

# THE CANADA-UNITED STATES ANTITRUST NOTIFICATION AND CONSULTATION PROCEDURE

## A Study in Bilateral Conflict Resolution

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### *Introduction*

It is widely held that third party dispute settlement by arbitration or adjudication may not be the best primary mode of conflict resolution between states. In an economically interdependent world, sources of conflict are numerous and arbitration or adjudication may prove too costly and time consuming. Professor Richard Baxter of Harvard, subscribing to the well-worn (but somewhat updated) adage that a gram of prevention is worth a kilo of care, has taken the view that states should avoid allowing conflicts to develop to the point at which adjudication is the only recourse that remains.<sup>1</sup> There is an urgent need to develop models of bilateral dispute settlement which will facilitate the identification and resolution of interstate conflicts at an early stage.

The Canada-United States environment is characterized by a high level of economic interdependence and cultural identity and the success or failure of Canadian-American attempts at bilateral dispute settlement provide valuable lessons for interstate affairs generally. The Antitrust Notification and Consultation Procedure<sup>2</sup> between Canada and the United States has been in operation for almost two decades and it is essential to determine if the current potash and uranium disputes between Canada and the United States indicate that this mode of bilateral dispute settlement suffers from a technical

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<sup>1</sup> Address to the Annual Joint Conference of The Canadian Council on International Law and the Canada-U.S. Law Institute, University of Ottawa, October 21st, 1977.

<sup>2</sup> House of Commons Debates, 1959, Vol. 1, pp. 617-619; Annual Report, Director of Investigation and Research, Combines Investigation Act (1960); Statement on Co-operation Between the United States and Canada on Anti-Combines and Anti-Trust Matters, House of Commons Debates, 1969, Vol. 1, pp. 574-575. The Antitrust Notification and Consultation Procedure has also been known as the Fulton-Rogers and later, the Basford-Mitchell Understanding.

design defect, a failure of good will, or something equally fundamental, a basic misapprehension of national policies and perceptions.

### I. *The Canadian Radio Patents Cases.*

The Antitrust Notification and Consultation Procedure evolved primarily as a result of particularly strong Canadian reaction in the late 1950's to a series of United States antitrust actions collectively known as the *Canadian Radio Patents* cases.<sup>3</sup> The *Canadian Radio Patents* cases almost became the "straw that broke the camel's back" in Canadian-American interface taking place, as they did, against a background of unusually strained relations that had been brought on by several factors: allegations of dumping of American surplus commodities in the Canadian market, disagreements over defence policies, and the persistent irritant of the long arm of United States export regulations.<sup>4</sup> The *Canadian Radio Patents* cases<sup>5</sup> consisted of civil antitrust suits filed in the United States, alleging that the defendants (General Electric, Westinghouse, and Philips) had engaged with others, through their subsidiaries, in an unlawful combination in restraint of the foreign commerce of the United States in breach of sections 1 and 2 of the Sherman Act.<sup>6</sup> It was alleged that Canadian Radio Patents Limited, a Canadian corporation, incorporated by United States owned Canadian subsidiaries, consisted of a patent pool which through the initiation of patent infringement suits and the denial of licenses, had effectively closed the Canadian market to United States domestic producers of home entertainment apparatus. United States home entertainment producers with manufacturing subsidiaries in Canada were alleged to have sealed off the Canadian market. The *Canadian Radio Patents* cases ended in consent decrees which enjoined the defendants from participating, by themselves or through their subsidiaries, in any agreement which directly or indirectly restricted the export of United States goods.<sup>7</sup>

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<sup>3</sup> *United States v. General Electric Company, Westinghouse Electric Corporation, N.V. Philips*, [1962] Trade Cases, paras 70, 342; 70, 420; 70, 546.

<sup>4</sup> See Trading With The Enemy Act, 50 U.S.C. App. ss 1-44 (1964); The Export Control Act, 50 U.S.C. App., ss 2021-32 (1964); The Foreign Assets Control Regulations, 31 C.F.R., ss 500.101-808 (1967); The Transaction Control Regulations, 31 C.F.R., ss 505.01-60 (1967); The Cuban Assets Control Regulations, 31 C.F.R., ss 515.01-808 (1967).

<sup>5</sup> *Supra*, footnote 3.

<sup>6</sup> 15 U.S.C., ss 1-7 (1970).

<sup>7</sup> Westinghouse, for instance, was enjoined from,

(A) Entering into, adhering to, enforcing or claiming rights under any contract agreement, understanding, plan or program with any other persons which directly or indirectly restricts or prevents any manufacturer . . . in the United States from exporting . . . into Canada.

The initiation of the *Canadian Radio Patents* cases and the subsequent consent decrees caused an uproar in Canada. The Honourable E. Davie Fulton, Canadian Minister of Justice, speaking in the House of Commons, characterized the United States court action as follows,

As honourable members know, Mr. Speaker, concern has been caused in Canada by current U.S. antitrust actions against parent companies of Canadian subsidiaries in respect of the participation of these subsidiaries in Canadian Radio Patents Limited, a Canadian company dealing in radio and television patents. The object of the action appears to be to force the Canadian companies to make important changes in commercial practice which we consider to be of the concern of Canadian rather than United States law. Other United States antitrust cases have in the past raised similar cause for concern and some of them have been made the subject of representations by the Canadian Government to the United States Government.<sup>8</sup>

The Honourable Minister went on to say that formal and informal representations had been made concerning the patent pool cases and that discussions would follow later that month with United States Attorney General, William P. Rogers.

The next month, reporting to the House of Commons<sup>9</sup> on his conversations with the Americans, the Minister of Justice indicated that he had expressed Canada's general concern about United States antitrust actions in Canada and had used the recent *Canadian Radio Patents* cases as an illustration. The Minister reported that he had emphasized Canadian concern about the possible effect of the decrees asked for in the United States in the *Canadian Radio Patents* cases, in so far as these decrees might result in Canadian subsidiaries taking certain actions in Canada which would be a result of the enforcement of United States law and economic policy and not a result of Canadian law and policy. The Minister elaborated for the House of Commons, pointing out that Canadian Radio Patents Limited, a Canadian company, had been formed years before and that leading manufacturers had assigned their patents to it and that, in general, the firm had in turn licensed those patents only to firms intending to manufacture in Canada. He pointed out however, that since its inception, the company had never been in breach of Canadian law and that as a result of the operations of Canadian Radio Patents Limited, Canada had a healthy radio and television manufacturing

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- (B) Directing or causing or entering into any agreement with a foreign subsidiary . . . to take or actively consenting to such subsidiary taking, any action to restrict or prevent any manufacturer in the United States from exporting . . . into Canada.

*United States v. General Electric Company, etc., supra*, footnote 3, paras 70, 342; 70, 420; 70, 546.

<sup>8</sup> House of Commons Debates, 1959, Vol. 1, p. 25.

<sup>9</sup> *Ibid.*, p. 618.

industry which resulted in very little importation of home entertainment apparatus from the United States. The Minister told the House that he had informed the United States that if any actions in Canada were counter to American interests or infringing commercial agreements between Canada and the United States, that the proper remedial step was not unilateral action in the courts; but resort to the normal diplomatic channels. United States courts ought to exhibit restraint in interfering with commercial relations in Canada.

In particular, I emphasized our view that to follow any other course could only be based on the unacceptable proposition that foreign subsidiaries of United States parent corporations are merely projections of United States trade and commerce and subject to United States policy in priority to the laws and commercial interests of the country in which such subsidiaries are incorporated or carry on business.<sup>10</sup>

Justice Minister Fulton reported that Attorney General Rogers had assured him that the Canadian Radio Patents suits had not been initiated with a view to infringing Canadian sovereignty; but that the United States had acted only in accordance with its obligation to ensure that all those subject to American antitrust law adhered to that law.

## II. *The Antitrust Notification and Consultation Procedure.*

The Antitrust Notification and Consultation Procedure emerged from the discussions held between Justice Minister Fulton and Attorney General Rogers in the wake of the *Canadian Radio Patents* cases. The two Ministers agreed that in the future, discussions would be held between the two governments,

... when it becomes apparent that the interests of one of our countries are likely to be affected by the enforcement of the antitrust laws of the other. Such discussions would be designed to explore means of avoiding the sort of situation which would give rise to objections or misunderstandings in the other country.<sup>11</sup>

Under the informal procedures agreed upon, each government undertook to notify the other prior to the institution of any suit involving the interests of a national of the other country, and to allow for consultations between the two governments in such situations. As well, each country undertook to keep the other informed of developments in pending cases. Each state, however, reserved the right to proceed as it saw fit and the mere fact that consultations might be held on a particular issue was not to imply approval of subsequent actions.

In 1967, the Organization for Economic Co-operation and Development (OECD) became concerned with the growing level of

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, p. 619.

unrestrained restrictive business practices and the danger created by the unilateral implementation of national regulatory legislation in situations in which the business concerns of other states were involved. Recognizing a need for co-operation among member states to control international restrictive business practices, the OECD Council adopted a set of recommendations<sup>12</sup> which urged member states to co-ordinate action, exchange information, and co-operate in the development and implementation of restrictive trade practices legislation. Further, the Council recommendations called upon member states to notify each other when they undertook investigations or proceedings likely to involve the interests of other member states. In 1969, Ron Basford, the Canadian Minister of Consumer and Corporate Affairs and John Mitchell, the United States Attorney General, agreed to place the Antitrust Notification and Consultation Procedure (or Fulton-Rogers Understanding as it had come to be known) in the context of the 1967 OECD Council recommendations concerning co-operation in the control of restrictive business practices.<sup>13</sup> Both governments agreed that the OECD recommendations augmented the Antitrust Notification and Consultation Procedure and that the Council recommendations ought to be implemented between the two states as far as practicable. As a result, it was agreed that in addition to the continuation of notification and consultation,

Each country will insofar as its national laws and legitimate interests permit, provide the other with information in its possession of activities or situations affecting international trade, that the other requires in order to consider whether there has been a breach of its restrictive business practice laws.

A primary concern would be cartel and other restrictive agreements and restrictive business practices of multinational companies affecting international trade. The enforcement agencies of the two countries each within its own jurisdiction, will when possible, co-ordinate the enforcement of their respective laws against such restrictive business practices.<sup>14</sup>

### III. *The Notification and Consultation Procedure in Operation.*

#### A) *Form.*

The OECD sets out a formal procedure for contacts on antitrust matters between member states. Contacts are to take place in the manner set out by the country to whom the contact is to be addressed.

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<sup>12</sup> Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, 5th Oct., 1967, OECD Doc. C(67)53 Final.

<sup>13</sup> Statement on Co-operation Between United States and Canada on Anti-Combines and Anti-Trust Matters, House of Commons Debates, 1969, Vol. 1, Appendix A.

<sup>14</sup> *Ibid.*

The OECD publishes a confidential list which indicates the way in which member states wish to be notified on antitrust matters. Canada, for instance, specifies that any notification be addressed to the Director of Investigation and Research of the Department of Consumer and Corporate Affairs. The Department will then forward a copy to the Department of External Affairs. The United States, on the other hand, prefers communications to be addressed to the Department of State although it is permissible to address the Antitrust Division of the Department of Justice directly, with a copy to the Department of State. It appears that generally the United States makes more of a point of formal contact.

Pursuant to practices which have evolved between Canada and the United States, inter-governmental contacts concerning antitrust matters do not take the form typical of other OECD inter-member communications. Indeed, contacts between Canadian and American anti-trust and anti-combines officials no longer consist of the regular quarterly meetings originally envisioned in the Basford-Mitchell Understanding. While formal meetings do occasionally take place and officials do meet periodically at UNCTAD Conferences or at meetings of the OECD Committee of Experts on Restrictive Business Practices, for the most part Canadian-American inter-communication concerning antitrust matters is extremely informal and unstructured. Telephone contact is most frequently relied upon to provide notification and an opportunity to exchange information. Informal conversations between officials may lead to a high level of co-operation. For instance, in the course of a conversation with a Canadian official, legal counsel to the United States Federal Trade Commission revealed that the Commission was beginning an investigation into the automobile industry. The official asked if his Canadian counterpart might make available any information which his Department had concerning automobile trade and sales practices in the parts industry. The Canadian official obliged his American counterpart by forwarding a copy of a relevant Economic Council of Canada *Report*.

More formal modes of contact will be resorted to in some situations. For instance, if United States officials wish to interview Canadian corporate executives concerning events in the United States or events in Canada with effects upon the United States, Canadian officials will be advised if the United States Antitrust Division forwards a questionnaire (to be voluntarily completed) to the individuals involved. Formal OECD contact, by diplomatic note, will be relied upon in more critical situations such as the indictment of a Canadian citizen in a United States antitrust suit. In such a situation, a formal note is sent to the Department of Consumer and Corporate Affairs, the proper Canadian addressee of a formal contact

according to the OECD list. One should not lose sight of the fact that face to face meetings do take place between Canadian and American antitrust counterparts, but not in any regularized manner. Meetings may be of several different types; courtesy calls between antitrust officials take place occasionally and are designed to provide a "tour d'horizon", purely technical meetings take place when antitrust experts of one government wish to borrow from the experiences of their foreign counterparts, formal meetings between high antitrust officials take place in the context of particularly abrasive situations.

### *B) Participants.*

The participants in Canadian-American contacts are generally antitrust counterparts, on the American side, officials from the Antitrust Division of the Justice Department, on the Canadian side, officials of the Department of Consumer and Corporate Affairs, Bureau of Competition Policy. There is, however, an opportunity for the involvement of officials of other departments. Canadian combines officials generally keep the External Affairs Department apprized of the current status of Canadian-American antitrust relations. If a Canadian official is about to go to Washington to meet with American officials, the Canadian Department of External Affairs is so informed. If a matter to be discussed is purely technical, External Affairs will remain uninvolved; but if the issue to be discussed is of a sensitive diplomatic nature, either the First Secretary of the Canadian Embassy in Washington, or an official of External Affairs will attend and State Department counterparts are likely to be present as well. Further, if an issue under discussion with American officials involves a matter of interest to a particular Canadian government department (for instance, the Canadian Department of Energy, Mines and Resources) a representative of that Department is likely to seek to attend any meeting which takes place.

### *C) Agenda.*

In the early days of the Antitrust Notification and Consultation Procedure, the test of "substantial impact" determined if a matter was to be the subject of an intergovernmental communication. The "substantial impact" test was construed very broadly so that the proper subject of a contact from one state to the other comprised any action, investigation, or other proceeding with "substantial impact" upon the other state, whether this resulted from the "direct" or the "indirect" extraterritorial application of law. A direct extraterritorial application of national law would involve an attempt to regulate persons or activity wholly outside the national territory. An indirect extraterritorial application of law, would involve the application of national law territorially; but with a reverberating effect abroad.

Canadian combines officials today indicate that they will notify the United States in any situation in which actions taken in Canada have a "direct" or "indirect" effect upon the United States. Interviews with Canadian officials revealed however, that there is an entire category of situations in which "indirect" effect upon the United States will not be considered by Canada to necessitate notification to the United States. A Canadian official explained that whenever the Department of Consumer and Corporate Affairs investigates an anti-combines violation in Canada, there is a great likelihood of involvement by American owned firms due to the significant presence of American owned subsidiaries in Canada. If the Department of Consumer and Corporate Affairs is about to subpoena Canadian firms for actions in Canada that comprise violations of Canadian law, the fact that one of the firms is American owned will not lead to notification of the United States. The Canadian official added that the mere fact that a firm under investigation or indictment is controlled by American shareholders is of no concern to the United States Antitrust Division, for the United States would not object to the application of Canadian law in Canada. American antitrust officials agree, pointing out that prior notification is not required when what is involved is a largely Canadian interest. Earlier in the United States-Canada relationship there appeared to have been an ongoing dispute concerning whether or not Canada was expected to notify the United States about an action against a United States subsidiary in Canada, or vice versa. There seems to be general agreement today that the territorial application of national regulatory law to foreign owned subsidiaries operating within the national territory is essential and acceptable and normally need not be the subject of a diplomatic contact.

Notifications necessitated by the "direct" effect of Canadian actions or Canadian law upon the United States are rare, not because Canada chooses not to notify in such situations, but rather because Canada seldom undertakes actions with substantial "direct effect" upon the United States. A Canadian official stressed that Canadians are not "... extraterritorial people. We just don't issue subpoenas to persons resident abroad" and that if something was "going on" in the United States the Department would not attack it. Cases of resale price maintenance were focused upon as an example of situations in which Canada would avoid applying anti-combines law extraterritorially if at all possible. In the event that resale price maintenance was originating abroad as a result of the action of a non citizen or a non resident corporation, Canadian combines officials would not look to the foreign offenders but would strive to control the practice through the mechanism of a conspiracy action against local participants.

A Canadian official revealed that in usual practice it is the state



beginning an action or commencing an investigation which may be of concern to the other state, which initiates a notification. However, the Canadian Department of Consumer and Corporate Affairs will not hesitate to contact the United States Antitrust Division if it becomes concerned about an action being undertaken in the United States, whether or not the Antitrust Division considers that the action warrants a notification to Canada. It was pointed out that contacts which are reactions to United States actions are "less frequent but more abrasive". As well, contacts will be initiated to provide or request background information, and a consultation may be requested when a prior notification has revealed that a foreign policy issue is at stake.

Both Canadian and American antitrust officials expressed views on the involvement of other government departments in the notification and consultation process, and the influence of these departments upon the agenda of intergovernmental contacts. An American official expressed the view that Canadian Combines Investigation officials often "wave the flag" for the Canadian Department of Justice or the Department of Energy, Mines and Resources and pointed out that often when consultations are held, it is with participants from the most concerned Canadian agency. The American official went on to say that Canadian Government departments enjoyed less autonomy than American Government departments in the post-Nixon era. He asserted that unlike the Canadian situation, the Antitrust Division does not "carry the ball" for other Federal Departments. The job of the Antitrust Division is to assist competition, not to "front for industry". While stressing their desire to remain neutral, Canadian Combines officials freely acknowledged the participation of and the pressure brought to bear by, other Canadian Government departments. It was pointed out that economists play a bigger role in Canada than they do in the United States in the implementation of combines law. In view of the Canadian outlook that restrictive business practices comprise only part of the global economic picture, it is not surprising that Canadian Government departments, whose concern is with the development of Canadian trade and industry, should seek to influence the Department of Consumer and Corporate Affairs and remind the Department that Canadian competition policy should not defeat general Canadian economy policy. Further, this should be kept in mind when deciding whether an objection to a particular course of American action is or is not warranted.

#### *D) Results of Contacts.*

In the past, the range of possible results from a Canadian-American antitrust interface was somewhat less broad than today. A

former very high official in the Antitrust Division of the United States Department of Justice maintained that the Division perceived itself as a prosecuting agency, duty-bound to prosecute every violation of the antitrust laws no matter how upsetting that might be to Canada. The former official could not recall a situation in which the United States had not proceeded with an action it had planned to initiate and he insisted that if any damper whatsoever had been placed upon an action, it arose out of diplomatic pressures, not consultation between antitrust counterparts of the two states. The main value of Canadian-American antitrust notifications and consultations, the official maintained, was to provide the United States with an opportunity to explain to Canada the reason for certain United States actions so that the two states could fully understand each other.

Theoretically, negotiations and consultations between Canadian and American antitrust officials may produce any one or more of a wide range of results. While it is true that antitrust officials of one state might flatly refuse to alter a course of action in any way, it has often been the case that officials have been persuaded to modify their plans somewhat. After consultation, it may be agreed to shape an indictment in a less offensive manner, to change the ground rules of an investigation so as to require only "voluntary" testimony from foreign witnesses, or that officials of the government initiating an investigation or action will keep their antitrust counterparts informed of progress in the case and allow them to voice their concerns. In exceedingly rare circumstances, one state may be led to "close a file" at the other state's urgent request. Neither Canada nor the United States are bound by the understandings reached in the context of the Antitrust Notification and Consultation Procedure, yet one state might go quite far towards implementing an undertaking. In one such case, the Canadian Department of Defense was about to enter an agreement with an American owned company and it was necessary that the company make certain commitments to the Canadian Government with respect to patents and research. As there was some fear that these commitments might be construed as a violation of a consent decree to which the company was subject in the United States, consultations were held with United States antitrust officials, who agreed to study the matter and if necessary to obtain an amendment of the decree before the court.

Antitrust officials today stress that the United States might drop a case and close a file as a result of serious objections raised during consultations with Canadian combines officials coupled with political pressure brought to bear by the Department of External Affairs and the Department of State. An American official indicated that the State Department does try to influence the Antitrust Division because it is responsible for the foreign policy implications of an antitrust suit. Assistant Attorney General Baker, Chief of the

Antitrust Division (as he then was), speaking at Harvard,<sup>15</sup> asserted categorically that the State Department had never "compelled" the Antitrust Division to desist from a course of action. However, on occasion, State Department officials had made it clear to the Antitrust Division that the State Department was "taking a beating from the Canadians on a certain issue" and that the Division "should be aware in the global sense", although the ultimate course of action was always left to the Division. A Canadian official pointed out that his Department welcomed the participation of State Department officials in contacts with the Antitrust Division, because State Department officials could help drive home to the Antitrust Division the implications of certain contemplated actions. The State Department, it was insisted, often cools down the Antitrust Division.

One should not overlook that Canadian-American contacts provide both states with help of an informational nature. Consultations, notifications, technical meetings and informal chats all provide access to valuable information. If officials of one government wish to be educated about something which their counterparts in the other government are informed of, they do not hesitate to ask for help. The Antitrust Division and the Department of Consumer and Corporate Affairs are prepared to share evidence if it is of a kind which can legally be so shared. However, grand jury testimony and civil investigation demand testimony is secret and will not be provided by the Antitrust Division. The value of the Antitrust Notification and Consultation Procedure for the exchange of information should not be underestimated. Lastly, Canadian-American contacts may be valuable in that one state will inform the other, when in the course of its own investigations concerning antitrust violations within its own territory, facts have come to light which may indicate the possible violation of the restrictive trade practice law of the other state.

#### E) *Sovereign Compulsion, Business Records Protection.*

We have seen that it is very seldom if ever that the United States Antitrust Division "closes a file" as a result of Canadian objections; however, in some instances proceedings may be significantly modified. Certain circumstances surrounding a pending investigation or action may lead the Antitrust Division to back off. Firstly, American antitrust officials acknowledge that foreign government involvement in what may be technically anti-competitive behavior, may create intricate problems for the Antitrust Division. The

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<sup>15</sup> Address to Harvard Government Attorneys Project, Harvard Law School, Nov. 3rd, 1976 (authors own notes).

American courts have come to accept that the clear unequivocal command by a foreign sovereign compelling a company to engage in an anti-competitive practice abroad must be considered as a good defense to an anti-trust action. The case of *Interamerican Refining Corporation v. Texaco Maracaibo Inc.*,<sup>16</sup> clearly recognized sovereign compulsion as a valid defense to an antitrust action. Later cases, most notably *United States v. Sisal Sales Corporation*<sup>17</sup> and *Continental Ore Company v. Union Carbide and Carbon Corporation*,<sup>18</sup> qualified the defense somewhat accepting as a defense true sovereign compulsion but holding that, the "encouragement" or "acquiescence" of a foreign sovereign will not suffice to excuse anti-competitive behavior with an effect on the foreign or domestic commerce of the United States. The role played by the Canadian Government in the activities of the international uranium cartel will present the American courts once again with the very neat question—whether in fact "sovereign encouragement" may be distinguished from "sovereign compulsion".

Recent American decisions establish that the courts will not end their inquiry once sovereign compulsion (in the sense of sovereign command) has been found to be a contributing cause of anti-competitive behavior. Rather than accepting sovereign compulsion as an outright defense, there is a tendency to attempt to balance the law of the forum against principles of international comity. Using such a balancing technique, a court will inquire into the origins of a sovereign command and the consequences of non-compliance.<sup>19</sup> One American judge has turned principles of international comity upside down holding, without any attempt at balancing interests, that the laws of an American state which protect the fundamental public policy of the state must prevail over the national policy of a foreign country as legislated by that country.<sup>20</sup>

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<sup>16</sup> (1970), 307 F. Supp. 1291 (D. Del.).

<sup>17</sup> (1927), 277 U.S. 268, 47 Sup. Ct 592.

<sup>18</sup> (1962), 370 U.S. 69, 82 Sup. Ct 1401.

<sup>19</sup> T. G. Smith, *Discovery of Documents Abroad in U.S. Antitrust Litigation; Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production* (1973-74), 14 Virginia J. Int. L. 747.

<sup>20</sup> In the case of *United Nuclear Corporation v. General Atomic Company et al.*, State of New Mexico, District Court, County of Santa Fe, Nov. 18th, 1977, No. 50827, General Atomic had been required by an order of the court to identify all relevant documents housed in Canada. The company argued that the Canadian Uranium Information Security Regulations SOR/76-644, *infra*, footnote 68, prohibited the releasing of any such information. Felter J. held, that deference to the sovereignty and national interest of Canada cannot be accomplished through sacrifice of the sovereignty of New Mexico. General Atomic was ordered to identify all the documents requested and the plaintiff was asked to indicate which facts were to be proveable from those documents. On March 2nd, 1978, Felter J. ruled in favour of

The United States Antitrust Division is equally concerned about statutes which prohibit compliance with foreign judgments, decrees, subpoenas for documents and generally all forms of foreign process.<sup>21</sup> An American antitrust official expressed the view that the Business Records Protection Act of Ontario<sup>22</sup> and the recent amendments to the Combines Investigation Act<sup>23</sup> limiting the implementation of foreign court decrees were very unfortunate and troublesome stumbling blocks to antitrust enforcement and the protection of American citizens. As well, the American official pointed out that such statutes do not advance the regulation of international restrictive trade practices which may only be effectively dealt with if enterprises are obliged to provide information. Foreign business records regulations have served to deter the Antitrust Division to a degree; however, the uranium cartel investigations have revealed that relevant documents are often readily obtainable outside Canada (for instance, from American parent companies) and thus business records legislation may be sidestepped.

A Canadian official pointed out that it is exceedingly difficult to explain or predict the circumstances which will convince the Antitrust Division to abandon or modify an investigation or action. Provincial government involvement in the potash marketing scheme and extensive federal government involvement in the uranium cartel were made abundantly clear to the United States Antitrust Division, but the Division would not cease its investigations nor bring its influence to bear to modify the civil actions though the Canadian Government was deeply concerned to avoid embarrassment. American antitrust officials acknowledge that they remain sensitive to the problems which American investigations and actions may cause in Canada and that whenever possible they will attempt to phrase indictments or conduct investigations in such a manner as to avoid blatant embarrassment of the Canadian Government. But in the absence of solid legal grounds for desisting (such as sovereign compulsion), process must issue in one form or another for violations of the antitrust laws.

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United Nuclear, accusing General Atomic of following a policy of concealing the true facts concerning the international uranium cartel. *United Nuclear Corporation v. General Atomic Company et al.*, New Mexico District Court, County of Santa Fe, Sanctions Order and Default Judgment.

<sup>21</sup> E.g., Business Records Protection Act, R.S.O., 1970, c. 54; Business Concerns Records Act, R.S.Q., 1964, c. 278; Combines Investigation Act, R.S.C., 1970, c. 23 as am. by c. 10 (1st Supp.), c. 10 (2nd Supp.), 1974-75-76, c. 76. With respect to these statutes, just as they do in the case of sovereign commands, U.S. courts may attempt to balance the foreign statute against the U.S. regulatory law, weighing the importance of one against the other.

<sup>22</sup> *Ibid.*      <sup>23</sup> *Ibid.*

F) *Statistics on Notification and Consultation.*

Statistics recently made public<sup>24</sup> concerning the number of antitrust notifications and consultations between Canada and the United States and identifying which of the two states initiated those contacts are quite revealing. During interviews, both Canadian and American antitrust officials estimated that, since 1974, the United States had initiated twice as many contacts as Canada. But the OECD *Report on The Operation of the 1967 Council Recommendations Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade During the Period 1967-75*, contains some contrary indications, recording that between 1968 and 1974, Canada initiated twenty notifications and consultations with the United States (twenty of a total of twenty-one Canadian contacts with all OECD members) while in contrast, in that same period, the United States only initiated eight contacts with Canada. With the exception of one instance,<sup>25</sup> which could be understood to have consisted of a complaint by Canada concerning a United States antitrust inquiry, Canadian initiated contacts involved Canada informing the United States of: (1) the results of a Combines Investigation Inquiry, (2) the likelihood of certain anti-combines actions against American owned subsidiaries in Canada, (3) a desire to interview American citizens about activities in Canada, (4) evidence of offences in the United States which had come to light and which it was thought would be of interest to American antitrust authorities.

Bare statistics would seem to indicate that it must be Canada which has the more ambitious antitrust law. However, the statistics are misleading. The OECD *Report* is incomplete as matters which form the basis of a confidential or abrasive contact are not reported to the OECD Council for inclusion in the *Report*. Under the OECD reporting procedures, states may keep confidential those notifications and consultations which are regarded as sensitive by any party to the contact. A Canadian official revealed that Canada appears to

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<sup>24</sup> *Report on The Operation of the 1967 Council Recommendations Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade* [C(67) 53 (Final)] During the Period 1967-75, OECD, Oct. 1976. [Hereinafter OECD Report].

<sup>25</sup> *Ibid.*, Annex II, p. 19. In this case, the OECD Report reveals that there was consultation concerning the possible indictment of a U.S. owned Canadian subsidiary in a U.S. antitrust suit. The Report reveals that, as a result of consultations, U.S. officials undertook to inform Canada of any evidence of involvement of Canadian firms in subsequent legal proceedings. It is possible to argue that Canada was not in fact complaining about the possible indictment of a Canadian subsidiary, but rather wished to be kept informed in case subsequent investigation revealed a violation of the Combines Investigation Act, *supra*, footnote 21.

have contacted the United States far more times than the United States has contacted Canada because few if any contacts initiated by the United States are reported on the OECD list. A matter may not be reported to the OECD if its publication would cause a furor in Canada. On the other hand, very few actions which Canada may take with an effect on the United States and which are the subject of a notification by Canada to the United States are really of concern to American authorities, and therefore the inclusion of these matters on the OECD list is rarely challenged by the United States. Given the purported extraterritorial reach of the United States antitrust laws, it is most probable that unreported notifications and consultations initiated by the United States concerning American actions are more numerous than reported.

The OECD *Report* also reveals that between 1968 and 1974, seven Canadian-initiated contacts consisted of "consultations" while the United States form of contact has never been "consultations". In two cases however, where the form of United States contact was initially notification, consultation followed. When confronted with these statistics, Canadian officials were at first a bit perplexed. The view was advanced that the Department of Consumer and Corporate Affairs would never proceed with something if it was felt that the Americans might have the slightest objection and as a result Canada consults very often. One Canadian official pointed out that the disparity in notifications and consultations must be seen in the light of the greater "firepower" of the United States Antitrust Division. The Antitrust Division is able to remedy many things itself or at least believes that it can, whereas many of the greater number of Canadian contacts are to solicit badly needed co-operation, rather than to warn of the impact of Canadian actions on the United States. It may be that often an action which Canada feels should form the basis of a consultation is made the subject of only a notification by the United States and that at times, what Canada regards as the valid subject matter of a notification by the United States may not be regarded by the Antitrust Division as significant at all.

#### G) *Transnational Identity.*

The ongoing interaction of Canadian combines officials and American antitrust officials has resulted in lasting friendships and a transnational identity of function between the officials of the two government departments charged with anti-combines enforcement. While personalities may not determine the kinds of conflicts which arise between states, personalities may certainly determine the level of conflict which ensues. The understanding which builds up over time between those engaged in similar endeavors may result in smoother interactions and greater sensitivity, but may also jeopardize national policies. Canadian and American antitrust officials

interacting and caught up in the goals and nuances of their specialized field may overlook subtle differences in national policy which divide the competition laws of the two states.

A former high official in the Foreign Commerce Section of the Antitrust Division revealed that he and his former Canadian counterpart in the Office of the Director of Investigation and Research of the Department of Consumer and Corporate Affairs, shared an extremely close relationship, that they rarely disagreed and saw "eye to eye" on the merits of the extraterritorial application of United States law. The particular Canadian official, it seems, did not object to the extraterritorial reach of United States antitrust law because he felt that in most cases American antitrust decisions and consent decrees had had a benign impact upon competition in Canada. Mr. Justice Henry, the former Director of Investigation and Research, agrees, insisting that one may differentiate between good and bad extraterritoriality. In *The United States Antitrust Laws: A Canadian Viewpoint*,<sup>26</sup> Mr. Justice Henry, relying on some preliminary classified research conducted by the Department of Consumer and Corporate Affairs on the true economic effect of the extraterritorial application of United States antitrust laws, finds that for the most part Canada has benefited from the ultimate American actions. It is his view that the majority of American decisions reviewed (many of which Canada protested) in fact resulted in enhanced competition in Canada.

Current Canadian officials agree that there was less friction in earlier times and regard former officials of the Foreign Commerce Section as more sensitive to Canada's views, while current American officials may be more effective though somewhat more irritating. Canadian combines officials today recognize that they too have much in common with their American counterparts and tend to be more sympathetic to the Antitrust Division than the Department of External Affairs might be. The Department of External Affairs, however, must take into account other Canadian departments such as the Department of Energy Mines and Resources. It has been a fundamental principle of Canadian policy that the extraterritorial application of United States law is unacceptable. However, Canadian officials point out that there may be disputes within the Canadian Government concerning what exactly comprises extraterritoriality and whether one should distinguish between beneficial and detrimental extraterritoriality. What appears to one Canadian Government department to be an example of the unacceptable extraterritorial reach of United States law, may not appear as such to the Department of Consumer and Corporate Affairs. A perfect example

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<sup>26</sup> (1970), 8 Can. Y.B. Int. L. 249.



may be found in the reaction of different Canadian Government departments to the recent Antitrust Division investigation into the operations of the uranium cartel. The Canadian Minister of Industry, Trade and Commerce claimed that the United States had no business in this matter, the Minister of Finance took the opportunity to lash out at the application of American law extraterritorially; but the Minister of Consumer and Corporate Affairs stated,

... effective international lines of communication must be maintained if combines legislation is to be effectively enforced on both sides of the Canadian, United States border.

The rise of international enterprise has brought about restrictive business practices which would be beyond the reach of purely national enforcement agencies.<sup>27</sup>

Canadian anti-combines officials understood why the Antitrust Division was taking certain steps however much they might have been forced to object to the resultant effects on Canada. Situations arise in which Canadian Government departments pressure the Department of External Affairs to mitigate some action undertaken by the United States and the Department of Consumer and Corporate Affairs finds itself forced to object to actions of the United States Antitrust Division or the United States courts which the Department truly feels are insignificant, necessary, or inevitable.

Keeping in mind the identity of the function between antitrust officials in the two governments, it is not difficult to imagine a situation in which the Department of Consumer and Corporate Affairs is extremely sympathetic to the scope of a United States antitrust action. Officials of the Department of Consumer and Corporate Affairs might in certain circumstances welcome actions undertaken by the United States Antitrust Division which they themselves for political or practical reasons are constrained from launching. It is certainly the case that there are limitations in Canadian anti-combines law which preclude certain actions. A Canadian official stated that as regrettable as recent events concerning the potash industry may have been, American potash cases should serve as a warning to Canadians that they can no longer, with immunity, participate in export cartels involving the United States. Participation in an export cartel may not be contrary to Canadian combines law and Canadian anti-combines officials may believe that this loophole should be tightened up and appreciate the fallout from American antitrust actions in the area.

It is not impossible as well, to imagine a situation in which the federal Government of Canada, precluded by court decisions or good

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<sup>27</sup> News Release, Department of Consumer and Corporate Affairs, NR-76-37, Aug. 1976.

sense from intervening in agreements or conspiracies in restraint of trade involving provincial governments, might equally welcome some adventuresome American antitrust action. Canada and the Province of Saskatchewan recently found themselves locked in litigation concerning control of the potash industry in the province.<sup>28</sup> Although the provinces are entitled to all lands, mines and minerals within provincial boundaries, the litigation concerned production and pricing for export, the issue of the scope of provincial ownership of resources in view of federal power over trade and commerce. If the federal government failed to dismantle the provincial marketing scheme by way of a successful constitutional challenge, a successful United States antitrust suit against potash producers might achieve the same result and be welcomed.<sup>29</sup>

#### H) *Linkages and Keeping Score.*

A very delicate point is raised by the issue of linkages. A linkage may be intra-sphere or inter-sphere. An intra-sphere linkage consists of the tie-in of current negotiations with earlier events, outstanding issues, or conflicts in the same sphere of an interstate relationship (that is in the field of antitrust enforcement). An inter-sphere linkage consists of the tie-in of current interaction in one sphere with the outcome of interaction in other unrelated spheres or with the overall status of the relationship between the two states.

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<sup>28</sup> The Province of Saskatchewan, fearing that overproduction of potash (of which it is a major world producer) would have an adverse effect on the industry, acted under the Mineral Resources Act, R.S.S., 1965, c. 50 and passed an Order in Council, 1933 of 17th Nov. 1969 and the Potash Conservation Regulations, establishing price controls and a potash prorationing scheme (Sask. Reg. 287/69 as am. by Reg. 64/70 and Reg. 233/73). The plaintiff, Central Canada Potash Ltd., complained that the Saskatchewan regulations restricted its production of potash and placed in jeopardy certain contracts with United States distributors. The plaintiff challenged the constitutionality of the Order in Council and the Regulations passed pursuant to it and the Saskatchewan Court of Queens Bench found the potash scheme to be *ultra vires* of provincial jurisdiction as the true purpose and intent of the regulations was to limit export and impede the flow of trade, a usurpation of federal power over trade and commerce. See *Central Canada Potash Co. Ltd., and Attorney General of Canada v. Attorney General for Saskatchewan, Minister of Mineral Resources for Saskatchewan and Government of Saskatchewan*, [1975] 5 W.W.R. 193 (Sask. Q.B.). In the Saskatchewan Court of Appeal, however, Culliton C.J.S. reversed the lower court, holding that in determining the constitutionality of legislation, the transaction must be looked at in its particular circumstances and intent and purpose is determined by the true nature of the legislation not its ultimate economic effect. Culliton C.J.S. held that the schemes were in pith and substance for the management, utilization and conservation of the potash industry and hence within provincial competence: *Central Canada Potash Co. Ltd., and Attorney General of Canada v. Government of Saskatchewan*, [1977] 1 W.W.R. 487. A further appeal in the case has been heard before the Supreme Court of Canada and has been taken under advisement.

<sup>29</sup> For a discussion of recent United States litigation concerning potash marketing see *infra*.

In the Canada-United States interrelationship so many exchanges are occurring simultaneously that it may be impossible for Canada or the United States to focus on any two specific issues with a view to a trade-off in outcomes and it may be absurd to assume that difficulties or intransigence in one conflict area are related to the attainment of national goals in another conflict area. However, Canadian and American antitrust officials involved in antitrust notification and consultation admit that they are human and cannot help but have in mind the general status of Canadian-American relations at a given time. As well, antitrust officials are keenly aware of the pressures brought to bear by other government departments which may help to determine the occurrence, intensity and outcome of an antitrust dispute. A Canadian official insisted that in his experience, the Department of External Affairs had never tried to encourage the Department of Consumer and Corporate Affairs to be particularly tough on an antitrust matter in order to provide leverage and convince the United States to be more flexible in another sphere of Canadian-American relations. The official ventured to say however, that the same might not be true of the United States, for he could identify in the recent uranium investigation a linkage between the United States Antitrust Division's concern and other areas of United States national interest. The official pointed out that the United States had instituted an absolute embargo in 1969 on the importation of uranium in order to protect the United States uranium industry at a time of world oversupply. The United States action destroyed free competition in uranium and a foreign cartel had been formed in reaction to the loss of the United States market. Shortly thereafter, Westinghouse Electric Corporation had made some very unwise bargains, selling reactors and guaranteeing to supply eighty million pounds of uranium under long term contract at seven to eight dollars a pound without securing long term supplies. Later, when the price of uranium skyrocketed, Westinghouse faced disaster unless it could climb on the back of a United States antitrust action and be compensated through damages. "You tell me how the issues in the United States were interrelated", was the Canadian official's final cynical comment. American officials believe that Canadian anti-combines officials frequently engage in fronting for Canadian industry and that, as a result, there is a linkage between Canadian commercial objectives and Canadian goals in Canadian-American antitrust relations.

The linkage of issues may work in a reverse way. We have been concerned, for instance, that the Canadian Department of External Affairs might pressure Canadian anti-combines officials to remain resolute or weak on one issue in order to counterbalance another pending interface. In fact, from time to time, the Department of Consumer and Corporate Affairs requests that External Affairs

officials refrain from becoming involved in new areas of conflict with the United States at times of existing friction with the United States in the antitrust field. This would seem to indicate that Canadian officials believe that American antitrust officials are influenced by developments in Canadian-American relations in other fields, even if they themselves are not so influenced. Most likely, despite the protestations, officials on both sides are conscious of the status of Canadian-American relations generally and have this history in the back of their minds though it is unlikely that officials of either state, when approaching antitrust issues, seek or are frequently prevailed upon to seek solutions in the antitrust realm that will help to balance the global ledger of Canadian-American relations.

What is no more surprising than the fact that Canadian and Americans officials have the general status of bilateral relations in mind, but is certainly more disturbing, is the fact that antitrust officials are affected by the outcome of the last antitrust interaction when confronted with a new antitrust conflict. When asked, both Canadian and American antitrust officials denied that they "kept score" of the results of Canadian-American antitrust relations (that is, that they kept in mind who won or lost the last round or who was winning generally). But when asked for a quick off the top of the head score of the outcomes of Canadian-American antitrust interface, officials of both governments responded immediately with words such as "we won X dispute, they won Y dispute, Z dispute was a tie".

The question of wins and losses and the linkage of antitrust issues highlight the misunderstandings which exist concerning the proper purpose and possible outcomes of the Antitrust Notification and Consultation Procedure. Interviews revealed that among current American antitrust officials there is a sense that antitrust wins and losses should be balanced and that there should be give and take. But these same officials indicated that one cannot really keep score in the Canadian-American interrelationship because the Antitrust Notification and Consultation Procedure is not a two way process, involving as it does, Canada resisting United States extraterritoriality, but never the reverse. In this sense, the United States Antitrust Division never wins, since it is constantly subjected to a "check" on its action and must either give in to Canadian requests or risk disappointing or worse, angering Canada. A former high American official in the Antitrust Division took the opposite view, arguing that Canada could never "win" because the Antitrust Notification and Consultation Procedure was designed solely as a procedure to keep Canada informed of United States investigations and proceedings and was never intended to present Canada with an opportunity

to alter a course of action undertaken in the United States or to "win" a point. Canadian officials however, speak bitterly about the "losses", viewing them as a sign of the failure of the procedure. Canadian officials believe that the Antitrust Notification and Consultation Procedure should not be seen as a win-loss game as it was intended to bring about an end to the extraterritorial reach of United States law and, if functioning properly, should provide Canada with a "win" every time. If functioning properly, the Antitrust Notification and Consultation Procedure should result in the identification and elimination of United States actions with extraterritorial effect.

Joseph Nye Jr.,<sup>30</sup> has also attempted to keep score of the Antitrust Notification and Consultation Procedure in his excellent study of interstate conflicts resolution. Nye finds that interstate politics among highly interdependent advanced industrial societies, such as Canada and the United States, are typically characterized by "... the absence of force but not an indifference to power".<sup>31</sup> Between such advanced nations, reliance on force as a source of power has had to give way to reliance on more subtle sources of power. In the Canada-United States context, for instance, the lack of military security issues has not led to an indifference to power because between developed interdependent states,

[u]neven vulnerability and subtle suggestion of potential retaliation in situations of economic interdependence become a significant source of power.<sup>32</sup>

A high level of foreign ownership of a host nation's businesses may be a source of power to both the parent state and as recent economic history has demonstrated, to the host state as well.

Professor Nye suggests that Canadians believe that they have traditionally done poorly in interface with the United States because of the asymmetrical relationship which exists between the two states, but research does not bear this out. Setting up a "win" as a conflict resolved closer to the objectives of one state than the other, Nye's findings reveal that before World War II, outcomes in Canadian-American conflicts were closer to Canadian objectives in only one quarter of the cases but Canada today does much better in the area of its economic objectives. Currently, outcomes are closer to Canadian objectives in nearly one-half of the cases. Canada has done well because (1) parliamentary government exhibits great cohesiveness and Canada has focused more attention on the United States than the

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<sup>30</sup> Nye, *Transnational Relations and Interstate Conflicts: An Empirical Analysis* (1974), 28 *Int. Org.* 961.

<sup>31</sup> *Ibid.*, at p. 993.

<sup>32</sup> *Ibid.*, at p. 962.

reverse, (2) in many conflict situations Canada has had sufficient resources and credibility to deter American actions. Canada is smaller but not powerless, for the nation has the capacity for economic retaliation.

The Nye study covered several areas of economic interface, antitrust conflict comprising but one area. If the conflicts that the extraterritorial application of United States antitrust law gives rise to are calculated as Mr. Justice Henry<sup>33</sup> has done, it may be that Canada wins some conflicts and loses others. But Nye studied cases involving the application of United States antitrust law as a lumped group and determined that in this area Canada has emerged as the clear loser, because what was always hoped for from the operation of the Antitrust Notification and Consultation Procedure was an end to the extraterritorial application of American antitrust law and all that Canada has ever been able to achieve is an agreement to be kept in mind. As well, Nye points out that even if the outcomes of interstate antitrust conflicts are closer to Canada's objectives in one-half of the cases, any loss for a smaller state is decidedly more significant than a loss for the United States.

#### IV. Overview.

Interviews with Canadian and American antitrust officials concerning the operation of the Antitrust Notification and Consultation Procedure reveal fundamental differences in outlook and perception. The observations of participants, past and present, expose a sociological nightmare of cross-purposes, misunderstandings and misperceptions. At the bottom of much of the confusion will be found fundamental disagreements about the proper limits of national sovereignty, the related jurisdictional scope of statutes and the role of government in the regulation of the economy.

The United States has an extremely broad view of the necessary jurisdictional reach of national legislation which is a result of a conscious policy choice nurtured by a belief that, in an interdependent world, truly effective national regulatory law requires extraterritorial impact. Early antitrust cases construed the Sherman Act<sup>34</sup> so as not to embrace acts done in foreign states, even though done with the encouragement of American citizens,<sup>35</sup> based on the principle that statutes ought to be confined in their operation to the territorial limits of the lawmaking state. However, it was not long before American Court decisions began to erode the territorial limits placed

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<sup>33</sup> *Op. cit.*, footnote 26.

<sup>34</sup> *Supra*, footnote 6.

<sup>35</sup> *American Banana Company v. United Fruit Company* (1909), 313 U.S. 347, 29 Sup. Ct 511.

upon the Sherman Act. The Sherman Act was soon construed to apply to combinations of foreigners and Americans, though the agreements in issue were concluded abroad and valid abroad.<sup>36</sup> Later cases, applying the Sherman Act to combinations of foreign and American corporations, when the conspiracies identified were in part carried out in the United States, went so far as to hold foreign defendants subject to the prohibitions of the Sherman Act.<sup>37</sup> But it was the case of *United States v. Aluminum Company of America*,<sup>38</sup> which most clearly exemplified the United States view that,

... it is settled law ... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.<sup>39</sup>

American courts have come to rely upon the "objective territoriality" principle and the related "territorial effects" principle as justifications for the extraterritorial reach of American antitrust law.<sup>40</sup> The objective territoriality principle is a principle which, simply stated, accords jurisdiction over a specific act to any state in which a constituent element of the offense has occurred. In situations in which act and effect are so closely tied to each other as to be a constituent whole (for instance, a gunshot fired across a border), "the state in which the actual conduct occurred could exercise subjective territorial jurisdiction over the defendant while the state in which the immediate result occurred could claim objective territorial jurisdiction".<sup>41</sup> Jurisdiction based on the territorial effects test is jurisdiction based upon a principle which disregards notions of "constituent elements" to focus on "effects". Under the territorial effects test a state may claim territorial jurisdiction over events outside the state because of an "effect" within the state seeking jurisdiction.<sup>42</sup> The United States Department of Justice, *Antitrust Guide for International Operations*<sup>43</sup> as well as section 18 of the *Restatement of the Law Second on the Foreign Relations Law of the United States*,<sup>44</sup> reflect the territorial effects test.

<sup>36</sup> *United States v. American Tobacco Co.* (1911), 221 U.S. 106, 31 Sup. Ct 632.

<sup>37</sup> *United States v. Sisal Sales Corp.*, *supra*, footnote 17; *United States v. Watchmakers of Switzerland Information Center Incorporated*, [1963] Trade Cases para. 70,600 (S.D.N.Y.).

<sup>38</sup> (1945), 148 F. Supp. 416 (2d. Cir.).

<sup>39</sup> *Ibid.*, at p. 443.

<sup>40</sup> See N. Allan, *The Development of EEC Antitrust Jurisdiction Over Alien Undertakings* (1974), 2 *Legal Issues of European Integration* 149.

<sup>41</sup> *Ibid.*, at p. 150.

<sup>42</sup> *Ibid.*, at p. 153.

<sup>43</sup> *Antitrust Guide for International Operations*, The United States Department of Justice, Jan. 26th, 1977.

<sup>44</sup> American Law Institute (1965).

Canada has a much more traditional view of the proper limit of sovereign authority and has joined with many other states in rejecting the objective territoriality principle and the related territorial effects test as valid justifications for the extraterritorial application of restrictive trade practices legislation. International practise, as it relates to the objective territoriality principle, recognizes that a state may assume jurisdiction over the acts of a foreigner only in cases where the acts in question are universally regarded as crimes. Unlike the effects of physical acts, which are usually associated with the objective territoriality principle,<sup>45</sup> the effects of economic conduct abroad may be difficult to trace.

The export of United States antitrust law has been rejected by international jurists as without legal foundation and by others as an affront to national sovereignty, an attempt by the United States to export and compel compliance with a particular economic world view. The attempted extraterritorial application of law is not a phenomenon restricted to the United States, but the overwhelming presence in Canada of American owned subsidiaries has provided vast transmission channels for the export of United States law and given rise to a fear that American owned Canadian subsidiaries will suffer a clash of loyalties which will resolve in favour of the stronger American economy.<sup>46</sup>

Canada's more traditional view of the limits of national sovereignty and the proper scope of national legislation has made Canada supersensitive to the extraterritorial application of law. Extremely concerned with incursions of sovereignty, Canada has become scrupulous with regard to notifications to the United States under the Antitrust Notification and Consultation Procedure, often notifying the Antitrust Division of Canadian actions which are not regarded by the United States as incursions of United States sovereignty. The Canadian Government is overly cautious about doing the very things it would object to if done by the United States and this mental set may help to explain why Canada has been the source of far more antitrust notifications and consultations than the United States. Canadian notifications are a barometer of the Canadian definition of sovereignty, an attempt to accord that degree of respect to American sovereignty that Canada insists be accorded to Canadian sovereignty. An intergovernmental golden rule may be

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<sup>45</sup> See A. Riedwig, *The Extraterritorial Application of Restrictive Trade Legislation, Jurisdiction and International Law*, Report of the Committee on the Extraterritorial Application of Restrictive Trade Legislation, International Law Association, Tokyo conference, 1974.

<sup>46</sup> See *Foreign Ownership and The Structure of Canadian Industry*, Report of the Task Force on the Structure of Canadian Industry, Government of Canada, Privy Council Office (1968), hereinafter cited as the Watkins Report.



operating: "Canada is doing unto the United States as she would have the United States do unto her."

The reluctance of the United States to make notifications to Canada in situations in which Canada expects notification and the ambivalence with which American officials regard many of Canada's notifications, are a reflection of the American viewpoint. Relying on a very broad definition of national sovereignty in antitrust regulation, the United States perceives itself much more infrequently to be infringing Canadian sovereignty than is perhaps the case and this may lead the United States to initiate far fewer notifications and consultations with Canada than some might feel appropriate. As well, less stringent American requirements about notifications emanating from Canada reflect the desire of American antitrust officials that Canada accord to the Antitrust Division the same openness when it desires to act in Canada, as is accorded to Canadian anti-combines officials whenever they seek to operate in the United States. For instance, the Antitrust Division allows the interview of an American by Canadian authorities without prior notification, because it desires the same freedom in the reverse situation.

In Canada, antitrust regulation occupies a substantially different place in the economic regulatory picture than it does in the United States. This fact may help to explain Canada's inability to appreciate the motivation behind the scope of United States law and, as well, help to explain Canada's great resentment of antitrust laws applied extraterritorially. In Canada, as well as in the United States, competition policy is concerned with the protection of the public and while the antitrust laws of both states appear similar in outline, they differ greatly in application. In the United States, competition policy has been aimed point blank at the protection of competition and the Antitrust Division perceives itself as an enforcement agency prepared to strike out at pernicious antitrust practices wherever they may occur. In Canada, government regulation is apt to take into account the global economic picture and restrictive trade practices are seen as one problem among many (such as taxes and tariffs) which affect the total trade picture. Recent legislative developments exhibit the fundamental differences between Canadian and American approaches to competition policy. The proposed amendments to the Combines Investigation Act,<sup>47</sup> are intended to make Canadian competition policy more effective. When first introduced, the proposed amendments were said to recognize,

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<sup>47</sup> Bill C-42, An Act to amend the Combines Investigation Act and the Bank Act and other Acts in relation thereto or in consequence thereof, Thirtieth Parliament, 25-26 Elizabeth II, 1976-77, First Reading March 16th, 1977, was withdrawn, revised and reintroduced as Bill C-13, Third Session, Thirtieth Parliament, 26 Elizabeth II, 1977, First Reading November 18th, 1977.

... the hard fact that in certain industries the scale of production of many individual products is insufficient to enable Canadian firms to compete effectively with giant producers either in markets abroad or at home.<sup>48</sup>

As a result, under the amendments introduced and then re-introduced, certain mergers, specialization agreements and monopolistic practices would be permitted if the result would be "substantial gains in efficiency" or a greater ability of Canadian firms to compete with foreign producers. As well, the exemption of export cartels from the anti-combines law would be clarified. To offset the reduced domestic competition likely to result from market specialization and large scale mergers, it was proposed that, if necessary, relevant tariffs be reduced to allow foreign competition in products affected by authorized mergers or other market arrangements. The preamble to the proposed amendments establishes that competition policy is a segment of overall Canadian public policy and that a dedication to the preservation of competition must be tempered by a dedication to the efficient utilization of resources and a recognition of the fact that, to be competitive in the world market, Canadian industry must be permitted to realize economies of scale.

The regulation of restrictive trade practices is tied up with Canadian economic development as a whole. In the United States, when the stakes are not too high, the ideal view may be that companies which cannot compete in the world market on their own merits should be allowed to die at the hand of the god of competition, but to smaller states, the destruction of any one of an overall proportionally smaller number of enterprises competing in the international market, may be much more significant. As a result, states such as Canada are more likely to intervene to protect and promote the development of a growing industry in order to enable it to compete abroad or to compete at home with foreign producers.

There are many who fail to appreciate Canada's sensitivity to any encroachment of sovereignty or autonomy. There are many (and some Canadians as well) who believe that the extraterritorial application of United States antitrust law has had the beneficial effect of enhancing competition in Canada and that one must distinguish between "good" and "bad" extraterritoriality. But many who quite correctly identify benefits flowing to Canada as a result of certain antitrust decisions in the United States are always shocked to learn of Canadian outrage. However, those who focus on the economic costs of the extraterritorial application of United States law focus on only one level of the issue. While the economic costs of the extraterritorial application of United States law may be benign,

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<sup>48</sup> News Release, Department of Consumer and Corporate Affairs, NR—77-18, March 1977.

the significant costs of legal imperialism are perceived by many Canadians to be political.

Whether a decree of a United States court does or does not help to maintain competition in Canada or prevent the American takeover of a large Canadian firm . . . is irrelevant. Such benefits are bought at the excessive price of lessening Canadian sovereignty and, if deemed desirable, could be achieved directly by Canadian policy without the undesirable political costs.<sup>49</sup>

Several years ago, the *Watkins Report*<sup>50</sup> addressed itself to two popular views about extraterritoriality: (1) that one could distinguish between good and bad extraterritoriality and (2) that there should be an estimate of the actual loss to Canada caused by the extraterritorial application of United States law.

Both of these approaches miss the main point, which is the creation of an elaborate legal and administrative apparatus by the American government to implement their legislation abroad in regard to American goods, technology and the actions of subsidiaries. The general picture . . . is one of a tight legal and administrative network capable of being turned to any objective in foreign policy or to meet any . . . stringency. This poses for Canada a basic political problem, namely, that for an uncertain future the "elbowroom" or decision making power of the Canadian government has been reduced in regard to economic relations involving American subsidiaries. The essence of the extraterritorial issue is not the economic cost . . . but rather the political loss of control over an important segment of Canadian economic life.<sup>51</sup>

Americans often comment that Canadians tend to overreact, and are unnecessarily concerned about the threat of an American takeover of the Canadian economy, but asymmetrical relationships contain real and imagined threats and the weaker party, at times, may have to try harder just to keep up.

In many instances therefore, it is the desire to safeguard Canadian sovereignty and autonomy which lies at the heart of Canada's rejection of the extraterritorial reach of American law. It is certainly clear that in areas in which Canadian and American economic policies diverge, the decision by an American owned Canadian subsidiary to look to American law and policy for guidance leads to a frustration of Canada's control over its economy. Since the American market is the more important of the two and often the one to which a subsidiary's parent owes its allegiance, an American owned Canadian subsidiary will keep a close watch on the policies of the United States. The threat to Canada is less clear; however, in situations in which Canada has no policy and the resort to American economic policy does not conflict directly with Canadian wishes. But in these situations too, it is in Canada's interest to prevent the development of a pattern whereby local industry looks to the United

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<sup>49</sup> *Watkins Report*, p. 331.

<sup>50</sup> *Passim*.

<sup>51</sup> *Ibid.*, p. 331.

States. Failing this, in the event that Canada wishes to regulate a field hitherto unoccupied by Canadian law, the task will be difficult. Furthermore, failure to regulate a particular field may itself amount to a conscious policy choice and it is not the place of American courts or the American legislature to decide when a foreign state has or has not directed its attention to the regulation of a particular aspect of its economy. If a pattern is allowed to develop whereby local industry looks abroad for guidance; ultimately, it may be more than the local economy which is undermined. The administrative network established in such a situation might be turned to the implementation of any policy objective.

### V. *Recent Cases.*

Two recent situations have tested the Antitrust Notification and Consultation Procedure to the fullest extent and these situations reveal that, despite almost two decades of bilateral contact in the field of antitrust regulation, frustration and misunderstanding still persist.

#### A) *Potash.*

In June 1976, a federal grand jury indictment<sup>52</sup> and a companion civil suit<sup>53</sup> were filed in the United States District Court of Illinois naming eight United States corporations as participants with unnamed and unindicted co-conspirators in a conspiracy to restrain competition in the marketing of potash, in violation of the Sherman Act. The indictments alleged that the Government of Saskatchewan (a major potash producing province) had instituted a potash prorationing scheme and pricing arrangement with the encouragement and consent of potash producers, most of which were United States firms with potash mining interests in Saskatchewan and the State of New Mexico. It was alleged that consultations between potash producers and government officials of New Mexico and

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<sup>52</sup> Indictment, U.S. District Court Illinois, *United States v. Amax Inc., Amax Chemical Corp., Duval Corp., Duval Chemical Corp., National Potash Co., Potash Co. of America*. Criminal Action No. 76 CR 783, June 29th, 1976. On May 6th, 1977, Marshall J. dismissed the criminal action, holding that potash producers were not guilty of a conspiracy to fix prices or limit production. It was held that the prorationing and floor price scheme resulted from economic conditions in the potash industry and not as a result of a conspiracy proven beyond a reasonable doubt. Assurances concerning future output, given by American producers to the Saskatchewan Government, evidenced not a conspiracy but an appreciation of the economic realities of a depleting potash supply. It was understandable, as a matter of economics, that if Canada limited production and set a floor price above current free prices, that U.S. prices would move upward accordingly. *United States v. Amax Inc., et al.* (1977), 1 Trade Cases 71, 793. A civil antitrust suit is still pending.

<sup>53</sup> Complaint, U.S. District Court Illinois, *United States v. Amax Inc. et al*, Civil Action No. 76 C2393, June 29th, 1976.

Saskatchewan had amounted to a conspiracy to restrain the quantity of potash produced in the United States, to raise and stabilize world prices and to restrict the exportation of potash from the United States and the importation of potash from outside North America into the United States. In the course of pre-trial proceedings, the defendants demanded and received a bill of particulars setting out the names of the unindicted co-conspirators. Among those named as unindicted co-conspirators, were the Honourable Ross Thatcher, former Premier of Saskatchewan, the former Mineral Resources Minister of the province, a current and a former Deputy Minister of Mineral Resources, the chairman of the Saskatchewan Potash Conservation Board, as well as numerous other Saskatchewan civil servants and officials of the State of New Mexico.<sup>54</sup>

Reaction in Canada to the naming of the unindicted co-conspirators (most of them past or present government officials and at least one deceased), was swift and angry.<sup>55</sup> Provincial government spokesmen rejected the right asserted by the United States to control the activities of potash producers in the province and warned that the true purpose of this action was to make any Canadian resource developed by a company with United States shareholders, subject to American laws respecting production and sale, rather than Canadian laws.

### B) Uranium.

The operations of the so-called "uranium cartel" have been the focus of several mammoth court cases,<sup>56</sup> a federal grand jury investigation in Washington<sup>57</sup> and numerous related proceedings in the United States and abroad.<sup>58</sup> In the 1970s, in the course of vigorously competing for contracts to build nuclear power plants,

<sup>54</sup> Montreal Star, Aug. 27th, 1976, p. 8.

<sup>55</sup> See Regina Leader Post, Aug. 27th, 1976, p. 1; Aug. 31st, 1976, p. 1; Sept. 21st, 1976, p. 1.

<sup>56</sup> *T.V.A. v. Rio Algom Inc. et al.*, United States District Court for the Eastern District of Tennessee, Southern Division, Civil Action File No. 1-77-24C; *Westinghouse Electric v. Rio Algom Inc. et al.*, United States District Court for the Northern District of Illinois, Eastern Division, No. 76C 3630; *Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company v. Westinghouse Electric Corporation*, Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, No. GD75-23978, in equity; *Westinghouse Electric Corporation Uranium Contracts Litigation*, United States District Court for the Eastern District of Virginia, MISC 6728, MDL No. 235; *United Nuclear Corporation v. General Atomic Company et al.*, State of New Mexico District Court, County of Santa Fe, November 18th, 1977, No. 50827.

<sup>57</sup> Grand Jury, United States District Court for the District of Columbia.

<sup>58</sup> *In Re Westinghouse Electric Corporation Uranium Contract Litigation*, M.D.L. Docket No. 235 U.K. (C.A.), [1977] 3 W.L.R. 430; *In Re Westinghouse Electric Corporation and Duquesne Light Company et al.* (1977), 16 O.R. (2d) 273 (H.C.).

Westinghouse Electric Corporation had undertaken (without the precaution of securing long term supplies) to provide the uranium that would be required to fuel those plants over the long term. Though the long term Westinghouse contracts specified price escalation pegged to the cost of living, no provision was made for the possibility (highly unlikely in the naive days before the energy crunch) of a rise in world uranium prices. In 1973, the price of uranium was six dollars a pound, but by 1976, the price had jumped to roughly forty seven dollars a pound, leaving Westinghouse facing a two and one half billion dollar loss and certain disaster if required to carry out its original supply contracts. Accordingly, Westinghouse advised its clients that "commercial impracticability"<sup>59</sup> (or frustration owing to supervening circumstances) had made further performance of the supply contracts impossible. Power utilities under contract with Westinghouse sued<sup>60</sup> and Westinghouse sought in its defense to establish the existence of a uranium cartel composed of Australia, South Africa, France, Canada and Rio Tinto Zinc of Great Britain. Westinghouse alleged that the cartel had been founded in 1972 and that through the activities of its secretariat, its operating committee, and its trade association (The Uranium Institute) the cartel had allocated markets and set world prices.<sup>61</sup> Westinghouse asserted that when it had concluded its uranium supply contracts, all parties had anticipated that the uranium supply market would remain free, open and stable but that the activities of the uranium cartel (producers and governments) had belied those basic assumptions.

Taking the offensive in 1976, Westinghouse itself launched a civil treble damages suit<sup>62</sup> against twenty-nine uranium producers, alleging substantially the same facts that it had offered in its defense to the earlier suits initiated by the utilities, namely, that uranium producers had engaged in an illegal combination or conspiracy to restrain the domestic and foreign commerce of the United States.<sup>63</sup> In

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<sup>59</sup> S. 2-615 of the Uniform Commercial Code provides that non-delivery is not a breach of a duty under a contract if performance has become impracticable due to a contingency the non-occurrence of which was a basic assumption of the parties to the contract.

<sup>60</sup> Proceedings in Pittsburgh involved three utilities and the actions of thirteen utilities were consolidated in U.S. District Court in Richmond, Virginia. See *Duquesne Light Company et al. v. Westinghouse Electric Corporation*, *supra*, footnote 56; *Westinghouse Electric Corporation Uranium Contracts Litigation*, *supra*, footnote 56.

<sup>61</sup> For the Uranium Cartel Rules For Orderly Marketing of Uranium [March 4th, 1974] and The Uranium Institute; Memorandum and Articles of Association of The Uranium Institute, see (1977), 16 Int. Leg. Mat. 988.

<sup>62</sup> *Westinghouse Electric Corporation v. Rio Algom Inc. et al.*, *supra*, footnote 56.

<sup>63</sup> The Tennessee Valley Authority, the largest United States utility also launched

early 1976, the United States Department of Justice began its own investigation of the uranium industry to determine if the Antitrust Division should launch an action for violation of the antitrust laws and a United States grand jury was empanelled to augment the Justice Department investigation.<sup>64</sup>

The Canadian Government did not deny the existence of the uranium cartel. In a *News Release*,<sup>65</sup> the Minister of Energy, Mines and Resources indicated that the government had regarded the cartel as in the national interest and that in many cases compliance with price and quota provisions, internationally agreed upon, had been at government direction. The United States Atomic Energy Commission had been informed at the onset<sup>66</sup> that the motivation behind the cartel was concern that chaotic pricing would endanger the adequacy of uranium supplies in the 1980's. The Canadian Government argued that the United States had been squeezing the uranium market, closing the large United States domestic market to foreign producers (regarded as a contravention of the General Agreement on Tariffs and Trade), while at the same time disposing of the large United States strategic stockpile of uranium on the world market, a situation which forced foreign uranium producers to band together or perish. While the Canadian Atomic Energy Control Board was directed to deny export approval to any uranium shipment below the minimum prices adopted under the marketing scheme, Canadian officials stressed that the uranium pricing scheme specifically excluded the United States domestic market and; therefore, at most, minimum floor prices had affected only sales of United States reactors abroad. In 1975, all price directives were withdrawn by the Canadian Government as the oil shortage had resulted in a greater demand for uranium, resulting in prices well above any agreed upon minimum.

Pursuant to numerous United States court cases and investigations, subpoenas and letters rogatory<sup>67</sup> demanded the testimony of

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a treble damages suit against thirteen uranium producers. *T.V.A. v. Rio Algom Inc. et al.*, *supra*, footnote 56.

<sup>64</sup> United States District Court, District of Columbia, Grand Jury. In May 1978, Gulf Oil Corporation was indicted for having engaged with other unnamed conspirators in a combination in unreasonable restraint of the interstate and foreign trade and commerce in uranium. See *United States of America v. Gulf Oil Corporation*, Western District of Pennsylvania Criminal No. 78-123.

<sup>65</sup> Energy, Mines and Resources Canada, News Release, 14 Oct. 1977. See also Minister of Consumer and Corporate Affairs, Press Release and Background Paper on the Canadian Uranium Industry's Activities in International Uranium Marketing, Sept. 22nd, 1976; Minister of Energy, Mines and Resources, Press Release Aug. 23rd, 1976.

<sup>66</sup> *Ibid.*

<sup>67</sup> *In Re Westinghouse Electric Corporation and Duquesne Light Company et al.*, *supra*, footnote 58.

individuals alleged to have knowledge of cartel activities and demanded the production of an unprecedented amount of documentation in the possession of subsidiaries or affiliates of United States companies, "wherever located". The Canadian Government reacted to the remarkably broad United States subpoenas by enacting the Uranium Information Security Regulations<sup>68</sup> which prohibited any person from releasing any written matter or documentation relating to any phase of uranium mining, refining, or marketing, unless required to do so by Canadian law or unless with the consent of the Minister of Energy, Mines and Resources. As well, it was prohibited to give any oral evidence which might reveal the contents of any communication to which the regulations applied.<sup>69</sup>

The Antitrust Notification and Consultation Procedure has been in operation for almost two decades and yet the actions of American tribunals in the two cases above have caused outrage in Canada. The Canadian Government has rejected the extraterritorial sweep of subpoenas in these cases and reacted with anger to what some regard as American attempts to control Canadian resources through United States owned Canadian subsidiaries. Twenty years have elapsed since the *Canadian Radio Patents* cases necessitated the development of the Antitrust Notification and Consultation Procedure, but things appear to have changed little.

Both Canadian and American officials insist that the Antitrust Notification and Consultation Procedure was resorted to in both the potash and uranium cases. A *News Release* of the Department of Consumer and Corporate Affairs<sup>70</sup> denied press reports which suggested that United States Justice Department officials might not have followed the notification procedure in the investigation of price fixing among uranium producers. The *News Release* pointed out that American officials had complied with the spirit and letter of the established notification procedure, but that when the voluntary return of information was not forthcoming, more formal procedures had to be resorted to. Canadian combines officials were generally unwilling to discuss the uranium and potash cases. They characterized both cases as extremely difficult due to provincial government involvement in potash marketing and federal government involvement in uranium marketing. The Canadian government wanted very much to convince the Antitrust Division to avoid these investigations and actions but has apparently failed in both cases to achieve this end. It was asserted rather strongly by Canadian

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<sup>68</sup> SOR/76-644 (P.C. 7976-2368, Sept. 21st, 1976), under the Atomic Energy Control Act, R.S.C., 1970, c. A-19 as am.

<sup>69</sup> SOR/76-644 was revised by SOR/77-836.

<sup>70</sup> News Release, Department of Consumer and Corporate Affairs, NR-76-37, Aug. 1976.



officials that there were certain initiatives by the Antitrust Division in relation to potash that Canadian officials thought a little "brash", that "unnecessarily stirred up the pot", and that the Antitrust Division was "not as diplomatic as it could have been". Generally, Canadian Government officials expressed the fear that Canadian companies would derive a damaging lesson from these actions, that as a result of these prosecutions and investigations, Canadian companies would be afraid to follow Canadian provincial or federal economic policy for fear of a conflict with United States antitrust law, and that this would clearly undermine the power of all levels of Canadian elected governments.

One Canadian combines official demonstrated the sympathy that a transnational identity of function may lead to and admitted that Canadian combines officials understood the problem which the Antitrust Division had in the potash case. The Antitrust Division had evidence of a conspiracy to impair the domestic and foreign commerce of the United States and it was difficult to avoid the presentation of all the evidence available, even if that evidence involved communications from Canadian Government officials. The combines official asserted that the Department of Consumer and Corporate Affairs had always taken the view that Canadian Government officials must not violate the Combines Investigation Act, and that they had been warned. His comments seemed to suggest no regret that United States antitrust laws were broad enough to embrace possible anti-competitive acts of the provincial Government of Saskatchewan in the potash case in a situation in which Canadian law was inadequate.

American officials interviewed, were very sensitive to the implications of the potash and uranium cases. An American official stated, that with respect to the potash situation it had been quite clear, without the need to resort to consultation, that Canadian Government officials could not be indicted as named conspirators. Conduct of the Government of Saskatchewan was obviously at issue, but the indictment was framed in such a way so as not to show a violation of United States law by any Canadian official. The Saskatchewan prorationing scheme was not alleged to be the behavior indicted. The official insisted that the Canadian interest had been served and Canadian sensitivity recognized, and that it was the defendant's demand for a bill of particulars which forced the naming of the unindicted co-conspirators and led to the uproar in Canada.

#### *VI. Assessment.*

It is the assessment of Canadian officials that the Antitrust Notification and Consultation Procedure is not meeting its original aim. While it is true that the undertaking between Canada and the

United States is serving to "lower temperatures", the original intent, from the point of view of Canadian officials, was that the arrangement should remove confrontation by improving upon each state's appreciation of the other state's point of view. In 1959, the Canadian Government of the day believed that the *Canadian Radio Patents* cases were intolerable and that similar incursions of American law must never happen again. The Canadian Government believed that if the United States could be made to understand that Canada regarded the extraterritorial reach of American law and the resulting meddling with the Canadian economy as intolerable, that the United States would desist from similar action in the future. A Canadian official commented, that while this was the ideal, there was never any real possibility of Canada realizing this goal. Although American officials believe that the procedure is valuable for the exchange of views and to smooth feathers, and though the Antitrust Division has on occasion adopted courses inconvenient to it to avoid upsetting Canada, it was pointed out that the Division has never been deterred from proceeding with an issue that it regarded as very serious. At some point, the Canadian Government came to realize that it was impossible to stop the extraterritorial application of United States law, that this ideal was unattainable and that, at best, it might be possible to mitigate some of the harsher repercussions arising from the export of United States law.

The views of an American official, involved in the early days of the Antitrust Notification and Consultation Procedure, reveal why the Canadian "ideal" was an impossible dream. While Canada hoped to eliminate the extraterritorial application of United States law through the educational process of making Canada's objections known, the United States Government of the day undertook the procedure to provide Canada with an opportunity to be heard and an opportunity to preview upcoming American actions so as to avoid embarrassment to the Canadian Government. The main value of the procedure, according to the official, was to explain American actions and thereby, hopefully avoid diplomatic repercussions.

There has been an inversion in the Canadian and American appreciation of the goals and limitations of the Antitrust Notification and Consultation Procedure. Current United States antitrust officials insist that it is possible for Canadian officials to convince the Antitrust Division to close a file while in the beginning this was not the case. Canadian officials set out to bring home to the United States the necessity of a change in American policy, an end to the extraterritorial application of law and found themselves instead, engaged in a case by case ongoing attempt to blunt this extraterritoriality. The extraterritorial application of United States antitrust law never came to an end and Canada continued to have to cope

periodically with the long arm of United States law. But the Canadian attitude towards the extraterritorial application of law has undergone a transformation. There is more of a realization today that business is internationalized and that, as a result, there will be conflicts with multinational corporations and foreign governments for a long time to come. Conflicts are presently the rule and not the exception. The Antitrust Notification and Consultation Procedure is now praised by Canadian officials for its value as a co-operative procedure, and its potential as a springboard for a multinational approach to multinational problems.

### *Conclusion*

Those seeking a formula for bilateral dispute settlement in the Canada-United States context would be well advised to consider the anguished evolution of the Antitrust Notification and Consultation Procedure. The road to dispute settlement in the antitrust field has proven to be long and rocky. But the continued presence of aggravating disputes (such as those in the fields of potash and uranium), the continued irritation over the issues of sovereignty and extraterritoriality, the residual bitterness and cynicism, are less a reflection of a failure of institutions, or technical arrangements or good will as they are a reflection of a failure in attitudes. Smooth working technical arrangements and the best of intentions will be insufficient to guarantee the success of any bilateral framework as long as one or both sides exhibit a failure to appreciate differences "in national policies, priorities and unspoken assumptions".<sup>71</sup>

In the Canada-United States antitrust context, it is incorrect to say that both sides agree on fundamental antitrust principles, that the only differences concern the mode of applying those principles. Though Canadian combines officials may (as a result of a transnational identity of function) be fully conversant with American aims and assumptions, the Canadian Government and Canadian people, for the most part, are not. Donald I. Baker<sup>72</sup> has identified facets of the American reality (the desire for open government, open markets, born of an intense suspicion of government and an unabiding faith in the individual) which have been embodied in the United States antitrust laws. The Canadian reality, however, is shaped by a different economic history, characterized by a concern for the high degree of foreign involvement in the Canadian economy and a more charitable view of the role of government in the regulation of the economy. The Canadian inclination to react bitterly to any infringe-

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<sup>71</sup> Donald I. Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid 1970's*, Canada-United States Law Institute, University of Western Ontario, Sept. 30th, 1977, p. 2.

<sup>72</sup> *Ibid.*

ment of sovereignty, real or imagined, is a function of the Canadian reality. Canadian antitrust law, unambitious, and territorial in scope, is a product of this Canadian reality reflecting the belief that the pure protection of competition must give way to the need to ensure the survival of Canadian industry and its ability to compete abroad.

The Antitrust Notification and Consultation Procedure never really had a chance of success because the need for the procedure was perceived in completely different terms by both states involved and both states had a basic misunderstanding of the fundamental differences dividing Canadian and American antitrust policy. The Antitrust Notification and Consultation Procedure was an attempt to treat a compound fracture with aspirin. The aspirin would no doubt relieve part of the pain, but could never really get to the root of the problem. The Canadian Government saw the procedure as a means whereby the American Government would learn to avoid the extraterritorial application of law. The American Government, accepting the extraterritorial reach of antitrust law as rational and necessary, believed the procedure would lessen tensions by keeping Canada informed and in mind. American officials point to the United States-Germany agreement<sup>73</sup> on mutual co-operation regarding restrictive business practices, as an ideal which should evolve between Canada and the United States. But this suggestion reveals that American officials continue to misunderstand the Canadian outlook. Canada has no desire to aid in the execution of American antitrust law. The Antitrust Notification and Consultation Procedure was not designed to aid in the execution of United States antitrust law, but rather to restrict that law to what Canada regarded as its proper jurisdiction.

Successful bilateral dispute settlement requires several critical features. First, a technical apparatus to allow the early identification and confrontation of problems, perhaps against a background of some sort of compulsory adjudication to encourage early resolution. Second, the participation of experts in the particular field in conjunction with other government representatives to ensure that a transnational identity of function does not inadvertently circumvent government policy. Third, an overriding appreciation of the differences in outlook and perception which characterize the policies of the participants and a willingness to give equal weight, equal credence to those perceptions. It is with respect to this last element that the Antitrust Notification and Consultation Procedure has failed. In the area of understanding each other's needs in the field of antitrust

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<sup>73</sup> Agreement Between The Government of the United States of America and The Government of The Federal Republic of Germany Relating to Mutual Co-operation Regarding Restrictive Business Practices (entered into force September 11th, 1976) (1976), 15 Int. Leg. Mat. 1282.

regulation, Canada and the United States have been spinning their wheels for twenty years. It is rumoured that out of the uranium and potash debacles has arisen a commitment to institute the Antitrust Notification and Consultation Procedure in a more regularized manner. But without a fundamental examination of the role of antitrust regulation in each state, without a dedication to give equal weight to diverse modes of economic regulation, without some appreciation that there is more than one way to view the world, this mode of bilateral dispute settlement will continue to fail.

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