Canada-United States Law Journal

Volume 12 | Issue

Article 8

January 1987

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*by Joel Davidow**

In 1889, Canada enacted the first antitrust law in the modern world.[1] In 1890, the United States followed with enactment of the Sherman Act.[2] Both laws reflected "prairie populist" concern with the monopoly power of railroads and graineries. Despite common origins in terms of time and motivation, the two antitrust laws developed in quite different ways. In general, the U.S. antitrust system emerged as broader, tougher, more extraterritorial and more frequently enforced privately than the antitrust system of Canada. Nor did common origins and purposes ensure that antitrust enforcement across the U.S.-Canadian border would be easily accepted. Eventually, U.S.-Canadian agreements for antitrust cooperation were developed and refined, but disputes about extraterritorial U.S. enforcement have been heated and recurrent over the last four decades, and have resulted in the passage of Canadian blocking legislation which is the complete antithesis of cooperation.[3]

At present, the United States and Canada are embarked upon a serious effort to negotiate a free trade zone between themselves. The issue has been raised whether such a trade zone should not only involve elimination of tariffs but also coordination and harmonization of rules governing competition. Such rules are contained both in international trade laws, such as those dealing with dumping and subsidized competition, and in antitrust laws. There are international agreements, namely the GATT codes of conduct on dumping and subsidies, which commit the

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[1] An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, 1889, 52 Vict., ch. 41 (Can.). This enactment was incorporated into the Criminal Code in 1892, where the provisions remained until their consolidation in 1960 in the Combines Investigation Act. An Act to amend the Combines Investigation Act and the Criminal Code, R.S.C. ch. 23 (1960) [hereinafter cited as the "Combines Investigation Act"]. *See generally* Cambell, *Canadian Combines Law: A Perspective on the Current Combines Investigation Act and Recent Case Law*, 5 N.C.J. OF INT'L L. & COMM. REG. 57-60 (1980).

[2] The Sherman Act was the Act of July 2, 1890, ch. 617, 26 Stat. 209, 15 U.S.C.A. §§ 1-7 (1982). *See* 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 9-16 (E. Kitner ed. 1978) for the historical background of the passage of the Act.

[3] *See infra* notes 9, 10, 24, 31, 40 and accompanying text.

signatories to relatively uniform trade laws.[4] There is no GATT requirement that nations should harmonize their antitrust laws. The OECD and the U.N. have adopted codes of conduct dealing with restrictive business practices and have formed expert committees to further harmonization and cooperation.[5] Nevertheless, none of these codes is binding and none has had a comprehensive effect in regard to creating uniformity among the antitrust laws of nations accepting the guidelines.

Assuming that one had very strong ambitions regarding competition rules within a free trade zone, there appear to be three major goals one might want to achieve: 1) standardization of the national antitrust laws of the member states within the zone; 2) institutionalization of mechanisms to ensure cooperation in the enforcement of the national laws to trans-border violations; 3) creation of a supranational body to arbitrate disputes or to enforce an international antitrust law which embodies the same principles as are contained in the national laws of the member states.

Relevant to these goals is the question whether the free trade agreement would, as in the European Common Market,[6] treat trans-border sales within the zone as domestic sales that are exempt from the dumping and countervailing duty laws of the member nations. In that event, antitrust laws would be the major remaining laws to regulate competitive behavior. It has seemed, however, the United States, at least, was reluctant to follow the EEC precedent in dealing with Canada. Nevertheless, Canada has pushed the issue strenuously. The U.S.-Israel free trade zone expressly preserves the applicability of the dumping and subsidy laws,[7]

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[4] Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade (GATT), April 12, 1979, T.I.A.S. No. 9650; Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of General Agreement on Tariffs and Trade (GATT), April 12, 1979, T.I.A.S. No. 9161. The GATT is a multilateral agreement which incorporates the principle of "most favored nation" treatment of foreign products into trade relations. General Agreements in Tariffs and Trade, October 30, 1947, 61 Stat. 5, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

[5] *See, e.g.*, UNCTAD, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices § E(7), (8), UN TD/RDP/CONF/10 (1980); Recommendation of the OECD Council Concerning Action Against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprise, OECD Doc. C (78) 133 (Final) (July 20, 1978), reprinted in 17 INT'L LEGAL MATERIALS 1527 (1978) (representing examples of international agreements to harmonize control of restrictive business practices to promote trade liberalization). *See also* GLEISS & HIRSCH, COMMON MARKET CARTEL LAW 14 (1981) (emphasis on control of restrictive practices as a concomitant of trade liberalization is also found in the Common Market Treaty and the European Free Trade Association Agreement).

[6] Regulation 3017/79, 22 O.J. Eur. Common. (No. L 339) 1 (1979) (the countervailing duty and antidumping laws of the European Common Market apply only to exports from non-member states).

[7] Trade and Tariff Act of 1984, 19 U.S.C. § 1654 (1984). Section 460 expressly provides:
Neither the taking effect of any trade agreement provision entered into with Israel under section 102(b)(1), nor any proclamation issued to implement any such provision, may affect in any manner, or to any extent, the application to any Israeli articles of section 232 of the Trade Expansion Act of 1962, section 337 of title VII of the Tariff Act of 1930, chapter 1 of title II and chapter 1 of title III of the Trade Act of 1974, or any other provision of law

but the Canadians want a better deal.

The practical reality appears to be that the agreement will not contain exemptions from the dumping or countervailing duty (CVD) laws. Furthermore, if businesses can have recourse to either trade or antitrust laws to use to challenge foreign competition that they regard as unfair, they will almost always choose the trade laws, which are faster, stricter and less costly to use. That being true, the issue of antitrust harmonization as such could be somewhat minor and academic to analyzing the future trade situation.

In this context this paper will, first, examine the troubled history of U.S.-Canadian antitrust relations and, second, consider the prospects for harmonization and cooperation.

I. ENFORCEMENT CONFLICTS

To trace the history of U.S.-Canadian antitrust relations is to embark upon a roller coaster ride. Rigorous extraterritorial enforcement of U.S. antitrust policy against Canada has been followed by reactive Canadian blocking legislation. Diplomatic efforts to assuage these resultant tensions have usually produced bilateral agreements providing for antitrust consultation and cooperation. Such agreements have been followed by another round of unwelcome U.S. antitrust litigation and Canadian legislative reactions.

U.S.-Canadian tensions in the antitrust area surfaced at least as early as 1947, when the Department of Justice successfully sought to obtain inspection by means of a grand jury subpoena of the corporate records and other documents of Canadian corporations who were engaged in the paper and pulp industry.[8] The Ontario Legislature reacted swiftly to U.S. judicial intrusion by passing the Business Records Protection Act which barred presentation of Canadian business records for use in foreign courts by rendering such production illegal.[9] Reacting more slowly, the province of Quebec passed its Business Concerns Records Act in 1958.[10] Provincial legislation, however, was not particularly effective in shielding Canadian firms from American discovery orders.[11]

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under which relief from injury caused by import competition or by unfair import trade practices may be sought.

See H.R. Rep. No. 1092, 98th Cong., 2d Sess. (1984) for additional explication of application of GATT to United States-Israel free trade zone.

[8] In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Co., 72 F. Supp. 1013 (S.D.N.Y. 1947).

[9] Business Records Protection Act, S.O. 1947, ch. 10, now Ont. Rev. Stat. ch. 54 (1970). The provisions of this Act are not self-executing. Either the Attorney General or any person with an interest in a business whose records are the subject of a foreign subpoena must first make a court application to require persons responsible in the firm not to divulge records of the firm.

[10] *See* Business Concerns Records Act, S.Q. 1957-58, ch. 42, now Que. Rev. Stat. ch. 278 (1964).

[11] *See, e.g.*, Sabalot, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes,* 28 LOYOLA L. REV. 213, 252 (1982) (explaining the Cana-

Canadian resentment of extraterritorial U.S. antitrust policies increased as a result of the 1958 *Canadian Radio Patents* case where the U.S. attacked pooling arrangements among Canadian home entertainment patent holders and licensed manufacturers.[12] The practical effect of these agreements was to coerce companies who wished to participate in the Canadian market to establish facilities in Canada rather than export from the U.S.[13] In 1962, consent decrees that prohibited pool participation were entered.[14] In a related private treble damage action, Zenith recovered a $10 million settlement against three of the Canadian firms in the pool.[15]

Not all Canadians favored confrontation as a policy. In 1959, Canadian Minister of Justice Fulton and U.S. Attorney General Rodgers achieved an informal antitrust understanding entitled, "Antitrust Notification and Consultation Procedure."[16] The purpose of this informal agreement was to recognize and attempt to alleviate existing U.S.-Canadian antitrust tensions.[17] The 1959 agreement was amplified in a 1969 accord between Canadian Consumer and Corporate Affairs Minister Ron Basford and U.S. Attorney General John Mitchell. The accord pledged to observe the OECD guidelines for antitrust cooperation.[18]

Commentators questioned the effectiveness of both the Fulton-Rodgers and the Basford-Mitchell agreements. The apparent flaws included: failure to ensure confidentiality of disclosures, lack of treatment of Canadian blocking legislation and failure to establish a mechanism by which Canada would be informed of the U.S. government position on the implementation of a specific trade or export policy. The general consensus regarding the effectiveness of these agreements seems to be that the roots

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dian policy that "Canadian firms should not be used as the instrumentalities of United States economic policy" and the enactment of blocking legislation which was the "only recourse to prevent the frustration of Canadian national policies and the infringement of its sovereignty").

12 United States v. General Electric Co., 87 F. Supp. 753 (D.N.J. 1949); 1962 Trade Cas. ¶¶ 70,342, 70,428, 70,546 (S.D.N.Y. 1962) (consent decrees). *See also* United States v. Imperial Chem. Indus., 105 F. Supp. 215 (S.D.N.Y. 1952) (holding that when restraints had been effected by patents and processes agreements calling for exclusive licensing and exchange of patents, compulsory licensing of patents at reasonable royalties would be decreed).

13 *Id. See also* A3 G. KAISER, WORLD LAW OF COMPETITION, Pt. 2 § 13.02(1) (1985) (providing analysis of implications of pooling arrangement).

14 *Id.*

15 Zenith Radio v. Hazeltine Research, 401 U.S. 321, 326 (1971) (the settlement ended protracted litigation in which Zenith had alleged that as a result of pooling arrangements it had been conspiratorially refused a license to import into Canada).

16 ANTITRUST NOTIFICATION AND CONSULTATION PROCEDURE, 1 HOUSE OF COMMONS DEB. 617-19 (Can. 1959) (Statement of Hon. E.D. Fulton, the Minister of Justice).

17 *Id.*

18 Canada-United States: Joint Statement Concerning Cooperation in Antitrust Matters, U.S. Dept. of Justice (press release Nov. 3 1969). *See also* OECD guidelines for antitrust cooperation contained in ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL CONCERNING COOPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE (1967).

of these problems remain.[19]

The cynicism of the commentators has to some extent been confirmed by the uranium and potash litigation of the 1970's. The very complex uranium cartel litigation involved challenges by plaintiffs of the antitrust validity of an international cartel initiated by four uranium producing nations (including Canada); a cartel that was designed to stabilize the non-U.S. uranium industry by setting minimum prices and allocating sales in countries outside of the United States and within the cartel nations themselves.[20] Although designed not to affect the U.S. market, the cartel allegedly involved a concerted refusal to deal with a U.S. "middle man" firm, Westinghouse. Canadian firms that were members of this cartel were sued by Westinghouse and other U.S. purchasers in private treble damage cases.[21] One Canadian firm, a subsidiary of a U.S. multinational corporation, was indicted by the U.S. Justice Department.[22]

In 1976, the Canadian government promulgated the Uranium Information Security Regulations in direct response to the U.S. litigation involving the uranium cartel in order to "secure compliance with its [Canada's] own laws and policies respecting a vital Canadian natural resource in the face of assertions of jurisdiction by non-Canadian tribunals."[23] Unlike the Business Records Protection Act and the Business Concerns Records Acts,[24] these regulations did prove effective in preventing U.S. courts from obtaining certain information, though usually not halting unwelcome investigations or lawsuits.

The Ontario High Court also declined to cooperate by refusing to enforce U.S. letters rogatory in a breach of contract action related to the uranium cartel litigation, because it felt the release of these documents would be used to determine the U.S. antitrust liability of Canadian com-

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19 *See, e.g.*, Campbell, *The Canada-United States Antitrust Notification and Consultation Procedure: A Study in Bilateral Conflict Resolution*, 56 CAN. BAR. REV. 459 (1978). Mr. Campbell describes the situation in the following manner: "The Antitrust Notification and Consultation Procedure [is] an attempt to treat a compound fracture with aspirin. The aspirin [will] no doubt relieve part of the pain, but [can] never really get to the roots of the problem." *Id.* at 494.

20 *See* In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980) (Plaintiff, Westinghouse Corporation obtained default judgments against 9 defendants for violating the Sherman Act by conspiring to fix the world market price of uranium); Re Westinghouse Electric Corporation, 16 O.R. 2d 273 (1977) (The Ontario Court dismissed Westinghouse's application to enforce letters rogatory because the disclosure of such information would conflict with Canadian public policy. The Court was deferential to the asserted crown privilege that "the documents relate to the marketing of uranium which constituted an essential part of the policy of the Government." *Id.* at 291).

21 *Id.* at 275.

22 *Id.* at 278.

23 Uranium Information Security Regulations, P.C. 1976-2368, SOR/76-644 (Sept. 21, 1976), promulgated pursuant to the Atomic Energy Control Act, R.S.C. 1970, ch. A-19. The Regulations prohibited the release of any written matter or documentation relating to any phase of uranium mining, refining or marketing unless required to do so by Canadian law or by the Minister of Energy, Mines and Resources.

24 *See supra* notes 9, 10 and accompanying text.

panies that were acting pursuant to Canadian law and policy.[25] Curiously, Canada itself challenged aspects of the uranium cartel. However, the Canadian prosecution was ultimately halted because of the immunity of Crown Corporations.[26]

Another major Department of Justice antitrust suit which inspired hostility in the 1970's in Canada was the potash litigation. The potash case involved an alleged conspiracy, between U.S. potash producers and Saskatchewan officials, to coordinate United States and Canadian potash production, prices and the importing and exporting of potash to and from the United States.[27] Canada resented the naming of a provincial premier as a "co-conspirator," but the Canadian Supreme Court itself held the potash scheme to be an unconstitutional restraint of inter-provincial commerce, a position supported by the Federal Government of Canada.[28]

At this time, the Canadian government took another legislative step to curb the U.S. antitrust intrusion. In 1975, the Combines Investigation Act was amended to allow the Restrictive Trade Practices Commission to direct Canadian nationals to disregard orders, laws or decrees that would adversely affect defined national interests.[29]

On the other side of the border, U.S. courts utilized the full force of their judicial power under Rule 37(b) of the Federal Rules of Civil Procedure[30] and entered judgment against the Canadian-based National Hockey League for failure to comply with discovery in its ensuing litigation.[31]

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25 Re Westinghouse Electric Corporation, 16 O.R. 2d 273 (1977).

26 Regina v. Eldorado Nuclear Ltd., 25 S.C.R. 551 (Can. 1983), it was held that Crown Corporations are exempt from the Combines Investigation Act when they are acting as agents of the Crown. The recently enacted Competition Act, Bill C-91, 1st Sess., 33rd Parliament, proclaimed June 19, 1986 divests Crown Corporations of this privilege of immunity from prosecution under competition law by providing that the Act will be binding upon all Federal and Provincial Crown Corporations in respect of their commercial activities.

27 U.S. v. Amax, Crim. Action No. 76 CR 783 (N.D. I11. 1976), Cir. 76 C 2392, [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,076, Cases, 2526, 2527 (N.D. I11. 1977).

28 *See* Central Canada Potash Co. v. Government of Saskatchewan, 88 DLR 3d 609 (S. Ct. 1978).

29 Combines Investigation Act §§ 31.5, 31.6, R.S.C. (1970) ch. 23, as amended. These amendments were based on the findings of various studies such as the WATKINS REPORT, the GREY REPORT and the ECONOMIC COUNCIL OF CANADA REPORT, INTERIM REPORT ON COMPETITION POLICY (1969).

30 FED. R. CIV. P. 37(b)(2) provides in pertinent part:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> . . . .
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> (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party.

31 National Hockey League v. Metropolitian Hockey Club, Inc. 427 U.S. 639 (1976). The U.S. Supreme Court, affirming a dismissal by the District Court, held that respondent's failure to respond

Despite these tensions, the United States and Canada continued to display a desire to cooperate with one another on a diplomatic level. In March 1984, the United States and Canada reached an amended memorandum of understanding regarding notification and consultation procedures with respect to the application of national antitrust laws.[32]

This agreement requires notification whenever a party becomes aware that an antitrust investigation will involve either a national interest of the other country or the information sought is located in the territory of the other.[33] Likewise, a party may request consultation when it feels antitrust investigation will affect its significant national interest.[34] (Significant national interests is broadly defined to include even interests not involving any governmental connection.) Each party will seek information in the following order: 1) from its own territory, 2) from the territory of the other party by voluntary means, and 3) by means of compulsory process as a last resort, with it being agreed that a party should allow the other party an opportunity to request consultation before issuing process.[35]

Unlike the previous agreements, the 1984 agreement reflects an acceptance of the importance of confidentiality. All notifications and consultations are deemed confidential unless otherwise provided.[36] The agreement acknowledges that there may be limitations imposed by the laws of the U.S. or Canada on the disclosure to the other of certain classes of information.[37]

Despite the greater comprehensiveness of the current agreement regarding procedures to be followed in the event of a U.S.-Canadian antitrust dispute, the extraterritoriality issue is still viewed by Canadians as an ongoing concern. In December of 1984, the Canadian Parliament passed the Foreign Extraterritorial Measures Act,[38] a defensive statute to be used as a last resort when informal diplomatic channels have failed.[39]

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to written interrogatories ordered by the court represented "flagrant bad faith" which justified the "extreme sanction of dismissal." *Id.* at 643.

[32] U.S.-Canada Antitrust Accord, Memorandum of Understanding Between the Government of Canada and the Government of the United States as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, reprinted in 5 Trade Reg. Rep. (CCH) ¶ 50.464 (1984).

[33] *Id.* The accord expressly provides that:

"(1) The Parties will notify each other whenever they become aware that their antitrust investigations or proceedings, or actions relating to antitrust investigations or proceedings of the other Party, involve national interests of the other or require the seeking of information located in the territory of the other."

[34] *Id.*

[35] *Id.*

[36] *Id.* Under the terms of the agreement each party pledged to use "best efforts to assure confidentiality to the extent consistent with its national law." *Id.*

[37] *Id.*

[38] 46 Antitrust & Trade Reg. Rep. (BNA) 1106 (June 7, 1984).

[39] The Foreign Extraterritorial Measures Act was introduced on December 3, 1984 and proclaimed in force on February 14, 1985. Its substantive provisions are based upon the Foreign Pro-

The Act provides that, when, in the opinion of the Attorney General of Canada, extraterritorial action infringes upon Canadian sovereignty or adversely affects Canadian trade or commerce, the Attorney General of Canada (with the concurring approval of the Secretary of State for External Affairs in matters covered under Section 5) may prohibit or restrict all discovery related actions, order the nonenforcement and nonrecognition of a foreign judgment or order and reduce the amount of a foreign judgment to an amount he finds equitable (e.g., the Attorney General would be able to reduce a U.S. treble judgment award by two-thirds).[40]

II. THE STATE OF CANADIAN AND UNITED STATES ANTITRUST LAW: CONVERGENCE OR DIVERGENCE?

Harmonization of U.S. and Canadian antitrust approaches would not be a simple matter. Each nation has developed its own approach to the balance between criminal and civil enforcement in the issue of international jurisdiction and to the problem of federal power versus states' rights. The United States has managed to keep in operation a fairly vigorous program of both criminal prosecutions and civil remedial actions. U.S. courts have tended to support both approaches as being legitimate exercises of federal prosecutorial power. In Canada, for many years only criminal actions were authorized because of doubts about the constitutionality of civil enforcement.[41] Canadian courts have tended to scuttle many of the criminal prosecutions, particularly in the merger and monopoly area, probably because of a feeling that criminal treatment would be too harsh in such circumstances.[42] More recently, Canada has developed a civil approach through the use of a competition commission (The Competition Tribunal) as authorized by the Competition Act, but the support of the courts remains uncertain.[43]

In the United States, the Sherman Act condemns all restraints of

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ceedings and Judgments Act (FPJA), a defensive statute providing protection against extraterritorial antitrust discovery and enforcement of judgments by means of records protection and clawback provisions. The FPJA was introduced in 1980; however, it remained unenacted upon the expiration of the 31st session of the Canadian Parliament. It was reintroduced in a more comprehensive form in May 1984 as the Foreign Extraterritorial Measures Bill.

40 *See* Rowley, *Civil Suits and Class Actions Under the Combines Investigation Act*, NEW COMBINES LEGISLATION at 27 (1977).

41 The holding of Regina v. K.C. Irving, Ltd. 72 D.L.R. 3d 82 (1976) that the onus is on the Crown to prove detriment to the public arising from alleged merger and monopoly activities because "presumptions" are not permissible in criminal cases, makes prosecution of merger and monopoly activities virtually impossible. *See* Campbell, *supra* note 20 at 78-80.

42 *See supra* note 28. The recently enacted Competition Law provides that the laws regulating mergers and the use of monopoly power shall no longer be subject to criminal sanctions, rather alleged violations of these laws will be adjudicated in civil proceedings before the Competition Tribunal. All other criminal offenses as specified in the Combines Investigation Act retain their criminal designation in the Competition Act. *See also* Executive Summary of Bill C-19 an Act to Amend the Combines Investigation Act (1985) (for further explanation of civil offenses).

43 *See supra* note 2, at § 1.

interstate commerce or of U.S. commerce with foreign nations.[44] Canada has no grant of jurisdiction which relates to foreign commerce. Moreover, Canadian law is influenced by the British tradition that emphasizes territoriality as a necessary basis for jurisdiction. In 1982, for a variety of reasons, the United States amended the Sherman Act to limit its foreign commerce jurisdiction in two ways: first, by stating that jurisdiction would only extend to offshore activities that have a "direct, substantial and reasonably foreseeable" effect on the U.S. domestic market and second, by making the law applicable to export activity only if such an activity injures the U.S. domestic market or rival U.S. exporters.[45]

The U.S. approach to jurisdiction, even as modified in 1982, appears to be broader than that of Canada. There is one oddity in this regard, however. Canada condemns, under S.31.6 of its Competition Law, any direction by a foreign parent of a subsidiary in Canada which has the effect of injuriously restraining the export interests of Canada.[46] This provision is quite extraterritorial in that it may relate to the conduct of persons who have never set foot in Canada. The provision also apparently differs substantively from U.S. antitrust and Common Market antitrust, in that it condemns certain agreements between a parent company and its controlled subsidiary, while the United States and the EC have held that there cannot be actionable conspiracies among commonly owned corporations.[47]

U.S. law and practice has been modified to a limited extent to assuage Canadian and other foreign concerns. Canadian antitrust law, on the other hand, has recently been strengthened by passage of the Competition Act of 1986, which partially follows certain U.S. models. Earlier, Canadian makers of competition policy had followed a number of U.S. leads, particularly in the area of deregulation. Nevertheless it does not seem likely, or even realistically possible, that the striking differences be-

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44 15 U.S.C. § 4001 (1982). *See* Ryan, *The Export Trading Companies Act of 1982: Antitrust Panacea, Placebo or Pitfall?*, 28 ANTITRUST BULL. 501 (1983) (concluding that although "the ETC Act provides no exemption from U.S. antitrust laws and no protection against foreign antitrust laws, it does provide advantages to potential exporters in the form of an antitrust 'security blanket.' ").

45 Combines Investigation Act R.S.C. ch. 23, S.31.6, (1970), as amended.

46 *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (In reversing a 7th Circuit affirmance of a Sherman Act § 1 violation, the Supreme Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act."); Centrafarm B.V. v. Sterling Drug, Inc., Comm. Mkt. L.R. ¶ 8246 (1974) (Ruling that Article 85 of the EEC treaty (patent rights) is not concerned with agreements or concerted practices between undertakings belonging to the same concern as parent company and subsidiary if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.).

47 The proposed legislation is the Intellectual Property Rights Protection and Enforcement Act of 1986, H.R. 3776, 99th Cong. 1st Sess., 131 CONG. REC. H10259 (daily ed. Nov. 18, 1985). The bill was introduced on November 18, 1985 and referred to the House Judiciary Committee for consideration, to date the bill remains unenacted.

tween the two antitrust systems in terms of severity and scope are likely to be harmonized in the foreseeable future.

All this pessimism is not to imply that harmonization would not bring benefits. Canada would probably be better off with a stronger, more effectively enforced antitrust law. The United States would undoubtedly be better off if it got rid of some of its nonstandard antitrust approaches which Canadians never adopted as such.

Actually, much harmonization is now occurring because of the pressures of a common body of economic analysis and politico-economic pressures which affect both nations. Canada has moved toward deregulation for essentially the same reasons as the United States. It has attacked price fixing in the service sectors, such as real estate brokerages, in direct imitation of U.S. prosecutions. Conversely, the Reagan Administration is now seeking to implement a very permissive policy toward patent and other technology licensing restrictions, a program which would bring U.S. practice much closer to the present state of Canadian law on that subject.[48] The current and proposed weakening of U.S. merger control laws would also move the United States closer to the Canadian approach.[49] Canada has moved closer to the U.S. approach to merger control by enacting civil antitrust control of mergers (and notification of them) while dropping most elements of foreign investment control.

CONCLUSION

It has always been evident that Canadian irritation about various U.S. antitrust prosecutions has been more related to political sensitivities about U.S. policy domination and specific case-by-case issues than it has been to purely technical questions of jurisdiction.[50] In particular, there has been irritation about the strict U.S. attitude toward act of state or foreign compulsion defenses and the liberal American attitude toward allowing private treble damage actions to proceed into sensitive areas where governments would prefer they not intrude. Solutions have been attempted and are being considered now, but the differences in attitudes continue, which make it likely that the new solutions, like the old ones, will slightly miss the mark and that tensions will continue.

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[48] The Merger Modernization Act of 1986 was one of five administration legislative proposals unveiled February 19, 1986 (the other four are the Promoting Competition in Distressed Industries Act, the Foreign Trade Antitrust Improvements Act, the Antitrust Remedies Improvements Act and the Interlocking Directorate Act). For full discussion of these proposals, see 50 Antitrust & Trade Reg. Rep. (BNA)(Feb. 20, 1986; Feb. 27, 1986; Mar. 13, 1986).

[49] *See* Sanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195 (1978) (analyzing jurisdictional problems arising in applying United States antitrust law in the Canadian-United States economic context).

[50] Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970) (In a private action alleging a boycott in violation of 15 U.S.C. §§ 12, 15, the court held that where defendents were compelled by regulatory authorities in Venezuela to boycott the plaintiff, such compulsion is a complete defense to an action under the antitrust laws based on that boycott).

It has been well-settled U.S. antitrust law for some time that actions of private companies which are compelled by the order of a foreign sovereign are entitled to a full defense that excuses what appears to be an antitrust violation.[51] This defense was implicitly accepted by the Justice Department in the uranium cartel case when it declined to prosecute export price fixing because Canada had established a minimum export contract price for uranium fuel.[52] On the other hand, U.S. courts and enforcement agencies have stated that the defense is not available when the foreign government involvement is by a lower-ranking official who is acting outside his authority,[53] when a foreign government seeks to control the behavior of firms outside its territory, and when a foreign government merely approves or invites activity without compelling it.[54]

There is a certain logic to these U.S. positions in terms of classic international law. Moreover, the U.S.'s skeptical position concerning foreign approval is quite understandable, because it is very difficult to distinguish approval from mere toleration or non-disapproval. Since most governments allow or expressly permit cartel activity which is aimed toward foreigners abroad, the acceptance of mere permission as a full defense would protect virtually every foreign-based, outward-bound restraint from challenge by the injured nation. On the other hand, the foreign compulsion defense does not square with practical realities in free market countries. Most governments, no matter how strong their interest in the welfare of a particular industry, are not willing or able to set specific market prices and adjust those prices as necessary. Thus they are compelled to leave some pricing freedom to firms in the industry.

A solution to this issue has begun to emerge in regard to the antitrust defenses which are available to firms regulated by state governments within the United States. In a recent decision of the U.S. Supreme Court regarding rate fixing by trucking firms, the Court held that state approval *combined with detailed supervision of the prices being set* was sufficient to create a state action defense for the firms involved.[55] As of now, the official position of the U.S. Justice Department is that it would not accept the comprehensive supervision defense as the equivalent of foreign compulsion defense in some circumstances, especially where—as with the Arab League blacklist challenge in the *Bechtel* case—the foreign government policy is inimical to the interest or policies of the United

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[51] *See* Testimony of Assistant Attorney General John Shenefield to Senate Judiciary Committee (1979).

[52] Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962).

[53] *See* U.S. Dept. of Justice, Antitrust Guide for International Operations 8 (1977).

[54] Southern Motor Carriers Rate Conference v. United States 471 U.S. 48 (1985) (collective rate making activities of rate bureaus, which were composed of motor common carriers operating in the four states were entitled to Sherman Act immunity under the "state action" doctrine).

[55] Bechtel Corp. v. United States, 1 Trade Cas. (CCH) ¶ 62,430 (N.D. Cal. 1979), *aff'd* (9th Cir.) *cert. denied*, 454 U.S. 1083 (1981).

States.[56]

In both the uranium and potash cases, Justice Department prosecutions which caused little or no measurable damage to Canadian interests were followed by private treble damage actions which provoked cash settlements of significant size. Canada therefore joined the United Kingdom and certain other foreign nations in calling for control of private actions as being the "rogue elephants" within the U.S. antitrust system. The only immediate aid they received from the United States was an occasional amicus brief by the U.S. Justice Department and a promise in the 1984 U.S./Canadian Antitrust Accord to provide more of the same.[57]

More relief would be provided by proposed bills submitted in 1986 and 1987 by the Reagan Administration. Such bills would create a new balancing test for international jurisdiction,[58] would abolish treble damages in cases not involving price fixing,[59] or would abolish treble damages in regard to various types of cases, including international ones. However, the bills appear to be opposed by Democratic leaders in the U.S House of Representatives and Senate. The chances of ultimate passage of such bills are difficult to assess since most remained unenacted at the conclusion of the 99th Congress.[60]

It is becoming obvious that the creation of a U.S.-Canadian free trade zone is a precarious endeavor. Given that there are major obstacles to beginning the negotiations and to achieving an agreement, it appears doubtful that competition law harmonization will be achieved at this time or in conjunction with these negotiations.

On the other hand, it is clear that both nations would prefer that there be as level a playing field as possible in terms of competition rules. Similarly, continuance of disputes about antitrust enforcement and efforts to block that enforcement would add to the problems which are making achievement of the free trade zone difficult. In the antitrust area,

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[56] *See* Amicus Brief of United States in Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986).

[57] *See* United States-Canada Antitrust Accord, 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, reprinted in 5 Trade Reg. Rep. (CCH) ¶ 50,464.

[58] The Foreign Trade Antitrust Improvements Act of 1986, was introduced on February 6, 1986 as S. 397, 99th Cong., 2d Sess. (1986), but was not enacted prior to the conclusion of the 99th Congress. The bill was reported from the Senate Judiciary Committee on October 2, 1986, but died on the Senate Calendar. Section 3 of S. 397 would have added a new § 21 to the Clayton Act enumerating the factors courts were to consider in deciding whether the exercise of United States antitrust jurisdiction in private antitrust cases involving trade or commerce was reasonable.

[59] The Antitrust Remedies Improvements Act of 1986, was introduced on March 7, 1986 as S. 2162, 99th Cong., 2d Sess. (1986) and referred to the Senate Judiciary Committee; however, this bill was similarly unenacted before the expiration of the legislative session.

[60] *See* 50 Antitrust & Trade Reg. Rep. (BNA) (Feb. 20, 1986; Feb. 27, 1986; Mar. 13, 1986) for discussion and text of Reagan Administration antitrust reform proposals and Democratic opposition.

some bilateral progress has been made, such as with the achievement of the 1984 cooperation agreement.

The new Reagan Administration antitrust proposals to limit treble damage recoveries and create new grounds for dismissal of controversial international antitrust cases evidence a serious intent to lessen causes of tension with nations such as Canada. In the same spirit, it should be hoped that Canada will continue its efforts toward harmonization of its antitrust approaches with those of the United States and will refrain from expansion or intemperate use of its various blocking statutes. Actions such as these can help create an atmosphere conducive to the achievement of a free trade zone. Creation of the zone, in turn, could then ultimately lead to further U.S.-Canadian coordination in the antitrust area.