Company, Inc. v. Kay Hattori and Company, Ltd.*, 508 F. Supp. 1322 (E.D.N.Y. 1981)).

230. But what about the situation whereby, for instance, all of the activity involving the sale at predatory prices by a Canadian firm to a U.S. customer for consumption in the United States, including transfer of title, takes place in Canada? Although clearly within the subject matter jurisdiction of the antitrust laws (*infra*, ¶ 250-54), has the Canadian firm crossed the personal jurisdiction due process threshold?

231. In *Asahi Metal Industry Company Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), the Supreme Court refused to find personal jurisdiction over a Japanese company that manufactured tire valve assemblies in Japan and sold them to several non-U.S. tire manufacturers which then sold the assembled tires in the United States. The Court, without explicitly ruling on whether the minimum contact standard was

met,<sup>114</sup> held that personal jurisdiction could not be established because the Japanese company, although presumably aware that the “stream of commerce” would direct some of its tire valves into the forum state, never contemplated that its limited sales to the Taiwanese company in Taiwan would subject the Japanese company to lawsuits in California. The serious burdens of suit in the United States outweighed the minimal interests on the part of the plaintiff or the forum state, and thus the exercise of personal jurisdiction was unreasonable and unfair. (*Id.* at 105-07). The logical corollary to the Asahi holding is that when the defendant sells a product to a U.S. purchaser purposefully for consumption (or use) in the United States, particularly when it intentionally structures the transaction to avoid direct contact with the United States, personal jurisdiction is reasonable and fair.

(b) Canada

(i) Venue and Service of Process

232. A prosecution for an alleged violation of the criminal provisions of the Competition Act is governed by the rules of criminal procedure and may be initiated in the appropriate provincial Superior Court by the Attorney General of Canada or by his counterpart in any of the provinces. In addition to the rules as to venue provided in the Criminal Code, the Competition Act provides that a prosecution of a corporation may be initiated in any territorial division in which the corporation has its head office or a branch office and, where the accused is not a corporation, in any territorial division in which the accused resides or has a place of business (Section 68). Prosecutions also may be initiated by the Attorney General of Canada. However, no prosecution may be instituted in the Federal Court against an individual in respect of an alleged conspiracy under Section 45 without the consent of the individual (Section 73).

233. An action for compensation relying on Section 36 of the Competition Act can be commenced in the Federal Court of Canada (Section 36). An action based on the Competition Act or on common law principles could also be commenced in the Superior Court of one of the provinces under the applicable rules of court. Ontario is illustrative. The Ontario Rules of Civil Procedure (“Ontario Rules”) (Rule 17) provide for service of process on a defendant outside of the jurisdiction without a court order where the proceeding consists of a claim, *inter alia*, in respect of a tort committed in Ontario and in respect of damage sustained in Ontario arising from a tort or breach of contract wherever committed. The Ontario Rules also provide for service on a person ordinarily resident or carrying on business in Ontario, and would be applicable to a defendant and sales personnel regularly visiting customers in Ontario and obtaining orders even if no permanent establishment is maintained.

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<sup>114</sup> If the various opinions in the case are read carefully, one may be able to muster a five member majority for holding that sufficient contacts took place.

In addition, the Ontario Rules also provide that a court may grant leave to serve an originating process at its discretion. Provision is made in the Ontario Rules for a party to challenge the jurisdiction of the Ontario court on the basis, *inter alia*, that Ontario is not a convenient forum for the hearing of the proceeding. Although it might be questioned whether an action on Section 36 of the Competition Act is an action arising from a tort and therefore covered by the rule providing for service without a court order, there appears no doubt that a court might grant leave for service out of Ontario in a case where the plaintiff is claiming compensation for alleged predatory pricing. In that case, having regard to principles enunciated in other types of cases, the damage is clearly suffered in Ontario and a substantial part of the evidence will relate to the effect in Ontario to the claimant.

(ii) Personal Jurisdiction

234. The issue of whether or not jurisdiction is properly exercised over a person with regard to an alleged violation of the Competition Act or a private action for damages is a combination of the considerations dealt with in this study under Venue and Service of Process and Subject Matter Jurisdiction. An accused person or defendant will be properly before the court if the rules as to venue and service of process have been observed. Relevant Canadian statutory principles and decisions blend considerations of subject matter and personal jurisdiction. The Competition Tribunal Act provides that the Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record. Notwithstanding the recent decision of the Federal Court of Appeal in *Chrysler Canada Ltd. v. Competition Tribunal*, Federal Court of Appeal (July 10, 1990, under appeal to the Supreme Court of Canada), that the Tribunal does not have power to enforce its orders by contempt proceedings, there should be no doubt that the Tribunal has the same powers as any Superior Court (federal or provincial) to assert jurisdiction over persons (Competition Tribunal Act, s. 8(2)). The Rules of the Tribunal provide that where a question arises as to the practice or procedure to be followed in cases not provided for by the Rules, the practice and procedure set out in the Federal Court Rules will be followed, with such modifications as the circumstances require (Rule 48). The Federal Court Rules set out a procedure for service out of the jurisdiction (Rule 307).

(c) Summary Re: Personal Jurisdiction and Service of Process

235. The laws of Canada and the United States clearly support personal jurisdiction in the case of transborder predatory pricing.<sup>115</sup> Simi-

<sup>115</sup> To the extent that a firm injured by unfair pricing wishes to attack under its own laws

larly, both countries have long included rules providing for notifying persons outside of the territorial jurisdiction of a court that they are impleaded in process that has been initiated before the court.

236. However, if persons do not physically or otherwise subject themselves to the jurisdiction of the court, there remains the questions of gathering evidence and effective enforcement of any judgment that might be rendered. Effective enforcement of any order for compensation will depend upon the availability of assets of the defendant within the territorial jurisdiction of the court rendering judgment and, in the absence of sufficient assets (or desire to continue doing business) within that territory, upon the willingness of the foreign court to enforce the award of that court.

## 2. Jurisdiction Over Activities (“Subject Matter” Jurisdiction)

237. Notwithstanding that by the jurisdictional rules of any court or tribunal, a person, whether individual or corporate, may be properly before the court or tribunal to answer a complaint or charges, there remains not only the question of whether that court or tribunal is the appropriate forum for adjudication of the issues but also the question of which laws should be applied to resolve the issues.

238. It is our position that there is consensus among jurists that a court may properly assert subject matter jurisdiction over an activity that is designed to have an effect, or has a substantial effect, on economic activity within the territorial jurisdiction of that court. Therefore, there should be no objection in the Canadian-U.S. context to the assertion of subject matter jurisdiction by Canadian or U.S. courts and tribunals in circumstances where predatory pricing is initiated in one country but targeted at competitors in the other country.

239. As between Canada and the United States, there should not be considered to be a problem of extraterritoriality or conflict of jurisdiction in cases where the activity involved is selling goods from one country into the other. We are here concerned about the impact on domestic commerce (*i.e.*, competition in the national market) of sales deliberately made (either directly or indirectly) into the import market. The question is whether such sales are in violation of the rules of the market in which they are intended to participate. The debate about extraterritoriality is largely irrelevant to the subject matter of this report.

240. The so-called extraterritoriality problem arises in cases where activity is lawful in one country (even blessed by government as in the uranium situation) but alleged to be unlawful in the other country. In the context of this report, we are concerned about the effectiveness of each country’s laws to reach pricing or other market behavior initiated in

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exclusionary behavior in the other country, the analysis is unchanged. Of course, personal jurisdiction is not an issue at all if the firm proceeds in the courts of the country in which the exclusionary conduct by the competitor is taking place.

one country but intended to have effect in the other. The extraterritorial debate would be relevant only if it is perceived that in some cases one country might object to enforcement action in the other country, that is, where a Canadian exporter would be challenged in a U.S. proceeding on the basis that his action violated U.S. law although legal in Canada, or vice versa. For example, a Canadian exporter's prices to a U.S. customer might be challenged as constituting tertiary line discrimination with effects proscribed by U.S. law while not being in breach of any Canadian law. However, it is hard to imagine that this situation will occur in practice with any significant frequency. In any event, an appropriate bilateral mechanism could be established to determine which of differing principles should apply ("choice of law") in any particular case. We can conjure up theoretical problems about subject matter jurisdiction and choice of law in connection with predatory pricing, but we should not lose sight of the fact that such problems could have occurred before the FTA, can occur now, and rarely, if ever, do occur.

(a) Canadian Law

241. The potential reach of Canadian competition law has not been tested by aggressive efforts at enforcement against corporations not resident or doing business in Canada. The reason for this may be that there has been little or no occasion to do so, or that the responsible government officials have concluded that, for practical reasons related to gaining jurisdiction in personam and enforcement of orders, attempts at enforcement against corporations and individuals with no presence in Canada would be futile.

242. In the surgical blades case, *R. v. Campbell*, ([1964] 2 O.R. 487, 46 D.L.R. (2) 83 (1965) Ont. C.A.; *affirmed* without written reason [1966] 4. C.C.C. 333 n. (S.C.C.)), although the unlawful conduct was that of the U.S. manufacturer in attempting to maintain resale prices in Canada through independent wholesale distributors, proceedings were instituted only against the manufacturer's representative in Canada who was convicted of aiding and abetting price maintenance. Evidently no attempt was made to prosecute the U.S. manufacturer.

243. The Royal Commission on Farm Machinery reported a collusive arrangement being carried on outside of Canada to prevent distribution in Canada other than through the distribution arrangements in Canada chosen by the manufacturers. Although one of the corporate organizations involved was Massey Ferguson Limited, a company incorporated, headquartered and carrying on major business activities in Canada, it was apparently concluded that the collusive arrangements could not be reached by Canadian legal processes. Statutory amendments directed at the implementation by a company in Canada of a foreign arrangement, misleading advertising (in which case the Canadian importer is made responsible), and refusal to supply by a foreign supplier are tentative and very limited attempts to reach effectively beyond Canada's borders

(Competition Act, ss. 46, 52(2) and 84).<sup>116</sup>

244. The Competition Act, as criminal legislation, is limited by the general principle that “no person shall be convicted . . . of an offense committed outside Canada.” (Criminal Code, Section 6(2)) Section 6(2) was considered in *Libman v. The Queen* [1985], 2 S.C.R. 178; 21 C.C.C. (3rd) 206; 21 D.L.R. (4th) 174). The Supreme Court of Canada summarized the relevant principle as follows (per LaForest, J. [1985] 2 S.C.R. 178 at 211-12):

We must take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence. One must then consider whether there is anything in those facts that offends international comity. (p. 211)

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[A]ll that is necessary to make an offense subject to the jurisdiction of our [Canadian] courts, is that a significant portion of the activities constituting that offense took place in Canada. . . . It is sufficient that there be a “real and substantial” link between the offence and this country, a test well known in public and private international law. (p.212-13). . . . The outer limits of the tests of [a real and substantial link] may . . . well be co-terminous with the requirements of international comity. (p. 213)

245. Although the general principle is that no person shall be convicted in Canada for an offense committed outside of Canada, the question of where an offense is committed is especially difficult in circumstances involving economic effects. The *Libman* case involved physical acts in Canada as well as elsewhere, and the decision is inconclusive in that it does not deal with the case where only the effects of acts done outside Canada are felt within Canada. In the case of a simple export/import contract between a U.S. exporter and a Canadian importer, the participation of the importer may be the necessary and sufficient link. This reasoning should apply even if the act of contracting occurs outside of Canada. In any event, the process of importing the goods into Canada (or accepting services in Canada) is an act in Canada. Statutory clarification is desirable.

246. Canada has not hesitated to extend its jurisdiction in special cases. For example, Section 7 of the Criminal Code provides extensive jurisdiction with regard to offenses in relation to aircraft and international air navigation. Also, Section 465(4) of the Code is expressly extra-territorial in that it provides that: “every one who, while in a place outside Canada, conspires with anyone to do anything referred to in subsection 1 in Canada shall be deemed to have conspired in Canada to do that thing.” Among other things, subsection 1 covers everyone who

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<sup>116</sup> See Castel, deMestral and Graham, *International Business Transaction and Economic Relations*, chapter 10, part 3, page 449 and following. See also Castel, *Canadian Conflicts of Laws*, chapter 11 and chapter 13.

conspires with anyone to commit an indictable offense or an offense punishable upon summary conviction.

247. Where a person is alleged to have conspired to do anything that is an offense by virtue of subsection (3) or (4), proceedings in respect to that offense may, whether or not that person is in Canada, be commenced in any territorial division in Canada, and that accused may be tried and punished in respect of that offense in the same manner as if the offense had been committed in that territorial division.

248. It is apparent therefore that the principle is well established that Canadian law may be given extraterritorial reach. All of the provisions of the Competition Act deal with effects in Canada. A review of relevant principles of Canadian law leads to the conclusion that there is no reason why Canadian law should not be applied to transborder pricing practices and to persons outside of Canada with respect to their intentions with regard to those prices. In any event, there is no constitutional impediment to the enactment of a clear declaration that the plain meaning of the provisions of the Competition Act should be applied; for example, that the offense of predatory pricing may be committed by a person regardless of where that person is when the pricing action is initiated.

249. A provision added to the Competition Act in 1976 may implicitly limit the reach of the Act by providing specifically that any *company* that carries on business in Canada and that gives effect in Canada to a directive from outside Canada to implement an arrangement that would, if entered into in Canada, be a breach of Section 45 (summarized above) is guilty of an indictable offense (Section 46). This provision is operative whether or not any director or officer of the company in Canada knew of the foreign arrangement. The provision may therefore be properly interpreted as being intended to achieve effective jurisdiction over a person not within the personal jurisdiction of a Canadian court, and not to indicate that a Canadian court would not have subject-matter jurisdiction over that person's activities which occur outside Canada. Furthermore, it does not follow that this particular provision should be interpreted to imply that other provisions of the statute do not have extraterritorial reach. The addition of the provision does indicate that the purpose of the Competition Act is to protect the Canadian market from collusion (and presumably other anticompetitive action) wherever it occurs.

#### (b) United States Law

250. The effects doctrine is well recognized in U.S. law. The doctrine originated in *U.S. v. Aluminum Company of America*, (148 F.2d 416 (2nd Cir. 1945)), where the court held that the United States had jurisdiction over conduct which impacts upon its territory, even if the conduct was done by a foreigner and took place outside the United States. The "effects" doctrine of *Alcoa* has been widely applied in subsequent cases, with the relatively minor modification that the challenged conduct would have an effect which was "direct, substantial and reasonably foreseeable" in

order to be judged an antitrust violation.<sup>117</sup>

251. This clarification was codified with respect to export transactions by the Foreign Trade Antitrust Improvement Act (“FTAIA”). The 1982 Act provided that export commerce should be subject to U.S. antitrust law only if the conduct has a “direct, substantial, and reasonably foreseeable” effect on domestic commerce or import trade or on the export commerce of a U.S. person engaged in such trade or commerce.<sup>118</sup> With respect to the latter, the effect on export commerce must cause “injury to export business in the United States”<sup>119</sup>

252. The potentially harsh effects of an overreaching “effects” doctrine has been tempered in a number of U.S. courts by the application of a “jurisdictional rule of reason,” whereby a court weighs certain factors such as national and vital interest of the respective states, in addition to effect on U.S. commerce, in order to determine whether the exercise of jurisdiction is proper in a given case (see, *Timberlane Lumber v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), cert. denied, 472 U.S. 1032 (1984)).<sup>120</sup> The jurisdictional rule of reason is reflected in Restatement (3rd) of Foreign Relations Law of the United States, Section 415. Furthermore, under the FTAIA, the court retains the authority to refuse to assert jurisdiction on comity grounds, even if the statutory test is satisfied. (See H.R. Rep, *supra*, fn. 119 at 7-8; *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, fn. 8 (9th Cir. 1988)).

253. Other courts have rejected the *Timberlane* balancing approach, adhering strictly to the effects test. (See *Laker Airways v. Sabena, Belgian World Airline*, 731 F.2d 909 (D.C. Cir. 1984) (observing that courts were ill-equipped to pass judgment on foreign policy issues and applying a black line test that accepted jurisdiction “whenever conduct is intended to, and results in, substantial effects within the United States”).<sup>121</sup> This is also the position of the DOJ (see *supra*, fn. 118).

254. Clearly, there are no subject matter jurisdiction obstacles to the application of domestic competition law in either Canada or the United States to predatory pricing taking place within the respective domestic market. It may be an issue, however, with respect to exclusionary an-

<sup>117</sup> See Restatement (2d) of Foreign Relations Law of the United States § 18 (1965).

<sup>118</sup> The DOJ, for its own enforcement purposes, also applies the “direct, substantial and reasonably foreseeable standard” to import commerce and mergers or acquisitions. See Antitrust Enforcement Guidelines for International Operations, 4 Trade Reg. Report (CCH) ¶ 13,109 at 20,611.

<sup>119</sup> According to its legislative history, the standard set forth in the FTAIA also is intended to apply to wholly foreign transactions which affect domestic commerce or a domestic competitor. H.R. Reg. No. 97-686, 67th Cong., 2nd Sess., 9-10.

<sup>120</sup> There has been some confusion, however, as to whether the jurisdictional rule of reason goes to the existence of jurisdiction or to whether a state should refuse to exercise jurisdiction on comity grounds.

<sup>121</sup> In *Nat'l Bank of Canada v. Interbank Ass'n*, 666 F.2d 6 (2nd Cir. 1981), the court applied a similar test but required, with respect to international antitrust cases, an intended “anticompetitive” effect. The rule of reason analysis was also rejected by the EC in the *Wood Pulp* case. Case 89/85 (Ct. of Justice of the Eur. Com., Sept. 29, 1988).



ticompetitive conduct in one country that affects the export trade of the other. For instance, the conduct may not (under U.S. law) be found to have the requisite “direct, substantial and reasonably foreseeable” anticompetitive effect on U.S. export commerce. Moreover, the activity may be perceived by the court to be the product of an articulated State policy, in which case its challenge raises classical issues of extraterritoriality. In any event, these jurisdictional impediments are largely irrelevant if the aggrieved exporter has access to the courts of the country in which the exclusionary anticompetitive behavior is taking place (although State action may still be available as a defense).

(c) Summary Re: Subject Matter Jurisdiction

255. There is no doubt that U.S. competition law reaches predatory pricing intended to have an anticompetitive effect in the U.S. market. Similarly, U.S. law may reach exclusionary conduct in Canada, provided it has a direct, substantial and reasonably foreseeable effect on U.S. export commerce.

256. The potential reach of Canadian competition law has not been tested, but there is nothing that would prevent the application of an “effects” doctrine similar to that applied under U.S. law. Furthermore, Canada has not hesitated to extend jurisdiction in special cases. Statutory clarification is desirable.

257. Moreover, application of U.S. or Canadian domestic competition law to such anticompetitive conduct comports with traditional international law principles governing subject matter jurisdiction. To the extent that prosecution impacts on foreign sovereign interests, the courts of both countries are equipped to proceed with appropriate and reasonable restraint. Nevertheless, it is suggested that Canada and the United States establish a uniform set of choice of law principles to be applied in the context of the FTA.

*C. Gathering Evidence*

1. Pre-Trial Discovery

258. Pre-trial discovery in the context of this study could be relevant in two circumstances:

- (1) where discovery is sought in Canada in support of an action in a U.S. court; and
- (2) where discovery is sought in the United States in support of an action in a Canadian court.

259. The situation in which discovery would be sought, for instance, in Canada in connection with an action in the courts of Canada does not raise problems essentially relevant to this study. The converse is also true. Similarly, if a Canadian claimant launched an action in a U.S.

court alleging injury under U.S. law, the action would be governed entirely by the applicable U.S. law. Again, the converse is also true.

(a) Discovery In Canada In Support of an Action in a U.S. Court

260. Discovery in Canada in the case of an action in a U.S. court can be achieved only through the process of the Canadian court system. A witness in Canada can be compelled to cooperate to provide evidence for use in an action in a U.S. court only through the appropriate process in a Canadian court. Therefore, even if the pretrial discovery rules in the United States are broader than they are in the Canadian jurisdictions (they have been described by some commentators as being “overly broad”), a witness in Canada would be protected by the screen of Canadian procedure.<sup>122</sup>

261. The laws of Canada and the Canadian provinces generally provide for the implementation of Letters of Request.<sup>123</sup> Ontario is illustrative. The Ontario Evidence Act (“Ontario Act”) provides that upon receipt of a request from a court or tribunal of competent jurisdiction in a foreign country for a purpose for which a Letter of Request could be issued under the Ontario Rules of Civil Procedure, an Ontario court may order the examination of a witness and the production of documents (Section 60). The Ontario Act also provides that a person subject to such an examination and order for production of documents shall not be compelled to answer any questions or produce any documents that he would not be required to answer or produce in an action in the Ontario court (Section 60(3)).

262. Ontario courts have ruled that production of documents will be ordered only if the material is required for a trial and not for discovery. (*Re RCA v. Rauland Corporation*, [1956] O.R. 630 at 635; *National Telefilm Associates, Inc. v. United Artists Corporation*, 14 D.L.R. (2nd) 343, at 346; and *Re Raychem Corporation v. Canusa Coding Systems, Inc.*, [1971] 1 O.R. 192 at 197). See also *Xerox v. IBM*, (1976), 24 CPR (2nd) 175, where the rule was again enunciated that discovery of either witnesses or documents is not permitted and an order to examine a witness will be granted only if it is made clear that the taking of the evidence is

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<sup>122</sup> It should be kept in mind, however, that under U.S. law, a *party* to a federal court action who, through no fault of his own, is unable to comply with discovery requests concerning evidence located in Canada, may be sanctioned under Rule 37 of the Federal Rules of Civil Procedure. The extent of permissible sanctions may be limited, however, by the Supreme Court’s decision in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), in which the Court held that severe sanctions were not appropriate when failure to comply with the discovery request was not the result of bad faith (such as courting impediments) on the part of the non-complying party. For a detailed discussion, see Restatement (3d) of the Foreign Relations Law of the United States §§ 442, 473.

<sup>123</sup> Under U.S. law, the issuance of a letter request is governed by 28 U.S.C. § 1783 and Fed. R. Civ. P. 28(b).

for the purpose of trial.<sup>124</sup> Ontario courts have also expressed a conservative approach to the enforcement of orders for production holding that enforcement will be granted only if it is absolutely necessary for the purpose of justice and only if the effect would not be contrary to Canadian public policy. The issues were canvassed in the Westinghouse uranium litigation (*Re Westinghouse Electric Corporation and Duquesne Light Co. et al.*, (1977), 16 O.R. (2d) 273; and *Gulf Oil Corporation v. Gulf Canada Limited*, (1980), 31 N.R. 451, Supreme Court of Canada).<sup>125</sup> The special facts of the uranium case should not be taken to establish a precedent with regard to any litigation in the United States. The uranium cases involved significant questions of Canadian public policy including the Federal Uranium Information Security Regulations. In principle, there would appear to be no reason why Canadian judicial assistance for obtaining evidence would not be accorded to a plaintiff who was claiming in an action in a U.S. court compensation for injury resulting from a violation of U.S. antitrust law just as in respect of any claim for compensation based on other laws.

263. The Canada Evidence Act also contains provision for the enforcement of Letters of Request (Section 46). The Canada Evidence Act applies to all criminal proceedings and to all civil proceedings and other matters respecting which Parliament has jurisdiction (Section 2).<sup>126</sup>

264. In granting assistance in connection with an action in a U.S. court, a court in Canada would have to consider the Ontario Business Records Protection Act (R.S.O. 1980 c. 56) ("Ontario Business Act") and the Quebec Business Concerns Records Act (R.S.Q. 1977 c. D-12). The Ontario Business Act prohibits compliance with an order of any legislative, administrative or judicial authority in any jurisdiction outside of Ontario to provide business records. On its face, the Ontario Business Act is unqualified except as to furnishing documents to a head office, certain matters in connection with the Securities Act and transmission of documents provided for, by or under any other law of Ontario or of Canada. However, it appears to contemplate that action will be taken by the Attorney General in appropriate circumstances to prohibit the delivery of business records. The Quebec statute is virtually identical. There has been little significant activity in recent years under either statute.

265. Reflecting continuing concern about the extraterritorial reach of U.S. legislation, Canada passed the Foreign Extraterritorial Measures Act in 1984 (RSC 1985, chapter F-29). In summary, this statute provides for blocking action in a situation:

where, in the opinion of the Attorney General of Canada, a foreign

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<sup>124</sup> See Kokonis/Kelly, *World Litigation Law and Practice*, Vol. A.1, Canada, Matthew Bender, looseleaf. Chapter 10, Section 10.02.

<sup>125</sup> See discussion in Kaiser, *Competition Law of Canada*, chapter 13.

<sup>126</sup> Section 46 of the Canada Evidence Act also permits an application for an order directing the taking of evidence to be made directly to the Supreme Court of Canada. The Section also refers specifically to evidence in any civil, commercial or criminal matter.

tribunal has exercised, is exercising or is proposing or likely to exercise jurisdictions or powers of a kind or in a manner that has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe Canadian sovereignty. (s. 3)

266. The Attorney General may prohibit or restrict the production of documents and the doing of any act in Canada to produce the documents in a proceeding before a foreign tribunal. There is a similar provision in the Competition Act providing for an application by the Director of Investigation and Research to the Competition Tribunal (Section 82). Applications under the Foreign Extraterritorial Measures Act and the Competition Act are discretionary, and therefore in their present form should pose no impediment to the enforcement of predatory pricing and other laws in accordance with the mutual interests of Canada and the United States under the FTA.

(b) Discovery in the U.S. in Support of an Action in a Canadian Court Against a U.S.-Based Defendant

267. Assistance to foreign tribunals and to litigants before such tribunals is governed by 28 U.S.C. § 1782. Prior to 1964, this section embodied a restrictive policy that provided very limited assistance to foreign tribunals. The 1964 amendments marked a significant departure from Congress' cautious approach to international judicial assistance. Section 1782 reads in pertinent part as follows:

(a) The District Court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country . . . A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.<sup>127</sup>

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

268. Unlike its predecessor, the statute is not limited to the taking of

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<sup>127</sup> A letter rogatory or request may be transmitted through diplomatic channels or directly to the U.S. tribunal or agency. 28 U.S.C. § 1781.

depositions and testimony, but enables federal courts to assist in obtaining documents and other tangible evidence. Congress also expanded the statute to include evidence for use in a foreign "tribunal" as opposed to "court," taking notice of the growth of administrative and quasi-judicial proceedings all over the world. The 1964 amendments also extend judicial assistance "to an interested person" as opposed solely to the foreign tribunal. "Interested person" includes both actual litigants and foreign officials.

269. Finally, Congress eliminated the requirement that the assistance must be for use in a "pending" proceeding. Assistance is proper as long as the information is "related to" or "will likely be of use in" a civil or criminal proceeding before a foreign tribunal. (See *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1154 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 784 (1989); *In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976)). Only where the district court suspects that the request is for a "fishing expedition" or a vehicle for harassment and that a proceeding is not very likely to occur, should the district court deny the request.

270. *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Manitoba, Canada*, 488 F.2d 511 (9th Cir. 1973)), the court refused to honor a request for judicial assistance from the Canadian Commission of Inquiry because it was not found to be a "foreign tribunal" within the meaning of § 1782, which, according to the court,

was not intended to and does not authorize the United States courts to compel testimony on behalf of foreign governmental bodies whose purpose is to conduct investigations unrelated to judicial or quasi-judicial controversies.

271. This does not, of course, bar an official member of a nonadjudicatory institution from being an "interested person" under § 1782, and thereby requesting judicial assistance in the gathering of evidence for eventual use before an adjudicatory tribunal. (*In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d at 1155-56, n. 10).

272. One of the express purposes of the 1964 amendments was to encourage other nations to follow the lead of the United States and to adjust their procedures to afford U.S. parties reciprocal cooperation. (1964 U.S. Code Cong. & Admin. News at 3792-94). Nevertheless, application of the statute does not depend upon reciprocity. *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 135 (3rd Cir. 1985). If the technical requirements of the statute are met, the court merely need be satisfied that the evidence would be obtainable under the laws of (though not necessarily admissible in) the foreign country, and that neither the foreign country nor the United States recognizes any privilege that would forbid the discovery of the information. (*Id.* at 136).

273. Furthermore, an American court will not lightly assume that an

American defendant (or third party) from whom evidence is requested will be denied his constitutional rights, particularly when the foreign judicial system is of unimpeachable integrity, such as that of Canada. For example, *In Re Letter Rogatory from Justice Court, District of Montreal, Canada*, (523 F.2d 562 (6th Cir. 1975)), the court of appeals upheld the trial court's refusal to quash a subpoena issued in an attempt by Canadian prosecutors to obtain records from a Detroit bank relevant to defendant in a Canadian prosecution, even though defendant alleged that there was potential denial of rights under the Sixth Amendment of the U.S. Constitution. The court was guided by the Canadian government's assurance that the defendant would have an opportunity to cross-examine deponent at the hearing to be held by the rogatory commission, and observed that it could not be assumed that defendant's constitutional rights would receive no protection under Canadian procedures. A similar motion to stay the taking of testimony under subpoena issued pursuant to letter rogatory received from a Tokyo court, in order to allow consideration of the potential applicability of the Fifth Amendment privilege against testifying, was held to be premature where no witness had yet made any claim of privilege. (*In Re Letters Rogatory from Tokyo, Japan*, 539 F.2d at 1219). Nevertheless, as a general rule, the procedures followed by the foreign tribunal must comport with U.S. notions of due process of law.

274. Finally, a U.S. court may refuse to cooperate in the production of evidence if the substance of the underlying prosecution or investigation is repugnant to U.S. public policy or otherwise threatens important U.S. interests. For example, the United States protects its interests in important technical data through the Export Administration Regulations, 15 C.F.R. § 379 et. seq. Under these regulations, the "export of technical data" is defined to include "any release of technical data of U.S. origin in a foreign country." (15 C.F.R. § 779.1(b)(1)(iii)). Similarly, Congress responded to the Arab boycott by prohibiting the United States from furnishing the boycotting countries with information concerning the race, religion, sex or national origin of any other United States person. (50 U.S.C. App. § 2407 (1982)). These statutes bear little relevance to requests for information in the context of the application of Canadian competition laws.

## 2. Investigation by Government Agencies

275. The Competition Act does not contain a limitation to the national territory of Canada of any of the formal powers available to the Director. The same is true with respect to the FTC and DOJ in the United States. Of course, any demands or requests for information served outside of their respective territories would not carry the same legal compulsion that they do within, and would follow the same analysis as presented under the heading "Pretrial Discovery." Investigation powers are limited to the national jurisdiction of a court or other tribunal that

under national law has the power to authorize the search of premises and seizure of documents, the operation of computer systems, the examination of persons thought to have relevant knowledge, as well as to compel those persons to answer questions and supply documents, and to impose appropriate penalties for failure to respond to proper orders with respect to any of those matters.

(a) Official Cooperation

276. Unlike the case of the private litigant, however, “official cooperation” provides an alternative avenue for the gathering of information. Recent developments in the evolution of cooperation in law enforcement reflects the growing recognition of the common interest of countries, especially the United States and Canada, in protecting their essential interests by cooperating with each other in areas such as securities regulation, environmental matters, initiatives against trading in drugs, etc.

277. Canada and the United States recently implemented (February 1990) the Canada-United States Treaty on Mutual Legal Assistance in Criminal Matters, commonly referred to as “MLAT.” In that predation and collusion are criminal offenses under the Competition Act and may be prosecuted as such under the Sherman Act, the provisions of the treaty are now available to facilitate the gathering of evidence to support a prosecution. The treaty was aimed at aiding the prosecution of a wide variety of “modern” criminals, including white collar criminals. It provides for a broad range of cooperation in criminal matters: the taking of testimony or statements of a witness, the provision of documentation, the exercise of requests for search or seizure, the serving of documents, and the provision of assistance in proceedings relating to the forfeiture of the proceeds of crime and the collection of fines.

278. In the competition field, the Memorandum of Understanding (“MOU”) between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws (March 9, 1984) provides a basis on which to build a mechanism for cooperation in the enforcement of competition law to supplement the procedures available under MLAT. U.S. agreements with other countries are also instructive. The MOU is still largely defensive in its tone and content. It developed through several iterations from the Rogers-Fulton Agreement of 1959 which resulted from Canadian objections to the assertion by the United States of subject-matter jurisdiction over agreements that had been made in Canada with regard to the Canadian radio patents pool operated by Canadian General Electric, Canadian Westinghouse and others. The present MOU remains essentially an undertaking to provide notice when one party proposes action that is likely to affect the interest of the other. Nevertheless it provides a promising basis upon which to expand cooperation among the agencies responsible

for the administration of the competition laws.<sup>128</sup>

279. Agreements and established procedures in other areas of common interest are instructive and helpful. In that connection, the 1988 MOU between the SEC and major Canadian securities commissions (Ontario, Quebec and British Columbia) represents a significant step in cooperative activity to protect the securities markets of both countries. It is especially interesting that the document expressly recognizes that some of the undertakings may be beyond the legal power of the respective administrators, but none-the-less they undertake to use their best efforts to overcome any such limitations and to attempt to achieve necessary legislative action to that end.

Another important provision for cooperation is found in the Canada-United States Income Tax Convention. Article XXVII states:

#### Exchange of Information

281. 1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article I (Personal Scope). Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the taxation laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of the administration and enforcement in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

282. 2. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall endeavor to obtain the information to which the request relates in the same way as if its own taxation was involved, notwithstanding the fact that the other State does not, at that time, need such information. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall endeavor to provide information under this Article in the form requested, such as depositions of witnesses and copies of unedited original documents (including books, papers, statements, records, accounts or writings), the same extent such depositions and documents can be obtained under the laws and administrative practices of that other State with respect to its own taxes.

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<sup>128</sup> A recent example of U.S.-Canadian cooperation involves the revision and approval by the FTC of a final order arising out of a French company's acquisition of a Canadian company that is alleged to have anticompetitive effects in the U.S. market for rabies vaccines. The final order, modified after officials belatedly invoked the antitrust MOU, mandates the leasing of part of a business, but requires the lessee be approved by both the FTC and Investment Canada.



283. 3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; or

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (order public).

284. 4. Notwithstanding the provisions of Article II (Taxes Covered), for the purposes of this Article the Convention shall apply:

(a) in the case of Canada, to all taxes imposed by the Government of Canada on estates and gifts and under the Income Tax Act; and

(b) in the case of the United States, to all taxes imposed under the Internal Revenue Code.

285. The following technical explanation of the Convention released by the U.S. Treasury Department was adopted by the Canadian Department of Finance.

286. If a Contracting State requests information in accordance with Article XXVII, the other Contracting State shall endeavor, pursuant to paragraph 2, to obtain the information to which the request relates in the same manner as if its own taxation were involved, notwithstanding the fact that such State does not need the information. In addition, the competent authority requested to obtain information shall endeavor to provide the information in the particular form requested, such as depositions of witnesses and copies of unedited original documents, to the same extent such depositions and documents can be obtained under the laws or administrative practices of that State with respect to its own taxes.

287. Paragraph 3 provides that the provisions of paragraphs 1 and 2 do not impose on Canada or the United States the obligation to carry out administrative measures at variance with the laws and administrative practice of either State; to supply information which is not obtainable under the laws or in the normal course of the administration of either state; or to supply information which would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosures of which would be contrary to public policy. Thus, Article XXVII allows, but does not obligate, the United States and Canada to obtain and provide information that would not be available to the requesting State under its laws or administrative practice or that in different circumstances would not be available to the State requested to provide the information. Further, Article XXVII allows a Contracting State to obtain information for the other Contracting State even if there is no tax liability in the State requested to obtain the information. Thus, the United States will con-

tinue to be able to give Canada tax information even if there is no U.S. tax liability at issue.

288. We note particularly that the treaty calls for the requested country to use its powers to collect information, even though it does not need that information for its own purposes. According to the report of the U.S. Senate Committee on Foreign Relations, “It is intended that the requested country may use those powers even if the requesting country could not under its own laws. Thus, it is not intended that the provisions be strictly reciprocal.”

289. The objectives of the FTA imply that measures to facilitate action designed to further the objectives should be put in place in both countries. In that one of the stated objectives of the FTA is to “facilitate conditions of fair competition within the free-trade area,” (Article 102(b)) it follows that mutual assistance in the enforcement of parallel and similar competition rules should be provided. Sharing of information is indicated, as in the recently signed agreement with respect to the regulation of the securities markets.

#### (b) Confidential Information

290. Information sharing may raise difficult issues about the handling of confidential information. Confidentiality requirements, however, should not present an obstacle to full exchange of information between two governmental entities (as opposed to exchanges between a governmental entity and a private party), although some statutory amendment is likely required in both Canada and the United States to achieve this result.<sup>129</sup>

#### (i) Confidentiality of Information Submitted to the FTC and Department of Justice

291. Section 31(c) of the FTC Act grants confidentiality to “trade secrets or commercial or financial information” submitted to the FTC that is marked “confidential” by the submitter. It also provides a mechanism for judicial determination of a claim that a document falls within the confidential category claimed. Section 6(f) of the FTC Act imposes the additional obligation on the FTC to consider whether information constitutes a trade secret or confidential commercial information even where it is not so marked by the submitter. Although the FTC may not make public any of this information,<sup>130</sup> it is authorized to share such information with federal or state law enforcement agencies, if the officer

<sup>129</sup> For example, Article 1904, ¶ 14 of the FTA calls for the adoption of rules governing the disclosure of business proprietary information in the context of binational panel review of antidumping and countervailing duty determinations. The U.S. implementing legislation provides for the production of such proprietary material. 19 U.S.C.A. § 1677f(d) (1990 Supp).

<sup>130</sup> The release of this information is explicitly exempt from mandatory disclosure under the Freedom of Information Act.

or employee to whom the information is to be disclosed certifies that it will be maintained in confidence and will be used only for official law enforcement purposes. The FTC also will share information obtained by it with a committee or subcommittee of Congress. Such disclosures are not deemed to be releases to the "public." (*See Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 979 (D.C. Cir. 1976)).<sup>131</sup>

292. Given the willingness of Congress to authorize the FTC to provide information to other law enforcement agencies to be used for official law enforcement purposes, it should not be a formidable task to extend such cooperation to Canadian law enforcement officials, provided the information is not used in a manner repugnant to U.S. public policy.

293. Information submitted to the Division (Department of Justice) pursuant to a civil investigative demand may be used by the Division in any adjudicatory proceeding and may also, subject to certain conditions, be made available to the FTC. Beyond this, access to the information is prohibited without the consent of the person producing the material or, in the case of request for production of discovery, the source of the material. (15 U.S.C. § 1313 (c)(3)). This prohibition is very stringent and has been held to apply to state law enforcement officials, even those seeking to enforce the federal antitrust laws. (*In Re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 34, n.22 (2nd Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983)). The materials are also exempt from disclosure under the Freedom of Information Act. (15 U.S.C. § 1314(g)).

294. Information voluntarily disclosed to the Division is not automatically exempted from public disclosure, but the Division is generally willing to negotiate confidentiality, in which case disclosure may be prohibited by the Trade Secrets Act. (18 U.S.C. § 1905). The Trade Secrets Act makes it a crime for any federal agency employee to disclose "to any extent not authorized by law" information which "relates to the trade secrets, processes, operation, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association." (*Id.*)<sup>132</sup>

#### (ii) Confidentiality of Information Submitted Under the Canadian Competition Act

295. Under the Competition Act, information acquired under the powers of investigation provided for in the Competition Act may not be disclosed "except to a Canadian law enforcement agency or for the pur-

<sup>131</sup> Materials submitted to the FTC pursuant to the mandatory reporting of certain information related to mergers under the Hart-Scott-Rodino Act may not be shared with state law enforcement agencies. 15 U.S.C. § 18a.

<sup>132</sup> As noted above, the Division's criminal enforcement activities may be conducted by a regularly sitting or a special grand jury. The use of grand jury discovery is governed by Rule 6 of the Federal Rules of Criminal Procedure. Suffice it to say that the release of information is tightly circumscribed. *See U.S. v. Sells Engineering*, 463 U.S. 418, 429 (1983).

poses of the administration or enforcement of this Act” (Section 29). Cooperation with U.S. authorities could not likely be said to be for the purpose of the administration or enforcement of the Competition Act. To remove this impediment to the appropriate exchange of information, an amendment to this section or an overriding provision may be required.<sup>133</sup> Information acquired by the Bureau otherwise than by the exercise of the powers specifically referred to in the Competition Act is not protected by the competition Act from disclosure.

### 3. Summary Re: Gathering Evidence

296. Both Canada and the United States have in place effective mechanisms to aid foreign courts and tribunals in the gathering of evidence within their respective territories. Although the willingness of Canadian courts to issue compulsory process in aid of litigation in the United States is potentially subject to limitation and exceptions, it is presumptuous to assume that they will be invoked in the context of actions contemplated by this study. In the unlikely event of a dispute, recourse should be provided to a bilateral mechanism to resolve the issue.

297. Official cooperation in the governmental enforcement of competition laws also provides great promise. The Antitrust MOU has served to reduce tension in the sensitive area of extraterritoriality, and the recently adopted treaty on cooperation in criminal matters should ensure bilateral cooperation in appropriate cases.

#### *D. Enforcement of Orders*

298. Historically, courts have permitted actions to enforce orders for compensation. The principle of reciprocal enforcement of judgments is reasonably well established, and it should not be difficult to adopt those principles as between Canada and the United States in connection with the enforcement of orders for payment of compensation for damages found to be suffered by anticompetitive acts initiated in one country with an effect on persons in the other country. Moreover, the MLAT now provides a mechanism for the enforcement of penalties.

##### 1. Enforcement of a Foreign Judgment in Canada

299. Although Canadian courts will generally entertain an action to enforce a foreign monetary award, the recognition of the jurisdiction of a foreign court is more restrictive than the assumption of jurisdiction by a Canadian court. Again, using the Ontario law as illustrative, it appears that a foreign court order will be recognized where the foreign court had jurisdiction in accordance with the Ontario rules of conflicts of laws. In

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<sup>133</sup> MLAT Article XIII(2) provides that “The requested state may provide copies of any document, record or information in the possession of a government department or agency but not publicly available, to the same extent and under the same conditions as would be available to its own law enforcement and judicial authorities.”

particular, jurisdiction assumed under U.S. long-arm statutes will not on that basis alone be sufficient.<sup>134</sup> Generally speaking, it must be shown that the party against whom the award has been made was carrying on business in the foreign jurisdiction or had voluntarily submitted to the jurisdiction of the court.

300. Assuming recognition of jurisdiction in accordance with the principles noted above, there appears to be no reason to conclude that an award in a private action based on U.S. antitrust law of damages actually suffered would be denied enforcement in a Canadian court. The situation with regard to injunctions and penalties is historically different. The Canadian position is generally understood to be that courts have no jurisdiction to reach persons outside of their territorial jurisdiction with injunctions, although they may enjoin persons within their jurisdiction with regard to actions outside of the territorial jurisdiction. Also, courts have generally refused to enforce fines or other penalties levied by courts in other territorial jurisdictions.<sup>135</sup>

301. Although it may be difficult, if not impossible, to make a bright-line distinction between situations in which the extraterritorial reach of U.S. law would give rise to legitimate concerns in Canada and cases where it would not, it is reasonably clear that differences in the laws and public policy relating to horizontal arrangements (collusive agreements) are not in the same category as situations involving predatory effect or deliberate predation in the pricing of goods exported from Canada to the United States. One can imagine circumstances in which an attempt to claim damages based on a violation of Section 2 of the Sherman Act might involve cases where the alleged monopoly is permitted or even specifically provided for in Canadian law. However, it should not be difficult to identify the types of situations in which a Canadian-based company selling in the United States would be properly subject to both U.S. government enforcement and private actions.

302. In any case, it should be borne in mind that implementation in Canada of any award by a U.S. court will be subject to Canadian law. Where effective enforcement can be achieved in the United States by reason of there being persons, whether corporate or individuals, located within the territorial jurisdiction of the U.S. courts, there may be a legitimate objection from the Canadian point of view to such enforcement. Such situations should be dealt with by an appropriate mechanism for the resolution of conflicts in jurisdiction and choice of law.

303. Castel, a recognized Canadian legal authority, states that:<sup>136</sup>

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<sup>134</sup> See Kaiser, *Competition Law of Canada*, chapter 13 and Castel, *Canadian Conflicts of Law*, 2nd edition, chapter 14.

<sup>135</sup> MLAT now makes provision for the collection of fines, subject to the laws of the requested state.

<sup>136</sup> Castel, *Canadian Conflicts of Law* paragraph 88, referring to *Huntingdon v. Attrill*, notes that in *MacIntyre Porcupine Mines Ltd v. Hammond (1975)*, 119 DLR (3d) 139, the Ontario High Court refused to enforce a foreign judgment based on the U.S. Securities Exchange Act of 1934.

As Canadian courts will not entertain an action for the enforcement either directly or indirectly of a foreign penal or revenue law, they will not enforce a foreign judgment ordering the payment of taxes or penalties. A judgment which enforces both civil and criminal liability is severable and that part of it which awards a sum of money as damages is enforceable in Canada.

Hence the practical situation is that if a Canadian defendant is personally subject to the jurisdiction of a U.S. court and has assets in the United States, that person and those assets could be liable for treble damages in a U.S. private action, but a treble damage award would not be enforceable in Canada as to the penalty multiple. Also, "claw-back" may be possible under The Foreign Extraterritorial Measures Act (R.S.C. 1985, chapter F-29) ("Extraterritorial Measures Act").

304. However, that Extraterritorial Measures Act also recognizes that a foreign award for damages may be enforced in Canada. Although the Extraterritorial Measures Act throughout is concerned to prevent adverse effects on Canadian interests, and accordingly gives the Attorney-General the power to declare that a foreign judgment shall not be recognized or enforceable in any manner in Canada, it expressly provides that "in the case of a judgment for a specific amount of money" he may "declare that for the purposes of the recognition and enforcement of the judgment in Canada, the amount of the judgment shall be deemed to be reduced to such amount as is specified in the order" (Section 8(1)(b)). The Extraterritorial Measures Act goes on to state that the judgment to which the order relates "may, if enforceable apart from this Extraterritorial Measures Act, be recognized and enforced in Canada as if the amount specified in the order were substituted for the amount of the judgment, and not otherwise" (Section 8(3)(b)). In any proceedings to recognize or enforce a foreign judgment, no inference is to be drawn from the fact that the Attorney General of Canada has not made any order in respect of the foreign judgment (Section 8(4)).

305. As noted above (paragraph 199), the Competition Act gives broad power to the Competition Tribunal to act on an application by the Director in circumstances where the Tribunal finds that the implementation in Canada of a foreign judgment, decree, order or other process would adversely affect competition in Canada, adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve that efficiency, adversely affect the foreign trade of Canada without compensating advantages or otherwise restrain or injure trade or commerce in Canada without compensating advantages (Section 82).

## 2. Enforcement of a Foreign Judgment in the United States

306. The guiding principles for the enforcement of a foreign nation judgment was handed down by the U.S. Supreme Court in 1895. The American court must be convinced that:

307. There has been opportunity for full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment . . . .

*Hilton v. Guyot*, 159 U.S. 113, 202 (1895). If these conditions are met, the judgment will not be refused recognition on the ground that the rendering court made an error of law or of fact.

The standards set forth in *Hilton v. Guyot* represent the minimum requirement of due process under the U.S. Constitution and is applied under federal law. However, since the 1932 Supreme Court decision in *Erie*, federal courts having jurisdiction by means of diversity of citizenship (as opposed to federal question) have routinely applied the laws of the state where the federal court is located, and not federal law, to determine whether a foreign judgment will be enforced. Individual states are free to adopt more stringent requirements with respect to the recognition and enforcement of foreign nation judgments. Nevertheless, it is highly unlikely that the judgment of the Canadian court of competent jurisdiction would fail to meet even the most stringent state standards.

309. A number of states have adopted the Uniform Foreign Money-Judgment Recognition Act ("Uniform Act"). States that have not adopted the Uniform Act, for the most part, apply similar principles under state common law. The California Act is illustrative on a number of key points.

310. The California Act provides numerous bases for establishing whether the foreign tribunal properly assumed jurisdiction. Included is a catch-all provision that the "courts of this state may recognize [enumerated] basis of jurisdiction." (California Code of Civ. Pro. § 1713.5(b)). The Ninth Circuit Court of Appeals, construing California law, has ruled that this provision was intended to leave the door open for recognition by California courts of foreign judgments rendered in accordance with American principles of jurisdictional due process. (*Bank of Montreal v. Kough*, 612 F.2d 467 (1980)). It is highly unlikely that a Canadian court will assert personal jurisdiction where contacts with the forum would be insufficient under U.S. law. The broad scope of the Alcoa "effects" test compels the same conclusion with respect to subject matter jurisdiction. It is also notable that, with very few exceptions, reciprocity is no longer a mandated requirement for enforcement of a foreign judgment under either the Uniform Act or state or federal common law. (See, e.g., *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981)).

311. Although statutes governing the recognition of a "foreign judgment" generally contemplate a judgment granting or denying recovery of a sum of money, the Uniform Act does not prevent the recognition or

non-recognition of a foreign judgment in situations not expressly covered. Accordingly, applying principles of international comity, an American court may recognize injunctive decrees as well as monetary judgments (e.g., *Pilkington Bros. PLC v. AFG Industries, Inc.*, 581 F.Supp. 1039, 1043-44 (D.Del. 1984)).

312. American courts will not, however, enforce a “fine or other penalty” (e.g., *Chase Manhattan Bank, N.A. v. Hoffman*, 665 F.Supp. 73, 75 (D.Mass 1987),<sup>137</sup> nor will the court enforce a judgment that is offensive to the public policy of the state where enforcement is sought (*Ackerman v. Levine*, 610 F.Supp. 633, (D.C.N.Y. 1985), *aff’d in part, rev’d in part*, 788 F.2d 830). The question of whether the judgment involves application of a penal law in the international sense depends upon whether its purpose is to punish an offense against a public law of the state, or to afford a private remedy to a person injured by the wrongful act. Where the benefit of a judgment accrues in its particulars to a private party plaintiff, not the state, it is remedial in nature and enforceable in an American court, even if the judgment arose in the context of a primarily criminal (penal) proceeding. (See *Chase Manhattan Bank*, 665 F.Supp. at 75-76). Furthermore, courts are not limited to recognizing a judgment entirely or not at all. When a foreign judgment contains discrete components, the court will endeavor to discern the extent of appropriate recognition, with reference to applicable policy concerns. (*Ackerman v. Levine*, 788 F.2d 830).

313. With respect to U.S. public policy, it is unlikely that a U.S. court will refuse to enforce a Canadian judgment condemning predatory activities of a U.S. firm in Canada on the ground that it is repugnant to the interests of the United States. One could envision a refusal with respect to certain price fixing activity by a U.S. export association that is authorized, for instance, under the Webb-Pomerance Act,<sup>138</sup> or perhaps activity by a monopolist or cartel within the United States that inhibits penetration of the U.S. market by Canadian firms, but is insulated from antitrust scrutiny under U.S. law by the Parker (state action) doctrine or *Noerr-Pennington* (governmental petitioning) doctrine. Such protected activity is unlikely, however, to form the basis of significant impediments to the enforcement of Canadian judgments.

### 3. Summary Re: Enforceability

314. Subject to the limitations referred to above, both Canada and the United States provide recognition to judgments rendered under a foreign state’s competition laws. With the possible exception of the unwillingness of Canadian courts to enforce foreign injunctions, differences in

<sup>137</sup> *But see supra*, note 135.

<sup>138</sup> 15 U.S.C. §§ 61-66. The Webb-Pomerance Act permits export associations to, *inter alia*, collectively set export prices and establish resale price restrictions on foreign distributors, provided the activity does not interfere with domestic trade or restrain the export trade of any of its domestic competitors. See *U.S. v. Minnesota Mining & Manufacturing Co.*, 90 F. Supp. 947 (D.Mass. 1950).



the scope of the willingness of U.S. and Canadian courts to enforce these judgments need not interfere with the successful implementation of a system of competition laws to govern Canadian-U.S. trade. This conclusion is reinforced by the fact that the process of obtaining the judgment in the first instance probably will have included significant cooperation between the U.S. and Canadian judicial systems, implying that the courts of the state requested to enforce the judgment already will have passed on the legitimacy of the action.<sup>139</sup> Statutory clarification is desirable.

#### *E. Time and Costs*

315. In the context of a study of competition laws as potential analogs to antidumping laws, it is relevant to identify a practical issue which may arise in reviewing the effectiveness of competition laws in the absence of antidumping laws from the point of view of a person alleging unfair transborder pricing. There being no empirical evidence, we can only note that some perceive the antidumping laws as providing a private remedy primarily at public expense, given that investigation is largely conducted by public authorities. However, it is simplistic to assume that members of an industry need only provide superficial evidence of a legitimate complaint in order to activate the government machinery in either country. The same observations apply to enforcement by the public authorities of the competition laws. Private enforcement, especially in the absence of prior investigation and prosecution by public authorities, does present a formidable challenge to a potential claimant. Our observation is that the time and cost involved for a potential claimant vary substantially depending on the circumstances, regardless of whether a matter is proceeding under the competition laws or under the antidumping laws, and that no clear advantage can be demonstrated as a general rule for one regime or the other.

#### *F. Conclusions Re: Accessibility and Effectiveness*

316. In summary, very little in the way of modification to the rules governing evidence gathering, jurisdiction over persons, jurisdiction over activities and enforcement of orders, will be required to achieve a smoothly running system. Indeed, because most significant businesses have operations on both sides of the border, jurisdictional issues in terms of effective enforcement may be more imagined than real. In fact, we are not aware of any complaints that activities in the United States which would violate Canadian competition laws have gone unchallenged because of jurisdictional and enforcement difficulties; nor are we aware of any complaints in the other direction about activities relevant to this study.

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<sup>139</sup> We note in passing the possibility of imposing liability on the domestic firm that knowingly buys predatorily priced goods. This could be analogous for instance, to buyer liability for knowingly receiving favorable discriminatory prices under section 2(f) under the RPA.

317. With regard to the appropriate laws to apply to any trading activity, the ideal solution for the Canadian-U.S. situation would be the negotiation of an addendum to the FTA to deal with issues of jurisdiction and choice of law. Throughout, it should be borne in mind that the legitimate interest to be protected in each country is the effect on competition in that country of anticompetitive practices, whether they occur in that country or elsewhere. This would include proscribed anticompetitive activity, such as predatory pricing, which is currently treated in much the same way under the laws of both countries.

318. The complexities of the possible combinations of circumstances dealing with the gathering of evidence and the enforcement of injunctions and other directions dictates that there be developed, as an adjunct to the FTA, a set of rules that are as definitive as possible to implement the mutual interests of Canada and the United States in connection with the enforcement of competition laws relating to transborder pricing.

#### IV. NATIONAL TREATMENT, EQUALITY OF TREATMENT AND HARMONIZATION

##### *A. National Treatment and Antidumping Laws*

319. The FTA was carefully crafted to eliminate border measures without impinging on the right of each country to develop domestic and external relations policies consistent with their respective cultures, value systems, and political constituencies. The FTA is not a common market like the European Community. The various dispute settlement mechanisms established under the FTA and the explicit language used throughout the text of the Agreement give ample evidence of the each country's respect for the other's national sovereignty.

320. National treatment, as codified in the GATT, is an accepted obligation of both Canada and the United States. It imposes the principle of nondiscrimination as between goods which are domestically produced and goods which are imported. National treatment obligations are designed to reinforce the basic goal of Canada and the United States for trade liberalization by eliminating government interference and distortion of transactions which cross a common border.

321. The concept of national treatment as applied to imports is that once the good or service "passes" the border hurdle of, say, payment of a tariff, then the good or service can no longer be subject to any form of discrimination. Given that it is the contractual commitment of both Canada and the United States to remove substantially all border measures, subject only to common North American rules of origin, the legitimacy of bilateral antidumping remedies can be questioned under an extended national-treatment principle.

322. Antidumping law constitutes discrimination against foreign producers in that domestic competitors are not subject to the same rules. Put another way, a U.S. producer can be affected by nonpredatory price

discrimination under domestic U.S. law without any recourse (assuming no protection under the RPA), but will have an antidumping remedy against a Canadian producer selling below the latter's home market value. In this sense, U.S. produced goods do not receive national treatment in Canada nor do Canadian goods receive national treatment in the United States. National treatment is a fundamental principle of the FTA (notwithstanding the exceptions). Antidumping laws are not compatible with this basic principle of the Agreement.

### B. *National Treatment and Competition Laws*

323. Applying the national-treatment principle to the FTA, once a U.S. good enters the Canadian market, or the reverse, it should be treated the same as a domestic product. Does not this support the principle of equal access to domestic law in complaints dealing with unfair pricing? Concern has been expressed, however, that differences in the laws in the two countries will lead to inequality. For example, the treble damages provisions of U.S. law is a *bête noire* that is compared unfavorably with the provision of Canadian law for full damages, but not more. Under a national-treatment principle, all parties doing business in either jurisdiction would be treated equally under the laws of the respective jurisdictions, including the treble damages rule and others. Indeed, that is the present state of affairs, in that any business based in Canada but operating in the United States is subject to the same antitrust laws that apply to businesses based in the United States. The converse is also true.

324. Anyone investing in the other country or distributing products in the other country must be mindful of the competition laws in the market in which he or she is venturing. That was the situation before the FTA and the FTA has not changed that scenario. Business people will not find any great surprises if they are encouraged by the new Canadian-U.S. trading environment to export for the first time to the other country or to invest there. Decisions as to whether to invest in Canada or the United States or to distribute goods or offer services in either country continue under the FTA to be made on business judgment about market factors: will the market likely provide a satisfactory return? Competition laws are not a discouraging factor unless an investment by acquisition or merger is likely to reduce competition in the market. Likewise, differences in laws governing distribution arrangements are not likely to deter decisions to market goods or services in either country.

### C. *Harmonization*

325. Lack of harmonization in substantive law and in procedures should not be a major issue. In our view, it is fallacious to argue that competition law is not an adequate "substitute" for antidumping law *because* of differences as between the United States and Canada. Unless it is contemplated that removal of antidumping law in Canadian-U.S. trade

will cause a significant increase in attempts (especially by U.S. competitors) to apply antitrust laws to Canadian-U.S. trade, the harmonization/differences issues are *sui generis*. In any event, it is not realistic to suggest that anyone doing business in the United States or Canada should get preferential treatment compared with their competitors in the market. However, when there is a proper issue of which legal regime should apply in any particular situation, that is a choice of law issue which needs to be resolved by agreed upon principles applied by the courts, quasi judicial tribunals and administrative agencies of both countries.

326. There is nothing in the free trade scenario that exerts a compelling force toward perfect harmonization. It is often asked, how can there be different pricing laws (*i.e.*, RPA compared with the Competition Act) in a free trade area? The answer in our view is simple: sellers adjust to market requirements, whether business or legal, that differ from place to place. If one can discriminate as to price among customers in the Seattle-Tacoma area on the basis of cost but one can do so only on the basis of quantity in the nearby British Columbia market, so be it. A different legal regime for pricing might be better in both countries, and some or all elements of the U.S. or Canadian law may be better than the other system. But, that is a different debate. The free trade area can prosper even if the differences are not ironed out, just as differences in product safety standards, packaging and labelling requirements, for example, can continue to be different (as is expressly allowed by the FTA). In both cases, there may be economic benefits from harmonization, but it does not have to be achieved as an ingredient of a workable free trade area.

## V. PARTICULAR CANADIAN AND U.S. CONCERNS

327. As noted above, there are certain differences in U.S. and Canadian competition law that are perceived by some to make it easier and more appealing for a U.S. firm to initiate an antitrust action under U.S. law. Commentators have voiced concern that the elimination of the antidumping remedy will result in an increase in antitrust actions at least as great as the reduction in the number of antidumping investigations. It is further suggested by some that antitrust suits would be more likely to be initiated purely for harassment purposes than they are now, when U.S. industry has antidumping protection available to it.

328. These differences appear in provisions dealing with (1) class actions, (2) contingent fees, (3) costs and attorneys fees for plaintiff only, and (4) treble damages. After describing these differences, we conclude that they are of unlikely to spawn a disproportionate amount of antitrust litigation in the context of predatory transborder price discrimination. We also provide a rebuttal to claims that U.S. law has the potential to allow the recovery of the same damages in more than one action.

### A. *Class Actions*

329. Class actions are a form of a suit brought by one or a few alleged victims of a violation on behalf of themselves and all other victims in a defined class. Examples could include a group of businesses in a geographical area, all state and local buyers of a product, and a nation wide group of consumers.

#### 1. Canada

330. There is no provision in the Competition Act dealing with class actions. Claimants would therefore have to rely on the very limited scope for class actions under the rules of procedure of the provinces.

#### 2. United States

331. Class actions are readily available under U.S. law. Certification, procedural and administrative issues relating to class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. There are many examples in which antitrust classes were certified for general compliance with Rule 23.

332. In addition, class actions may be brought by groups of states, provided they comply with Rule 23 and, under Section 4(c-h) of the Clayton Act, states are authorized to bring *parens patriae suits* on behalf of natural persons injured as a result of violations of the Sherman Act.

### B. *Contingent Fees*

#### 1. Canada

333. Although contingent fees are permissible in several provinces, subject to some limitations, their utilization is not common practice. They are not permitted in Ontario.

#### 2. United States

334. The use of contingent fees is common practice both in state and federal courts, and in certain situations may be appropriate in antitrust actions. A contingent fee arrangement under which the attorney receives one third of the trebled damages plus all of the reasonable attorneys fees awarded under Section 4 of the Clayton Act is generally considered reasonable, although a trial court maintains the authority to establish the permissible fee, taking into consideration post agreement factors such as complexity of problems, quality of work and the like. (*See Farmington Dowel Products Company v. Forster Manufacturing Company, Inc.*, 1971 Trade Cases (CCH) ¶ 73,418 (1st Cir. 1970)).

### C. *Costs and Attorneys' Fees*

#### 1. Canada

335. The practice in Canadian courts is to award “costs” against a losing defendant according, in the usual case, to a scale described as the “party and party” scale which generally does not match the actual fees and expenses incurred. However, Section 36 of the Competition Act, as noted, specifically allows a successful claimant to receive the full cost to him of the proceedings, including the cost of any investigation in connection with the matter.

336. Conversely, the Canadian court rules provide generally that costs are awarded against an unsuccessful claimant. This is usually on the “party and party” scale. In addition, an unsuccessful claimant has to pay his own lawyer’s fees and other expenses without the benefit of a contingent fee relationship, under which the risk is wholly or partly taken by the claimant’s counsel.

#### 2. United States

337. U.S. courts do not adhere to the “English rule.” Unless established by private contract or by statute, parties are responsible for their own costs and fees. As noted earlier, under Sections 4 and 16 of the Clayton Act, plaintiffs are entitled to recover a reasonable attorney’s fee (as well as other expenses). Determination of an attorney’s fee is within the reasonable discretion of the trial court and depends upon the facts and circumstances of each case. Fees may be awarded to *defendant’s* attorney only when the court is satisfied that the suit was brought in bad faith or where there is a complete absence of justiciable issues of law and fact.

### D. *Treble Damages*

#### 1. Canada

338. Treble damages are not available in Canada.

#### 2. United States

339. The private, treble damage antitrust action was created in 1890 as part of the first federal antitrust law, and has since been superseded by Section 4 of the Clayton Act. In providing treble damages, Congress sought to create a private enforcement mechanism that would deter violators, deprive them of the fruits of their illegal action and would, as well, provide ample compensation to the victims of antitrust violations. Although the treble damage action has long been a mainstay of private antitrust enforcement, it has recently come under attack as providing “too much” incentive, resulting in frivolous suits, the threat of which in turn deters efficiency-enhancing cooperation among U.S. businesses.

340. Although it is highly unlikely that the treble damage provision

of Section 4 will be eliminated in toto, it has been chipped away at. For instance, companies that register under the National Cooperative Research Act of 1984, whose conduct is later found to be anticompetitive (under a rule of reason analysis), are subject only to actual damages. There is legislation pending before Congress to extend these provisions to joint production ventures as well.<sup>140</sup> In addition, legislation was proposed during the Reagan administration that would detreble damage in suits where damages are measured by lost profits, in an attempt to decrease competitor suits for exclusionary conduct. The legislation would not have affected treble damage awards when the illegal conduct involved priceover-charges.

### *E. Likelihood of Increased U.S. Litigation*

341. Our intuitive judgment is that this concern is unfounded, in light of the relatively few U.S. antidumping actions initiated against Canadian goods in the past ten years. The criteria for founding an antidumping action are so significantly different from the effect-on-competition tests of the competition laws, that it is unlikely that pricing which has triggered an antidumping response could have triggered a competition or antitrust law response.

342. It has always been possible for an aggrieved U.S. producer to file an antitrust suit against a Canadian firm engaged in predatory pricing. If the nature of U.S. antitrust doctrine, (e.g., treble damages, costs and attorneys' fees available to plaintiff only, class actions, and contingent fees), is as powerful an inducement to file suit as some would have us believe, then one would have expected this substitution to have occurred regardless of the availability of an antidumping remedy.

343. Moreover, as noted above, the requirement under predatory pricing or primary line RPA doctrines that the defendant's conduct injure competition is significantly more stringent than the material injury standard under antidumping law. This enhanced burden will convince at least some, if not most, potential antidumping petitioners that resorting to the antitrust laws will be fruitless. At some point, the lure of treble damages is overcome by the unlikelihood of success.

344. Contingent fees, while available under the antitrust laws, are unlikely to play a significant role in the shift from antidumping to antitrust laws. First, companies with the resources to fund an antidumping action are also capable of funding an antitrust action. If they believe they have a winning case, there is no incentive to share the spoils with attorneys. It is also unlikely that law firms will be willing to bear the risk of a contingent fee arrangement in an expensive litigation unless the likelihood of success is calculated to be relatively high, thus reducing the like-

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<sup>140</sup> It is the authors' understanding that this bill was challenged as violative of the FTA because it denies protection to ventures involving a foreign party; modifications were made to bring it into line but the final outcome is unresolved.

likelihood of “strategic” contingent fee antitrust actions.<sup>141</sup> Given the general movement of antitrust doctrine away from per se illegality toward rule-of-reason analysis in all but the most egregious cases, it is unlikely that contingent fee arrangements will result in the prosecution of many frivolous suits.

345. The effect of the availability of attorneys’ fees, which are only available if you win, follows the same logic. With respect to predatory pricing class actions, it is unlikely that there will be a sufficient pool of plaintiffs to constitute a class, particularly since consumers, the most typical parties in an antitrust class action, are not harmed during the period of predatory pricing.

#### F. Multiple Recoveries

346. Another concern expressed by some commentators — multiple recoveries - is also unfounded in the context of predatory pricing. Multiple recoveries may occur in some contexts as a result of antitrust actions being filed consecutively or simultaneously in both federal and state courts (or in the same state court) by injured parties at different levels of distribution. This possibility has been exacerbated by the Supreme Courts decision in *California v. ARC America Corp.* which held, in essence, that the full amount of overcharge collected by a monopolist or cartel of competitors, may be recovered by the first purchaser, even if that purchaser passes on some part of the overcharge downstream, and that the downstream recipient of the overcharge may recover his damages under state laws. (109 S.Ct. 1661 (1989)).

347. Although such a system of antitrust enforcement could result in the payment of damages well in excess of the amount of the overcharge trebled, it is irrelevant in the context of predatory pricing. During the period of “investment” (low cost pricing), predatory pricing harms competitors who are forced to sell their product at below cost or go out of business. Downstream purchasers are not harmed. Only during the recoupment period, assuming that the predatory pricing scheme successfully eliminated competitors, is multiple recovery a real threat.

348. Similarly, the threat of multiple recovery by U.S. firms should existing U.S. price discrimination laws be extended to sales in Canada is somewhat fanciful. Even assuming primary line injury to a U.S. competitor stemming from discriminatory sales in Canada and the United States, it is only the *higher* priced customer that might suffer secondary line injury, which in the case of transborder discrimination would be the Canadian customer. The alleged “litigious” nature of U.S. companies is therefore not in issue. To the extent that the concern is secondary line injury actions arising out of two discriminatory sales by a Canadian firm

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<sup>141</sup> “Strategic” suits are those brought because of the direct effect of the prosecution on a competitor, as opposed to a true desire for antitrust relief. As noted earlier, instituting such “sham” litigation may itself constitute illegal exclusionary conduct. See *supra* note 103.



within the United States. We have moved away from the “dumping” scenario. Furthermore, there is only a small possibility that customers in two parts of the United States that are in geographically distinct markets from the perspective of the *seller’s* competitor, will not also be distinct with respect to the secondary line requirement that purchasers also compete with each other as sellers.

#### CONCLUSIONS AND RECOMMENDATIONS

349. A practical view of Canadian-U.S. trade in the context of this study results in the conclusions that:

350. 1. Canadian and U.S. laws dealing with pricing practices that have a substantially detrimental effect on competition:
  - (a) are generally similar and compatible; and
  - (b) are applicable to pricing initiated in the other country.
351. 2. Measures should be added to the FTA and implemented by legislation:
  - (a) to facilitate access to remedies by those alleging substantial detriment to competition.
  - (b) to ensure effective enforcement of appropriate injunctions, penalties and compensation.

In the final analysis, replacement of the antidumping laws between Canada and the United States is the economically logical and legally feasible next step in the removal of barriers to trade and investment now underway in the FTA. Moving expeditiously to deal with this unfinished business will make both economies better able to meet competitive challenges from the Asia-Pacific region and Europe after 1992.