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Where There Is a Will, There Is a Way: Cooperation in Canada-U.S. Antitrust Relations

Lawson A. W. Hunter

Susan M. Hutton

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*Lawson A. W. Hunter, Q.C.**
*Susan M. Hutton***

I. INTRODUCTION

The title of the Canada-U.S. Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws[1] (MOU) might understandably create the impression that the antitrust enforcement agencies in the two countries are already involved in significant cooperation in the investigation of individual antitrust cases under the aegis of the MOU. A review of the history of the MOU and of the continuing structural impediments to meaningful cooperation reveals, however, that Canada-U.S. cooperation in antitrust enforcement is still in its infancy. Nonetheless, recent developments in transborder economic activity have highlighted the necessity for such cooperation at the same time that greater understanding has increased its chances for success.

Part II of this paper reviews the history of the MOU including the significant instances of antitrust friction which form its background. Factors supporting a more cooperative approach to transborder antitrust enforcement, including increased economic globalization, and increased harmony in the substantive laws of the two countries will be reviewed in Part III. Options for reform are presented in Part IV.

II. HISTORY OF THE MOU: CONFLICT IN ANTITRUST RELATIONS

At the outset it should be emphasized that the history of antitrust relations between Canada and the United States has generally been fairly smooth. For example, George Addy, the Director of Investigation and Research under the *Competition Act* (the Director) who is now Canada's top competition law enforcer, has recognized that as early as 1901 a Canadian inquiry into price fixing in the Canadian market for newsprint gathered evidence in Montreal, Toronto and New York and

* Partner, Stikeman, Elliott, Ottawa, Ontario.
** Associate, Stikeman, Elliott, Ottawa, Ontario.
Note: At the request of the authors, Canadian statutes have been cited using standard Canadian citation.

[1] Memorandum of Understanding 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, 23 I.L.M. 275.

lead to the uncovering of a similar conspiracy operating in the United States.[2]

Indeed, Canada has undoubtedly been the beneficiary of historically vigorous U.S. antitrust enforcement.[3] Nonetheless, conflict is more noteworthy than cooperation, and the most celebrated instances of antitrust interaction have been instances which caused serious political conflict between the two countries.

In 1947, for instance, in the course of another investigation involving the paper industry, a U.S. grand jury issued a subpoena to Canadian International Paper Company and International Paper Sales Company, Inc., both Canadian companies ultimately owned by the U.S. target of the investigation, International Paper Company. Despite the Canadian companies' objections to service, the U.S. court held that their sales offices in New York and the maintenance of salaried employees in the United States constituted "doing business" in the United States. The two Canadian corporations were held to have submitted to U.S. jurisdiction and were ordered to produce documents located in Canada.[4] The controversy surrounding this extraterritorial assertion of jurisdiction by the grand jury ultimately concluded in the passage of blocking legislation in both Ontario and Quebec designed to prohibit the removal of any business records in compliance with a request or order from any governmental authority outside of the province.[5]

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[2] JOHN BALL, CANADIAN ANTITRUST LEGISLATION (Baltimore: The Williams & Wilkins Company, 1934) 13-17, *cited in* George N. Addy, *International Coordination of Competition Policies, in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY, 291 (Kantzenbach et al. eds., Baden-Baden: Nomos Verlagsgesellcshaft, 1993).

[3] "In spite of. . .differing attitudes toward government regulation and antitrust enforcement, there is a great deal of commonality between the two nations, and the benefits to Canada of having a contiguous neighbor with a vigorous system of domestic antitrust enforcement do not go unnoticed." Gary E. Dyal, *The Canada United States Memorandum Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Enforcement Disputes*, 6 NW. J. INT'L L. & BUS. 1065, 1070 (1984-85).

[4] *In Re* Grand Jury Subpoena Duces Tecum, 72 F. Supp. 1013 (S.D.N.Y. 1947).

[5] Business Records Protection Act, S.O. 1947, c.10 (codified at R.S.O. 1990, ch. B19); Business Concerns Records Act, [1957-58] S.Q., c.42 (codified at R.S.Q. c.D-12).

It should be noted that the constitutional validity of these provincial blocking statutes was recently struck down as they apply to information requested by courts in other Canadian provinces. Hunt v. T&N plc, (1993), [1994] 1 WWR 129 (S.C.C.), 85 B.C. L. REV. (2d) 1, 161 N.R. 81. However, the Supreme Court of Canada expressly refused to comment on the validity of provincial blocking legislation as it applies to information requests from foreign countries such as the United States. The Court at several points took pains to distinguish interprovincial from international information requests. Still, the finding that the blocking legislation related in "pith and substance" to matters outside of the province in question, as well as statements regarding the increased need to consider comity in light of the globalization of business might suggest that the provincial legislation would not be upheld in its application to international information requests. Determination of the constitutional validity of the provincial blocking statutes as they apply to requests from foreign countries will have to await the appropriate case.

Shortly thereafter, the *Radio Patents Cases*[6] again brought the overlapping nature of national antitrust enforcement activities to the fore when the United States brought proceedings against the U.S. parents of several Canadian producers of radios and televisions. The Canadian subsidiaries had formed Canadian Radio Patents Limited and assigned their patents for radio and television production to that company. Through the enforcement of its patents and its licensing arrangements, Canadian Radio Patents Limited effectively forced companies wishing to sell home entertainment products in Canada to establish manufacturing facilities in Canada. Civil antitrust suits were filed in the U.S. against the parent U.S. companies alleging an unlawful combination in the restraint of U.S. exports. The *Radio Patents Cases* ended in consent decrees which enjoined the defendants, and their Canadian subsidiaries, from participating in any agreement which restricted the export of goods from the United States.

The *Radio Patents Cases* caused outrage in Canada, and lead to formal and informal diplomatic protests by the Canadian government. In the view of the Canadian government, the impugned actions related to Canadian commercial interests. The Canadian government felt that if lawful economic activity in Canada ran counter to U.S. interests, then the U.S. should have protested such activity through the proper diplomatic channels rather than resorting to unilateral action in its own courts. The discussions between then Canadian Justice Minister E. Davie Fulton and then U.S. Attorney General William P. Rogers eventually lead to the 1959 Bilateral Understanding regarding Antitrust Notification and Consultation Procedure (the Fulton-Rogers Understanding). This first incarnation of the present MOU provided for intergovernmental discussions "whenever it becomes apparent that the interests of one of our countries are likely to be affected by the enforcement of the antitrust laws of the other," and in any event prior to the initiation of any suit involving the interests of the other country. No circumstances requiring consultations were spelled out. Understandably, in light of the history of the understanding, there was no mention of cooperation in antitrust enforcement.[7]

Of course, antitrust friction has not been confined to Canada-U.S. relations, and by 1967, the Organization for Economic Co-operation and Development (OECD) adopted a set of recommendations to member states, in addition to the type of notification and consultation already provided for in the Fulton-Rogers Understanding, to coordinate

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[6] United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949), *modified*, 115 F. Supp. 835 (D.N.J. 1953); *United States and General Electric Company, Westinghouse Electric Corporation, N.V. Philips*, TRADE CASES, paras 70,342, 70,420, 70,546 (1962). *See, e.g.*, B.R. Campbell, *The Canada - United States Antitrust Notification and Consultation Procedure: A Study in Bilateral Conflict Resolution*, 56 CAN. BAR REV. 459, 460-2 (1978).

[7] Dyal, *supra* note 3, at 1083-84; Campbell, *supra* note 6, at 463.

enforcement actions, exchange relevant information and cooperate in the development and implementation of legislation regarding restrictive trade practices.[8] Despite, or perhaps in light of, further instances in which the U.S. courts enforced U.S. antitrust laws in a manner which impacted upon Canadian sovereignty or national interests,[9] in 1969 then Canadian Minister of Consumer and Corporate Affairs Ron Basford and then U.S. Attorney General John Mitchell agreed to supplement the notification and consultation procedures of the Fulton-Rogers Understanding with information sharing and coordination of enforcement activities, to the extent possible under each country's domestic laws.[10]

The inability of these Understandings to resolve serious antitrust disputes between the two countries were exemplified by the *Potash* and *Uranium* disputes during the 1970's.[11] In June, 1976, the United States government launched federal grand jury[12] as well as civil[13] proceedings against eight U.S. corporations and several unnamed and unindicted co-conspirators on charges of conspiracy to restrain competition in the sale of potash in the United States. The charges alleged that the Government of Saskatchewan had been encouraged by potash producers to establish a prorationing and price support arrangement for the Canada-U.S. potash market. When a motion for particulars resulted in the dis-

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[8] Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, October 5, 1967, OECD Doc. C(67)53 (Final). Several OECD Recommendations were issued over the years, the most recent in 1986 (June 5, 1986, OECD Doc. C(86)44 (Final)).

[9] Continental Ore Company v. Union Carbide and Carbon Corporation, 370 U.S. 690 (1962): despite the fact that a Canadian defendant had carried out behavior which lead to the monopolization of the Canadian market for ferrovanadium and vanadium oxide, and had done so as the purchasing agent for the Canadian government, the U.S. Supreme Court held that "the defendants are not insulated. . .by the fact that their conspiracy involved some acts by the agent of a foreign government." The Canadian government had not required Union Carbide's Canadian subsidiary to refuse to purchase from Continental Ore Company, and the foreign sovereign compulsion defense was therefore held to be inapplicable.

United States v. Jos. Schlitz Brewing Company, 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966). In this case, Schlitz was ordered to divest itself of a controlling 39.3% interest in the stock of John Labatt Limited because of the anticompetitive effect that Labatt's controlling interest in a California brewer would have caused in California. Note that the court prohibited the entire transaction rather than merely ordering the divestiture of the offending California assets.

These and fourteen other U.S. antitrust cases involving Canadian parties are briefed in Joseph P. Griffin, *The Impact on Canada of the Extraterritorial Application of the U.S. Antitrust Laws* 57 ANTITRUST L. J., 435, Appendix, 447-58 (1988).

[10] *Canada-United States: Joint Statement Concerning Cooperation in Antitrust Matters*, 8 I.L.M. 1305 (1969) [hereinafter Basford-Mitchell Understanding].

[11] Discussed in Campbell, *supra* note 6, at 486 *et seq.*

[12] *United States v. Amax Inc., Amax Chemical Corp., Duval Corp., Duval Chemical Corp., National Potash Co., Potash Co. of America*, 1 TRADE CASES 71, 793 (1977). The criminal charges were eventually dismissed.

[13] United States v. Amax Inc. et al, No. 76 Civ. C2393 (Complaint, D. Ill. June 29th, 1976).

closure that the unnamed co-conspirators included a former Premier (by that time dead) and a former Minister of the Saskatchewan cabinet as well as numerous other Saskatchewan civil servants, Canadian national pride was affronted and the perceived usurpation by the United States of Canadian sovereignty with respect to its natural resources was denounced.[14]

Probably the most celebrated case of antitrust enforcement conflict arose in the course of proceedings related to an international uranium cartel. The genesis of the dispute lay in the closure of the U.S. market to uranium imports and in the subsequent formation, at the behest of the governments of uranium exporting countries including Canada, the U.K., Australia and France, of a uranium producers cartel. Whether as a result of actions taken by the cartel, or as a result of the closure of the U.S. market to imports, or as a result of increased demand after the first oil shock, or some combination thereof, the price for uranium in the United States skyrocketed. Meanwhile, Westinghouse Electric Corporation had entered into long-term uranium supply contracts with several power utilities at fixed prices without ensuring a corresponding long-term source. Westinghouse faced billions of dollars in losses due to the sudden increase in prices. When Westinghouse sought to renege on the contracts on the grounds of commercial impracticability, the power utilities sued and Westinghouse sought to assert the existence and operation of the cartel in its defense.[15] Westinghouse also launched a private treble damages action against twenty-nine uranium producers, on the basis of the same facts.[16] Meanwhile, in early 1976, a grand jury investigation was launched to inquire into possible criminal violations arising out of the cartel.[17] The decision by the U.S. courts that they had jurisdiction to inquire into the activities of a cartel whose members and activities were located entirely outside of the United States, whose activities were sanctioned and encouraged by foreign governments, and whose intended effects expressly excluded the domestic U.S. market[18] offended the governments of more than just Canada. The Canadian government reacted to the U.S. court orders for the examination of Canadian witnesses and documents located in Canada by issuing the

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[14] Campbell, *supra* note 6, at 486-7.

[15] The suits were eventually consolidated into two actions: Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company v. Westinghouse Electric Corporation, No. GD75-23978 (Court of Common Pleas of Allegheny County, Civ. Pa. (in equity)); and Westinghouse Electric Corporation Uranium Contracts Litigation, MISC 6728, MDL No. 235 (E.D. Va.) *cited in* Campbell, *supra* note 6, at 488.

[16] Westinghouse Electric Corporation v. Rio Algom Inc. et al, No. 76C-3630, (N.D. Ill.), *cited in* Campbell, *supra* note 6, at 488.

[17] For details of the various proceedings, *see* Campbell, *supra* note 6, at 487-90; also, Griffin, *supra* note 9, at 451-2.

[18] *In Re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980), *cited in* Griffin, *supra* note 9, at 451.

Uranium Information Security Regulations,[19] the validity of which the Supreme Court of Canada upheld.[20]

The fact that the notification and consultation procedures embodied in the Fulton-Rogers and Basford-Mitchell Understandings were scrupulously followed in both the *Potash* and the *Uranium* cases served to illustrate the shortcomings of those agreements. Perhaps no agreement could have resolved the underlying differences in industrial and antitrust policies which lead to the conflicts between government supported Canadian resource industries and U.S. antitrust law in the *Potash* and *Uranium* cases. It is possible, however, that several deficiencies inherent in the text of the Understandings precluded their ability to avoid or resolve serious conflict.[21] The Understandings failed to define the circumstances in which antitrust consultation would be implemented. Similarly, the circumstances under which Canadian blocking legislation might be implemented were not mentioned. The understandings also failed to provide for the representation of Canadian concerns over sovereignty and the national interest in private antitrust suits, and there was no mention of export cartels. Antitrust cooperation was mentioned, but there was no provision for the confidentiality of information disclosed by the parties. "Lack of concrete terms, workable standards, and overall detail pervade[d] the agreement."[22]

The aftermath of the antitrust friction of the 1970's saw the enactment in late 1984 of generic Canadian blocking legislation designed to permit the Attorney General of Canada to prevent compliance with any foreign request for evidence from Canada.[23] Just prior to this, however, Canada and the United States had entered into another understanding regarding notification, consultation and cooperation in antitrust enforcement, the MOU.[24] The MOU contains much more detailed provisions designed to avoid antitrust conflicts between the two countries, while expressly recognizing that each country remains free to apply its national laws as it sees fit. The circumstances requiring notification are spelled out in detail. Each country will attempt to obtain the information necessary to its antitrust enforcement from within its own borders. If necessary, either country may seek information located in the other

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[19] SOR/77-836, 11 Can. Gaz. pt. II, at 4619 (1977) (replacing Uranium Information Security Regulations, SOR/76-644, 110 CAN. GAZ. pt. II at 39 (1976)).

[20] Gulf Oil Corporation v. Gulf Canada Ltd. et al., [1980] 2 S.C.R. 39 (1980).

[21] James W. King, *A Comparative Analysis of the Efficacy of Bilateral Agreements in Resolving Dispute Between Sovereigns Arising From Extraterritorial Application of Antitrust Law: The Australian Agreement*, 13 GA. J. INT'L & COMP. L. 49, 66 (1983).

[22] *Id.* at 68.

[23] Foreign Extraterritorial Measures Act R.S.C. 1985, c. F-29 [hereinafter FEMA]. The FEMA came into force on February 14, 1985.

[24] Principles of guidance to officials had also been agreed to in 1977 by the Canadian Secretary of State for External Affairs and Ministers of Justice and Consumer and Corporate Affairs and by the United States Attorney General; *see* Preamble to 1984 MOU, *supra* note 1.

country, but will first notify that country and provide an opportunity to seek consultations prior to actually requesting the information. Information requests arising out of private litigation will not necessarily be known to the government of the country where the litigation is taking place and so is not subject to the advance consultation requirements. Nonetheless, a country whose interests are affected by such a private request for information can request consultations.

Blocking legislation is specifically addressed in the 1984 MOU, with each country promising not to block access by the other's private or public parties to information located within its borders or from its nationals unless such access would be contrary to a "significant national interest," and only after consulting with the government of the requesting party. The understanding does not define the term "significant national interest," but the MOU states that such interests might normally be expected to be exhibited in antecedent laws, decisions or statements of policy, thus implying that *ad hoc* reactions to the mere fact of the extraterritorial enforcement of the other country's laws were not envisaged in and of themselves as forming the basis of invoking blocking legislation under the MOU.

The 1984 MOU went some way toward clarifying a workable procedure for ensuring that each country considers the interests of the other before irrevocably determining a course of antitrust enforcement conduct. Despite its name, however, there is little in the MOU actually to enhance cooperation in antitrust enforcement between the two countries. Nonetheless, such cooperation has been enhanced somewhat under the auspices of the *Mutual Legal Assistance in Criminal Matters Treaty* (MLAT) which was signed on March 18, 1985 and entered into force on January 24, 1990.[25]

Under the MLAT and its implementing legislation in Canada,[26] a U.S. authority investigating or prosecuting an indictable criminal offense can apply to the Canadian Minister of Justice for assistance in obtaining a Canadian court order for the gathering of evidence in Canada. If the Minister of Justice approves the request, the Minister must provide the Canadian "competent authority" responsible for conducting investigations or prosecuting offenses in Canada (*i.e.*, in the case of Canadian competition law, the Director or any of the Canadian or provincial Attorneys General or police forces, as appropriate) with any documents or information necessary to apply for a court order. The Canadian competent authority must then apply *ex parte* to a provincial court for an order to gather evidence. The judge will issue a court order if (s)he is satisfied that 1) an offense has been committed for which the penalty is one or more years' imprisonment and with respect to which

[25] CAN GAZ. pt. I, 953 (1990).

[26] Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. M-13.6.

the foreign state has jurisdiction, 2) evidence of the commission of the offense, or information that may reveal the whereabouts of a person who is suspected of having committed the offense, will be found in Canada, and 3) the order need not be refused on other public policy grounds. While Article II of the MLAT does provide that "assistance" to foreign states may include the exchange of information and objects and the provision of documents and records, Article XIII of the MLAT clarifies that the governments will provide public documents, and non-public documents only "to the same extent and under the same conditions as would be available to its own law enforcement and judicial authorities." Furthermore, by virtue of section 3 of the MLAA, the provisions of the Competition Act prohibiting the disclosure of non-public information gathered by the Director pursuant to his powers to compel information under that Act prevail over inconsistent provisions of the MLAA.

The adoption of specific procedures for cooperation in the investigation and prosecution of all criminal matters under the MLAT has proven to be a useful mechanism for gathering evidence relating to criminal antitrust violations in both countries. However, its procedures are not mandatory, and there is no provision for more informal antitrust cooperation between the two countries, nor for cooperation in respect of civil matters.

Although there has been comparatively little antitrust friction since the adoption of the 1984 MOU,[27] and comparatively more antitrust cooperation, there is a need to update the MOU in light of the changed shape of antitrust enforcement since 1984. The forces contributing to the shift in focus from "friction" to "cooperation" will now briefly be reviewed.

III. Forces for Cooperation in Antitrust Enforcement

It has become almost a cliché to refer to the increasing internationalization of business. Successive GATT rounds have brought down tariff and other barriers to worldwide trade since the Second World War. The economic integration of the European Economic Community (EEC) has seen the creation of a single unified market for goods and services with complete factor mobility among its member states. The Canada-U.S. Free Trade Agreement and now the North American Free Trade Agreement will result eventually in a free trade zone encompassing Canada, the United States and Mexico, with the possibility

[27] This fact may owe more to the increasing confluence of antitrust policies in the two countries and to the decreasing involvement of Canadian governments in the affairs of business than to any real "teeth" in the MOU. Similar observations have been made in respect of the Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S. - Germany 15 I.L.M. 1282; King, *supra* note 21, at 68.

of accession by other Latin American countries. Members of Asia Pacific Economic Cooperation (APEC) have also been discussing measures to facilitate trade and investment among economies bordering on the Pacific Rim.

As barriers to trade have fallen, the international flow of goods and services has increased dramatically.[28] As more companies in more countries take part in the export trade or opportunities for the provision of services abroad, the possibility that anti-competitive actions undertaken by those companies will have economic effects in other countries increases correspondingly. In light of the now more widely-accepted "effects" test for antitrust jurisdiction,[29] the rise in world trade flows has also increased the possibility for concurrent jurisdiction of two or more antitrust enforcement agencies over the same international economic activity. The growing interdependence of the world's economies has increased the need for a coordinated approach to antitrust enforcement and the concomitant need to avoid disputes over antitrust jurisdiction.

Not only has trade in goods and services increased, but the more than 34% increase in foreign direct investment (FDI) flows between 1983 and 1989 bears witness to the increasing "globalization" of economic actors.[30] Spurred in part by the liberalization of investment regimes in both developed and developing countries during the 1980's, and in part by a desire to circumvent those barriers to trade which continue to exist, the largest economic actors in many countries increasingly are companies based in multiple jurisdictions. Technological advances in international communications have decreased the economic distance between countries. In addition, the development of the interna-

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[28] Statistics drawn from the October, 1993 edition, WORLD ECON. OUTLOOK (IMF, Washington, D.C.) and from annual editions of the INT'L FIN. STAT. Y.B. (OECD, Paris) indicate that world trade has increased by more than 6,000% in nominal terms since 1948; in real terms, average annual growth in world trade has exceeded growth in global production by several percentage points in the 1970-79 and 1980-92 periods.

[29] This ground for accepting subject matter jurisdiction to consider the actions of foreign nationals on the basis of their effects on the domestic economy was expressed in the United States in the oft-cited *Alcoa* decision. United States v. Aluminium Co. of America, 148 F.2d 416 (2d Cir. 1945). The European Commission's assertion of jurisdiction on this basis dates back to Dyestuffs, July 24, 1969, J.O. L195/1, CCH Common Mkt. Rep. paras. 2011.59, 2021.26, and 2524.31. While not expressly dealing with antitrust law, the Supreme Court of Canada's decision in Libman v. The Queen, [1985] 2 S.C.R. 178, 202, endorsed the application in general of Canadian criminal law on the basis of the effects test. *Restrictive Business Practices of Multinational Enterprises*, THE OECD REP., para. 120, *cited in* William C. Graham, *The Foreign Extraterritorial Measures Act*, 11 C.B.L.J. 411, note 76 at 433 (1986), states that the "effects doctrine" is recognized in antitrust legislation in Germany, Austria, Denmark, Spain, France, Sweden and Finland and in the case law of Canada, Japan, Switzerland, the United States and the EEC.

[30] Christopher Bail, *Coordination and Integration of Competition Policies: A Plea for Multinational Rules, in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY, 279 (Kautzenbach et al. eds., Baden-Baden: Nomos Verlagsgesellcshaft, 1993).

tional financial markets made possible by modern telecommunications has been cited as a factor which has contributed to the growth in multinational enterprises (MNE's).[31]

The growth of MNE's has also brought to light some limitations on a purely national approach to antitrust enforcement.[32] Intra-group cost allocations, transfer pricing, and cross-subsidization are all potentially useful tools to assist an MNE wishing to develop a dominant position in any particular market, and to successfully evade an investigation launched by any particular national antitrust enforcement agency. A substantial lessening of competition, for example, might be difficult to prove if verifiable data on foreign cost structures is unattainable.

Although less amenable to statistical proof than the increase in international investment and merger activity, "international cooperation agreements" or "strategic alliances" have also been discussed in the antitrust literature, and their anti-competitive potential has been noted.[33] The increasingly global nature of important economic actors makes the need for cooperation and coordination in the investigation of transnational antitrust violations imperative for the maintenance of healthy competitive markets. As trade barriers fall, antitrust authorities must ensure that the market restricting effects of governmentally imposed trade measures are not replaced by collusive behavior or abuse of dominant market position by transnational corporations. Indeed, ". . .it is widely agreed that international markets, as domestic ones, cannot simply be left to themselves. They need a coherent regulatory framework ensuring that the expected benefits of the market economy are not undermined by the behavior of governments and private actors and that common goods and public interests are safeguarded."[34]

Cooperation and coordination of a preventative nature in the form of multi-jurisdictional merger review is also required, both for the sake of the efficacy of such merger review in preventing anti-competitive concentrations, and for the sake of the MNE's involved who are currently subjected to widely differing procedural and substantive elements of antitrust law. A few examples of recent multijurisdictional merger reviews will suffice to underscore the need for enhanced cooperation on this front.

Probably the most well-known example in Canada is the proposed

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[31] *Id.* at 279.

[32] Rolf Jungnickel and George Koopmann, *Globalization of Business: Implications for International Competition and Related Policies, in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY 33, 41 (Kautzenbach et al. eds., Baden-Baden: Nomos Verlagsgesellcshaft 1993).

[33] A. Edward Safarian, *Have Transnational Mergers or Joint Ventures Increased?, in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY, 9, 24 (Kautzenbach et al. eds., Baden-Baden: Nomos Verlagsgesellcshaft 1993).

[34] Bail, *Coordination and Integration of Competition Policies: A Plea for Multilateral Rules*, *supra* note 30, at 280.

takeover of Boeing's commuter aircraft division, de Havilland, by Avions de Transport Regional (ATR), a French-Italian consortium between Aerospatiale SA and Alenia SpA. De Havilland's assets were located in Canada, but the transaction was also subject to review under the *EC Merger Regulation*.[35] Canadian and EC authorities cooperated to the fullest extent possible within their respective statutory constraints and agreed on a definition of the market involved (the worldwide market for commuter aircraft). The Canadian authorities approved the transaction on the basis that the matter raised insufficient competition concerns in Canada to justify interfering with the transaction. The European Commission, however, declined to approve the transaction, since the consortium would have had 50% of the world market and 67% of the EC market for commuter aircraft. The differential impact of the transaction on different market segments, as well as substantive differences in the merger review statutes, lead to completely opposite results.[36]

The regulatory burdens which can result from a plethora of reviewing jurisdictions is perhaps best exemplified by the proposed Gillette/Wilkinson combination. Firms based in the United States, Sweden and the Netherlands were involved in the proposed transaction, which was ultimately reviewed by eight different antitrust authorities, including Canada, Germany, Britain, France, the EC and the United States. First proposed in 1989, the transaction was the subject of a consent decree with respect to U.S. intellectual property and voting rights in 1990. The German Federal Cartel Office expressed opposition to the merger on the basis of the 80% market share which would have resulted in Germany. British objections eventually blocked the deal entirely. Meanwhile, in 1992, an OECD roundtable discussion of the transaction highlighted the lack of uniformity of notification required by the various reviewing jurisdictions, as well as the barrier to cooperation posed by domestic confidentiality requirements.[37]

The acquisition by Institut Mérieux International S.A. of Connaught Bio Sciences Inc. in 1989 had also been subjected to multijurisdictional merger review. Institut Mérieux, a French based pharmaceutical company, eventually purchased Connaught with the blessing of the Director despite the complete monopolization of the rabies vaccine

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[35] Council Regulation (EEC) No. 4064/89 of September 21, 1989 on the control of concentrations between undertakings. 1990 O.J. L257/14.

[36] *Discussed in* George Addy, *International Coordination of Competition Policies, in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY 291, *supra* note 2, at 298; and Neil Campbell and Michael J. Trebilcock, *International Merger Review: Problems of Multi-jurisdictional Conflict, in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY 129, 138 (Kautzenbach et al. eds., Baden-Baden: Nomos Verlagsgesellcshaft 1993).

[37] Discussed in Addy, *supra* note 2, at 297; and Campbell and Trebilock, *supra* note 36, at 139.

market in Canada. The Director reasoned that the size of the market and the restrictive purchasing practices of provincial health authorities meant that competition in Canada would not be substantially lessened by the transaction. The merger had also been reviewed by the U.S. Federal Trade Commission (FTC), however, which consented to the merger only on the condition that the Connaught rabies vaccine business in Toronto, Canada be leased to an FTC approved acquiror for a period of twenty five years, and that Mérieux refrain from acquiring an interest in any company producing a vaccine with respect to any disease for which Mérieux already produced a vaccine. In the face of Canadian objections to the control of Canadian assets by the U.S. authorities, the order was modified to require the concurrence of Canadian authorities to the disposition of the Connaught lab in Toronto.[38]

Some mergers are actually blocked as a result of the burdens of multi-jurisdictional review, an example being the proposed purchase by Minorco, S.A., a Luxembourg corporation, of Consolidated Gold Fields PLC, a British corporation.[39] Minorco sought to purchase the remaining 70.1% of the Consolidated shares which Minorco did not already own. Although a mere 2.5% of Consolidated's stock was held in the U.S., Consolidated owned a controlling interest in the largest U.S. gold producer. Competition authorities in the U.S., the EC, the U.K. and Australia approved the transaction. Consolidated itself then successfully sued in the United States under the *Clayton Act* to prevent the transaction and obtained a preliminary injunction against the transaction.[40] A British white knight then came in to rescue Consolidated and buy out Minorco's minority position.

Enhanced multi-jurisdictional cooperation and coordination of merger review can offer significant benefits both to regulators and to corporations. From an enforcement point of view, information exchanges would eliminate the possibility that unscrupulous corporations might feed different information to different jurisdictions in an attempt to have an anti-competitive merger approved. As we discuss in greater detail below, however, any such information exchange would have to address business concerns regarding confidentiality. Of greater practical significance for the merging firms would be a reduction in the regulatory burden through the harmonization of filing requirements, waiting periods, *etc.* Ultimately, the development of common substantive approaches to merger review, as in other areas of competition law, would also increase certainty and thus lower transaction costs in this area.

With Canada's open economy and an increasingly multinational

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[38] *See* Campbell and Trebilcock, *supra* note 36, at 139, note 66.

[39] *Id.* at 139.

[40] Consolidated Gold Fields PLC v. Minorco, S.A., 698 F. Supp. 487, *affirmed*, 871 F.2d 252 (2d Cir. 1989).

world of business, Canadian antitrust authorities, like their counterparts elsewhere in the world, wish to extend their reach extra-territorially in order to consider the impact of foreign actions on the Canadian marketplace.[41] In so doing, however, in order to avoid *Uranium*-type clashes between governments, both coordination and cooperation between antitrust authorities will be required. In fact, developments since the 1970's have rendered meaningful cooperation between Canada and the United States, and beyond, a more realistic possibility. For one thing, substantive antitrust laws in Canada and the United States have come to be more closely aligned than had been the case in previous decades. Laws relating to price and non-price vertical restraints, predatory pricing, monopolization and, to a large degree, horizontal agreements in restraint of trade are essentially compatible. Certainly differences do exist, but experience has shown that these differences do not have a significant effect on business behavior.[42]

As far as substantive merger law is concerned, the merger review implemented in Canada in the late 1980's was modelled on that in the

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[41] The Canadian authorities' need for cooperation has existed for some time, but has likely been exacerbated by the growing number of transborder issues. *See* Campbell, *supra* note 6, at 473, where, in 1978, in discussing the greater use by Canadian officials than by American officials of the consultative mechanism in the Canada-U.S. Undertakings, Campbell posited that "the Antitrust Division is able to remedy many things itself or at least believes it can, whereas many of the greater number of Canadian contacts are to solicit badly needed co-operation, rather than to warn of the impact of Canadian actions on the United States."

[42] Although the two laws relating to horizontal agreements are largely similar, the *per se* illegal nature of many, especially horizontal, U.S. restrictive agreements which do not involve joint ventures must be recognized. Such behavior is nonetheless regulated in Canada under a "rule of reason" approach depending on the extent to which it lessens competition in the relevant market, but the difference has not lead to rampant conspiratorial activity in Canada.

Another area where the two enforcement regimes differ in respect of horizontal agreements is in the use of circumstantial evidence as the basis for finding an agreement. U.S. courts have generally been more favorably disposed to finding agreements based on such evidence than have the Canadian courts *see* R.J. ROBERTS, ROBERTS ON COMPETITION/ANTITRUST: CANADA AND THE UNITED STATES, 90-101 (2d ed., Toronto: Butterworths, 1992). As a result, one might expect to find that the incidence of overt "conscious parallelism" is somewhat higher in Canada than in the United States. That said, some commentators feel that such behavior might nonetheless be addressed by the Director under the "joint dominance" theory. *See* Margaret Sanderson, Emerging Issues in Competition Law, Address Presented to the Canadian Bar Association, Competition Law Section, Living with the Competition Act in the 1990's: Do's and Don'ts for Business (September 30, 1993). In reality, business behavior in respect of horizontal agreements is likely not affected by the differences in the substantive laws of the two countries.

The price discrimination provisions in the two laws do have significant practical differences. In particular, the cost justification and meeting the competition features of the U.S. law, and the quantity test and restriction to secondary line discrimination in the Canada law, have practical implications for business. The requirement to show injury to competition in the U.S. deters would-be complainants or private suits. That said, the *Price Discrimination Enforcement Guidelines* released in 1992 by the Director, indicate, with the permission of functional discounts and relaxation in the treatment of volume incentive plans, that the two regimes may be moving closer together with regard to this offense.

United States. Moreover, the *Merger Enforcement Guidelines* (MEG's) issued by the Director in 1991 were in large part based upon the 1984 *Merger Enforcement Guidelines* issued by the U.S. Department of Justice. Businesses are thus assured that the basic approach of each country to merger review is largely the same. That said, the "safe harbor" threshold for combined market share below 35% with a four firm concentration ratio less than 65% indicated in the Canadian MEG's is substantially higher than the 40% four firm concentration ratio and individual pre-merger market shares of 7% implied in the U.S. version.[43] In addition, the statutory limitation of Canadian pre-notification requirements to "operating businesses" in Canada indicates that Canadian merger review is less likely to be concerned with purely extra-territorial transactions. As shown by the FTC's actions with respect to *Institut Mérieux*, however, United States merger review is not discouraged merely because of a lack of assets of the merging parties in the jurisdiction.[44] Perhaps the most important distinction, however, is the "total welfare" approach to the assessment of a merger's likely competitive effects in Canada. This approach permits producer interests in the form of efficiencies to be gained from the merger to offset the consumer harm which any lessening of competition might entail. No such explicit balancing of producer and consumer interests is undertaken in the assessment by U.S. authorities of a merger's likely economic effects.

Despite the differences in some of the details of the substantive provisions of Canadian and U.S. antitrust law, therefore, from a practical business point of view, the results are usually identical in terms of permissible business behavior. Moreover, as is evidenced by the similarity of approaches in the two countries' MEG's, the substantive considerations which enter into merger analysis, and in particular the manner in which the relevant markets are defined, mean that businesses in either country can be assured of a certain degree of familiarity and predictability in the enforcement of the other country's merger provisions. In these circumstances, the way is paved at the conceptual level for cooperation between the antitrust enforcement agencies in the two

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[43] *See* Donald G. McFetridge, *Globalization and Competition Policy* (manuscript at 166, on file with the authors).

[44] It should be noted that the threshold requirements for merger notification under the EC *Merger Regulations* relate to turnover in the EC, and not to the presence of assets or an operating business in the jurisdiction. As evidenced by the European Commission's October 2, 1991 decision regarding the *de Havilland* case, EC merger review might be expected to follow the more expansive U.S. model in asserting the European Commission's jurisdiction to review the competitive effects in the EC of any qualifying transaction with significant EC effects, and not merely those with assets in the jurisdiction. For an examination of the EC *Merger Regulation* and a review of its early application, *see* Ingo L.O. Schmidt, *Early Experiences with the EEC Merger Control System, in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY 109 (Kautzenbach et al. eds., Baden-Baden: Nomos Verlagsgesellcshaft 1993).

countries. With a less interventionist political climate in Canada since the 1970's, moreover, the political will for increased cooperation and effective antitrust enforcement would also appear to be established. Finally, the Canadian courts themselves have recognized that effective law enforcement in an interconnected world occasionally requires the application of Canadian law to foreign actors and events and *vice versa*.[45] Acceptance of extra-territoriality in the Canadian legal system indicates that the reaction to U.S. enforcement activities involving Canadians should be somewhat more accommodating than during the *Potash* and *Uranium* disputes.

Where there is a will, there is a way. The Director has indicated that he considers the enhancement of enforcement cooperation to be a priority "so that we can get at anti-competitive behaviour that is not housed in Canada."[46] He has also indicated that a greater ability to disclose information would enable him to inform other jurisdictions when he discovers anti-competitive activity aimed at their markets rather than Canadian markets.[47] In addition, he considers that the quality of merger review might be enhanced through increased cooperation between the various enforcement agencies.[48] In light of the degree to which the economies of Canada and the United States are intertwined, it seems obvious that the most significant front for cooperation from a Canadian perspective would be with the United States. To achieve true efficiency in international antitrust enforcement, however, cooperation must go beyond the bilateral front. The will for antitrust cooperation has clearly been established. What remains, then, is to examine the various options for reform in that regard.

IV. Options for Reform

A. Unilateral Reform

Although substantively uniform antitrust laws in both Canada and the United States would theoretically serve to reduce the instances of friction between enforcement efforts in the two countries, there is probably no need to attempt to achieve broad substantive harmonization at this time. The present legal regimes are compatible in principle and, as outlined above, do not lead to serious confusion or divergent behaviors among businesses in the two jurisdictions. As noted by the Director: "It must be remembered that the antitrust statute of each nation-state reflects a host of country-specific factors. Such factors include the coun-

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[45] *See dicta* and cases, *cited in* Libman v. The Queen, [1985] 2 SCR 178.

[46] George Addy, Director of Investigation and Research, *Quoted in* John Geddes, *New competition cop on global trail*, Financial Post, Jan. 27, 1994, at 11.

[47] Addy, *International Coordination of Competition Policies, in* Competition Policy in an Interdependent World Economy, *supra* note 2, at 298.

[48] *Id.* at 296.

try's legal system, current stage of economic development, its business culture, and its past experience with antitrust law and enforcement. It is neither possible nor desirable to ignore all of these differences in the name of international harmonization."[49]

That said, there are some changes in the substantive laws of each country which would reduce the potential for antitrust friction more than others. Removal of the "beggar thy neighbor" exemptions for export cartels from the *Competition Act*,[50] the *Webb Pomerene Act*,[51] and the *Export Trading Act of 1982*,[52] for instance, would remove the apparent hypocrisy of permitting otherwise criminal behavior so long as the victims are foreigners. Indeed, as noted by Mr. Justice La Forest in the Supreme Court of Canada's decision in *Libman*: "In a shrinking world, we are all our brother's keepers. In the criminal arena this is underlined by the international cooperative schemes that have been developed among national law enforcement agencies."[53]

In terms of unilateral procedural changes which might usefully be considered, the elimination of the oft-criticized private treble damage actions in the U.S. would also eliminate the need for clawback legislation and remove the incentive for purely protectionist private antitrust claims in the U.S. against Canadian exporters.[54]

It is in the area of merger review, perhaps, that the prospects for harmonization are the greatest. Harmonization of pre-notification filing procedures could easily be accomplished without impinging upon antitrust principles of either country, and would significantly reduce the administrative burden on transborder merger participants. Uniform thresholds may not be appropriate in light of the imbalance in the sizes of the two economies, but common definitions of a "merger" might usefully be explored, along with uniform substantive filing requirements, common waiting periods, and common fixed time limits within which to make a decision as to whether or not to challenge the merger.

Even if the procedural and substantive provisions of the antitrust laws in Canada and the United States were identical, however, differences in enforcement priorities and differential impacts upon the two economies would prevent uniform results of national antitrust reviews. "No degree of procedural and substantive harmonization can eliminate

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[49] *Id.* at 301.

[50] R.S.C. 1985, c. C-34 (*as amended*).

[51] 15 U.S.C. § 61-65 (1982).

[52] 15 U.S.C. § 4001-4053 (1982).

[53] *Libman v. The Queen*, *supra* note 29, at 214.

[54] The Foreign Extraterritorial Measures Act, *supra* note 23, § 8 permits the Attorney General of Canada to reduce the amount of foreign money judgments if he is of the opinion that significant Canadian interests in relation to the international trade or commerce are affected. Section 9(1) of the FEMA permits a Canadian to sue in Canada to recover from a person who has obtained and enforced an antitrust judgment abroad the amount of "excessive" damages as specified by the Attorney General. *See* Graham, *supra* note 29.

the qualitative judgements entailed in merger review nor the possibility that different agencies will reach different judgments, albeit within a common legal framework."[55]

Consultation and cooperation between Canadian and U.S. antitrust authorities will therefore continue to be essential in order to avoid potential conflicts, to minimize those that do occur, and to enable each country to effectively police anti-competitive behavior. The informal, biannual senior officials meetings which have been held since 1990 ensure that the open dialogue and communication essential to fruitful cooperation is maintained, as does the program of personnel exchanges between the Bureau of Competition Policy and the Department of Justice.[56] Even with such a spirit of cooperation, however, further development of the 1984 MOU could serve to significantly enhance the ability of the two countries to effectively police transborder activities.

B. Future Development of the 1984 MOU

The notification and consultation procedures outlined in the 1984 MOU, along with its stated intentions regarding cooperation and the growing informal ties between antitrust enforcement officials in the two countries appear to have been successful in avoiding or reducing antitrust friction in recent years. As a review of the MOU shows, however, the MOU was aimed more at avoiding conflicts and safeguarding perceived attacks on Canadian sovereignty than at enhancing cooperation in the international antitrust sphere. With the developments in the world economy outlined above, the Director has expressed a desire to increase substantive cooperation between Canada and other jurisdictions.[57] Some options for future expansion of the MOU might include provisions for mutual agreement on facts, joint investigations, and procedures for the adoption of a primary jurisdiction in transborder cases.

For instance, Canadian and U.S. antitrust authorities could be required to reach an agreement on the facts in a particular case involving transnational issues. Although this would not guarantee identical enforcement results, it should remove a significant source of differing results. For example, an issue in a number of merger cases is whether the party being acquired is failing or about to fail. It is possible that the antitrust authorities in each country might take a different view of that question. An understanding whereby there had to be agreement on facts with respect to market definition, barriers to entry, product definition, and failing firms in transborder merger cases might go a long way to reducing divergent results in cases affecting both parties.

Somewhat more ambitious might be the amendment of the MOU

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[55] Trebilcock and Campbell, *supra* note 36, at 147.

[56] Addy, *supra* note 2, at 295.

[57] Addy, *quoted in Financial Post*, *supra* note 46.

to provide for joint investigations in antitrust cases. It would be necessary to have a mechanism to decide the cases where a joint effort was appropriate or necessary. Joint efforts could go some distance toward facilitating agreements on facts and, ultimately, consistent enforcement decisions. Since this proposal would not extend beyond the enforcement activities of the antitrust agencies, it would not deal with the judicial questions of jurisdiction[58] or applicable law, or provide a means to have one joint judicial body determine such cases.

Another possible step toward greater cooperation would be the establishment of criteria to decide which antitrust agency would have primary jurisdiction to handle any particular transborder case. The basic notion of primary jurisdiction is the exercise of restraint by one country in the enforcement of its law through the recognition of a greater rationale for jurisdiction resting with the other party. An assumption of such a system is that the degree of discretion necessary to allow deferral to another jurisdiction exists in the present Canadian and U.S. antitrust regimes however such discretion does not exist at present.[59]

Some features of the recent U.S.-European Community agree-

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[58] With respect to jurisdiction, recent comments by the Supreme Court of Canada in *Morguard* and *Hunt* indicate that in potentially multi-jurisdictional cases Canadian courts can and should consider the reasonableness of either enforcing foreign judgments or asserting jurisdiction in light of the principle of international comity. In Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 1094, La Forest J. wrote: "Modern States. . . cannot live in splendid isolation. . . ." In *Hunt*, La Forest J. said: "Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe." Hunt v. T&N P/C, *supra* note 5.

In the United States, the line of cases flowing from the *Timberlane* decision of the U.S. Court of Appeals provides the basis for U.S. courts to refrain from asserting jurisdiction in every possible case should a more reasonable jurisdiction present itself. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), *cert. denied.* 53 U.S.L.W. 3895 (U.S. June 25, 1985) (No. 84-1761) *cited in* Dyal, *supra* note 3, at 1076. The flexibility provided by the *Timberlane* case has likely been considerably restricted, however, by the United States Supreme Court's 5:4 decision in Hartford Fire Insurance Co. v. California, 65:1621 ATRR 30 (June 28, 1993). *Amicus curaie* briefs were filed by both the U.K. and Canada in this case to the effect that the impugned actions of the London-based reinsurers were permissible under a complete U.K. regulatory scheme and that the application of the *Sherman Act* to such conduct would not be reasonable in light of the principle of international comity. The majority held that principles of international comity would only mitigate against exerting jurisdiction in cases where the defendants were required by foreign law to act in a fashion prohibited by the United States, or where compliance with the laws of both countries was otherwise impossible. The strong minority opinion written by Mr. Justice Scalia, called this a "breathtakingly broad proposition," which would "bring the *Sherman Act* and other laws into sharp and unnecessary conflict with the legitimate interests of other countries - particularly our closest trading partners." Hartford Fire Insurance Co. v. California, 65:1621 ATRR 30, 46 (June 28, 1993). Although the majority judgment left *Timberlane* intact, its rather narrow approach to the application of *Timberlane* may have set the stage for further friction in international antitrust enforcement.

[59] Section 10 of the *Competition Act* requires the Director to investigate *whenever* he thinks a matter warrants enforcement action or he receives a sworn complaint from six Canadian residents. This duty would appear to be mandatory and non-delegable.

ment[60] might be incorporated into any updated MOU between Canada and the United States. Notification and consultation procedures could be extended to cover regulatory and judicial actions in which one of the parties intervenes or participates. The biannual meetings could be institutionalized in order to ensure that they survive current and future rounds of budget cut-backs in the two administrations. The parties could be called upon to inform each other of activities which come to their attention which would have an anti-competitive impact on the other's economy. In this case, in light of the substantive differences between the two legal regimes, it would be necessary to ensure that information would be provided only with respect to actions which, if their effects were felt in the informing jurisdiction, would be valid objects of investigations there and subject to similar penalties.

Perhaps of the greatest potential significance, however, are the provisions in the EC-U.S. agreement relating to cooperation and coordination in antitrust enforcement activities. As in the Canada-U.S. MOU, each party is required to assist the other if such assistance is in accord with its own interests and laws. The EC-U.S. MOU goes further, however, and provides a list of factors to consider in deciding whether coordination is in the best interests of the parties. Such factors include the cost and enforcement efficiencies which could result from coordination, and the other party's interests (*i.e.*, comity). Perhaps most innovative, however, are the "positive comity" provisions[61] which allow for one party, when it decides that conduct in the other's territory is contrary to its important interests, to request that the other party take action against the conduct.[62] This provision permits the requested country to avoid the extraterritorial application of the first country's laws by itself asserting jurisdiction over actions taken within its territory. Although the provision is voluntary, and the idea of deferring to a foreign jurisdiction to enforce its antitrust laws in respect of effects felt in the domestic economy may conflict with notions of sovereignty, in the field of merger review they might actually prove to be the most workable and the least contentious. If this idea eventually could be developed into a workable mechanism for antitrust enforcement generally, it has the potential to avoid the sort of extra-territorial enforcement actions which have caused friction in the past.

In order to implement any of these developments in a meaningful way, it would be necessary to amend domestic laws in both countries to

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[60] Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, September 23, 1991, 30 I.L.M. 1487. *See* summary and discussion in William K. Walker, *Extraterritorial Application of U.S. Antitrust Laws: The Effect of the European Community - United States Antitrust Agreement*, 33 HARV. INT'L L.J. 583 (1992).

[61] Walker, *supra* note 60, at 33.

[62] EC-US Agreement, *supra* note 60, at art. V, para. 2.

permit the antitrust authorities to exchange information and to exercise discretion in the transborder investigations so that comity principles could be applied. The confidentiality provisions, in particular, have been identified as posing the biggest obstacle to meaningful cooperation even under the existing framework.[63] The challenge will be to strike the appropriate balance between safeguarding business concerns for confidentiality sufficiently so that business cooperation with antitrust investigations is not impaired, and permitting antitrust authorities to share the information necessary to form agreed sets of facts, to jointly investigate an issue, or to choose a lead jurisdiction.

In our view, the current provisions of the *Competition Act* (the Act) do not permit the disclosure of case-specific information by Bureau officers to foreign antitrust authorities, even for the purpose of gathering information in that particular case. Subsection 10(3) of the Act provides that all inquiries conducted by the Director "shall be conducted in private". This is reinforced in subsection 29(1), which prohibits anyone involved in the administration or enforcement of the Act from communicating, among other things, the identity of anyone from whom information has been obtained, or any information obtained pursuant to the Director's compulsory powers to gather evidence. The exception to this prohibition on disclosure permits disclosure to "a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act." By virtue of section 126 of the Canadian *Criminal Code*, willing disclosure of information in violation of the prohibition in subsection 29(1) of the Act is an indictable offense, punishable on conviction by up to two years in prison.

Subsections 10(3) and 29(1) would appear to constrain the Director from disclosing information obtained pursuant to an inquiry to any foreign law enforcement agency. In our view, the explicit reference to Canadian law enforcement agencies in subsection 29(1) negates any possible implication that disclosure for "the purposes of the administration or enforcement of this Act" contemplates disclosure to foreign law enforcement agencies. This is also consistent with the stipulation that disclosure be permitted for the enforcement of *this* Act and not that of another state. Furthermore, if the latter part of the exemption extended to all law enforcement agencies, and indeed to anyone to whom disclosure was deemed convenient, then both the exemption for Canadian law enforcement agencies, and the stipulation that investigations be conducted in private would be redundant.

This view is reinforced when one compares the limited approach to disclosure permitted under the *Competition Act* with the broad disclosure permitted under subsection 231(2) by investigators appointed pursuant to section 229 of the *Canada Business Corporations Act*

[63] Addy, *supra* note 2, at 297-98.

(CBCA). Subsection 231(2) of the CBCA provides as follows:

> In addition to the powers set out in the order appointing him, an inspector appointed to investigate a corporation may furnish to, or exchange information and otherwise cooperate with, any public official in Canada or elsewhere who is authorized to exercise investigatory powers and who is investigating, in respect of the corporation, any allegation of improper conduct that is the same as or similar to the conduct described in subsection 229(2).

The contrast between the wording of subsection 29(1) of the *Competition Act* and subsection 231(2) of the CBCA makes it clear that the Director is not currently permitted to exchange information in a manner which would be necessary if there were to be agreed sets of facts in transborder cases, or joint investigations or deferral to lead jurisdictions.

A disclosure provision such as that contained in the CBCA would be improper unless there were a concomitant safeguard for the confidentiality of the information once it is provided to the U.S. authorities and a *proviso* that information only be exchanged pertaining to alleged violations which would be actionable in both jurisdictions and, if actionable, subject to similar penalties. Perhaps a leaf could be taken from the U.S.-Australia Agreement[64] in this regard, by providing that information supplied by the other country's authorities is not to be used as evidence in any judicial or administrative proceeding without the consent of the supplying country. Better yet, in view of the reliance historically placed by Canadian antitrust authorities on voluntary cooperation by target companies with the Director's investigations, the MOU should contain a complete prohibition on such use. The receiving country would be notified of potential violations of its laws, but would be forced to gather its own evidence independently. This provision would be consistent with the development of agreed sets of facts, joint investigations and deferral to lead jurisdictions as referred to above. Moreover, any confidentiality requirements to which each country would be bound in respect of information supplied by the other country must be backed up by equivalent sanctions as are imposed for breaches of confidentiality in respect of information obtained from domestic parties.[65]

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[64] Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, 21 I.L.M. 702. *See* King, *supra* note 21, for a discussion of this agreement and a comparison to the U.S.-Germany agreement, as well as to the 1959 and 1969 Understandings.

[65] Addy, *supra* note 2, at 300. The authors note that the passage of the International Antitrust Enforcement Act of 1994 in the United States has given the updating of the MOU new impetus. This Act permits the U.S. Attorney General and the Federal Trade Commission to enter into agreements to provide information and other assistance to foreign antitrust agencies, conditional on reciprocity of assistance and confidentiality safeguards.

Bilateral solutions to the problems of policing transborder business can, however, only go so far. Although the majority of international business and trade in Canada is with the United States, the plethora of reviewing jurisdictions in the Gillette/Wilkinson merger and the multitude of nations which were offended by the *Uranium* cases bear witness to the utility of broadening cooperation beyond these two countries. Moreover, so long as such bilateral understandings are voluntary and subject to existing domestic law, even the broadest statements of good intent can be thwarted on a practical level. Indeed, Davidow and Chiles referred in 1978 to the "general attitude that the voluntary, non-public, bilateral, diplomatic approach to international business conflict resolution constitutes a cosmetic formula designed to indicate goodwill and diplomatic accessibility while actually disguising a basic unwillingness to surrender national discretion in the economic arena."[66] Owing to the convergence of enforcement philosophies in Canada and the United States since 1978, we would not subscribe to such a gloomy view of the efficacy of expanding the provisions of the MOU. Nonetheless, strengthened and expanded MOU's can be seen as building blocks on the road to more comprehensive methods of policing international antitrust affairs: ". . .because of the territorial limitations of the jurisdiction of competition authorities, a truly international framework cannot result from a purely bilateral or even trilateral approach."[67]

C. *Multilateral Approaches to International Antitrust Enforcement*

Regardless of the shape which any supranational antitrust enforcement mechanism might eventually take, continued work will be required to identify areas where substantive laws presently diverge, and to attempt to develop consensus in those regards. The OECD's work in the development of recommendations for multilateral antitrust enforcement[68] could be usefully directed toward the coordination of competition policies. The fact that the development of common ground rules will take years should not deter the process. In addition, more empirical research into the actual anti-competitive effects of many of the practices which national antitrust agencies are commonly called upon to assess (*e.g.*, international strategic alliances, vertical restraints, transnational mergers, *etc.*) would assist in the development of a consensus

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[66] Joel Davidow and Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247 (1978), *quoted in* King, *supra* note 21, at 79, note 135.

[67] Bail, *supra* note 30, at 285.

[68] OECD Recommendations, *supra* note 8. The biannual conferences under UNCTAD which lead to the promulgation of the *Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices*, G.A. Resolution 35/63, U.N. Doc. A/RES/35/63 (1980) might also provide such a forum, although the larger number of countries involved may render this impractical.

in antitrust enforcement.[69] The promulgation by national antitrust authorities of guidelines such as those published by the Director relating to mergers, price discrimination, predatory pricing and misleading advertising would also add to the transparency of national antitrust enforcement policies, and so contribute to the dialogue which is essential if consensus is to be encouraged.[70]

Looking down the road to possible supranational enforcement, several options have been proposed in the antitrust literature. The EC and the broader European Economic Area already provide a model for supranational antitrust enforcement,[71] and some have speculated as to whether the EC model might be applicable elsewhere.[72] The contrast between the tortured road to the successful conclusion of the Uruguay Round GATT discussions[73] and the comparative ease with which Canada and the United States and Mexico were able to negotiate the NAFTA supports the theory that regional consensus in supranational business regulation might be achieved more easily than global agreement. "Regional competition policies should therefore be seen as necessary building blocks for a coherent multilateral system."[74] The development of an EC style competition law applicable to the NAFTA would nonetheless be an imposing challenge, as the three countries would have to agree on a common set of competition rules, and agree to grant binding authority to a supranational administrative authority as well as to a common supranational court.[75] Given the inability so far of Canada and the United States to agree on a common set of rules regarding anti-dumping and countervailing duty actions, the development of a NAFTA competition authority with binding power to investigate and

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[69] *See, e.g.*, Ronald Corvari, Marie Lavoie and Caroline Pestieau, *Trends in Foreign Direct Investment and Joint Ventures: Their Impact on Technological Accumulation and Competition in Canada in the 1980's, in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY 51 (Kautzenbach et al. eds., Baden-Baden: Nomos Verlagsgesellcshaft 1993).

[70] Campbell and Trebilcock, *supra* note 36, at 147.

[71] As described by Christopher Bright: "The (European Commission) has full power to collect information, investigate and enforce throughout the 12 member states and there is one supreme judicial body - the European Court of Justice. Under the EEA Agreement, twin authorities - the EC Commission and the EFTA Surveillance Authority - have equal powers in the EC and EFTA respectively. The EC Commission is required to use its information-gathering and investigatory powers to assist the EFTA Surveillance Authority in enforcement work by the latter in the EC and vice versa. There is express power to exchange confidential information and business secrets. Decisions by either body are enforceable throughout the twelve EC member states and seven EFTA countries. The European Court of Justice sits over EC Commission decisions and a new EFTA court over decisions of the EFTA Surveillance Authority." Bright, *Internationalisation of anti-trust*, 136:39 SOLICITORS J. 990 (October 9, 1992).

[72] Bail, *supra* note 30, at 295; Campbell and Trebilcock, *supra* note 36, at 153.

[73] Launched in November, 1986 and concluded at the meeting of trade ministers in Marrakesh, Morocco from April 12-15, 1994.

[74] Bail, *supra* note 30, at 285.

[75] *Id.*

prosecute in respect of transborder competition law issues is likely still some years in the future.

One alternative for multi-jurisdictional merger review, suggested by Campbell and Trebilcock, is the expansion of the primary review jurisdiction proposed for the MOU to a multilateral setting.[76] A coordinating agency could be chosen from among the nations who would be affected by the transaction, possibly that which would be most affected by the transaction, or perhaps that in which the largest portion of the assets of the companies is found. The lead jurisdiction would coordinate the gathering of information from all affected states, perform an analysis, and formulate an opinion which would be binding in its own jurisdiction, but take the form of a recommendation for action to enforcement authorities in the other jurisdictions. Such a mechanism would require rules for identifying mergers with multinational effects, and for choosing the lead jurisdiction. In addition, confidentiality rules in most jurisdictions would have to be modified to permit the provision of information to authorities in the lead jurisdiction. A stronger version of the lead jurisdiction model as suggested by Campbell and Trebilcock would provide that the lead jurisdiction's decision in respect of a merger would be binding in all affected nations. Such a development would require agreement on criteria and methods for merger analysis, as well as cooperation and agreement between nations in whose markets the effects of the merger would be felt and those in which the merging parties' assets are located. A dispute resolution mechanism would also strengthen this option.

Lead jurisdiction review still involves other nations entrusting antitrust enforcement with respect to their jurisdictions to some other national enforcement agency. It is not clear that many nations would willingly forego jurisdiction in favor of an agency that might have its own national priorities. Accordingly, a supranational antitrust authority has been proposed by many,[77] either in the form of a disinterested dispute resolution body, or in the form of an independent and binding supranational antitrust authority.

One example, the *Draft International Antitrust Code* published by the ABA International Antitrust Code Working Group on July 10, 1993, proposes minimum standards for national antitrust laws, and the establishment of an International Antitrust Authority under the auspices of the World Trade Organization (WTO) to be established pursuant to the Uruguay Round of GATT negotiations.[78] Concentrations with international dimensions would be notified to all national antitrust

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[76] Campbell and Trebilcock, *supra* note 36, at 147.

[77] *See generally*, papers by Ostry, Bail, Addy and Ruppelt, in section IV, International Coordination of Competition Policies?, *in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY (Kautzenbach et al. eds., Baden-Baden: Nomos Verlagsgesellcshaft, 1993).

[78] Special Supplement, 64:1628 ATRR, (August 19, 1993).

enforcement agencies affected, as well as to the International Antitrust Authority.[79] The International Antitrust Authority would be an independent body established within the institutional framework of the WTO. Its powers would include the power to request actions in individual antitrust cases or groups of cases to be instituted by a national antitrust enforcement agency; to bring actions against national enforcement agencies if such agencies should refuse to take appropriate measures against individual restraints of competition; to sue private persons or undertakings before national law courts asking for injunctions against anti-competitive restraints of competition; to appeal from decisions of the national courts even when it was not a party in the trial, but under the same conditions as the parties to the case; to sue a party to the agreement for violations of the agreement; and to assist parties to the agreement to promulgate antitrust laws and to institute efficient antitrust administration.[80]

The *Draft Code* also envisages the establishment of a permanent International Antitrust Panel to operate in the framework of the new dispute settlement mechanism under the WTO. Provided consultations were first tried but failed, this permanent six member body would be authorized to adjudicate disputes between the parties to the agreement with respect to alleged violations of the agreement. The Panel would decide whether obligations under the agreement had been violated. If a national judicial decision was found to be inconsistent with the obligations under the agreement, the competent national law court or other authorities would have to reconsider their decisions respecting the findings of the Panel.[81]

V. CONCLUSIONS

The 1984 MOU between Canada and the United States regarding transborder antitrust investigations was born out of a series of conflicts reflecting divergent approaches to antitrust law in the two countries at the time. Since that time, substantive law and enforcement philosophies have converged somewhat, thereby reducing the severity and frequency of incidents of antitrust friction between the two countries. No doubt, the notification and consultation mechanisms of the 1984 MOU also contributed to the increased understanding between the countries regarding antitrust enforcement.

In light of an increasingly interdependent business world, however, there have been calls for an updated MOU in order to enhance the ability of the antitrust authorities in both countries to cooperate in appropriate cases. The current disclosure provisions in the *Competition*

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[79] *Id.* at art. 10.
[80] *Id.* at art. 19.
[81] *Id.* at art. 20.

Act would have to be amended to permit some degree of sharing of information between the regimes. At the same time, however, care needs to be taken to safeguard businesses from undue disclosure and to ensure at a minimum that the receiving party is bound to the same degree of confidentiality as is the party providing the information. In the immediate future, with each country independently applying its own antitrust laws to actors and events which impact upon their own economies, inclusion of a provision borrowed from the U.S.-Australian agreement preventing the receiving party from using information as evidence in any administrative or judicial proceedings would lessen the degree to which the sharing of information between the antitrust authorities will discourage businesses from providing information to either the Director or the Antitrust Division.

For the long run, several models for a more integrated multinational approach to antitrust enforcement in transborder settings have been proposed. These models take many shapes, and would require varying degrees of substantive harmony in the antitrust laws of the countries involved. Further discussion, and continued debate concerning the relative merits of these models can only serve to clarify the underlying issues and improve antitrust relations between the countries involved.