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Canada

CALVIN S. GOLDMAN, JOHN D. BODRUG,
AND MARK A. A. WARNER

This chapter has two principal objectives. First, it overviews Canadian competition and foreign investment review legislation and administrative practice, focusing on those aspects that are distinctive or touch on extraterritorial issues in enforcement. In so doing, this chapter also discusses the prevailing economic theory underlying competition policy in Canada, as well as some of the principal characteristics of the Canadian economy and the political institutions that influence that philosophy. Second, this chapter discusses implications of Canadian competition law and policy for Canada's competitiveness and its economic relations with its trading partners. Then, we turn to a broader definition of competition policy to examine how the application of Canadian laws pertaining to foreign investment, trade, and intellectual property rights affects competitive conditions within Canada and between Canada and its major trading partners.

Two broad conclusions emerge. First, the Canadian experience shows that a modern competition policy may be implemented effectively in a relatively small and open economy. Second, the relationship between Canada and the United States illustrates both the difficulties and the advantages of harmonization and convergence of competition policies.

Calvin S. Goldman and John D. Bodrug are partners at Davies, Ward & Beck, Toronto. From May 1986 until October 1989, Mr. Goldman was the director of investigation and research, Bureau of Competition Policy, Ottawa. Mark A. A. Warner is a legal counselor at the OECD Trade Directorate, Paris, and chair of the American Bar Association Section of Antitrust Law International Committee. Mr. Warner's views are his own and do not necessarily represent the views of the OECD or its member states.

The Economic Framework

Canada's economic environment is perhaps best understood in the context of a few basic statistics. In 1995, Canadian GDP was 8.1 percent of US GDP.[1] Canada's exports accounted for 36.4 percent of its GDP, and its exports to the United States amounted to 28.9 percent of its GDP. Canada exported to the United States 79.6 percent of all its exports, while imports from the United States accounted for 66.5 percent of total Canadian imports. By contrast, exports represented 9.0 percent of the US GDP, and US exports to Canada accounted for only 1.9 percent of total US GDP. However, exports to Canada represented 21.6 percent of all US exports, and imports from Canada accounted for 19.2 percent of all US imports.

These data demonstrate three simple themes that are central to understanding the Canadian approach to competition policy, particularly in explaining certain differences from US antitrust policy. First, there is an asymmetric relationship between the importance of the United States to the Canadian economy and the importance of Canada to the US economy. Second, Canada is dependent on international trade for its economic well-being. Third, even though foreign trade is relatively less important to the US economy generally, Canada is nonetheless a significant factor in the US economy.

At various times in Canadian history, Canadians have viewed these factors more as a threat than an opportunity. Up until the mid-1980s, Canada protected its domestic industries with significant tariffs. These tariffs induced foreign firms to establish branch-plant subsidiaries to produce and distribute in Canada rather than to export into Canada. Notwithstanding this policy, Canada periodically displayed skepticism toward the level of foreign ownership in the Canadian economy (Warner 1990, 16). For instance, in the 1970s this concern culminated in the creation of the Foreign Investment Review Agency to screen new foreign investments, and a National Energy Program, which severely restricted foreign ownership of the Canadian oil and gas industry. By the mid-1980s, however, there was widespread understanding in Canada that both of these policies prolonged recessions in Canada by discouraging much-needed foreign investment.[2]

In addition to their macroeconomic effect, these Canadian economic policies increased entry barriers (such as tariffs) and induced firms to establish comparatively small branch plants that produced below an

1. The data in this section of the paper are based on calculations made from data contained in *International Financial Statistics* (International Monetary Fund, June 1994) and *Direction of Trade Statistics Yearbook* (International Monetary Fund, 1993).

2. See Rugman and Warner (1988). The authors calculated that between 1980 and 1985 net outflows from the oil and gas sector totaled slightly more than C$15 billion.

efficient scale.[3] The effect of these policies, combined with the relatively small Canadian population spread over a large land mass, was to create small, segmented, and relatively inefficient markets within Canada.[4] Although these policies often led to concentrated markets with few firms, the firms themselves were still not large enough to produce efficiently. Furthermore, excess capacity in these industries, government subsidies and tariffs, and other barriers to entry prevented new competition from emerging and encouraged rivalistic firm behavior within many Canadian markets. Arguably, the horizontal effects of oligopolistic behavior in Canada further reduced the efficiency of the Canadian economy and, in the absence of effective competition in Canada, any efficiency gains from vertical integration did not necessarily accrue to the Canadian economy.

By the mid-1980s, however, the Canadian economy had matured considerably as a result of other developing economic trends. Canada, a traditional host country for foreign direct investment (FDI), also became an important home (or source) country for FDI as Canadians invested in other countries (Rugman 1987, 1990). In 1991, Canada was the fourth largest source of the stock of FDI in the United States, behind the United Kingdom, Japan, and the Netherlands (Borghese 1993, 18 and 24). In fact, between 1981 and 1990 Canadian FDI in the United States grew at an average rate of 12.1 percent, nearly three times faster than the rate of growth of US FDI in Canada over the same period (Rugman and Verbeke 1994, table 2). Furthermore, successive rounds of multilateral tariff reductions under the General Agreement on Tariffs and Trade (GATT) had already forced many multinational corporations to rethink their branch-plant strategies. What emerged was a new generation of multinational enterprises marked by greater bilateral integration, as is evidenced by the importance of intrafirm trade to their profitability. Intrafirm trade dominates the overall bilateral Canada-US trading relationship.[5]

The maturation of the Canadian economy and the adverse effects of the old protectionist policies led the Canadian government to pursue free trade with the United States, which culminated in the signing of the Canada-US Free Trade Agreement in 1988 and the North American Free Trade Agreement (NAFTA) in 1993, and to reform Canadian competition, foreign investment, and intellectual property legislation. As discussed below, these new policies recognize the role of foreign competition in achieving competitive and efficient markets in Canada. The remainder of this chapter discusses the significant aspects of this new

3. For a review of the economic literature on this point, see Khemani (1991, 205).

4. See, generally, Eastman and Stykolt (1967).

5. Rugman (1990, 3) estimated that the 50 largest multinationals (whether foreign or Canadian-controlled) operating in Canada account for 70 percent of Canada-US trade. See also Encarnation (1994, 309).

economic policy environment, with particular emphasis on the existing competition and trade law regimes.

Competition Legislation

History and Enforcement

In 1889, Canada became the first western industrialized nation to enact legislation to prevent firms from forming agreements in restraint of trade. (Canada also has the dubious distinction of being the first country to pass antidumping legislation, in 1904.) Legislation with respect to mergers and monopolization (1910), misleading advertising (1914), price discrimination and predatory pricing (1935), price maintenance (1951), and other specific practices followed later. For the most part, this legislation was included in the Criminal Code or the Combines Investigation Act. However, until the enactment of the Competition Act in 1986, successful enforcement of competition legislation was relatively infrequent and rarely accompanied by significant penalties. Between 1910 and 1986, only nine criminal merger charges were laid, and not one contested merger case resulted in a conviction. While the government did successfully prosecute a number of price-fixing cases during that period, penalties were relatively low (at least by US standards), and no one was sentenced to imprisonment. Prior to 1990, the highest fine in a conspiracy case was C$447,000.[6]

This historical, low level of enforcement is partly explained by the fact that, before 1986, Canadian competition law was exclusively criminal legislation. It was very difficult to prove elements such as an "undue" lessening of competition beyond a reasonable doubt—the standard that criminal proceedings require.

Since 1986, mergers, abuses of dominance, refusals to deal, exclusive dealing, tied selling, and several other practices no longer constitute criminal offenses. They are now characterized as "reviewable practices," which may be subjected to an order of the Competition Tribunal, a quasi-judicial body of both judicial and lay members. The tribunal has the power to order that such conduct cease, and in some cases the tribunal also may order divestitures of assets or shares, or other actions to overcome the anticompetitive effects of the particular practice. Failure to comply with an order of the tribunal is a criminal offense punishable by fine or imprisonment and may constitute contempt of court. Conspiracy, bid rigging, price discrimination, predatory pricing, price maintenance, misleading advertising, and several other practices remain criminal offenses under the Competition Act. These offenses are tried by criminal courts and not the tribunal.

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6. *R. v. Armco Canada Ltd.* (1976), 24 C.P.R (2d) 145 (Ont. C.A.).

Canadian law does not allow individuals to sue for damages suffered as a result of the breach of any of the reviewable practices in the Competition Act, including mergers and abuse of dominance. Only since 1976 has the act provided a right to recover (single) damages and certain costs in respect to a breach of its criminal provisions or of an order of the tribunal. While there have been relatively few such private actions to date, they may become more commonplace in light of the Supreme Court's decision in 1989 confirming the constitutional validity of the act's private-action provisions. However, significant restrictions on contingency fees and class-action suits in Canada, as well as the Canadian rule that the loser generally pays for a significant portion of the winner's costs in a legal action, will likely ensure that private actions in Canada will continue to be much less significant as an enforcement mechanism than they are in the United States.

Similarly, unlike state governments in the United States, provincial governments in Canada have had a very limited role in competition law enforcement to date. While many provinces have passed business practices legislation, such legislation is, for the most part, focused on consumer protection. Some of these provincial laws create private rights of action to recover damages; however, these have also seen limited use to date.

Scope of the Competition Act

The Competition Act applies to all sectors of the Canadian economy, including service, resource, and manufacturing industries. It does not regulate subsidies or state aids to industry at either the provincial or federal level. The act is also binding on Crown corporations in respect to their commercial activities. Certain activities authorized by government legislation may be within the scope of a "regulated conduct" defense; that is, conduct that follows a statutory direction or authorization is exercised in the public interest and, therefore, is generally held to be outside the scope of the act (Goldman 1986, 1989). This defense covers a significant degree of economic activity in Canada, such as price setting and quota allocation by agricultural marketing boards.

In addition, the act exempts collective bargaining, certain activities by associations of fishermen, securities underwriting, and amateur sports leagues.

Underlying Philosophy

Arguably, there is no one philosophy that applies consistently throughout the Competition Act. While the act generally seeks to address market failures and focuses on the acquisition and exploitation of market power, market power is not a necessary element of the provisions governing price discrimination, price maintenance, and several other areas.

The Competition Act itself contains a "purpose clause," which sets out a number of related but sometimes conflicting goals. On the one hand, the Act is intended to promote the efficiency and adaptability of the Canadian economy and expand opportunities for Canadian participation in world markets. On the other, it is intended to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and to provide consumers with competitive prices and product choices. As will be seen below, decisions of both the tribunal and Canadian courts have displayed a tension in balancing these goals.

Canadian competition law operates on the principle of national treatment, regardless of the nationality of the owners of a firm. While, for example, the possibility of job losses or the acquisition of a Canadian-controlled business by a foreign entity pursuant to a merger of two competitors may be relevant for the purposes of a review under the Investment Canada Act, discussed below, it is not normally relevant in a Competition Act merger analysis.

Administration

The director of investigation and research, who is appointed by the federal cabinet to head the Competition Bureau, administers the Competition Act. The director is an independent law enforcement officer, so ministers in the federal cabinet cannot direct him to make any particular decision or recommendation, although the minister of industry can require the director to inquire into a particular matter.

The director and the bureau investigate and enforce both criminal offenses and reviewable conduct under the Competition Act. But with a staff of only about 240, the bureau has limited resources at its disposal. The director has attempted to use these resources most efficiently by focusing the bureau's resources on conspiracy, bid rigging, mergers, and abuses of dominance (Wetston 1992a, 9); seeking significantly higher fines (most recently a court imposed a C$2.5 million fine for a market allocation conspiracy [Director of Investigation and Research, news release, 27 September 1995]); recommending to the attorney general that more charges be brought against individual directors and officers where appropriate (*Financial Post*, 21 October 1991, and Chandler 1994a); and, in conjunction with the attorney general, instituting a "whistle blowing" policy.[7]

7. See Consumer and Corporate Affairs Canada, news release, "Abbott Laboratories Granted Immunity under the Competition Act and Provides $2.122 million restitution," NR-1-898-32. See also Goldman and Crampton (1993), Wetston (1991), and Chandler (1994).

Program of Compliance

Particularly outside the context of conspiracy or bid rigging, directors since 1986 have adopted a proactive approach to Competition Act compliance, generally favoring consultation and cooperation in investigating and resolving issues.[8] For instance, the director will provide advisory opinions on whether proposed conduct would provide grounds for an inquiry.[9] Unlike those under the US business review program, such opinions are not made public.

With respect to mergers, the director may be receptive to reasonable proposals to negotiate a solution (such as a partial divestiture) to concerns about possible anticompetitive effects. Alternatively, the parties and the director can apply to the tribunal for a consent order. The director increasingly prefers this approach, particularly when the merger has significant national implications or when the terms of resolution require a higher degree of enforceability than a negotiated settlement—known in legal parlance as an "undertaking"—or if the resolution involves undertakings once the merger is completed (Goldman and Bodrug, 1997a).

The tribunal was intended to provide both expertise and an expeditious means of addressing mergers that the director had concluded were likely to lessen or prevent competition substantially. However, experience to date has demonstrated that parties appearing before the tribunal in a contested merger proceeding may face a lengthy hearing, in addition to extensive prehearing discovery proceedings comparable to those in any other contested commercial litigation. Delay and cost are at issue, as well as the public disclosure of information relating to the businesses involved. In the *Southam* case, a contested matter, two years passed between the filing of the director's notice of application and the tribunal's final order. The hearings themselves took 40 days, during which 50 witnesses were called. It was not until six years later that a final decision was handed down by the Supreme Court of Canada (*Director of Investigation and Research v. Southam Inc. et. al*. [1997], 71 C.P.R. [3d] 417). Some consent-order proceedings have similarly been significantly delayed, in large measure because the tribunal has let intervenors participate in consent-order proceedings to a much greater extent than US courts have under the Tunney Act in the United States. As a result, only 13 merger cases have gone to the tribunal on either a consent or contested basis since

8. Goldman's successor as director, Howard I. Wetston (who is now a federal court judge), served in that post until June 1993. Weston's successor, George Addy, was the senior deputy director of investigation and research during Wetston's tenure and counsel to the director for the latter part of Goldman's tenure.

9. Supply and Services Canada, Director of Investigation and Research, Program of Compliance, Information Bulletin No. 3, 1993.

1986.[10] Many private parties have sought resolutions based on undertakings, and others have apparently abandoned mergers rather than have them come before the tribunal.

In 1995, the director stated that he preferred the use of consent orders because they allowed for greater openness to the public (Addy 1995). However, the director has, for a number of years, been prepared to accept undertakings from parties as an efficient and pragmatic means of resolving certain types of concerns under the Act. Recent decisions of the Tribunal and the Federal Court have confirmed the appropriateness of the director's use of undertakings to resolve issues arising under the Act (Goldman and Bodrug 1997c).

Consent prohibition orders, which do not necessarily involve a guilty plea, may be issued by a court with regard to conduct directed toward criminal offenses. However, the director is more likely to resort to criminal charges with regard to price-fixing or bid-rigging allegations.

The compliance approach gives businesses more assurance that proposed transactions or practices will not run afoul of the law. Nonetheless, some have criticized the lack of transparency of the bureau's review process. They argue that the public and interested parties often do not understand how a particular case will be approached and believe they do not have sufficient input into the director's decisions (see, e.g., Davidson 1991).

Partly in response to these criticisms and based on the limited case law to date, the director has issued enforcement guidelines with regard to strategic alliances, mergers, price discrimination, predatory pricing, and misleading advertising. In May 1995, the director also issued a statement on confidentiality of information under the Competition Act. This statement addresses issues of interpretation of the provisions, the evidence the bureau reviews, and, timing. However, some commentators still question whether the guidelines accurately reflect the bureau's practice in, for example, defining markets and assessing qualitative factors.

Agreements in Restraint of Trade

Section 45 of the Competition Act prohibits conspiracies or agreements to restrain or injure competition unduly. The Supreme Court of Canada has recently defined "unduly" in terms of the ability to exercise market power. In contrast to the approach in the United States, the Supreme Court adopted neither a per se nor a full rule-of-reason standard and characterized the Canadian conspiracy provision as mandating a "partial rule of reason inquiry into the seriousness of the competitive effects of

10. For a detailed discussion of the Canadian experience with consent-order proceedings under the act, see Goldman (1990).

the agreement" in the sense that they require a review of the likely prevention or lessening of competition resulting from the agreement, but "considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie . . . outside of the inquiry under [section 45]" (*R. v. Nova Scotia Pharmaceutical Society* [1992], 43 C.P.R. [3d]). As such, the act may be less flexible than the US law in accommodating information exchanges, such as benchmarking, which may have significant procompetitive effects that arguably outweigh any lessening of competition. On the other hand, section 45 does not create a per se rule with respect to any particular type of agreement. Even a blatant price-fixing agreement could be permissible if the parties have little or no market power.

Under section 45, the forming of an agreement, understanding, or mutual consent between two or more parties is a prerequisite for proving an offense has been committed.[11] However, an agreement can be proved through a course of conduct or circumstantial evidence, and it is not necessary for the agreement to have been carried into effect.

The "foreign-directed conspiracy" provision of the act (section 46) prohibits a corporation that carries on business in Canada from implementing a foreign agreement or arrangement that, if entered into in Canada, would violate section 45. Whether the officers of the Canadian subsidiary knew of the agreement or arrangement is irrelevant, and two convictions have been registered under this provision to date. Finally, it may be noted that separate provisions make bid rigging, certain forms of price maintenance, and certain agreements or arrangements among federal financial institutions per se offenses (sections 47, 49, and 61).

As noted above, fines or price-fixing offenses in Canada were relatively low until the maximum penalty for a section 45 offense was increased to $10 million in 1986. In this respect, a $2.5 million fine has recently been assessed for market allocation conspiracy.

The director has, in two cases, recommended that the attorney general seek imprisonment for serious antitrust offenses. In 1996, a Quebec judge imposed the first prison term in Canada for a price-fixing offense under the Act. The defendant was sentenced to imprisonment for a period of one year (*R. v. Perrault*, Quebec Superior Court, File #450-27-005489-983, 15 June 1996, unreported). The director has also asked the attorney general to explore possible legal mechanisms to prevent corporations from paying fines on behalf of individuals convicted of an offense under the act (Chandler 1994b). On the director's recommendation, the attorney

11. While the Competition Act does not have an equivalent to the prohibition of "unfair methods of competition" similar to that under section 5 of the US Federal Trade Commission Act, it is possible that an attempt to reach an agreement in contravention of section 45 could be an offense under section 24 of the Criminal Code and, in this sense, may capture some conduct that constitutes an incipient violation of section 45.

general applied to US authorities for extradition of an individual in relation to a misleading advertising offense (the individual subsequently submitted to Canadian jurisdiction voluntarily), and the director will likely continue to recommend such proceedings when necessary (Larabie-LeSieur 1994).

Exemptions to the Conspiracy Provisions

Conspiracies or agreements relating only to exported products are exempt from section 45 as long as such agreements are not likely to reduce or limit the real value of the exports, restrict any person from exporting, or unduly lessen competition in export-related services. No registration as an exporter is required to qualify for this exemption.

The act also exempts agreements solely related to cooperation in research and development, exchange of statistics, definition of product standards, advertising restrictions, and measures to protect the environment. However, to qualify for the exemption, any such agreement must not be likely to lessen competition unduly in respect to prices, production, markets, customers, or channels of distribution and must not be likely to restrict anyone from entering into or expanding a business. In light of these limitations, it is unclear whether and to what extent this exemption either permits agreements that would otherwise be prohibited or provides any practical degree of comfort to businesses seeking such agreements.

Abuse of Dominant Position

Abuse of dominance is a noncriminal practice subject to the tribunal's review. The tribunal may issue an order under section 79 of the Competition Act if it finds that one or more persons substantially or completely control a type of business in any part of Canada and engage in anticompetitive acts that prevent or lessen competition substantially. Then the tribunal may prohibit anticompetitive acts or order other actions that it considers necessary and reasonable to overcome the effects of the practice. For example, it might require that assets or shares be divested or that terms of a contract not be enforced.

The act contains a nonexhaustive definition of "anticompetitive acts" that includes a number of vertical restraints designed to prevent entry or eliminate a competitor from a market (section 78).

A supplier may be considered to "control a business" if it has the market power to set prices above competitive levels for a considerable period. In determining whether a supplier has market power, the tribunal will look to indicators such as market share and entry barriers. The tribunal also has indicated that if a firm has a very large market share, it will very likely have market power, but considerations such as the number of competitors and their respective market shares, excess capacity in the market, and ease of entry will also be taken into account.[12] In the six tribunal decisions to date under section 79, market shares exceeded 85 percent, and the tribunal did not adopt any minimum market-share threshold below which a firm would not be considered to possess market power.[13] However, a firm enjoying a large share of a market in Canada relative to its competitors may be subjected to greater restrictions in its pricing and marketing practices than its smaller competitors.

In addition, since section 79 applies where one or more people substantially or completely control a type of business, the abuse of dominance provisions could be applied in the context of a business that is subject to "joint dominance." In 1996, the tribunal issued a consent order under the abuse of dominance provisions in section 79 of the Act in respect to the Interac shared electronic banking network. That proceeding involved allegations by the director that, through the Interac association, the six largest Canadian chartered banks and a number of other deposit-taking financial institutions jointly dominated the shared electrical financial services business in Canada and had engaged in a series of anticompetitive acts, including implementing exclusionary rules and fees that prevented other competitors from participating directly in the network (Goldman and Bodrug 1997c). Section 79 does not appear to require proof of any agreement between the dominating firms, only that they are each engaging in a practice having anticompetitive effects. In the Tele-direct case, the tribunal appeared to give business justifications greater weight than it had in previous abuse of dominance cases. In addition to considering business justifications in the context of assessing whether certain conduct constituted an anticompetitive act, the tribunal also suggested that, in assessing whether the conduct gives rise to a substantial lessening of competition, the anticompetitive effects should be weighed against the business justification or efficiency-enhancing effects of the conduct (*Director of Investigation and Research v. Tele-Direct [Publications] Inc. et. al.* (26 February 1997) [Comp. Trib.] [No. CT 94/03, unreported].

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12. *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.), 325.

13. *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.), 325; *Director of Investigation and Research v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Director of Investigation and Research v. AGT Directory Limited et. al.* (18 November 1994) (Comp. Trib.) (no CT 9402/19 unreported); *Director of Investigation and Research v. Bank of Montreal et. al.* (1996), 68 C.P.R. (3d) 527 (Comp. Trib.); *Director of Investigation and Research v. D&B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.); and *Director of Investigation and Research v. Tele-Direct (Publications) Inc., et. al.* (26 February 1997) (Comp. Trib.) (No. CT 94/03 unreported).

Deregulation of industries such as telecommunications will likely raise issues under the civil provisions of the Competition Act, such as abuse of dominance (Addy 1994b). The conduct of these industries may also raise criminal law issues. With regard to such industries, the director has commented:

> [i]n rapidly changing industries such as telecommunications, it may be less important to focus on the potential effects of a particular transaction on existing levels of competition. Instead, it could perhaps be more helpful to look forward, and consider if the transaction would likely "prevent" future competition that might otherwise come about as the result of technological expansion. (Addy 1994b)

Similarly, the director, in commenting on his enforcement objectives with respect to the "electronic marketplace," has described a need to deal with "essential facilities" and stated:

> Where any firm—telephone, cable or whatever—controls network facilities essential to competitive entry, obligations must be created for these firms to provide open access to these facilities on a non-discriminatory basis. These obligations should involve the development of common standards, open network architecture, co-location and unbundling or required services. Control of network facilities and proprietary standards should not be used to disadvantage rivals to the detriment of competition. (Addy 1994c)

The director has argued that telecommunications regulators should forbear from regulation where a service is subject to sufficient competition and has promised to intervene in such matters where appropriate (Addy 1994c).

Mergers

The Competition Act defines a merger broadly to include acquisitions of control over, or a "significant interest" in, all or part of a business. The act's merger provisions may apply not only to share and asset acquisitions but also to contracts that give a person the ability to materially influence another business. Asset transactions within the scope of the act include purchases or leases of a brand name or intellectual property rights (Director of Investigation and Research 1991). If a merger is likely to prevent or lessen competition substantially, the director may apply to the tribunal for an order to dissolve or enjoin a merger at any time within three years of the substantial completion of the merger.

Certain large mergers may be subject to prenotification and waiting-period requirements under part IX of the act. Part IX is similar to the US Hart-Scott-Rodino Antitrust Improvements Act. Regardless of size, all mergers are subject to the act's substantive provisions.[14]

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14. For a discussion of premerger notification, see Goldman and Bodrug (1993, § 10.09).

In defining relevant product and geographic markets, the merger guidelines adopt a "hypothetical monopolist" approach broadly similar to that described in the 1992 US horizontal merger guidelines. The Canadian guidelines do not use the Herfindahl-Hirschman index, a measure of industry concentration, and the Competition Act specifically provides that the tribunal may not rely solely on market shares (section 92). However, the guidelines state that challenges related to a merger's effect on unilateral market power are unlikely if the postmerger market share will be less than 35 percent. Similarly, challenges with respect to interdependent market power are unlikely where the four largest firms would have less than 65 percent of the market or where the merged entity would have less than a 10 percent share (see section 4.2.1. of the guidelines).

These are not fixed rules. A merger below these thresholds could be challenged, and many mergers with market shares above these thresholds are not challenged. In its first contested merger case, the tribunal declined to dissolve a merger that resulted in a 60 percent market share in the rendering business in Southern Ontario.[15] Both the director and the tribunal will tolerate market share thresholds that are clearly much higher than levels that would likely be challenged in the United States.

Another distinguishing feature of Canadian merger enforcement compared with that in the United States is a focus on the ability to exercise unilateral market power rather than an assessment of the likelihood of interdependent conduct.[16] The Canadian deemphasis of market share and the risk of interdependent conduct reflects a recognition that the relatively concentrated markets in Canada may coincide with the need for Canadian firms to achieve internationally competitive economies of scale.

The Competition Act lists factors the tribunal may take into account in assessing a merger: the impact of foreign competitors, the level of barriers to entry (including tariffs and regulatory control over entry), the degree of effective competition remaining, the likelihood of the merger resulting in the removal of a vigorous and effective competitor, and the nature and extent of change and innovation in a relevant market. Of these factors, foreign competition and the level of barriers to entry appear to have the greatest influence on the director's decision on whether to challenge a merger (Khemani and Shapiro 1993).

In general, the director has not applied an incipiency standard to seek

15. *Director of Investigation and Research v. Hillsdown Holdings* (Can.) Ltd. (1992), 41 C.P.R. (3d) 289.

16. See merger guidelines, section 2.2. However, the tribunal has identified "enhanced ability for tacit collusion" as one of the issues that should be the focus of attention in any merger case (*Director of Investigation and Research v. Imperial Oil Ltd.*, 26 January 1990, CT./ 89-3, #390, Comp. Trib. at 54 reported in Goldman and Bodrug 1997c at appendix E3.

any remedies where the bureau has identified only speculative concerns about the possible exercise of market power by the merged entity. In some cases, however, the director has advised parties to a merger that the bureau intends to monitor the merged entity and the relevant industry under both the merger and abuse of dominance provisions of the Competition Act. The director has also indicated that he will consider whether mergers in the telecommunications and other technology-intensive industries are likely to prevent competition by making the development of new products or innovations less likely (Addy 1994c).

The act expressly recognizes the "failing firm" factor, and the merger guidelines suggest that if one of the parties to a merger is likely to either fail or exit the market if the proposed merger does not proceed, then a lessening of competition would occur in any event and cannot be attributed to the merger (sections 4.1 and 4.4.1. of the guidelines). By extending the failing-firm defense to exiting firms, the Canadian guidelines may provide a somewhat broader failing-firm defense than the US guidelines. However, it may be difficult for a firm that is not failing to show that there are no competitively preferable purchasers willing to pay more than the net liquidation value of the firm (which is one of the conditions in the guidelines). It may also be difficult to show that the firm will likely leave the market if the merger is stopped.

The Efficiency Exception

In the context of mergers, the Competition Act appears to give greater weight to efficiencies than in the United States, although the tribunal has cast doubts on whether this will be the case in practice. Under section 96, the tribunal may not make an order under the merger provisions if it finds that (1) the gains in efficiency likely to be brought about by the merger will be greater than, and will offset, the effects of any prevention or lessening of competition that is likely to result from the merger, (2) the claimed efficiency gains would not likely be attained if the order were made, and (3) the alleged efficiency gains would not be brought about by reason only of a redistribution of income. In addition, the act directs the tribunal to consider whether such efficiency gains will significantly increase the real value of exports or cause domestic products to be substituted for imported products. But there is no consensus on how these two factors are to be taken into account (Goldman and Bodrug 1993, § 10.05). A full panel of the tribunal has yet to rule on this issue.

In *Hillsdown*, both the director and the acquiror took the position that section 96 directs the tribunal to balance the likely gains in efficiency against the misallocation of resources or loss to society as a whole resulting from the increased prices—that is, the "deadweight" loss—that the merged firm is able to impose as a result of the merger. In the director's view, there is no need to establish that the efficiency gains will be passed on to the consumer. The tribunal suggested, however, that section 96 could be read to permit it to take into account a much broader range of effects, including wealth transfers (*Director of Investigation and Research v. Hillsdown Holdings*, 343).

The tribunal also reviewed "the various purposes served by competition law in relation to efficiency gains" and commented:

> . . . one traditional purpose has been to protect the consumer from being charged supra-competitive prices. While one can argue that this is insignificant from the point of view of loss to the economy as a whole, . . . there is a powerful political argument for preventing such accretions of wealth at the consumer's expense. Another purpose which has traditionally been seen as served by competition law is to encourage the dispersal of power and the distribution of wealth. . . . A third objective of competition law is seen as that of protecting the small firm against more powerful rivals. . . . These objectives can run counter to the fourth objective which is that of furthering the efficiency of the economy as a whole. (*Director of Investigation and Research v. Hillsdown Holdings*, 338–39)

Against this background, the tribunal questioned whether it was appropriate to give precedence to the efficiency objective in the purpose clause over the provision of "competitive prices" and "equitable opportunities for small and medium sized enterprises" (*Director of Investigation and Research v. Hillsdown Holdings*, 343).

Finally, the tribunal questioned whether wealth transfers are always neutral and posed the following two examples: a merger of two drug companies where the relevant product is a life-saving drug, and a merger resulting in a dominant firm that charges supracompetitive prices resulting in wealth transfer out of Canada. These examples suggest that the tribunal may be willing to consider a very broad range of possible negative effects of a merger that must be demonstrated to be offset by efficiency gains in order for section 96 to apply.

Furthermore, Fisher and Lande (1983) have suggested that the combined effect of the deadweight loss and the neutral wealth transfer resulting from a price increase typically far exceeds any efficiencies that may be brought about by a merger. Thus, the approach of the tribunal in the *Hillsdown* case could leave the efficiency exception as a largely academic possibility.[17] Nevertheless, the director continues to apply the approach set forth in the merger guidelines (Wetston 1992a; Sanderson 1997; Ross 1997) and has identified the efficiency exception in the Canadian legislation as one of the factors that led to different decisions by the Canadian Bureau and the European Commission in the *de Havilland* case. The director decided not to challenge the proposed acquisition of de Havilland by Aérospatiale/Alenia on the basis that it was not likely to

17. For an alternate perspective on the analysis of efficiencies of merger cases in Canada, see Warner (1994).

lessen competition substantially in Canada, while the European Commission blocked the transaction on the basis that it would create a dominant position in the world market for commuter aircraft (Addy 1991). It should be noted, however, that the efficiency exception has rarely been applied by the director (Warner 1994a and 1997).

Vertical Restraints

Vertical restraints are generally covered under Competition Act provisions dealing with abuse of dominance, exclusive dealing, tied selling, and market restriction. Usually, the tribunal must show that the practice substantially lessens competition in Canada. An exception is the refusal-to-deal provisions that may be invoked when the refusal substantially affects a person in his or her business (in addition to meeting a number of other criteria).

In addition, the price maintenance provisions—one of the more frequently enforced criminal offenses under the act—prohibit refusals to supply or other forms of discrimination against individuals because of their low pricing policies. Certain attempts to influence prices upward (or discourage their reduction) are also illegal. A separate provision also bans certain attempts to induce a supplier, whether within or outside Canada, to refuse to supply individuals with a product because of their low pricing (Goldman and Bodrug 1997b).

International or Extraterritorial Aspects

Some sections of the Competition Act apply only to conduct in Canada; others are not expressly qualified in that regard. The market-power tests are inherently concerned with effects on a national or subnational market and not on the physical location of the businesses. Effective enforcement may, for example, require national officials to assert jurisdiction in a merger review, even when the merger takes place outside its borders, if they believe the country will suffer anticompetitive effects. As many Canadian and US markets continue to integrate, the bureau will be dealing with an increasing number of investigations that raise issues on both sides of the border.

Under the Canada-US treaty on mutual legal assistance in criminal matters (MLAT), in effect since 1990,[18] either the Canadian or US government can request certain assistance of the other. This assistance can include exchanging information, locating or identifying persons, serving documents and taking evidence, or executing searches and seizures.

18. Mutual Legal Assistance in Criminal Matters Act, R.S. 1985, c. 30 (4th supp.) and SOR/90-704.

Furthermore, it must be given even if the conduct under investigation in the requesting state does not constitute an offense in the other (Article II, section 3). MLAT provisions have been used in price-fixing conspiracies in the plastic cutlery and thermal fax paper industries.[19] The MLAT does not apply to mergers, abuses of dominance, and other noncriminal matters under the Competition Act.

In addition, on 3 August 1995 the governments of Canada and the United States entered into an agreement regarding the application of their competition and deceptive marketing practices laws (the "1995 Agreement"). This agreement superseded the 1984 memorandum of understanding as to notification, consultation, and cooperation with respect to the application of national antitrust laws between Canada and the United States (the "MOU"). The 1995 Agreement operates in addition to, and not in lieu of, the MLAT. While the 1995 Agreement does not have the force of law, it does provide a framework for intergovernmental notification of antitrust investigations (including noncriminal matters) involving the national interest of the other party or requiring searches for information located in the territory of the other. The MOU is intended to avoid or moderate conflicts of different interests and policies between the two countries. However, it also serves as a useful source of information for the bureau about potentially anticompetitive conduct that may affect Canada. From 1986 through 31 March 1994, the bureau delivered 68 notifications to US antitrust authorities and received 165.[20]

Such information exchanges raise significant confidentiality issues. In Canada, section 29 of the Competition Act prohibits the director and the bureau from divulging, except to Canadian law-enforcement agencies, the identities of those who provide them information. There are exceptions: the director may communicate information to further the administration and enforcement of the act (Goldman and Kissack 1997).

In addition, section 29 may not extend to information voluntarily supplied to the bureau, although the director has indicated it will usually be treated as if it were covered. The director has also indicated that he may disclose confidential information if he is satisfied with the assurances the foreign antitrust agency provides regarding use of the information, and if doing so would advance a matter under investigation in Canada.[21] It is not clear, however, whether a court would agree with this policy. In addition, the director has not guaranteed he will notify

19. See 66 Antitrust & Trade Reg. Report 661 (1994); 67 Antitrust & Trade Reg. Report 108 (1994); Goldman and Kissack (1997).

20. See the annual reports of the director of investigation and research, *Competition Act*, for the years ended 31 March 1987-31 March 1993, inclusive (Supply and Services Canada).

21. See the statement on "Communication of Confidential Information under the Competition Act," Bureau of Competition Policy, Industry Canada, May 1995.

those who have supplied confidential information of his intention to share their information.

The MLAT permits but does not require confidentiality restrictions. Thus, individuals who have provided information cannot be certain who has it or what use is made of it. The information the director gets from a foreign antitrust authority is not subject to section 29. However, as noted above, the director has indicated that such information will be protected. Neither current US law or practice nor the International Antitrust Enforcement Act of 1994 appears to require US authorities to provide notice to those who have supplied information before that information is passed on to Canadian authorities.

Canadian Experience with Extraterritoriality

Historically, the Canadian government has asserted that claims of jurisdiction based solely on effects in the country making the claim run counter to international law. This position is understandable, given Canada's past experience with the extraterritorial reach of US antitrust authorities. In the *Alcoa* case, the US Supreme Court held a Canadian company to be in violation of the Sherman Act for agreeing with European producers to allocate world markets and not to supply the American market (*US v. Aluminum Company of America*, 334 US 100, 1947). In another case, the US Supreme Court rejected an act-of-state defense by a purchasing agent of the Canadian government that had prevented the plaintiff from shipping vanadium to Canada (*Continental Ore Co. v. Union Carbide*, 370 US 690, 1962).

In the *Radio Patents* case, three US corporations doing business in Canada through subsidiaries combined to incorporate a Canadian corporation and transferred all their Canadian patents to that company, which in turn required sublicensees to manufacture products in Canada and to refrain from importing products manufactured in the United States (*United States v. General Electric Company, et al.*, 82 F. Supp. 753, D.C.N.J. 1949). It was alleged that these agreements restrained US commerce contrary to the Sherman Act. In the final consent decree, each of the US parent companies agreed that neither they nor their Canadian subsidiaries would exercise their patents or patent licenses to restrict any manufacturer in the United States from exporting products to Canada (1962 Trade Cases §§ 70,342; 70,428; 70,546).

Before 1970, there had been at least 30 US antitrust cases with some effect on Canadian structure and behavior (Henry 1970). One commentator (Kilgour 1963, 101-02) wrote that "a good case can be made for saying that the Sherman Act has had more effect on the Canadian economy than [Canadian competition legislation] has had." At the same time, Henry (1970, 279-81) has suggested that in many of these cases

Canada may have benefited from the extraterritorial application of the US antitrust laws because such action may have blocked an acquisition and ensured the continued independence of a Canadian company, lowered prices in Canada, increased export opportunities, or removed barriers to entry for new firms. One commentator has noted that Canadians "don't so much complain about the injury as the insult" and "there is understandable resentment that Canadians may wake up some day and find that a court somewhere in [the United States] has made a decision which has a large effect on the industrial structure of Canada" (Blair 1979).

Canadian sensitivity has been greatest when attempts to enforce US antitrust law have directly affected Canadian policy. The *Radio Patents* case is arguably an example of a conflict between US antitrust laws and the policy of the Canadian Patent Act to encourage the manufacture of patented articles in Canada (Henry 1970, 280). In commenting on that case, the Canadian minister of justice said that a US decree requiring directors of Canadian companies "to take certain actions with respect to the operations of those companies in Canada, which actions would not be dictated by the requirements of Canadian law, or be in accord with Canadian business or commercial policy, but would be dictated by requirements of United States law and be in accord with United States policy . . . could only be regarded as an infringement of Canadian sovereignty."[22]

In antitrust litigation concerning an alleged international uranium cartel involving uranium producers, a US District Court sought documents from Canadian private corporations through an order known as "letters rogatory." Subsequently, the Canadian government enacted regulations[23] prohibiting release of documentation related to any aspect of uranium production, and the Supreme Court of Canada refused to enforce the letters rogatory on several grounds, including public policy (*Gulf Oil Corporation v. Gulf Canada Limited et al.*, 1980, 2 S.C.R. 39). As a result, some defendants in US civil actions could not obtain evidence to support their defense without violating Canadian law and thus subjecting their officers and directors to fines and prison terms.

Similarly, provincial governments in Ontario and Quebec, during proceedings against Canadian International Paper Company in 1947, passed sweeping legislation that generally prohibited anyone from complying with an order or subpoena of a legislative or judicial authority in any jurisdiction outside the province for removal of business records from

22. See the House of Commons debates ([Hansard] 1959, vol. 1, 618). This case led to discussions between the minister of justice and the US attorney general and resulted in an understanding known as the antitrust notification and consultation procedure, a predecessor to the MOU and the 1995 Agreement.

23. SOR/76-644 (P.C. 1976-2368, 21 September 1976).

within either province. In that case, the subpoenas were ultimately withdrawn after negotiations between the Canadian Department of External Affairs and the US State Department. The provincial blocking legislation remains in force and has occasionally been applied (Warner 1994b).

More recently, the *Institut Mérieux* case rekindled concerns about the extraterritorial application of US antitrust laws. That case involved a proposed merger of two pharmaceutical companies completed outside the United States. Neither party to the merger had significant relevant assets in the United States. The US Federal Trade Commission (FTC) issued an order requiring Institut Mérieux to lease part of the acquired business in Toronto, Ontario, to an FTC-approved buyer for a period of 25 years.[24] The FTC exercise of jurisdiction was apparently in conflict with the US Department of Justice's 1988 international guidelines (Owen and Parisi 1991) and was done apparently without at least initial compliance with the notification requirements of the MOU (Rosenthal 1991).

Extraterritorial Assertions of Jurisdiction by Canada

The relatively few policy statements in recent years on extraterritorial application of Canadian antitrust laws reflect the increasing tension between the official position of the Canadian government and antitrust authorities' growing recognition that effective enforcement of competition laws may require at least some extraterritorial reach.[25] However, the bureau has been willing to proceed against conduct that takes place outside Canada. For example, it has reviewed proposed mergers to be effected through share acquisitions where shares are held and traded outside Canada and in which Canadian markets are affected only through a Canadian subsidiary.[26] In one case, the tribunal found that conduct relating to the use of a US patent amounted to an abuse of dominance (*Director of Investigation and Research v. NutraSweet Co.* 1990, 32 C.P.R. 1 [Comp. Trib.]). In addition, Mitsubishi Corporation, a Japanese company, pleaded guilty to and was fined C$500,000 for a price-fixing charge while its Canadian subsidiary pleaded guilty under section 46 and was fined C$250,000 for its role in implementing the conspiracy in Canada. Both companies also entered guilty pleas and were assessed fines totaling C$200,000 for refusing to supply a company because of its low pricing policy in Canada (Bureau of Competition Policy, news re-

24. *Institut Mérieux,* 1990 Trade Cases (CCH) ¶22,779 and 66 Antitrust & Trade Reg. Report 509 (1994).

25. For example, compare Hunter (1983) to Addy (1991). See also Goldman (1988).

26. See, for example, the discussion of the Schneider/Square D merger in Goldman, Cornish, and Corley (1992).

lease, 5 August 1994). A US subsidiary of another Japanese company was also fined $950,000 for the same alleged activity (Director of Investigation and Research, news release, 12 July 1994). Finally, Mitsubishi Paper Mills, Ltd. pleaded guilty to and was fined C$850,000 for one count of fixing prices and one count of refusing to supply under the conspiracy and price maintenance provisions of the Act (Competition Bureau, news release, 17 February 1997).

The application of the criminal provisions of the Competition Act in an extraterritorial context is, however, complicated by the Criminal Code, which says that no one shall be convicted of an offense committed outside Canada.[27] Canadian courts have recently expanded their view of what constitutes an offense considered to have been committed in Canada. For example, acts involved in carrying out a conspiracy may be sufficient to invoke criminal conspiracy laws, even if the acts committed in Canada do not constitute a necessary element of the offense.[28] Nevertheless, it remains to be seen how Canadian courts will apply this territorial limitation in the Criminal Code in proceedings based only on anticompetitive effects in Canada resulting from conduct taking place entirely outside its borders.

Effect of Investment and Trade Policies on Competition

Regulation of Foreign Investment

The principal legislation restricting the ability of a non-Canadian to acquire a Canadian business is the Investment Canada Act (ICA). This is currently the only such legislation of general application. Foreign ownership in specific industries, such as airlines, banks, and other financial institutions and broadcasting systems, is regulated by other legislation in a manner similar to foreign ownership restrictions in many other countries, including the United States.

The Investment Canada Act

In general, "non-Canadian" investors who want to establish or acquire control of a business carried on in Canada may only have to notify

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27. Criminal Code, R.S.C. 1985, c. C-46, s. 6(2), but see also section 465(4), which provides that anyone who, while in a place outside Canada, conspires with anyone to commit certain indictable offenses in Canada shall be deemed to have conspired in Canada to commit the offense.

28. *R. v. Libman* (1985), 2 S.C.R. 178 and *R. v. Rowbotham and Roblin* (1992), 60 O.A.C. 75, affirmed (1993) 4 S.C.R. 834.

authorities under the ICA; in some circumstances—such as a high value of the assets involved—investments are subject to review. Establishments of new Canadian businesses normally require only notification—that is, the filing of very basic corporate information. The ICA applies whether or not the acquired business is currently controlled by Canadians and also applies where a Canadian business is acquired indirectly by a foreign corporation with a Canadian subsidiary. Whether a company is "Canadian" depends on the citizenship or residency of its ultimate controlling shareholders or, in some cases, the members of its board of directors. If the minister of industry considers an acquisition subject to review under the ICA not likely to be of "net benefit to Canada," the acquiror may be required to divest, or be prohibited from acquiring, the business.

The general rule is that acquisitions of Canadian businesses having assets of C$5 million or more, or certain "indirect" acquisitions of Canadian businesses having assets of C$50 million are subject to review. However, acquisitions of some types of "cultural businesses" may be subject to review regardless of the value of the assets involved. Even the establishment of a new "cultural business" can be subjected to a review and, potentially, an order to divest.

For these purposes, a "cultural business" includes the production, sale, or exhibition of books, compact discs, videos, movies, and similar products. The actual scope of this definition is much wider than might first appear because there is no *de minimis* exception to the determination of whether a business carries on any cultural activity. Thus, a convenience store that sells newspapers is likely to be considered a cultural business.

Special Rules for "WTO Investors"

As a result of amendments enacted following agreement on WTO, the ICA contains two sets of review thresholds: the general thresholds (described above), and the higher WTO thresholds, applicable only to acquisitions by or from a "WTO investor."[29] Direct acquisitions of most Canadian businesses by or from a WTO investor implemented in 1997 are subject to review if the assets of the business exceed C$172 million. Indirect acquisitions of most Canadian businesses by or from a WTO investor are not subject to review but must still be notified.

However, acquisitions of Canadian businesses engaged in uranium mining, certain cultural activities, certain financial services, and transportation services are excluded from the WTO review thresholds and continue to be subject to the lower general review thresholds. Again,

29. The definition of a "WTO investor" under the ICA is complex but is generally similar to the definition of a "Canadian," discussed above, insofar as it relates to citizenship in a country (other than Canada) that is a member of the WTO.

there is no *de minimis* exception to the determination of whether a business carries on any such activities. Accordingly, a corporation primarily engaged in some other type of business that also, for example, provides some trucking services is excluded from the higher WTO thres-holds even if such services represent a very small part of the corporation's activities.

The Review Criterion: "Net Benefit to Canada"

As noted above, the minister must be satisfied that a proposed acquisition under review is likely to be of "net benefit to Canada." The minister must take into account certain factors: (1) the effect of the acquisition on the level and nature of economic activity in Canada (including employment); (2) the degree and significance of participation by Canadians in the business; (3) the effect of the investment on productivity, industrial efficiency, technological development, product innovation, and product variety in Canada; (4) the effect of the acquisition on competition in Canada; (5) the compatibility of the acquisition with national industrial, economic, and cultural policies; and (6) the contribution of the acquisition to Canada's ability to compete in world markets. However, the ICA does not suggest any weighting or hierarchy for these potentially conflicting factors, and it would appear that the minister's decisions are not subject to judicial review on the merits (*Baril v. Minister of Regional Industrial Expansion*, 1986, 1 F.C. 328).

In order to satisfy the "net benefit" criterion, the minister sometimes requires undertakings from the acquiror, typically related to (1) maintaining existing employees; (2) guaranteeing participation of Canadians as directors or in management; (3) processing resource products in Canada; (4) making capital expenditures or investing in research and development in Canada; (5) transferring technology to Canada; (6) protecting the environment; and (7) supporting local communities.[30] For example, in order to obtain approval of its acquisition of Woolco's retail stores in Canada, Wal-Mart Inc. provided the minister with an undertaking to identify the origin of goods on display in its stores and to "make commercially reasonable efforts to provide Canadian-based suppliers with a full and fair opportunity to supply Wal-Mart Canada" (*Toronto Star*, 3 August 1994; see also undertakings of Viacom Inc., 12 December 1994, in connection with its acquisition of Paramount).

As a practical matter, it may be noted that Investment Canada has not to date instituted any formal process to block any acquisition or

30. See, for example, "Investment Canada approves Li Ka-shing's acquisition of Husky Oil Limited," news release, Investment Canada, 20 December 1991; and "Investment Canada Approves Bayer's acquisition of Nova/Polysar's Rubber Division," news release, Investment Canada, 21 September 1993.

require divestiture. All issues arising to date, except with respect to cultural industries or, until 1992, oil and gas industries, appear to have been resolved by undertakings. However, it is impossible to know how many investments were halted because Investment Canada indicated that it would not approve the transaction. Investment Canada does not release information concerning its decision making to nearly the same extent as the director under the Competition Act.

Investment Canada has been more aggressive in enforcing the ICA with respect to both establishments and acquisitions of cultural businesses. In some instances, Investment Canada has requested undertakings from companies that have limited "cultural" activities relative to their business, who may, for example, sell or advertise cultural products of Canadian authors or artists. The federal government also announced in July 1993 a policy to significantly restrict the ability of a foreign-owned magazine publisher to establish new magazines in Canada.[31] Related cultural policies have been successfully challenged before the WTO.[32] "Anti-avoidance" amendments to the ICA enacted in 1993 may also signal more vigorous enforcement of the ICA with respect to cultural businesses. However, the sale of a publishing business by a Crown corporation, apparently in contravention of Investment Canada's guidelines for the publishing industry, was approved by Investment Canada (*Globe & Mail*, 19 February 1994). In 1996, a proposed joint venture between a Canadian firm and Borders Group Inc., a large US book chain, was refused permission to establish a retail book-selling business in Canada under the ICA cultural policy. The minister apparently believed the venture's proposed use of Borders' information and ordering software and the substantial management influence would give the US-based company effective control (*The Financial Post*, 9 February 1996).

The ICA has also imposed significant impediments to investment in the uranium industry and, until recently, the oil and gas industry. However, the federal government in March 1992 abandoned its oil and gas acquisitions policy (which had prohibited the sale of Canadian-controlled oil and gas assets valued in excess of $5 million unless the companies were in financial difficulty). The minister of Energy, Mines, and Resources Canada (news release, 25 March 1992) commented that "the policy imposed increased costs, uncertainty, and delays on the industry" and noted that the change was intended to "allow Canadian and foreign oil and gas companies to rationalize their operations and improve their competitiveness in global markets."

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31. See related business guidelines, July 1993, issued by the minister of industry, science, and technology under the authority of section 38 of the ICA; see also "Magazines Offered Canadian Shield," *Globe & Mail,* 20 July 1993.

32. See also "WTO Body Orders Canada to Change Magazine Rule," *The Wall Street Journal*, 1 July 1997.

The Relationship between Competition and Trade Laws

Special Import Measures Act

In 1988 the Canadian Parliament enacted the Special Import Measures Act (SIMA) to conform the existing Canadian trade laws to the 1979 Tokyo Round GATT revised antidumping code and the subsidies and countervailing measures code. SIMA governs the imposition of both countervailing and antidumping duties. In both areas, the administrative process begins with a determination of dumping or subsidization by the deputy minister of national revenue for customs and excise (the MNR). Subsequently, a quasi-judicial, government-appointed body, the Canadian International Trade Tribunal (CITT), determines whether there has been material injury or retardation to a domestic industry.

SIMA shares many of the problems found in the trade laws in other jurisdictions, including the United States. Procedures and practices that may favor an ultimate imposition of duties include (1) detailed requests for information and short time frames for response; (2) comparison of individual export prices with a weighted average of home-country prices to determine margins of dumping or subsidization (a procedure that tends to exaggerate the magnitudes of these margins); (3) a low threshold for a causal nexus between the alleged dumping or subsidy and the material injury to the relevant domestic industry;[33] (4) a lack of consistent economic rigor in the determination of the relevant "like good" being produced in Canada; and (5) frequent determination of constructive costs on the basis of average total costs rather than, as many economists suggest should be used, some measure of incremental costs, for the purposes of measuring the margin of dumping or subsidization.

In the past, there were differences between SIMA and US trade law where SIMA appears deficient. For instance, while US law provides that margins of dumping or subsidization less than 0.5 percent are *de minimis* and are, therefore, insufficient to justify the imposition of duties, Canadian law has no similar provision. However, pursuant to the WTO Antidumping Code, Canada amended SIMA to provide for a 2 percent *de minimis* standard for the margin of dumping.[34] Furthermore, following the WTO Antidumping Code, SIMA now provides that if the volume of dumped imports from any one country is less than 3 percent of all imports, it shall normally be regarded as negligible.[35]

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33. See *American Farm Bureau Federation v. Canadian Import Tribunal* (1990), 74 D.L.R. (4th) 449 (S.C.C.), 488-89.

34. Section 5.8, Agreement on Implementation of Article VI, 15 December 1993, GATT MTN/FA II-A1 A-8.

35. Section 5.8, Agreement on Implementation of Article VI, 15 December 1993, GATT MTN/FA II-A1 A-8.

Both Canada and the United States permit negotiated settlements, or undertakings, in order to avoid facing administrative proceedings. In the past in Canada, however, these negotiated settlements had to be reached before the MNR made a preliminary determination of dumping and had to be entered into by the importers of all or substantially all of the relevant producers. Pursuant to the WTO Antidumping Code, Canada no longer seeks or accepts price undertakings from exporters until after a preliminary determination of dumping and material injury.[36] As a practical matter, these negotiated settlements have not been used as frequently in either Canada or the United States as in other jurisdictions such as the European Union.[37]

Other aspects of SIMA, notably its “sunset” provision, recognize the adverse competitive effects of unfair trade laws. CITT findings, such as the imposition of dumping duties, expire at the end of five years unless they have either been previously removed or interested parties can show why they should not lapse.[38] In the United States and elsewhere, it has been much more difficult to remove such orders once they are granted. However, under the Uruguay Round, US has been brought into conformity with the Canadian practice.[39]

Another Canadian innovation is the inclusion of competition or consumer-welfare concerns in decisions on trade-law administration. There are three ways this can be done. First, section 31 of the Competition Act provides that, following an inquiry by the director or a decision of the tribunal or a court, the federal cabinet may order the reduction or removal of any custom duty it believes to be preventing or lessening competition.

Second, section 125 of the Competition Act provides that the director, on his own initiative or at the request of any federal regulatory agency, may advise the agency on relevant competition issues.[40] Accordingly, the director can make submissions to the MNR about the calculation of the margin of dumping or subsidization or to the CITT about material injury determinations under SIMA. Since 1984, the director has done so on four occasions (Ireland 1991, 23).[41]

In one case, domestic car producers sought to have the CITT impose

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36. Agreement on Implementation of Article VI, 15 December 1993; GATT MTN/FA II-A1 A-8, section 8.2.

37. See *Stegemann* (1991, 219) and *Rugman and Porteous* (1989, 13-15).

38. SIMA, section 76(5).

39. Agreement on Implementation of Article VI, 15 December 1993, GATT MTN/FA II-A1 A-8, section 11.2.

40. Section 126 of the Competition Act extends this authority to provincial regulatory bodies where they consent to the director’s intervention.

41. See also *In the Matter of Preformed Fibreglass Pipe Insulation with a Vapour Barrier, Originating in or Exported from the United States of America,* Inquiry No. NQ-93-002 (CITT 6 December 1993, 9).

antidumping duties on imports from South Korea.[42] The director submitted that there ought not to be a finding of material injury for several reasons: factors other than the imported cars were causing injury to the domestic industry; the imported cars helped maintain competition in the Canadian automobile market; and the relevant product market under consideration was too broad. Ultimately, the CITT found that the imports did not materially injure domestic production for domestic consumption (Ireland 1991, 23-24).

In the director's more recent intervention into the CITT's fiberglass pipe insulation inquiry, the Federal Court of Appeal upheld a CITT ruling that the director's right to intervene "does not include an automatic right of access to all confidential information in the [CITT's] possession" (*Director of Investigation and Research v. Canadian International Trade Tribunal et al.*, 17 November 1993, 3 [Fed. C.A.]). As a result, the effectiveness of such interventions in the future may be limited.

A third mechanism by which competition concerns enter into the trade policy process is through public-interest inquiries under section 45 of SIMA. Generally, SIMA provides that countervailing or antidumping duties must equal the full amount of the margin determined by the CITT (section 3). If the CITT believes that the imposition of such a duty would not or might not be in the public interest, it must formally report its reasoning to the minister of finance. The CITT's statement must be made public, and anyone (including producers and consumers) can weigh in on whether the CITT should issue a report to the minister (section 45[2]). Once the CITT issues such a report, the minister of finance decides whether to lower or to eliminate the duty. As a practical matter, this provision is rarely used.[43] At this writing there have been 13 antidumping investigations and only 3 formal inquiries under section 45, and in only 2 cases has the CITT recommended that the duty be reduced, which the minister of finance did in only one case (although not by the full amount recommended; see Porteous and Rugman 1990, esp. 263-64).

A dispute brought by the CITT over alleged dumping by three US beer producers in British Columbia raises issues on the director's role in such cases. In 1989, the director had decided not to challenge a merger between Canada's second and third largest brewers, partly because of the presence of low-priced US imports in a number of markets, including British Columbia.[44] The merged entity, however, was one of the applicants

42. *Statement of Reasons re Inquiry Under Section 42 of The Special Import Measures Act Respecting: Cars Produced by or on Behalf of Hyundai Motor Company* (23 March 1988), CIT-13-87 (CITT).

43. "[S]ection 45 . . . is to be applied on an exceptional basis, as for instance, when the relief provided producers causes a substantial and possibly unnecessary burden to users (downstream producers) and consumers of the product."

44. Consumer and Corporate Affairs, Canada, *Backgrounder: Proposed Merger of Molson/Carling O'Keefe,* CCAC No. 189 10254 E 89-07, 6-7.

in the antidumping proceedings before the CITT. Significant antidumping duties against the US imports clearly would increase the market power of the merged entity.

The director made submissions in 1991 to the MNR on calculating the dumping margin, and later to the CITT on the material injury question.[45] The director cautioned that considerations such as marketing differences and market segmentation, and not mere physical similarity, should be used in determining the appropriate Canadian beer product to compare with a given US beer import. Furthermore, he said that, wherever possible, the MNR should not resort to constructed cost measures in determining the margin of dumping. However, because the Canadian beer industry is, more or less, a regulated oligopoly, the director argued that the "normal values" should be adjusted to reflect the discriminatory "markups" and "cost of service" fees imposed on importers.

In the subsequent public-interest inquiry, the CITT rejected the director's view that the dumping in the context of this regulated oligopoly would move the market toward an efficient competitive outcome.[46] However, the CITT did agree that it was unnecessary to impose duties equal to the full margin of dumping to remove the injury. Accordingly, in 1991 the CITT recommended that the minister of finance reduce the antidumping duty by any amount that is "superfluous from the standpoint of removing [the] injury."[47]

The beer case shows the CITT's reluctance to use section 45 of SIMA as a "back door" through which competition law may replace trade law. Most recently, in the context of a public interest inquiry into certain antidumping duties imposed on fiberglass pipe insulation from the United States, the CITT again agreed with the director's submission that such duties in the full amount "would likely reduce economic welfare in Canada."[48] However, the CITT also commented:

45. Submission of the Director of Investigation and Research Concerning Public Interest Pursuant to Section 45 of the Special Import Measures Act in the matter of certain beer originating in or exported from the United States of America for use or consumption in the Province of British Columbia, NQ-91-002-H3 (19 September 1991); and Submission of the Director of Investigation and Research to the Deputy-Minister of National Revenue for Customs & Excise Concerning an Antidumping Investigation with respect to beer imported from the United States to British Columbia, NQ-91-002 B-26, 22-29.

46. Submission of the Director of Investigation and Research concerning public interest pursuant to Section 45 of the Special Import Measures Act resulting from the section 42 Inquiry No. NQ 91-002, 19 September 1991.

47. In the Matter of the Canadian International Trade Tribunal under Section 45 of the Special Import Measures Act, resulting from the section 42 inquiry No. NQ-91-002, CITT, 25 November 1991, 3-5.

48. Tribunal's consideration of the public interest question in the matter of preformed fiberglass pipe insulation with a vapor barrier, originating in or exported from the United States of America, Inquiry No. NQ-93-002, CITT, 27 January 1994, 4.

> The economic welfare argument would lead to the conclusion that it is in the public interest not to apply antidumping duties in the full amount in virtually every case that comes before the [CITT]. This conclusion would conflict with the public-policy purpose that Parliament recognized in providing protection against injury caused by dumping to Canadian Industry.

In December 1996, a Parliamentary Committee recommended that a nonexclusive list of factors be included in section 45 to guide the CITT respecting whether or how to conduct a public interest inquiry. Among the factors suggested for inclusion are (1) significant damage to downstream users; (2) problems of access to inputs due to imposition of the full duty; (3) restriction of competition in the Canadian market; (4) significant impact on choice or availability of products to consumers; and (5) elimination of competition in the marketplace. The government has agreed that these factors should be considered, however, at the time of writing no amend-ments to section 45 have been made.[49]

The beer case raises the broader question of whether the director should obtain from parties to a proposed merger undertakings not to initiate antidumping actions when foreign competition is a significant factor in the director's decision not to challenge the merger. The director did, in fact, obtain such an undertaking (with a five-year term) in the merger of the large power transformer businesses of ABB and Westinghouse (Ireland 1992, 92).

In conclusion, although the Canadian trade laws are designed primarily to protect domestic producers, Canada has evolved procedural and substantive innovations that may allow for competition policy concerns to enter into the analysis to some extent. However, the CITT has recognized that there is a fundamental policy conflict between the two statutory regimes and has generally been reluctant to embrace competition policy concepts. Nevertheless, there is room for further consideration of how competition policy can promote greater concern for competition and efficiency in the administration of the trade laws.

Dispute Settlement in FTA and NAFTA

The Canada-US FTA made only limited reference to competition policy. Under Article 2010, Canada and the United States could maintain or designate monopolies, which are defined to include any consortium that is designated as the sole provider or purchaser of goods and services.[50]

49. Canada, Minister of Finance (1997), "Government Responses to the Report on the *Special Import Measures Act* by a Joint Subcommittee of the Standing Committees on Finance and Foreign Affairs and International Trade."

50. Monopolies arising from intellectual property rights are specifically excluded from the definition and thus are not subject to the limited further obligations set out in the FTA and NAFTA. NAFTA also specifically includes government agencies within the definition of monopoly.

Both countries further agreed that, before designating a monopoly, each would notify the other and would use its best efforts to minimize the impact of such a monopoly on other FTA obligations. Furthermore, both countries agreed that such monopolies would not be allowed to engage in discriminatory sales or other anticompetitive practices that would harm the other country.

Further, the countries were to establish a working group on replacement of certain trade remedy laws with domestic competition laws. As a practical matter, however, the efforts of the "replacement option" working group were effectively overtaken by NAFTA negotiations and the developments in the Uruguay Round. The NAFTA Trade Remedies Working Group concluded its work in spring 1997 without making any recommendations for fundamental reform of each country's substantive trade remedy. However, the NAFTA parties did agree to adopt a number of procedural measures to improve the transparency and predictability in the administration of the trade remedy laws and to simplify each country's trade remedy laws.[51]

The NAFTA also does not address competition policy in detail. Chapter 15 of NAFTA requires each country to maintain a competition law to proscribe anticompetitive business practices and cooperate in its enforcement. Most of the balance of chapter 15 affirms the right of each country to maintain or designate monopolies or to create or maintain state-owned enterprises. Chapter 15 also calls for a Working Group on Trade and Competition to be created and to report with recommendations by 1 January 1999, but it has not been directed to consider replacing trade remedy laws with competition laws. To date, the NAFTA Trade and Competition Working Group has undertaken its mandate via the generation of papers that address trade and competition issues in terms of: (i) setting out the contextual framework of the discussion, (ii) comparing competition laws, and (iii) studying specific issues relevant to trade and competition. The studies undertaken to date identify similarities and differences between the competition laws and policies of the three NAFTA parties, and consider which, if any, of these differences may have implications for trade among the three contracting parties. The working group meets approximately every six months to discuss current and future work.[52]

Interestingly, Article 1501 expressly stipulates that no country may have recourse to any NAFTA dispute settlement mechanism for disputes over competition law or policy. However, as these dispute settlement mechanisms are otherwise relevant for trade and investment disputes,

51. NAFTA Trade Remedies Working Group (1997), "Statement by the Governments of Canada, Mexico, and the United States."

52. NAFTA Trade and Competition Working Group (1997), "Interim Report of the NAFTA 1504 Working Group to the NAFTA Commission."

they are briefly reviewed below. The so-called chapter 19 dispute settlement mechanisms of the FTA and NAFTA call for expert panels to review administrative decisions in antidumping and countervailing duty cases. These panels become effective only when the relevant administrative agency has reached a final decision. A panel then determines whether the agency correctly applied the domestic legislation using each country's own standard for judicial review. Under the FTA, panels were chosen from a roster of Canadian and US trade lawyers or economists. However, in response to the US perception that panelists (who were often trade specialists) were applying their own normative perspectives rather than applying the law, NAFTA now provides that the panels should include judges or former judges "to the fullest extent practicable." The panels may uphold a final determination or remand it for further action by the domestic administrative agency. However, the panels cannot substitute a different finding or determination. Both the FTA and NAFTA provide for "extraordinary" challenges on the grounds of bias, breach of a fundamental procedural rule, and an excess of jurisdiction by a panel.

The chapter 19 panel mechanism was created to stem administered protection by agencies that were believed to be improperly interpreting domestic law. However, it did not reduce the number of investigations (Boddez and Trebilcock 1993). In the competition law area, particularly in the United States over the last decade, enforcement policy has been considerably more liberal than the existing judicial precedent (Pitofsky 1991, 530). Hence, recourse to an FTA- or NAFTA-type dispute settlement would not likely be sufficient to deal with competition policy disputes such as those that arose in the *Alcoa* and *Radio Patents* cases, or more recently in *Institut Mérieux.*

Both the FTA (chapter 18) and the NAFTA (chapter 20) also provide for recourse to dispute settlement panels when a party believes that an actual or proposed action of another party would be inconsistent with or would nullify and impair obligations under either agreement. In this case, the panel reports to a commission of the trade ministers of each country.

Even these dispute settlement mechanisms would not likely be effective with respect to competition policy without the parties reaching much greater consensus on the laws and policies to be enforced. The initial competition concern would likely not be remedied, while the withdrawal of trade concessions or other trade disciplines may create new competition concerns over cartel behavior in either market. One alternative with respect to antitrust cases may be to require monetary compensation by the losing party. Here, the experience of courts in assessing damages caused by anticompetitive conduct may provide a useful starting point. The NAFTA-side agreements on environment and labor may provide a partial solution to this problem. Both authorize only the suspension of benefits when a party fails to pay compensation or is not fully implementing a previously agreed-upon action plan (ABA 1994).

In conclusion, the dispute settlement mechanisms of the FTA and NAFTA represent an important step forward in the adjudication of trade and investment disputes in North America. Even so, they have not curbed the use of administered protection. In any case, these mechanisms have only limited applicability for contentious competition disputes. Thus, in the next section we discuss some proposals for the replacement of dumping law with domestic competition law.

Replacing Dumping with Predation Law

In this chapter, we have discussed several problems in the administration of dumping laws in Canada and the United States. In this section, we briefly review the predatory pricing and price-discrimination laws in both Canada and the United States to assess the prospects for the convergence/harmonization of these laws more generally if the abolition of dumping rules can be achieved through NAFTA (ABA 1994, chapter 6; Graham and Warner 1994; Warner 1992; and Feltham et al. 1991).

As tariff and nontariff barriers are reduced and eliminated between and among nations, the incentives for successful dumping should diminish, as any non-cost-justified price differential between the home market and export market should be eliminated by reexporting and other arbitrage activities (Goldman 1987). Accordingly, a separate antidumping regime may be unnecessary within the FTA or NAFTA. To the extent that other incentives for anticompetitive predation remain within the free trade area, these should not be any different from the generic predation issues normally addressed by national predatory pricing and price discrimination laws.

In Canada, predatory pricing is dealt with primarily under the abuse of dominance provisions and the predatory pricing offense in the Competition Act. Paragraph 50(1)(c) makes it a criminal offense to sell at "unreasonably" low prices, which either substantially lessen or tend to lessen competition or eliminate a competitor, or are designed to have that effect. Paragraph 50(1)(c) is not expressly limited to conduct occurring within Canada, but rather refers only to the effects on competition within Canada. It could conceivably be used in cases of alleged dumping into Canada by a foreign producer.

As noted above, one of the principal problems with national dumping laws is the frequent use of constructed measures of costs (in the absence of arm's-length prices) to determine whether dumping has occurred. When constructed costs are used, the MNR compares the export price of the foreign firm against a measure of costs that is at least equal to average total costs. However, Canadian courts have held that if an article is sold for more than the total cost to the vendor, the price is not unreasonably low for the purposes of the predatory pricing offense in the Competition Act, while prices between average variable cost and average total cost may or may not be predatory. Furthermore, courts have held that one may not simply infer that a price is unreasonably low because it is below cost. Courts have held that other competitive factors, such as chronic excess capacity, could justify such prices.[53]

In 1992, the director issued predatory pricing enforcement guidelines. In determining whether to challenge a pricing practice, the director employs an analysis of market power consistent with that used in mergers and discussed above.

"Predatory" pricing that does not constitute an offense under the Competition Act could also constitute an "anticompetitive act" under the abuse of dominance provisions. However, the tribunal is empowered to make a remedial order only if the conduct in question is part of a practice and has a predatory, exclusionary, or disciplinary effect that has resulted, or is likely to result, in a substantial prevention or lessening of competition.

Any replacement option may also have to address price discrimination under Canadian and US law because antidumping laws are often concerned with international price discrimination. National price discrimination laws are arguably a lingering element of the populist roots of competition law. However, except for all but the most restrictive economic assumptions, the efficiency and aggregate welfare effects from price discrimination are, at best, indeterminate (Graham and Warner 1994, 505). Therefore, some have suggested, the replacement option should focus exclusively on harmonizing predatory pricing laws (Ireland 1991, 6). However, it may be that governments will not agree to abolish all laws pertaining to international price discrimination while continuing to apply them domestically. Consequently, it may also be necessary to consider the harmonization of price discrimination laws. We believe this approach, as suggested in the ABA Task Force Report, to be more realistic (ABA 1994, 269-71).

In Canada, price discrimination is dealt with primarily in paragraph 50(1)(a) of the Competition Act. Again, while the provision does not expressly contemplate conduct occurring outside Canada, it may be violated by making a practice of selling the same product to two or more competitors who purchase similar quantities. Unlike the US Robinson-Patman Act, a defendant cannot successfully argue that the price differentials were "cost justified" or necessary to "meet the competition," although such conduct may be permitted if it does not amount to a "practice." Also, a seller can give a preferential discount to a purchaser of a significantly higher quantity even if the discount is not cost justified. The director issued price discrimination enforcement guidelines (1992) that significantly liberalized Canadian enforcement policy in this regard

53. *R. v. Hoffman-La-Roche* (1980), 28 O.R. (2d) 164, 200; affirmed (1981), 33 O.R. (2d) 694 (Ont. C.A.).

to generally permit a broader range of functional and other discounts (Goldman and Bodrug 1994). The Canadian law can be applied extraterritorially while the Robinson-Patman Act is unusual among US antitrust laws because its extraterritorial application is somewhat limited (Goldman and Bodrug 1994, 664-67). Each of these issues would have to be considered in detail if harmonization of price discrimination laws were considered an important part of a replacement option.

Other Harmonization Issues

As noted above, the Competition Act exempts conspiracies relating solely to exports from its general prohibition on agreements that unduly lessen competition. Similarly, in the United States, the Webb-Pomerene Export Trade Act (*US Code* 15, sections 61-65 [1988]) exempts from antitrust liability notified conspiracies and combinations that do not affect domestic US commerce. As a practical matter, however, Canadian companies generally do not rely on the export exemption in conspiracies or combinations formed to export to the United States or any other jurisdiction with similar conspiracy legislation. In effect, the exemption facilitates export cartels that sell to less-developed countries that either do not have or do not enforce such competition laws.

Joint Ventures

Intellectual property rights (IPR) encompass patents, trademarks, copyrights, and industrial designs. It is beyond the scope of this chapter to discuss the effects of all the relevant IPR laws and policies on Canadian trade and competition policies. Instead, this section focuses on the competition law treatment of joint ventures and strategic alliances, particularly research joint ventures in Canada.

Under section 95 of the Competition Act, the tribunal cannot use the merger provisions to act against a joint venture that does not involve the formation of a separate corporation. In order to qualify for this exception, the joint venture must satisfy the following criteria: (1) the project would not take place without the venture; (2) the venture results in no change in control of any of the parent corporations; (3) the parties agree in writing to the terms of their relationship, including the contribution of assets; (4) the agreement restricts the range of activities to be carried on by the venture and provides for its termination; and (5) the venture does not prevent or lessen competition except to the extent reasonably required to complete the venture. The director has indicated that covenants barring the parent firms from engaging in independent research could deprive the venture of the benefit of this exception (Wetston 1988, 4). In such instances, or others where the joint venture exception does not apply, the merger review provisions of the Competition Act are fully applicable.

The merger guidelines do not specifically discuss joint ventures. However, the director has elsewhere indicated that a pure joint R&D venture with no restraints on independent research, production, marketing of products, or licensing of technology developed by the parents would not generally be considered anticompetitive. On the other hand, a joint venture that encompasses production and marketing of a new product in an industry characterized by high concentration, barriers to entry, and no foreign competition would probably be considered anticompetitive. This position could still be tempered by the availability of effective substitutes and the expected market share of the parent firms. However, any covenants barring independent competition by the parents would likely make the venture unacceptable absent proof of very substantial efficiency gains (Wetston 1988, 8-9).

There are no publicly reported cases involving this joint venture exception. Section 95 does not require registration, and a similar provision exempts certain joint ventures from the premerger notification requirements. Thus, private parties may have used this exemption without making it public or notifying the bureau. However, section 95 does not exempt a joint venture from a challenge under the criminal conspiracy provisions in section 45 of the Competition Act.

Section 86 of the Competition Act provides for the registration of specialization agreements among competing firms under which each firm agrees to discontinue production of a particular article or service. An agreement registered under this provision is exempt from challenge under either the criminal conspiracy provisions or certain reviewable-matters provisions of the Competition Act. Section 86 was intended to facilitate the rationalization of production within certain industries. The tribunal may register such agreements where it finds that the agreement has been made free of coercion and the efficiency gains are greater than the effects of any lessening of competition. It is possible that even though the efficiency gains will outweigh the likely lessening of competition, there will not be substantial competition remaining in a relevant market. In such instances, the tribunal can make the registration conditional, for example, on the divestiture of assets or the broader licensing of patents. The Supreme Court has been reluctant to consider the positive impact of efficiency gains under a "partial rule of reason" analysis in conspiracy cases. However, section 86 clearly could exempt some types of specialization agreements that would otherwise offend the conspiracy provisions in section 45.

When the specialization agreements and joint venture provisions were created in 1986, officials hoped they would facilitate the restructuring of Canadian businesses, but section 86 has never been used, nor has the joint venture defense (Anderson and Khoshla 1993, 72).

A former director (H. I. Wetston 1991b) has raised questions about the appropriateness of this treatment of R&D joint ventures, export consortia, production sharing, or specialization agreements in the context of emerging global firms. Specifically, will the Canadian economy reap the benefits of the productive efficiencies for which the loss of competition in the national market may be tolerated? These issues have assumed added importance in light of recent legislative developments in the United States (Warner and Rugman 1994), and the succeeding director's announced intention to allocate significant resources into enforcement of policy regarding joint ventures and strategic alliances.

Conclusions

In conclusion, the Canadian experience illustrates how a modern competition policy in a relatively small and open economy can seek to recognize efficiency and innovation. It also provides examples of the tensions that may develop as a result of the extraterritorial application of the antitrust and trade laws of a much larger trading partner, as well as the possible responses. Finally, the attempts by the Canadian antitrust authorities to intervene in antidumping proceedings may instruct future attempts to incorporate competition policy concepts into antidumping laws.

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