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## COMPETITION POLICY, TRADE LIBERALIZATION AND AGRICULTURE

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### INTRODUCTION

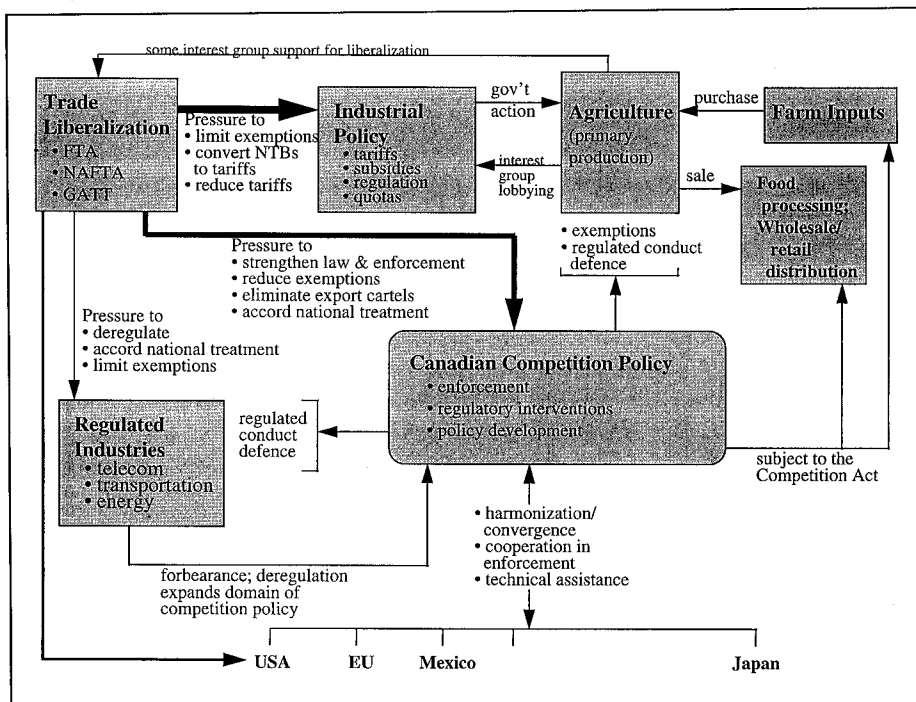
Over the past two decades, one of the most notable changes in public policy in Canada and many other countries has been the growing political strength toward advocating free trade or at least some reductions in government-created barriers to trade. During this period, Canada has been a party to a new GATT agreement, the Free Trade Agreement with the United States (or CUSTA), and the North American Free Trade Agreement (NAFTA). While these agreements contain many exceptions, exemptions, and special provisions, they send a clear signal of a need for change to policies in those sectors which have enjoyed various types of protection from foreign competition.

Trade liberalization has put pressure on a wide variety of domestic industrial policies which have been erected to provide financial support and to protect producers from foreign (and sometimes domestic) competition. The effect of trade agreements has been to make explicit and codify almost all the protections that remain. This raises their visibility (as does tariffication, etc.) and so probably makes them more vulnerable in future trade negotiations. The framework for analysis within which this paper has been written is summarized in Figure 1. These relationships are the substance of this paper.

While the forces of trade liberalization have "worn away" some industrial policies in some sectors, in others most of these policies have been sustained largely by interest group lobbying. Thus it is fair to say that the agriculture sector in Canada - while "feeling the heat" - has so far been less directly affected by trade liberalization than many other sectors. But the pressures to reduce/end protectionist measures remain strong and appear to be growing.<sup>1</sup>

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<sup>1</sup> We also recognize that economic, hence political, interests in the agriculture sector have long been divided. Export-oriented farmers and processors want easy access to foreign markets and so favour policies which help to reduce barriers to their exports. Other interests focus on the domestic market and fear competition from imports as well as from within the domestic market. They want a wide variety of government policies (regulation, tariffs, quotas, subsidies, etc.) which



**Figure 1. Framework for Analysis**

In addition, trade liberalization has created pressures to modify national competition policies in the direction of harmonization.<sup>2</sup> Supporters of trade liberalization recognize that as various industrial policy measures are reduced or eliminated the importance of competition policy grows. Their concern is that private anti-competitive behaviour could

to a greater or lesser extent may restrict competition and raise their incomes (often in the name of protecting the family farm).

<sup>2</sup> Authors use different terms to describe harmonization including convergence, compatibility, and consistency. Some use one or more of these in a general sense, others use different terms for different meanings. For example in competition policy terminology, convergence is used to describe moving towards a particular model (i.e., the same substantive rules) whereas harmonization is used to mean maintaining differences in approach but basing all approaches on similar principles. In this paper the terms are used somewhat interchangeably in their general English sense. Generally, see *Interim Report on Convergence of Competition Policies* (Paris: OECD, 1994), and Derek Ireland et al.; "Globalization, The Canadian Competition Act and the Future Policy Agenda" (Paper prepared for the Conference "Trade Investment and Competition Policies: Conflict or Convergence?" Ottawa, May 18-19, 1993).

frustrate access to foreign markets despite trade liberalization.<sup>3</sup> Of course, the central role of competition policy is to prevent or eliminate anti-competitive behaviour. But not all national competition laws are equally effective in this regard. Another limitation on the effectiveness of national competition laws is their jurisdictional limitation. For example, international anti-competitive activity by multinational enterprises may be able to frustrate the operation of competition laws because they operate across several national boundaries and so may be beyond the reach of any national authority. Also, the competition laws of most advanced industrial countries contain specific provisions which are antithetical to free trade doctrines of national treatment, market access, etc. These include exemptions for export cartels, and exemptions for state-owned enterprises (even those which are engaged in commercial activities). Further, certain activities (even whole industries) may be exempted from competition or antitrust laws either by statute or by common law, e.g., the regulated conduct defence in Canada and the state action immunity doctrine in the United States.

Trade liberalization creates pressures (1) to strengthen both the specific provisions of competition law and its enforcement, (2) to reduce exemptions, and (3) to ensure national treatment for foreign corporations. It also puts pressure on industries subject to economic or direct regulation (based on price and entry controls) to deregulate, accord national treatment (largely by liberalizing or eliminating constraints on foreign ownership), and to limit the scope of exemptions from competition laws. In turn, changes occurring in regulated industries (notably forbearance and deregulation) expand the economic domain of competition policy (see Figure 1).

Canadian competition policy has been (and will continue to be) influenced by its linkages with the competition policies of other nations, most notably the United States. The nature and importance of these linkages have changed in the face of trade liberalization and the greater global integration of economic activity. In particular, there are pressures to harmonize national competition policies. Also, the existence of transborder private restraints of trade create a strong interest in cooperative enforcement efforts. In addition, countries like Canada are asked to provide technical assistance to countries creating a competition policy for the first time or seeking to harmonize their policy with major trading partners.

The purpose of this paper is to (1) discuss the linkages between trade liberalization and competition policy, (2) to identify emerging issues for the Competition Bureau including its role in agricultural policy issues, and (3) to examine the activities of the Competition Bureau as they relate to the agriculture/agri-food sectors, over the past decade. It is organized as follows. The next section outlines some of the key provisions of Canada's *Competition Act*. The third describes the regulated conduct defence and the statutory

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<sup>3</sup> An OECD study notes that "a 'weak' competition policy that condones predatory or exclusionary behaviour by domestic firms trying to keep out foreign goods, services or investments may effectively serve as a substitute for 'traditional' protection." Of course, "the difficulty lies in determining whether competition laws are relaxed for reasons appropriate to competition policy or for protectionist reasons". See OECD, *Antitrust and Market Access: The Scope and Coverage of Competition Law* (Paris: OECD, 1996), p. 9 and p. 10.

provisions which exempt large parts of agriculture from the purview of the *Competition Act*. The fourth briefly compares the competition laws of Canada, the United States, and Mexico. The fifth section briefly summarizes the Competition Bureau's enforcement activities and regulatory interventions as they relate to agriculture and agri-food over the past decade. The sixth section outlines the Bureau's policy development activities related to agriculture. The seventh section discusses the linkages between trade liberalization and competition policy. Our conclusions are set out in the last section.

## OVERVIEW OF CANADA'S COMPETITION ACT

The *Competition Act*<sup>4</sup> is framework law which establishes basic rules for the conduct of businesses in Canada. It is designed to maintain and encourage competition in Canada in order to: promote the efficiency and adaptability of the Canadian economy; expand opportunities for Canadian participation in world markets while recognizing the role of foreign competition in Canada; ensure small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and provide consumers with competitive prices and product choices. The *Act* applies to all sectors of the economy with the exception of activities that are specifically exempted such as collective bargaining, and amateur sport, or are subject to direct regulation pursuant to other legislation. The Director of Investigation and Research is responsible for the enforcement of the *Act*. In addition to traditional enforcement actions, a program of compliance has been developed to inform the public about the application of the *Act*, and to provide Advisory Opinions upon request. Its purpose is to encourage voluntary compliance with the *Act*.

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<sup>4</sup> *Competition Act*, R.S., 1985, c. C-34 as amended. This *Act* replaced the *Combines Investigation Act* in mid-1986. W.T. Stanbury, "The New Competition Act and the Competition Tribunal Act: 'Not with a Bang but with a Whimper'," *Canadian Business Law Journal*, Vol. 12(1), 1986, pp. 2-42. The first competition law in Canada was enacted in 1889, see Paul K. Gorecki and W.T. Stanbury, "The Administration and Enforcement of Competition Policy in Canada, 1889 to 1952," in R.S. Khemani & W.T. Stanbury (eds.) *Historical Perspectives in Canadian Competition Policy* (Halifax: Institute for Research on Public Policy, 1991), pp. 53-154.

The key criminal provision of the *Act* is the conspiracy provision.<sup>5</sup> This section (i.e., 45), makes it an indictable offence for any person to conspire, combine, agree or arrange with another person to prevent, limit or lessen competition unduly.<sup>6</sup> It does not prohibit any or all types of agreements outright, necessitating an assessment of the likely effect of the agreement on a case-by-case basis. The *Act* lists several defences from the conspiracy provision. If the conspiracy relates only to the export of products from Canada, the conspiracy section does not apply provided that the conspiracy does not result in a reduction or limitation of the real value of a product or has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada or has lessened competition unduly in the supply of services facilitating the export of products from Canada. However, export cartels may be subject to foreign antitrust enforcement. A conviction under section 45 could result in imprisonment for a term not exceeding five years or to a fine not exceeding \$10 million, or both.

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<sup>5</sup> In addition, s.47 makes bid-rigging illegal per se; s.49 makes certain agreements among banks illegal per se; and s.46 prohibits foreign directives to give effect to an agreement made outside Canada which, if made inside Canada, would violate s.45. For section 46, the penalty is a fine at the discretion of the Court. Section 47 carries a penalty of a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or both. For section 47, the penalty is a fine not exceeding four million dollars or to imprisonment for a term not exceeding five years, or both. The history of the conspiracy provisions and their enforcement is discussed in W.T. Stanbury, "Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform," in R.S. Khemani and W.T. Stanbury (eds.) *Canadian Competition Law and Policy At the Centenary* (Halifax: Institute for Research on Public Policy, 1991), pp. 61-148. For a recent review, see Patrick Hughes & Margaret Sanderson, "Conspiracy Law and Jurisprudence in Canada: Towards an Economic Approach", *Review of Industrial Organization* (forthcoming).

<sup>6</sup> "Undueness" has been described by the Supreme Court of Canada as a serious or significant effect on competition as determined by a two stage examination. As a preliminary step, the relevant product and geographic markets in which the parties operate are defined. The first stage is to determine if the parties to the agreement have market power, which is the ability to unilaterally affect industry pricing. Market share alone, although a significant factor, is not sufficient to demonstrate market power; other factors, such as ease of entry, are also of importance. The Supreme Court has noted that possession of even a moderate amount of market power may support a finding of undueness. The second stage requires the court to look at the parties' behaviour to determine whether some behaviour likely to injure competition has occurred, or is likely to occur. It is a combination of market power and behaviour that makes a lessening of competition undue; particularly injurious behaviour may trigger liability even if market power is not considerable. About one half the acquittals in Canadian conspiracy cases are due to the Crown's failure to prove, beyond a reasonable doubt, that the effect of the agreement was to lessen competition unduly.

Price discrimination and regional price discrimination are prohibited in s.50(1)(a) and (b) of the *Competition Act*.<sup>7</sup> Price discrimination exists when a supplier charges different prices to competitors who purchase similar volumes of an article. The supplier must know that the purchasers are in competition and make a practice of discrimination for this to be an offence. Predatory pricing is prohibited by s.50(1)(c).<sup>8</sup> The offence consists of a policy of selling products at unreasonably low prices where the effect or tendency is to substantially lessen competition or eliminate a competitor or is designed to have that effect.

Price maintenance and refusal to supply because of a low pricing policy are illegal *per se* under s.61 of the *Competition Act*. Price maintenance involves an attempt by suppliers to influence upward prices charged by those supplied, or to discourage price reduction, by agreement, threat or promise. It is also illegal to refuse to supply a product or to discriminate against any other person because of their low pricing policy. Likewise, it is illegal to attempt to induce a supplier to engage in price maintenance. It is only necessary to show an attempt to influence prices in this manner. Suppliers or producers who make suggestions regarding resale prices must clearly state that customers are under no obligation to accept the suggested price. Price maintenance penalties include a fine at the discretion of the court or imprisonment for a term not exceeding five years, or both.

The misleading advertising and deceptive marketing practices provisions in sections 52 to 60 of the *Act* help to ensure an honest and effective functioning of the market.<sup>9</sup> Representations which are false or misleading in a material respect are prohibited. Unsubstantiated performance and durability claims, misleading warranties and misrepresentations as to regular price fall into this category. Penalties include a fine at the discretion of the court or imprisonment for not more than five years, or both. Promotional contests are also subject to the *Act* and the *Act* also prohibits double ticketing.

We turn now to the key civil reviewable provisions. The abuse of dominance provision is contained in section 79 of the *Competition Act*.<sup>10</sup> For the abuse of dominance provision to apply, one or more persons: 1) must substantially control a class of business throughout Canada, 2) have engaged in or are currently engaging in anti-competitive acts, and 3) the anti-competitive acts must prevent or lessen competition substantially. An illustrative list of anti-competitive acts is provided in section 78. The Tribunal may make orders prohibiting the continuance of the practice or may order alternative additional

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<sup>7</sup> Director of Investigation and Research, *Price Discrimination Enforcement Guidelines* (Ottawa: Minister of Supply and Services, 1992).

<sup>8</sup> Director of Investigation and Research, *Predatory Pricing Enforcement Guidelines* (Ottawa: Minister of Supply and Services, 1992).

<sup>9</sup> Director of Investigation and Research, "Misleading Advertising Guidelines", in the *Misleading Advertising Bulletin* (Ottawa: Consumer and Corporate Affairs Canada, 1991), pp. 1-19.

<sup>10</sup> Robert D. Anderson, S. Dev Khosla and Joseph Monteiro, "Market Definition in Abuse of Dominant Position Cases Under the Canadian Competition Act," *Abuse of Dominance and Monopolization* (Paris: OECD, 1996), pp. 89-112.

remedies. This civil law provision replaced the all-but unenforceable criminal law dealing with monopoly in 1986.

The civil law provisions covering mergers (sections 92-107) are intended to control transactions that substantially lessen or prevent competition.<sup>11</sup> The Tribunal shall not find that a merger or proposed merger prevents or lessens competition or is likely to prevent or lessen competition substantially solely on the basis of evidence of concentration or market share. In determining the matter, other factors may be considered. These respond directly to such developments as the growth of foreign competition, the importance of innovation to Canada's future economic development and the need to facilitate the efficient restructuring of Canadian businesses. Further, an explicit exception for transactions that yield efficiency gains that will be greater than and will offset the likely anti-competitive effects of the merger is contained in the provision (see s.96).

Section 125 of the *Competition Act* authorizes the Director to appear before federal boards, commissions or other tribunals to advocate the role and advantages of competition. A similar role may be played by the Director before provincial boards, commissions or tribunals at their consent or request under s.126.

## THE RELATIONSHIP BETWEEN COMPETITION POLICY AND ECONOMIC REGULATION<sup>12</sup>

In Canada, the relationship between competition policy and economic regulation is governed by a doctrine known as the regulated conduct defence (RCD).<sup>13</sup> This doctrine provides a legal defence to individuals or corporations for conduct which would otherwise be a criminal violation of the *Competition Act*, when that conduct is subject to valid federal or provincial regulatory authority. Much of this doctrine has its roots in cases involving agriculture, for example *Rex v. Chung Chuck* (1929), *Rex v. Simoneau* (1935), *Cherry v. The*

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<sup>11</sup>Director of Investigation and Research, *Merger Enforcement Guidelines* (Ottawa: Minister of Supply and Services, 1991).

<sup>12</sup> This is based partly on Robert D. Anderson, Abraham Hollander and Joseph Monteiro, "Regulatory Reform and the Expanding Role of Competition Policy in the Canadian Economy, 1986-1996," *Review of Industrial Organization*, (forthcoming). Also see W.T. Stanbury, "Competition Policy and the Regulation of Telecommunications in Canada," in W.T. Stanbury (ed.), *Perspectives on the New Economics and Regulation of Telecommunications* (Montreal: Institute for Research on Public Policy, 1996), pp. 103-160.

<sup>13</sup> For general background, see W.T. Stanbury, "How Wide the Ocean: The Regulated Conduct Defence in Canada," *Antitrust Bulletin*, Fall 1984, pp. 577-604 and W.T. Stanbury, "Provincial Regulation and Federal Competition Policy: The *Jabour Case*," *Windsor Yearbook Of Access to Justice*, Vol. 3, 1983, pp. 291-347.



*King ex rel. Wood* (1937), *Reference Re the Farm Products Marketing Act*, (1957), etc. and is well known to individuals in agriculture and the agri-food sector.<sup>14</sup>

Before the RCD applies four elements must be present according to the Competition Bureau's interpretation of jurisprudence<sup>15</sup>: First, the relevant regulatory legislation must be validly enacted (i.e., it must be *intra vires* the responsible legislature). As stated in *Rex v. Chung Chuck*, (1929):

Whether or not s.498<sup>16</sup> is *intra vires* of the Dominion parliament, it cannot be said that to operate under an Act of the provincial legislature validly enacted enabling producers to market the products of the soil by orderly methods and under such restrictions as will tend to insure a fair return, is to commit a criminal offence with the meaning of s.498... Granted that the Act is *intra vires* following its provisions and acting under its sanction cannot constitute a criminal offence.

Second, the activity or conduct in question must not only fall within the scope of the regulatory legislation, but must also be specifically authorized by the relevant body.<sup>17</sup> Often the details of a regulatory regime are contained in its regulations or subordinate legislation. As the Supreme Court of Canada in *Jabour*<sup>18</sup> observed:

"It should be noted that in none of these cases so far has there been any requirement in the provincial statute for approval by the province of any regulations adopted by the statutory body for the control of the activities in question."

Third, the regulator's authority must be exercised for the defence to be applicable, mere passive acquiescence or tacit approval will not suffice to displace the application of competition law. Finally, before the defence will apply, a court must be satisfied that the

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<sup>14</sup> These cases are reviewed in *A.G. of Canada et al. v. Law Society of British Columbia*, (1982) 5 W.W.R. 289, (1982) 2 S.C.R. 307.

<sup>15</sup> Submission of the Director of Investigation and Research to the Canadian Radio-television and Telecommunications Commission re: Telecom Public Notice CRTC 92-78, *Review of Regulatory Framework*, April 13, 1993, pp. 7-8, and Don Mercer, *The Regulated Conduct Defence and the Telecommunications Industry* (Ottawa: Competition Bureau, September 1995).

<sup>16</sup> Section 498 of the Criminal Code dealing with agreements in restraint of trade, now in s.45 of the *Competition Act*.

<sup>17</sup> Some commentators argue that a general authorization will suffice. See, e.g., Lawson A.W. Hunter *et al*, *All We Are Saying, Is Give Competition A Chance -- The Role of Competition Policy in Industries in Transition from Regulation to Competition* (Paper presented at a Roundtable on the Competition Act, Ten Years On: A Stock Taking, University of Toronto Faculty of Law, December 8, 1995).

<sup>18</sup> See *A.G. of Canada et al. v. Law Society of British Columbia*, (1982) 5 W.W.R. 289, (1982) 2 S.C.R. 307.

activity that has raised concern will not frustrate the exercise of authority by the regulatory body.<sup>19</sup>

Whether the RCD is applicable in the context of the non-criminal (i.e., civil) provisions of the *Act* is less clearcut. The view of the Competition Bureau is that:

...the courts may be willing to accept the enforcement of the non-criminal provisions (supported under the trade and commerce powers of the federal government), which prohibit certain anti-competitive conduct, a regulator might otherwise accept. In other words, judicial bodies may be more willing to accept the paramouncy doctrine once the criminal stigma is removed.<sup>20</sup>

It is worthwhile noting that in a recent case, the court accepted the regulated conduct defence in a civil case. For example, in a case involving the Law Society of Upper Canada, the applicants alleged that the Law Society's scheme which did not permit members from buying insurance competitively on the open market was contrary to the abuse of dominant position and tied selling provisions of the *Competition Act*. The Court found that the *Ontario Law Society Act* contained specific authority to operate an insurance scheme and therefore the regulated conduct defence applied.<sup>21</sup> The Director decided to not proceed with the inquiry even though it involved the civil provisions.

It has also been held that the civil provisions may be concurrently applicable to particular conduct, along with relevant regulatory statutes.

... even more important, is to recognize that it is the Director's view, that where there is concurrent jurisdiction, as in NB Tel, the Director will not hesitate to challenge anti-competitive conduct under the *Act*, even though the issue is simultaneously being addressed by a regulator under the umbrella of other legislation. However, should the Director be of the opinion that the regulator is adequately addressing the issue, then he may stand aside. In short, the

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<sup>19</sup> This point was established in *R. v. Canadian Breweries*, a competition law case. *R. v. Canadian Breweries Ltd.*, (1960) O.R. 601, 126 C.C.C. 133, 33 C.R. 1, 34 C.P.R. 179. For example, in the *Charterways* case, school bus operators were charged with bid-rigging tenders to a Board of Education for school transportation services. At both trial and appeal, the application of the RCD was rejected on the basis that the bid-rigging offence prevented the provincial authority from exercising the power given to it to protect the public interest. *R. v. Charterways Transport Ltd.* (1981), 32 O.R. (2d) 791.

<sup>20</sup> Mercer, *supra* note 15.

<sup>21</sup> In the matter of an Application pursuant to Rules 14.05(3)(d), (g) and (h) of the Rules of Civil Procedure between The Law Society of Upper Canada and The Attorney General of Canada and the Director of Investigation and Research, March 27, 1996.

Director is simply leaving a message that competition law can have a concurrent and independent role to play in the regulatory arena.<sup>22</sup>

As far as the agriculture sector is concerned,<sup>23</sup> the existence of exemptions and the application of the regulated conduct defence has limited the application of competition law in some important parts of agriculture, namely dairy, poultry, eggs, and grains and oilseeds. For poultry and eggs, the national marketing agencies have been specifically formed under the *Farm Product Agencies Act* which expressly exempts marketing agencies from the *Competition Act*.<sup>24</sup> Dairy is regulated pursuant to the *Canadian Dairy Commission Act*. Some grains and oilseeds are regulated by the Canadian Wheat Board and the Canadian Grain Commission in Western Canada and the Winter Wheat Marketing Board in Ontario. The Canadian Wheat Board is established under the *Canadian Wheat Board Act*.<sup>25</sup> To the extent that this statute specifically authorizes the key activities of these agencies, the *Canadian Wheat Board Act* effectively puts them beyond the purview of the criminal law sections of the *Competition Act* due to the regulated conduct defence which has been developed in the context of the Canadian criminal law provisions of the *Act*. However, given the appropriate circumstances, the Director would argue that they are not beyond the reach of the civil law provisions. There is no doubt that the rest of the agriculture sector falls under the ambit of the *Competition Act*.

There are pressures to extend competition laws to some parts of the agriculture sector, namely grain and oilseeds, dairy and poultry, specifically the activities of marketing boards. However, the impact has been rather limited, as government policy in this sector has not changed as much as in some of the other regulated sectors like transportation and communications. This may be due to less pressure from technological change in agriculture.

In light of the above, perhaps a related activity of forbearance should be mentioned. Forbearance is an action whereby the regulator explicitly withdraws from regulation of a specific activity based on a determination on his part that such action serves best the

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<sup>22</sup> Mercer, *supra*, note 15.

<sup>23</sup> This sector accounts for approximately 3 percent of Canada's GDP at factor cost. However, when all aspects of the agri-food sector are included (i.e., to reflect the volume of food processing, distribution and retail activity), the contribution of this sector is considerably more significant, representing between 9 to 10 percent of GDP. From other perspectives, the contribution of agriculture is even greater. For example the Agri-food sector accounted for 13.1 percent of total employment in 1985.

<sup>24</sup>Section 32 of the *Farm Product Agencies Act* states that, "Nothing in the *Competition Act* applies to any contract, agreement or other arrangement between an agency and any person or persons engaged in the production or marketing of a regulated product where the agency has authority under this or any other Act, under a proclamation issued under this Act or under an agreement entered into pursuant to section 31 of this Act to enter into such an arrangement."

<sup>25</sup> Larry Martin, Linda Cousineau and Vincent Amanor-Boadu, *Competition in the Agri-food Industry*, A Report for the Bureau of Competition Policy, August 6, 1994, p. 36.

purposes of relevant legislation. Forbearance starts with legislative authority to forbear, a determination by the regulator that the private actions of market participants serve the purposes of relevant legislation as well if not better than regulation. By forbearing the regulator refrains from certain forms of market intervention, he does not however abdicate or transfer responsibilities. Forbearance is reversible (i.e., if the regulator resolves that the assessment of market performance was wrong, or that changes in the marketplace no longer warrant a reliance on competitive processes, the status quo ante can be restored). Forbearance does not relieve the regulator from the duty of monitoring whether the forborne activities are carried out in a manner consistent with the relevant legislation.<sup>26</sup> Further, forbearance may be conditional or unconditional, in whole or in part, it may apply to some sellers in a market or to all of them.

Principles of whether or not to forbear, for example, have been set out with regard to telecommunication in a recent decision.<sup>27</sup> The combination of RCD and forbearance is a flexible and effective way to monitor for anticompetitive behaviour especially during the transition from economic regulation to competition.<sup>28</sup>

## COMPARING CANADIAN, UNITED STATES AND MEXICAN COMPETITION LAW AND POLICY

This section briefly compares the competition laws of the three trading partners: Canada, United States and Mexico. Competition law in the United States is based on the *Sherman Act*, the *Clayton Act*, the *Robinson-Patman Act* and the *Federal Trade Commission Act* and in Mexico it is based on the recently enacted *Ley Federal de Competencia Economica* (LFCE).<sup>29</sup> The major areas that will be briefly reviewed are as follows: the objectives of the laws and policies, conspiracy provisions, monopoly provisions, price discrimination and predatory pricing, the merger provisions, and the application of these laws to regulated industries.

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<sup>26</sup> See *Telecom Decision CRTC 95-19*, "Forbearance - services provided by non-dominant Canadian carriers," Ottawa, September 8, 1995.

<sup>27</sup> See CRTC Decision, *supra*, note 26.

<sup>28</sup> For a further discussion see Stanbury, *supra*, note 12.

<sup>29</sup> See *Report of the Task Force of the Antitrust Section of the American Bar Association on The Competition Dimension of The North American Free Trade Agreement* (American Bar Association, Summer 1984), p. 81.

The primary objective of competition policy in Canada has already been examined in the overview.<sup>30</sup> In the United States, the goals of antitrust have evolved over history with emphasis on promotion of economic efficiency and maximization of consumer welfare.<sup>31</sup> The primary goal of Mexico's competition law is the promotion of economic efficiency. While the U.S. law appears to be most oriented towards consumer welfare, the Mexican law is not explicitly concerned with consumer surplus, protecting small business or redistribution. The Canadian law appears to be somewhere in the middle addressing concerns of efficiency and economic opportunity for small and medium-sized enterprises, and consumer welfare.<sup>32</sup>

The conspiracy provision in s.1 of the *Sherman Act* in the United States applies to virtually every form of horizontal or vertical act that may restrain competition. It has the broadest scope of the antitrust statutes in the United States. For this section to be violated four conditions must be met. First, there must be at least two persons acting in concert; second, the restraint complained of must restrain trade or commerce; third, the trade or commerce must be trade or commerce among several states or with foreign nations; and fourth, the restraint must be unreasonable. In Canada in general, horizontal matters fall under s.45 of the *Competition Act* which cover agreements to fix prices, eliminate or restrict competitors or new entrants, allocate customers or territories or agreements not to compete for certain customers, fix or limit production quantities, and to manage granting of trade credit.<sup>33</sup> Article 8 of the *LFCE* in Mexico condemns contracts and combinations among competitors whose intent or effect is to fix prices for goods or services, restrict output, divide market segments or rig bids. The *per se* rule is applied to "garden variety" price-fixing, market-sharing and entry barring agreements in United States<sup>34</sup> and Mexico, whereas in Canada such agreements must be shown to have lessened competition "unduly." However, agreements to rig bids are illegal *per se* in Canada under s.47 of the *Competition Act*.

Monopoly and monopolization is covered in the United States under section 2 of the *Sherman Act* and such acts in their incipency can be addressed under section 5 of the *Federal Trade Commission Act*. In Canada, the counterpart is the abuse of dominant position provision in section 79 of the *Competition Act*. Mexico has a general section on relative monopolistic practices (Article X) that deal with anti-competitive practices involving market power, although there is no specific provision which addresses abuses by a dominant firm. While abuse of dominant position is a civil reviewable matter under Canadian law, in the

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<sup>30</sup>For the evolution of the objectives, see Paul K. Gorecki & W.T. Stanbury, *The Objectives of Canadian Competition Policy, 1888-1983* (Montreal: The Institute for Research on Public Policy, 1984).

<sup>31</sup> See Robert H. Bork, *The Antitrust Paradox* (New York: Basic Books, 1978).

<sup>32</sup> In a wide variety of public statements, the Director of Investigation and Research has emphasized the efficiency goal.

<sup>33</sup> Also see section 49 of the *Competition Act* which prohibits a number of types of agreements among banks.

<sup>34</sup> The court-established "rule of reason" applies to other agreements in the United States.

United States, monopoly and monopolization can be addressed under both civil and criminal law, although most cases are brought under civil law.

Under the predatory pricing provision in Canada, the Director is of the opinion that the seller must have market power, the price must be below average variable cost, and the seller must be able to recoup its initial losses (which requires barriers to entry).<sup>35</sup> In the United States, the matter can be dealt with under section 2 of the *Sherman Act* as pricing below cost can be used to establish an attempt to monopolize a market.<sup>36</sup> There is no specific test for establishing below cost pricing in the United States<sup>37</sup> as in Canada, further the issue of the ability to recoup lost profits is considered a threshold issue. While the wording of the laws pertaining to predatory pricing in United States and Canada are different, they lead to similar results.<sup>38</sup> In both countries, the matter falls under the criminal provisions. The *LFCE's* drafters in Mexico have explained in the *Exposición de Motivos* that predatory pricing can be addressed under the catchall provision of Article 10 (VII), provided that the predator has power to drive out actual and potential competitors. While the principles of predatory pricing in Mexico may be consistent with those in Canada and the United States, the enforcement policy on this matter could provide greater clarity for harmonization and convergence.

Under the price discrimination section in Canada, the seller must not only knowingly discriminate between competitors in the purchase of an article, but must engage in a practice of discriminating. In the United States, price discrimination is covered under the provisions of the *Robinson-Patman Act*. Unlike the U.S. law, the Canadian law does not require injury to competition and focuses on secondary line price discrimination, further there is nothing to prevent the law from being applied extraterritorially.<sup>39</sup> Furthermore, unlike the U.S. law,

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<sup>35</sup> Director of Investigation and Research, *Predatory Pricing Enforcement Guidelines* (Ottawa: Supply and Services Canada, 1992).

<sup>36</sup> It is also possible to deal with the matter under section 2 of the *Robinson-Patman Act*.

<sup>37</sup> A recent U.S. Supreme Court decision regarding generic cigarettes establishes a recoupment test very close to the Canadian *Predatory Pricing Enforcement Guidelines*. See *Liggett Group Inc. v. Brown and Williamson Tobacco Corp.*, Trade Case 69,817, *CCH Trade Cases* 1992-1, pp. 67,805-67,810.

<sup>38</sup> A two stage structural and behavioural approach in these cases is involved in both jurisdictions. See R. D. Anderson and S.D. Khosla, "Review of McFetridge and Wong on Predatory Pricing in Canada", *Canadian Competition Policy Record*, March, 1986, Vol. 7, No. 1, pp. 16-21 and R. D. Anderson and S.D. Khosla, "Recent Developments in the Competition Policy Treatment of Predatory Pricing", *Canadian Competition Policy Record*, September, 1985, Vol. 6, No. 3, pp. 1-16.

<sup>39</sup>This pertains to section 50(1)(a). However, geographic price discrimination in Canada is covered under section 50(1)(b), and requires that the seller engages in a policy of price discriminating which has the effect of substantially lessening competition or eliminating a competitor. See Director of Investigation and Research, *supra*, note 7.

price differentials based on cost differences or lower prices to meet competition is not a defence to a price discrimination charge in Canada, though it may be permitted if it is not a practice. Price discrimination is not specifically dealt with in the *LFCE*'s provisions, nor mentioned in the *Exposición de Motivos*, however it is presumed that it could be covered under the catchall provision of Article 10 described above.

The merger provisions in all three countries are based on a substantial prevention or lessening of competition test.<sup>40</sup> However, there are minor differences between the three laws. The Canadian provisions contain an efficiency defence in situations where the efficiency gains would not have been realized without the merger, and the efficiency gains are greater than and will offset the likely anti-competitive effects of the merger. In determining whether the merger will be anti-competitive, the Canadian Competition Tribunal shall not base its decisions solely on evidence of concentration or market share and may have regard to a list of eight factors, including whether the party to the merger has failed or is likely to fail. While the law in the United States does not specifically contain clauses regarding failing firms or consideration of efficiencies, the application of the statute indicates that these matters will be taken into consideration.<sup>41</sup> Indeed, the failing firm defence is well developed in the United States.

In Mexico, although the merger law does not address failing firms, consideration is given to firms facing bankruptcy. Further, vertical and conglomerate mergers are viewed as efficiency enhancing and the merger provisions appear to be flexible.<sup>42</sup> All three countries have pre-notification provisions.

While the regulated conduct defence in Canada and the state action doctrine in the United States effectively exempts certain regulated industries, Mexico has no comparable defence or doctrine that would allow individual States to override federal competition law. One of the important goals of the *LFCE* was to expose state enterprises and the government itself to the forces of competition. The public sector would be subject to the new law, except those sectors expressly reserved to the State in the Constitution for example, oil, basic petrochemicals, etc. However, agents responsible for the above sectors will be subject to the competition laws when their acts go beyond those sectors.

There are a few other differences between Canadian and U.S. antitrust laws which should be noted. (1) While private actions are possible under the *Competition Act*, these are strictly for violations of the criminal provisions (though they can be used for a violation of a Tribunal order in a civil case), and only single damages may be awarded by the courts. In the United States, treble damages are available and private parties may sue for violations of

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<sup>40</sup>See subsections 92(1) and (2) of the *Competition Act* in Canada, sections 7 and 7a of the *Clayton Act* and articles 16 and 35 of Chapter III of the *LFCE*.

<sup>41</sup> See *U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines* (Washington: U.S. Department of Justice, 1992).

<sup>42</sup>*Antecedentes Económicos Para una Ley Federal de Competencia Económicas*, December 1992, pp. 15-17.

either the criminal or civil provisions. (2) Canada has a single public enforcement agency, the Competition Bureau, while the United States has two: the Antitrust Division of the Department of Justice, and the Federal Trade Commission. Their responsibilities overlap in some areas, e.g., mergers. (3) Some U.S. states have antitrust laws and in a few states enforcement is of some consequence. There is no counterpart in Canada. (4) In the United States, judges dealing with criminal antitrust cases are subject to the U.S. Sentencing Commission Guidelines. This has meant more frequent use of jail terms for individuals in price-fixing cases, for example, the Guidelines also provide a basis for much larger fines — such as the \$70 million fine in the recent ADM case.<sup>43</sup> There is no counterpart in Canada. Jail sentences are very rare in Canada.<sup>44</sup> (5) On the matter of adjudication, the United States uses the courts for both civil and criminal antitrust cases. Canada has a quasi-judicial tribunal (the Competition Tribunal) for all civil reviewable matters, notably mergers and abuse of dominant position. The courts deal with criminal cases. (6) Price maintenance is illegal *per se* in Canada. The U.S. courts are now close to a rule of reason approach under the influence of Chicago school thinking.

The generally modest differences in competition laws and policies of the three countries mean that the most important provisions of these laws are quite harmonious. Further, "fine tuning" could be done to bring about harmonization in some areas of conspiracy (i.e., undueness requirement, export consortium defence), price discrimination law (i.e., quantity requirement), etc.<sup>45</sup>

## COMPETITION BUREAU ENFORCEMENT ACTIVITIES AND REGULATORY INTERVENTIONS

This section reviews the volume of enforcement activities related to agriculture and agri-food over the past decade and describes the Bureau's interventions before regulatory agencies.

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<sup>43</sup> United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (1993 Edition) (St. Paul: West Publishing Company, 1993).

<sup>44</sup> An explanation is offered in W.T. Stanbury, "Prosecuting Individuals Under Canadian Competition Law" *Canadian Competition Policy Record*, Vol. 14(2), 1993, pp. 57-81.

<sup>45</sup> See concerns expressed in Albert C. Gourley, "Information Flow Across the Border: Is the Bureau of Competition Policy Considering the Public Interest Factor?," *Ottawa Law Review*, Volume 27, No. 2, 1995, pp. 233-259.



## **Criminal Cases**

Between 1984/85 and 1995/96, the Bureau completed eight criminal cases related to the agri-food sector. Four involved the conspiracy provisions (s.45 or s.47), and four involved price maintenance (which includes refusal to supply). Convictions were obtained in all cases except the prosecution involving 13 tree fruit packers and the B.C. Tree Fruit Grower's Association. The Crown failed to prove that the agreement had lessened competition unduly.<sup>46</sup>

In the price maintenance cases, the fines were modest: \$2000, \$5000, \$5000 and \$9000. In the price-fixing cases, the fines ranged from \$30,000 (one firm in the flour milling case) to \$1 million (three firms in the flour-milling case). At the time (December 1990), the \$1 million fine per firm was a record in a conspiracy or bid-rigging case (the present record is \$2.5 million established in 1995). Note however, that the total amount of fines in the flour milling case (\$3.41 million) amounted to only 0.6 percent of the value of the contracts on which the eight firms engaged in bid-rigging.

## **Abuse of Dominant Position**

The *Competition Act*, which came into effect in June 1986, included important new civil law provisions dealing with mergers and abuse of dominant position. For two decades, the previous criminal law dealing with mergers and monopoly was unenforceable. Between mid-1986 and 1995/96, the five Applications to the Competition Tribunal concerning abuse of dominant position were completed. The first one involved the NutraSweet Company, producer of the artificial sweetener aspartame. The Director obtained an Order from the Competition Tribunal preventing NutraSweet from entering into or enforcing exclusive supply or tied selling agreements.

## **Mergers**

Of the six (completed) merger cases brought by the Director before the Tribunal over the last decade, three related to the agri-food sector. One involved the acquisition of Palm Dairies Limited by four dairy cooperatives, and two involved the waste rendering industry. In Palm Dairies, the Tribunal denied the Director's Application for a Consent Order. When the Director then proposed to challenge the merger, it was abandoned. One of the Applications (re *Alex Couture Inc.*) concerning the waste rendering industry was withdrawn after delays and changes in circumstances. In the other (*Hillsdown*), the Tribunal refused to

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<sup>46</sup>About one-half the acquittals in s.45 (conspiracy) cases are attributable to the requirement that the agreement lessen competition *unduly*. In the United States a conviction would have been obtained because such an agreement is illegal *per se*.

grant the Director's request for an Order requiring the acquiring firm to divest one of its rendering facilities.<sup>47</sup>

As noted above, the new merger review process established in 1986 resulted in very, very few mergers being challenged by the Director in front of the Competition Tribunal. However, the review process influenced a somewhat larger number of transactions. Between 1987/88 and 1995/96, some 156 mergers in the agri-food sector were examined by the Competition Bureau, i.e., their review required at least two person-days — often many more. This number amounted to 9 percent of all mergers reviewed during the period.

For two-thirds of the 156 agri-food mergers reviewed by the Bureau the file was closed on the grounds that the merger posed no issue under the Act. For 28, an Advance Ruling Certificate was issued under s. 102 of the Act — indicating that the Director was satisfied that he would not have sufficient grounds to make an Application to the Tribunal, i.e., there was not likely to be a substantial lessening or prevention of competition.

The effect of the merger review process is that for the vast majority of cases where the Director expresses some concern, they are "settled" in his office.<sup>48</sup> This was true of agri-food mergers as well. Fifteen mergers were resolved by the Director indicating that he would monitor the situation for three years during which he could challenge it by bringing an Application for dissolution or partial divestiture. (Note that this has not occurred during the first decade the new merger provisions have been in effect.) In five cases, the Director's concerns led the parties to the merger to restructure the deal to alleviate those concerns. Thus the Director had no reason to bring any Application. In three cases, the proposed merger was abandoned in light of the concerns expressed by the Director following his review.

## Regulatory Interventions

Between 1975/76 and 1994/95 the Bureau made 13 interventions in the agriculture or agri-food sectors or 6.6 percent of the total.<sup>49</sup>

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<sup>47</sup> *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992) 41 C.P.R. (3d) 289 (Competition Tribunal, March 1992).

<sup>48</sup> The reasons for this are discussed in W.T. Stanbury, "An Assessment of the Merger Review Process Under the *Competition Act*," *Canadian Business Law Journal*, Vol. 20, 1992, pp. 423-63, and W.T. Stanbury, "The Merger Review Process In Canada: Information and the Structure of Incentives," *Canadian Competition Record*, Vol. 16, No. 3, Autumn 1995, pp. 73-89.

<sup>49</sup> Generally, see Gordon E. Kaiser, "Regulation or Competition: Where do we go from Here," in R.S. Khemani & W.T. Stanbury (eds.) *Canadian Competition Law and Policy At the Centenary* (Halifax: Institute for Research on Public Policy, 1991), pp. 427-437 at p. 435, N.J. Schultz, "Commentary: Competition Advocacy in the Deregulation Era," *Canadian Competition Policy Record*, Vol. 10, No. 3, September 1989, pp. 42-43 at p. 42, Joseph Monteiro, "Regulatory Interventions by the Bureau of Competition Policy" in R.S. Khemani & W.T. Stanbury (eds.)

In the poultry sector, three interventions were made regarding chickens and two interventions were made on eggs. In the dairy sector, two interventions were made regarding milk. In the fruit and vegetable sector, two interventions were made pertaining to apples, two with regard to potatoes, one regarding sugar beets and one regarding maple syrup.

Seven representations were made to various federal boards and six to provincial boards. Six were made to the National Farm Products Marketing Council; two were made to the Ontario Chicken Producer's Marketing Board; two were made to the Régie des marchés agricoles du Québec; and one was made to each of the following: Royal Commission on the British Columbia Tree Fruit Industry; Alberta Public Utilities Board; and Special Measures Committee.

The issues addressed in interventions in various sectors of the economy have ranged from licence and access application, rate/tariff, merger-agreement, dumping-imports, etc. However, there have been two basic issues that have been addressed so far in the interventions in agriculture: supply-management (10 interventions) and price setting (three interventions).

## COMPETITION BUREAU'S POLICY DEVELOPMENT ACTIVITIES

In addition to enforcement of the *Competition Act* and formal submissions to federal and provincial regulatory bodies, the Competition Bureau engages in efforts to influence a variety of public policies which relate to its statutory mandate, directly or indirectly. These policies are very largely those of the federal government, but the Bureau also participates in the policy development activities of several international bodies, e.g., the OECD. These policy-related activities have had a long history in the Competition Bureau.

Policy development activities arise not only from the initiative of the Bureau, but also because its advice is frequently sought by others as they develop policy. Some policy-related actions are relatively formal while others are very informal. Some involve a substantial amount of resources, others far less. In some cases, the Bureau acts alone while in others it is part of a team within the federal government. The Bureau tries to choose those policy activities in which it has a comparative advantage, and where there is a reasonable chance of having a beneficial effect, consistent with the objectives of the *Competition Act*.

From a Bureau perspective, there is a tradeoff between devoting resources to policy development and spending those resources enforcing the *Competition Act* or intervening before regulatory bodies. The advocacy of competition in the policy development process

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*Canadian Competition Law And Policy At The Centenary* (Halifax: Institute for Research on Public Policy, 1991), pp. 451-461, Joseph Monteiro, "Representation by the Bureau of Competition Policy: The First Fifteen Years," *Canadian Competition Record*, Vol. 15, March 1994, pp. 18-38, and Joseph Monteiro, *Interventions by the Bureau of Competition Policy* (Ottawa: Competition Bureau, May 1996, unpublished study).

may replace or reduce the need for enforcement actions or regulatory interventions in the future. They can also increase the responsibilities of the Bureau in terms of the amount of economic activity which is subject to the *Competition Act*. The best example is telecommunications where the Director has made a major effort to participate in the regulatory hearings of the CRTC.

The Bureau's policy development activities take several forms and occur in a variety of fora. These include:

- Regulatory interventions (see above),
- Participation in intra-departmental policy-making (since 1994, the Bureau has been lodged in Industry Canada),
- Participation in the federal inter-departmental policy process,
- Providing comments to policy advisory bodies,
- Participation in international bodies, e.g., OECD; various trade bodies,
- Financial support for and diffusion of research
  - by grants to academics and others outside the Bureau, and
  - by Bureau staff (some of which is used largely inside government, while other research is publicly disseminated), and
- Speeches and seminars.

***Intra-Departmental Policy Activities*** The Competition Bureau participates in policy development within Industry Canada<sup>50</sup>, the department in which the Bureau is located. The department's policy staff is vastly larger than the Bureau's reflecting the department's wide-ranging responsibilities. In some instances, coordination is required, e.g., where the Director is making regulatory interventions under s.125. As well, the Bureau's pro-competition position can come into conflict with an interventionist approach proposed by sector specialists in the department. The extent of the Bureau's involvement varies with the issue and the expertise of staff members.

***Inter-Departmental Policy Activities*** Policy making in Ottawa is a collaborative process although the degree of involvement of particular departments and agencies varies across issues and over time. On a selective basis, the Bureau participates in the federal government's interdepartmental policy development process. This may include analysis, discussions and briefings regarding draft policy papers from other departments (e.g., comments on Agriculture and Agri-Food Competition Paper). The Bureau may also review and comment on Memoranda to Cabinet<sup>51</sup> and draft bills.

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<sup>50</sup> For example, officials participate in the Policy Integration Committee and the Assistant Deputy Minister Policy Coordination Group.

<sup>51</sup> As these documents are secret, examples cannot be provided.

The Director's *Annual Report* for 1989/90 indicated that the Bureau was involved in discussions with External Affairs and Industry, Science, Technology Canada, provincial trade officials and representatives of the beer industry in an attempt to reduce or eliminate interprovincial barriers to trade in the sale of beer in Canada. These talks, spurred in part by a GATT panel ruling that Canadian policies and practices in the beer, wine and spirits industries discriminate against imports, were also intended to lead to the elimination of barriers in trade to imported beer as well.

In addition, the Bureau participated in interdepartmental consultations on agri-food related to the implementation of the Canada-U.S. Trade Agreement (e.g. accelerated tariff removal), administration of imports of supply-managed commodities (e.g. poultry), assessment of retaliatory trade actions, and the development of the Canadian position on agriculture in the Uruguay Round of the Multilateral Trade Negotiations.

**Providing Comments** The Bureau also helps to shape public policy by providing comments or submissions at the request of ad hoc commissions or other bodies. Bureau officers have appeared before Parliamentary Committees (for example, The Review of Farm Inputs) and Royal Commissions (e.g., Royal Commission on the British Columbia Fruit Tree Industry). Further, the Bureau may respond to a public announcement. For example, it recently submitted a brief to a task force conducting a review of Canada Post, a Crown corporation.

The Competition Bureau also regularly provides comments on research and reports by other government departments and agencies. On occasion and upon request, it comments on private sector research relating to competition matters where the Bureau has developed expertise.

**Participation in International Bodies** One of the more recent and growing policy-related activities of the Competition Bureau is its participation in international discussions involving competition matters. Bureau officials are active participants in the activities in the OECD and in other international fora.<sup>52</sup> They also participated in the Canada-United States Agreement through interdepartmental work and industry consultations which addressed anti-dumping, subsidies and countervailing duties. One of the effects of trade liberalization has been the need for a number of countries to create competition legislation<sup>53</sup> or to amend their legislation extensively. Canada's approach has been seen as a model by other countries. As a result, the Bureau has hosted delegations from other countries to exchange ideas, information and to learn more about how the *Competition Act* works in Canada.

**Research** The Bureau conducts its own research on a variety of policy matters, especially those in which it has a long-term interest, for example, intellectual property rights, abuse of dominance, etc. Much of this research is made available in papers which are available to the

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<sup>52</sup> Discussions toward a Canada-European Commission accord on cooperation in the enforcement of competition law have also occurred.

<sup>53</sup> The new countries created by the breakup of the USSR are obvious examples.

public.<sup>54</sup> Between April 1991 and fall 1996, Bureau officials have written or been co-authors of 38 competition policy-related papers dealing with such issues as the role of competition policy as a dimension of Canadian economic policy, applied aspects of competition law and policy, theoretical aspects of industrial organization, competition policy and intellectual property rights, competition policy and economic regulation, Canadian and comparative competition policy institutions, and international aspects of competition policy. It also provides financial assistance for academics conducting research on competition policy-related issues.<sup>55</sup> Some projects are directly related to interventions before regulatory bodies, some are related to current competition policy issues, and some are done in anticipation of future developments.

**Speeches and Seminars** Senior personnel (particularly the Director) make speeches regularly to the business and academic community. These occasions are used not only to provide information about competition policy, but also to gain feedback. Some of these have been related to agriculture and agri-food sectors. For example, in May, 1984 the Director gave an address to the Consultative Committee to the Canadian Dairy Commission on the subject of changes in the structure and performance of the dairy industry.<sup>56</sup> In 1983-84, six speeches on buying groups were delivered by the Director or his staff.<sup>57</sup> In 1987, a speech on the new competition legislation was delivered at a meeting of the Grocery Products Manufacturers of Canada.<sup>58</sup> In 1988, a speech on mergers was delivered to Women in Food Industry Management.<sup>59</sup> The Director's staff presented a workshop for members of the Agri-Food Competitiveness Council in Montreal on March 30, 1993 on the *Competition Act*, with a special focus on the status of strategic alliances under the *Act*. The Bureau also sponsors seminars and workshops (e.g., Dairy Transition Workshop held at the University of Guelph). These not only help to diffuse the Bureau's own analysis and the research it has supported, but they also bring into the Bureau the ideas and analyses of others.

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<sup>54</sup>For a list of these documents, see *Annotated Listing of Economic and Policy Analysis and Research* (Ottawa: Economics and International Affairs Branch, Competition Bureau, Industry Canada, 1996). This list can be made available upon request.

<sup>55</sup>Larry Martin, Linda Cousineau and Vincent Amanor-Boadu, *Competition in the Agri-food Industry*, A Report for the Bureau of Competition Policy, August 6, 1994; Larry Martin and Linda Cousineau, *Update on Changes Made in Market Policy for the Supply Managed Grain and Oilseed and Red Meat Industries*, A Report for the Bureau of Competition Policy, March 30, 1995; and Randall E. Westgren and Larry J. Martin, *Public Policy Implications of the Resource-Based Theory of Firm Strategy*, A Discussion Paper for the Bureau of Competition Policy, November 6, 1995.

<sup>56</sup>Director of Investigation and Research, *Annual Report* for year ended, March 31, 1985.

<sup>57</sup>Director of Investigation and Research, *Annual Report* for year ended, March 31, 1985.

<sup>58</sup>Director of Investigation and Research, *Annual Report* for year ended, March 31, 1988.

<sup>59</sup>Director of Investigation and Research, *Annual Report* for year ended, March 31, 1988.

**Inputs** The inputs to the Bureau's policy development activities consist largely of augmenting the intellectual capital of officials and expanding the Bureau's data base. Thus the Bureau monitors current developments in a variety of policy fields. It also systematically reviews the academic literature related to its enforcement, regulatory interventions and selected policy issues. Linkage to academic research is strengthened by the annual appointment of an academic to the T. D. MacDonald Chair in Industrial Economics in the Bureau. Additional insights have been gained through the advice of academic and industry experts with respect to cases and broader policy issues. Further, the Bureau regularly invites Canadian and foreign experts in the field of industrial economics and competition policy to provide seminars for staff members.

**Bureau's Approach** In its policy development activities the Bureau urges governments to rely to the maximum extent possible on market forces supported by the application of the *Competition Act* to prohibit anti-competitive behaviour. That is not to say that there is no role for regulation in the economy, but rather that its scope and use should be narrowed to those instances where market forces and competition cannot be relied upon to discipline participants in the market place and to allocate resources efficiently. While recognizing that there may be transition costs when moving from direct or economic regulation to competition, the Bureau is much more concerned about the protection of competition in the market place than the protection of specific competitors. As long as there is no anti-competitive behaviour, competitors are expected to succeed or fail based on price, quality and service (and innovation over the longer term). On the other hand, most federal regulatory agencies are very much concerned about the economic well being of incumbent firms. For example, the convergence of telecommunications and broadcasting has led to extensive rhetoric by the CRTC and officials in Industry Canada and Heritage Canada on the subject of "fair and sustainable competition." The tradition of regulated monopolies has not yet adapted to Schumpeter's "gales of creative destruction".<sup>60</sup>

## TRADE LIBERALIZATION AND COMPETITION POLICY

This section explores three aspects of the complex relationship between trade liberalization and competition policy. The first notes that a nation's trade policy and its competition policy can complement and reinforce each other or they may be in conflict in certain areas. The second aspect examines how the three main trade agreements signed by Canada formally relate to competition policy. The third aspect of the relationship between trade liberalization and competition policy is the way the former has, indirectly, helped to expand the scope of the formal agreement between Canada and the United States regarding cooperation in the enforcement of their competition/antitrust laws.

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<sup>60</sup> Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper & Row 1947).

## Conflicts and Complementarities

As trade agreements reduce the "policy room" of national governments and as more countries are reducing the role of direct economic regulation, competition policy is becoming more important. The underlying assumption is that market forces, backed-up by competition or antitrust laws, can keep markets open and allocate resources efficiently and so improve economic welfare.

However, as Figure 2 indicates, there are both complementarities and conflicts between trade and competition policies. Trade liberalization and a competition policy which has limited exemptions and which is effective in striking down restraints of trade complement each other. Yet, "in practice, certain trade measures have anti-competitive effects and certain competition rules have trade-discouraging effects".<sup>61</sup>

An OECD<sup>62</sup> study suggests that four variables affect the strength or weakness of a nation's competition laws:

- scope of application to governmental entities and to government-encouraged or sanctioned conduct of state-operated enterprises and private firms;
- substantive rules governing specific business practices and arrangements;
- scope of sectoral coverage; and
- enforcement.

The types of business practices and arrangements often cited as hindering market access to foreign competitors include:

- horizontal arrangements among competitors; such as, boycotts of foreign firms, exclusion from trade associations, predatory use of standards, predatory pricing and collective exclusive dealing;
- vertical restraints, notably exclusive dealing; and
- abuse of dominance, predatory/exclusionary behaviour, e.g., predatory pricing, price discrimination, fidelity rebates (and discounts, etc.) and "aggressive marketing".<sup>63</sup>

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<sup>61</sup> OECD, *Trade and Competition Policies: Comparing Objectives and Methods* (Paris: OECD, 1994), p. 43.

<sup>62</sup> OECD, *Antitrust and Market Access: The Scope and Coverage of Competition Laws and Implications for Trade* (Paris: OECD, 1996), p. 11.

<sup>63</sup> OECD, 1996, *supra*, note 62, p. 12.



**Figure 2. Complementarities and Conflicts Between Trade and Competition Policies**

	<b>Trade Policy</b>	<b>Competition Policy</b>
Complementarities	When the policy aims to: <ul style="list-style-type: none"> <li>• open markets</li> <li>• reduce public support of national firms</li> </ul>	When the policy aims to: <ul style="list-style-type: none"> <li>• control anti-competitive practices</li> <li>• remove statutory barriers to entry</li> </ul>
Conflicts	When the policy seeks to: <ul style="list-style-type: none"> <li>• use selective measures</li> <li>• provide lower/different standard of treatment to foreign firms</li> <li>• establish export/import cartels and other forms of trade management</li> </ul>	When the policy allows: <ul style="list-style-type: none"> <li>• exemption of regulated industries</li> <li>• exemption of export/import cartels</li> <li>• trade-affecting state-aids</li> </ul>

Source: OECD, *Trade and Competition Policies: Comparing Objectives and Methods* Paris:OECD, 1994, p. 40

Even if they address the full range of anti-competitive practices which limit competition within the domestic market or restrict access to foreign competition, a nation's competition laws may be limited in their effectiveness if key sectors are exempted from their application. For example, in some countries agriculture, or transportation may be regulated precluding the competition authority from acting against price-fixing, abuses of single-desk selling, supply-management, export restraints, etc. However, the deregulation of a number of sectors is increasing the scope and coverage of competition laws. Even without deregulation, there have been attempts to constrain the exemption from becoming broader in the agricultural sector, where resistance has been particularly notable.<sup>64</sup>

Even if a nation's competition laws are harmonized with its trading partners and are effective, anti-competitive practices may still frustrate market access if those laws are not properly enforced. Assessing the quality of the enforcement of competition laws is complex and fact intensive. For example, the absence of cases in a particular sector could mean either that the competition agency is choosing not to investigate (perhaps due to budget restraints), or simply that there are no violations of the law. To determine which in fact is the case may

<sup>64</sup>Michael J., Trebilcock, "Competition Policy, Trade Policy and the Problem of the Second Best," in R.S. Khemani & W.T. Stanbury (eds.) *Canadian Competition Law and Policy At the Centenary* (Halifax: Institute for Research on Public Policy, 1991), pp. 29-44.

require an inquiry into the underlying facts; moreover, different observers may place different interpretations on similar facts.<sup>65</sup>

Enforcement of the competition laws can be complicated or frustrated by multinational enterprises (MNEs). Since their business operations often cut across several national boundaries, it can be difficult to detect and document the anti-competitive activities of "stateless corporations".<sup>66</sup> National antitrust authorities have little control over anti-competitive agreements made beyond their borders except through multinational antitrust cooperation agreements such as those between Canada and the United States.

In general terms, how can trade and competition policies be modified to reduce/eliminate conflicts and to increase the degree to which they reinforce each other? An OECD study states that three kinds of actions can be taken in this regard.<sup>67</sup> First, existing trade regulations can be changed so as to minimize their adverse effects on competition, for example, by converting various restrictions to tariffs which are more visible and likely to be eroded over time. Further it is necessary to get credible commitments to wear off trade management measures — including the "voluntary" type. At the same time, the exemptions for export and import cartels must be removed from competition laws.

Second, and even more difficult, remaining non-tariff barriers must be eliminated (reduced). Also, "binding disciplines in domestic policies that distort trade"<sup>68</sup> must be established, and the competition rules against collusion and monopolization must be consistently enforced in a transparent/apolitical fashion.<sup>69</sup>

Third, and most difficult, policy makers must "tackle structural/systemic differences and conflicting interpretations of competition rules which could distort trade and investment".<sup>70</sup> The former include rules/policies relating to mergers, government ownership, and regulated industries (often exempted). Conflicting interpretations are often found in exemptions granted to co-operating firms, the review of transborder mergers and the treatment of efficiency claims in collusion or monopolization behaviour that inhibit international trade. International harmonization will be difficult on these matters because there is little consensus.

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<sup>65</sup> See OECD, *Strengthening the coherence between trade and competition policies*, Joint Report, Vol. IV, No. 40 (Paris: OECD, 1996).

<sup>66</sup> See S. Rao, *Global (Stateless) Corporations and the Internationalization of Business: Implications for Canada and Canadian Marketplace Framework* (Ottawa: Industry and Science Canada Interim Report, July 13, 1993), p. 32.

<sup>67</sup> See OECD, 1994, *supra*, note 61, pp. 43-44.

<sup>68</sup> Including subsidies, preferential public procurement and incompatible technical standards.

<sup>69</sup> See OECD, 1994, *supra*, note 61, p. 43.

<sup>70</sup> See OECD, 1994, *supra*, note 61, p. 43.

## Trade Agreements and Competition Policy

In an attempt, to ensure that the trading partners maximize the benefits under trade agreements and to see that the objectives of such agreements are not frustrated, some effort has been made to incorporate competition laws into trade agreements. The following reviews those attempts in the FTA, the NAFTA and the GATT.

**Canada-U.S. Free Trade Agreement** The Canada-U.S. Free Trade Agreement (FTA) did not contain any specific chapter on harmonization or convergence of antitrust laws between Canada and the United States. However, consideration of competition policy in the FTA arose as a result of the possibility of convergence of antidumping and antitrust laws. Antidumping and countervailing duty dispute settlement cases are dealt with in Chapter 19 of the FTA.<sup>71</sup>

In the past, trade remedy procedures (antidumping and countervailing procedures) had posed a serious threat to predictability and security of access and became a major trade irritant between the two countries. The two governments agreed that there was a need for conditions of fair competition to ensure equal access to the whole free trade area.

This is to be achieved through a three-track set of obligations. The first one is the development of mutually advantageous rules dealing with government subsidies and private anti-competitive pricing practices such as dumping, which are controlled through the unilateral application of countervailing and antidumping duties. The second is a bilateral review of any changes in existing countervailing or antidumping laws and regulations for consistency with the GATT and the FTA. The third is the review of countervailing and antidumping final orders by a panel. Provision was also made for the establishment of a Working Party under Article 1907.

An interdepartmental group was formed to develop the Canadian position under Article 1907. The Competition Bureau focused mainly on the area of dumping, where the possibility exists of relying on competition law as a substitute for the current anti-dumping system.<sup>72</sup> Research on the matter showed that there are no technical barriers to substituting competition law for the existing anti-dumping regime, and that replacement of the latter would provide clear benefits in terms of enhanced efficiency and competitiveness for both countries.<sup>73</sup> The dumping-antitrust convergence was suspended pending the negotiation and adoption of NAFTA.

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<sup>71</sup> See External Affairs Canada, *The Canada - U.S. Free Trade Agreement* (Ottawa: Minister of Supply and Services, 1988), pp. 267-293.

<sup>72</sup> An inter-departmental study was prepared in which the Bureau was involved. Director of Investigation and Research, *Annual Report* for the year ended March 31, 1993, p. 24.

<sup>73</sup> An attempt was made to gather support for this option in light of the steel anti-dumping cases. In this regard, the Prosperity Report, *Inventing our Future* (Ottawa: October, 1992, p. 28) proposed that anti-dumping trade law be replaced with competition law under the FTA within 18 months.

**NAFTA** The explicit inclusion of competition law in international trade agreements was achieved for the first time in the NAFTA signed by Canada, Mexico and the United States. Chapter 15 of NAFTA reflects a commitment in principle to maintain and enforce national competition laws and to promote effective competition law enforcement in the North American free trade area.

To achieve this objective, the parties are required to consult each other about the effectiveness of the measures undertaken by them. Further, the parties are required to cooperate on the enforcement of competition laws. This includes, mutual legal assistance, notification,<sup>74</sup> consultation and exchange of information on the enforcement of competition laws and policies in the free trade area. However, no method of dispute settlement is available in NAFTA for matters arising from conflicts in competition laws.

Regarding monopolies and state enterprises, the NAFTA does not prevent the parties from designating a monopoly, to which certain regulations apply. In such cases, where the interests of persons of another party may be affected, the latter shall be informed in writing whenever possible and conditions on the monopoly shall be introduced to minimize or eliminate any nullification or impairment of the benefits of the Agreement.

In addition, each party is responsible for ensuring: 1) that each designated privately-owned monopoly acts in a manner that is not inconsistent with its obligations under the Agreement (for example the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges); 2) that the monopoly acts solely in accordance with commercial considerations, except to comply with the terms of its designation (which are not inconsistent with non-discriminatory treatment or anti-competitive practices indicated hereafter); 3) that the monopoly provides non-discriminatory treatment to another party in its purchase of the monopoly good; and 4) that it does not use its monopoly position to engage in anti-competitive practices in competitive markets that affect the investment of another party. However, none of this applies to procurement by government agencies of goods and services for its own end use.

Further, the NAFTA does not prevent the parties from maintaining or establishing a state enterprise. However, such enterprises must act in a manner consistent with the nation's obligations under NAFTA dealing with investment and financial services whenever the enterprise exercises authority delegated to it (for example power to expropriate, grant licenses, approve commercial transactions, impose quotas, fees or other charges). In addition, the state enterprise shall accord non-discriminatory treatment in the sale of its goods or services to investments from another party in its territory.

Finally, Article 1504 of NAFTA provides for the setting up of a Working Group on Trade and Competition with members from the three countries with a mandate to report to the Free Trade Commission within five years on further issues relating to the relationship between competition laws and policies and trade in the free trade area.

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<sup>74</sup> This is mainly in the area of enforcement activity and is elaborated in the section on Canada-U.S. cooperation in enforcement below.

A senior official of the Competition Bureau is the head of the Canadian negotiating team for the Working Group. The group held its first meeting in Washington on March 29, 1994, and met thereafter in Ottawa, Mexico City, Washington, Ottawa and Mexico.<sup>75</sup> The Working Group is examining the relationship between trade and competition policy within the framework established by the provisions of NAFTA. As part of this work, the Competition Bureau took the lead role in tabling a paper on National Treatment under the competition laws of the NAFTA countries. The Bureau has also contributed to competition-related questions and issues in respect of Chile's proposed accession into NAFTA.<sup>76</sup>

**GATT**<sup>77</sup> The first attempt at convergence of national competition policies came in the 1948 Havana Charter for the International Trade Organization (ITO). Under the draft Charter, ITO Members were to take measures to prevent such anti-competitive practices as price-fixing, allocation of markets, boycotts, suppression of technology and unauthorized extension of patent monopolies. However, concerns about loss of sovereignty meant that the Charter was not adopted. Similarly, the ITO's successor, the GATT has never contained rules on competition policies *per se*.<sup>78</sup> The GATT deals only with government policies and therefore only indirectly encompasses the anti-competitive practices of private entities (e.g., government support of anti-competitive behaviour by the private sector).

The next significant initiatives to harmonize competition policies under trade agreements were introduced during the 1970s under the aegis of UNCTAD. Developing countries were looking for ways to control and regulate the business practices of the increasingly powerful multinationals. In 1980, a voluntary restrictive business practices (RBP) code was established. It reflected a compromise position between the United States and EC competition policies, and required multinational enterprises (MNEs) to conform to RBP laws of the countries in which they operate and encouraged greater enforcement efforts.

Around the same time, members of the OECD adopted Guidelines for Multinational Enterprises.<sup>79</sup> These guidelines focused on possible abuse of dominant market position by

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<sup>75</sup> See Director of Investigation and Research, *Annual Report* for the year ended March 31, 1994, p. 41 and March 1995, p. 29.

<sup>76</sup> Director of Investigation and Research, *Annual Report* for the year ended March 31, 1995, p. 29.

<sup>77</sup> This section draws heavily from *Competition Policy And The Agro-Food Sector*, OECD Working Paper, Vol. IV, No. 44 (Paris: OECD, 1996).

<sup>78</sup> Eleanor Fox, "Competition Law and the Next Agenda for the WTO", in OECD, *New Dimensions of Market Access in a Globalising World Economy* (Paris: OECD, 1995), pp. 169-194.

<sup>79</sup> *Competition Policy and the Agro-Food Sector*, OECD Working Papers, Vol. IV, No. 44 (Paris: OECD, 1996), p. 25.

requiring that companies refrain from predatory behaviour and from discriminatory pricing to limit access to markets or otherwise unduly restrain competition.

The Uruguay Round of GATT contains several competition-related provisions. For example, under the General Agreement on Trade in Services (GATS) there are disciplines covering most-favoured-nation treatment, monopolies and exclusive service suppliers and other anti-competitive business practices. The Agreement on Trade-Related Investment Measures (TRIMs) generally prohibits measures which require the purchase of domestic products or restrict the use of imported products. Of significance to the agri-food sector, because of the importance for biotechnology development, is the Agreement on Trade-Related Aspects of Intellectual Property Rights. It helps ensure protection against unfair competition with obligations and disciplines in such areas as copyrights, patents, protection of undisclosed information and control of anti-competitive practices in contractual licences.<sup>80</sup>

Most recently, ministers of the member countries of the World Trade Organization (WTO) met in Singapore for the first regular biennial meeting in December 1996. It was agreed that a working group would be established to study issues raised by members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify areas that may merit further consideration in the WTO framework.<sup>81</sup> A second working group on trade and investment was also established. Though the future paths of the two working groups have not been determined, they were encouraged to draw on each others' work and the work of UNCTAD and other intergovernmental fora.

### **Trade Liberalization, Globalization and the Need for Closer Cooperation in the Enforcement of Competition Laws**

Trade liberalization has spurred international trade and with it the close integration of natural economies. Even before the FTA and NAFTA, Canada and the United States, as each other's largest trading partner, have found it useful to exchange information and to consult each other on competition policy issues, particularly enforcement. The relationship has developed over time to facilitate cooperation in enforcement.<sup>82</sup> Recently, a far more

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<sup>80</sup>GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: GATT, 1994).

<sup>81</sup>World Trade Organization, *Singapore Ministerial Declaration*, No. 96-5315, Ministerial Conference, Singapore, December 9-13, 1996.

<sup>82</sup>The formal relationship began in 1959 when the Minister of Justice E. Davie Fulton and Attorney General William Rogers concluded a bilateral understanding. This was followed by another in 1969 by the Minister of Consumer and Corporate Affairs, Ron Basford and U.S. Attorney General John Mitchell, together with cooperative arrangements between the Department of Consumer and Corporate Affairs and the Federal Trade Commission. This arrangement was superseded in 1984 by a Memorandum of Understanding between Minister of Consumer and

comprehensive agreement between Industry Minister John Manley and Attorney General Janet Reno and Federal Trade Commission Chairman Robert Pitofsky was signed in August 1995.<sup>83</sup>

This new agreement is particularly significant in an era of increasing trade and the recent North American Free Trade Agreement. As the Minister of Industry Canada John Manley indicated "Effective enforcement of the *Competition Act* is essential to promoting Canada's economic welfare in today's global economy. Increasing trade between Canada and the United States benefits Canadian consumers and businesses. Closer cooperation between our two countries' competition authorities is essential to ensure that cross-border anti-competitive activities do not impair those benefits."<sup>84</sup> This formal international agreement deals with notification;<sup>85</sup> enforcement cooperation; coordination with regard to related matters; cooperation regarding anti-competitive activities in the territory of one party that adversely affect the interests of the other party; avoidance of conflicts; cooperation and coordination with respect to enforcement of deceptive marketing practices laws; consultations; semi-annual meetings; confidentiality of information that is exchanged; and communications under the agreement.

The Agreement in this regard goes beyond the earlier Memorandum of Understanding with regard to timing, notification of investigations that are relevant to the other countries enforcement activity, investigation of mergers involved in the two countries, remedial orders requiring implementation in both countries and interventions in regulatory or judicial proceedings in the other country. Notification is also required seven days in advance of enforcement action or settlement in particular cases notwithstanding prior notification in the original investigation.

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Corporate Affairs Judy Erola and Attorney General William Smith and Federal Trade Commission Chairman James Miller. See Director of Investigation and Research, *Annual Report* for the year ending March 31, 1984 (Ottawa: Consumer and Corporate Affairs Canada, 1984), p. 22 and pp. 155-159.

<sup>83</sup> See "Industry Minister Manley Signs Canada-U.S. Competition Policy Agreement," *News Release* 7304, Industry Canada, August 3, 1995, pp. 1-2.

<sup>84</sup> See *News Release*, *op cit.* p. 1.

<sup>85</sup> Each country is to notify the other "with respect to its enforcement activities that may affect important interests of the other [country]".

In recent years, the number of notifications have been as follows:

Year	Canada to United States	United States to Canada
<b>1990-91</b>	4	24
<b>1991-92</b>	5	8
<b>1992-93</b>	11	20
<b>1993-94</b> <sup>86</sup>	5	20
<b>1994-95</b> <sup>87</sup>	21	39
<b>1995-96</b> <sup>88</sup>	9	23

Source: Director of Investigation and Research, *Annual Reports*.

The enforcement of competition laws in importing countries against foreign-based cartels can face procedural and practical difficulties, for example the difficulty of obtaining evidence. Bilateral and multilateral co-operative arrangements for the enforcement of competition laws may help another country investigating those same export cartels (although at present all such arrangements are voluntary). Where they are absent, aggressive pursuit of a cartel organized beyond the affected nation's borders can be problematic.

This was the case, for example, when U.S. antitrust authorities prosecuted Japanese firms for fixing the price of thermal fax paper being sold in the United States. The agreement was made in Japan among firms exporting to the United States. While Mitsubishi Corp. was convicted of violating s.1 of the *Sherman Act*, Nippon Paper was acquitted at the trial level. This was overturned at the Appellate level.<sup>89</sup> Judge Joseph Tauro held that a criminal

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<sup>86</sup>Canada received requests for assistance in two criminal cases and made one of the United States.

<sup>87</sup>Canada obtained assistance in two cases which resulted in convictions and fines - thermal fax paper; and ductile iron pipe. See "Another Fine levied under the Competition Act, in Joint Canada- U.S. Investigation, *News Release 7375*, Bureau of Competition Policy, August 3, 1995; and "Canada Pipe Company Ltd. Pleads Guilty and Pays Record \$2.5 million fine for Conspiracy Offence under the Competition Act", *News Release 7331*, Bureau of Competition Policy, September 27, 1995.

<sup>88</sup> These figures include all notifications under the US-Canada Agreement and the revised OECD Recommendation.

<sup>89</sup>*United States v. Nippon Paper Industries Co., Ltd.* [No. 96-2001, U.S. Court of Appeals, First Circuit] (March 17, 1997).



conspiracy by foreign nationals on foreign soil cannot be pursued under the *Sherman Act*.<sup>90</sup> The Japanese government argued that the U.S. prosecution violated international law and Japanese sovereignty by the extraterritorial application of its antitrust laws. It also indicated that the current talks aimed at the closer coordination of U.S. and Japanese competition laws could be "seriously undermined". William Niskanen, economist and head of the Cato Institute, said that the Antitrust Division's actions "clearly violate the spirit of trade law" and that "It threatens foreign investment in the United States if we hold the subsidiaries of foreign firms hostage for the behaviour of the parents abroad".<sup>91</sup> An antitrust expert noted that Japan was not interested in prosecuting the cartel members because their agreement did not harm their citizens.

The fax paper case also indicates the usefulness of the agreement between Canadian and U.S. competition authorities regarding application of their competition laws.<sup>92</sup> A joint investigation was conducted in Canada and the United States into the effects of the agreement.<sup>93</sup> Competition Bureau investigators found an agreement in Canada in 1991 (as well as one in Japan in 1990). Crown prosecutors obtained a guilty plea (after negotiations) from four corporations. Substantial fines were obtained.<sup>94</sup>

## CONCLUSIONS

Tariffs have been reduced and government-administered import quotas and other quantitative restraints are being converted to tariffs and are likely to be reduced over time.

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<sup>90</sup> John R. Wilke, "U.S. trust busters flex muscles abroad," *Globe and Mail*, February 5, 1997, p. B 12.

<sup>91</sup> This argument seems illogical. The parent directed the subsidiary to implement in the United States the price-fixing agreement reached in Japan. The economic benefits of the agreement accrue to the parent. Why shouldn't a subsidiary be liable for the action of its parent in these circumstances?

<sup>92</sup> See "Agreement between the Government of Canada and the Government of the United States Regarding Application of their Competition and Deceptive Marketing Practices Laws," August 3, 1995.

<sup>93</sup> Francine Matte, *Business Across Borders Competition Law Enforcement in a Global Environment*, 11th Commonwealth Law Conference Canadian Bar Association Annual Meeting, Vancouver, August 27, 1996.

<sup>94</sup> Mitsubishi Canada and Mitsubishi Corp. pleaded guilty to one count under s.61 (price maintenance), one under s.45 (conspiracy) and one under s.46 (foreign conspiracy). Kanzaki Specialty Papers pleaded guilty to violating s.45. Rittenhouse Ribbons & Rolls pleaded guilty to violating s.61. New Oji Paper Company Limited pleaded guilty to a violation of s.45.

Trade liberalization through GATT and other treaties (e.g., FTA, NAFTA) has had (and will continue to have) wide ramifications for industrial policies, competition policy, regulated industries and state-owned enterprises. In trade-offs between national sovereignty and economic efficiency, it is evident that the material benefits of the latter are becoming more important.

As competition, trade and investment policies become more integrated, pressures are likely to increase for even higher limits on export/import arrangements, voluntary restraints, standards, intellectual property rights, investment restrictions and other competition-related barriers to trade. Under such a scenario, it may become increasingly difficult for the agriculture sector to resist trade liberalization pressures and pressures to eliminate the exemptions for supply management regimes.

In some ways, trade liberalization has become a new form of "collective imperialism". Ireland et. al. noted that, "It is argued that virtually any domestic policy which potentially could affect the free flow of goods, services, capital, technologies and people across national borders could find itself on the multi-lateral trade negotiating agenda of the future."<sup>95</sup> Even Canada's cultural industries, said to be exempt under the FTA, have proved to be vulnerable under GATT.<sup>96</sup>

Eliminating barriers to trade does not necessarily ensure free access to foreign markets, however. Restrictive business practices and discriminatory investment laws that limit foreign competition can offset more liberal trade laws. Market-sharing and output-restricting agreements are generally prohibited, but it can be difficult to distinguish between meeting competition and hindering access.<sup>97</sup> For these and other reasons, an effective competition policy is increasingly being seen as an important complement to trade policy reforms. Trade policy analysts recognize that the application of competition policy to governments themselves, state enterprises and various levels of government are very important given the size of the public sector and its influence on the private sector.

Governments may not apply the same criteria for their competition policies in their domestic markets as they do in their trade policies to foreign competition. For example, the competition laws of many industrial nations exempt export cartels from their conspiracy provisions. In other words, it is acceptable for domestic firms to exploit foreigners, but not domestic consumers. This is hardly consonant with a liberal trade policy.

The application of trade policy is embedded in international treaties and ultimately subject to international review and sanction — depending on the dispute resolution process.

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<sup>95</sup> Ireland et. al., *supra*, note 2.

<sup>96</sup>See, for example, Giles Gherson, "Canada' good ship Culture listing badly as barriers shot down," *Ottawa Citizen*, January 24, 1997, p. A10. Laura Eggertson et. al., "Copp's sets stage for war over culture," *Globe and Mail*, February 11, 1997, pp. A1-A4.

<sup>97</sup> Americo Beviglia Zampetti and Pierre Sauvé, "New Dimensions of Market Access: An Overview," in *New Dimensions of Market Access in a Globalising World Economy* (Paris: OECD, 1995), pp. 13-22.

Competition policy is governed by national law and institutions (with the EU an important exception). This has led to increased pressure to harmonize national competition policies, and to make them complementary to the new trade agreements. Trade liberalization, combined with domestic pressures to reduce the scope and intensity of price and entry control-type regulation, was seen increasingly as substitution of market forces backed-up by competition policy for direct regulation. Competition policy and direct regulation are quite different modes of social control.<sup>98</sup>

The growing importance of competition policy through its expanded economic domain has raised some questions about whether it is "up to the job". Do competition law enforcers have sufficient resources?<sup>99</sup> Do they have the specialized knowledge of the industries/activities newly brought under their jurisdiction? Can the authorities respond quickly enough to be effective in light of often rapid changes in competitive strategies? Do they have the legal tools<sup>100</sup> and necessary cooperative arrangements to be effective in dealing with transborder anti-competitive activities in the age of the multi-national enterprise? If corporate economic activity is "globalizing", can antitrust authorities do their job effectively without either some supra-national laws and enforcement organization?

Canada's Competition Bureau has benefited from Ottawa's more comprehensive agreements with Washington to exchange information and cooperate in the enforcement of competition/antitrust policy. In 1986, in a little noted amendment, Canada effectively expanded its competition law jurisdiction to price-fixing and related agreements made outside Canada, but which, if made inside Canada, would be illegal. The first use of s.46 of the *Competition Act* did not occur until June, 1993, and it has been used successfully in several other cases since then. Yet there has not been a legal challenge to the apparent extraterritorial reach of s.46 unlike the situation in the United States which has no counterpart legislation.

It is likely that greater information sharing in the name of the cooperation between Canada and the United States in competition antitrust law enforcement will be strongly

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<sup>98</sup> See Stanbury, *supra*, note 12.

<sup>99</sup> A recent paper indicates that both the legal responsibilities and economic domain of the Competition Bureau increased quite substantially at least by one quarter - yet its resources declined, particularly in the past few years. (See W.T. Stanbury, "Expanding Responsibilities and Declining Resources: The Strategic Responses of the Competition Bureau, 1986-1996," *Review of Industrial Organization*, forthcoming.) This situation does not bode well if - as expected - the Bureau's responsibilities increase in the future in light of further trade liberalization and deregulation. The Competition Bureau has found that the globalization of economic activity can also mean that restraints of trade now more frequently cross borders. Officials state that they are finding more international cartels. This requires closer cooperation with foreign antitrust authorities, most notably those in the United States and the EU.

<sup>100</sup> Strategic alliances because they can take so many different forms in terms of both horizontal and vertical forms and because they can be like the Curate's egg, are just one example. See Ireland et. al., *supra*, note 2, pp. 12-13).

resisted by large firms and major trade associations in Canada. This can be seen in the division of views in the report of the Consultative Panel on proposed amendments to the *Competition Act* relating to such information sharing.<sup>101</sup> Business interests wanted elaborate safeguards. While the present law, the *Mutual Legal Assistance in Criminal Matters Act*,<sup>102</sup> deals with the criminal provisions of both countries competition laws, it does not address civil law provisions which became much more important in Canada in the 1986 legislation.

The ability of "protectionist" interests in Canada's agriculture sector to keep much of the sector immune from trade liberalization will continue to be tested. As industrial policies in other areas are reduced or eliminated, agriculture will increasingly be seen as an anomaly; this could make it harder for protectionist forces to resist those wanting freer trade.

Mark Twain observed that prediction is mighty hazardous — particularly when it concerns the future! Suitably warned, we still believe that it is useful to try to identify issues in agriculture which are now emerging or which are likely to emerge in the next two to three years in which the Competition Bureau might well be involved.

The United States would like to find ways to gain access to agricultural markets protected by the high tariffs which support the Canadian supply management system.<sup>103</sup> These markets are essentially exempt from NAFTA and, as a result of the GATT, have the protection of very high tariffs.<sup>104</sup> There will be pressure bilaterally and in the next round of the WTO negotiations for reductions in the tariff levels and any subsidies. There will be continued pressure from both the United States and from some domestic producers for

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<sup>101</sup> See Ed Ratushny, chairman, *Report of the Consultative Panel on Amendments to the Competition Act* (Ottawa: Competition Bureau, March 7, 1996).

<sup>102</sup> On March 18, 1985, the Canada-United States Treaty on Mutual Legal Assistance on Criminal Matters was signed. It was proclaimed in force October 1, 1988. See Canada Gazette Part II, Vol. 122, No. 22, October 26, 1988, pp. 4390-4391. The text can be found in *Mutual Legal Assistance in Criminal Matters Act*, RSC 1985, c. 37, 35-36-37 Elizabeth II.

<sup>103</sup> Early in January 1997, the U.S. Trade Representative and Secretary of Agriculture announced a joint study of Canada's new dairy pricing system to see if it violates NAFTA, see Peter Morton, "U.S. renews fight over dairy and poultry pricing," *Financial Post*, January 8, 1997, p. 8. Trade Representative Charlene Barshefsky indicated that the United States would act to reduce Canada's high tariffs on dairy and poultry products and to curb Canada's export of wheat and barley. See Peter Morton, "Barshefsky rattles sabre at Canada", *Financial Post*, January 30, 1997, pp. 1-2. International negotiations on agriculture are scheduled to start again in 1999, but Ottawa has already said that the protection of dairy and poultry farmers will not be on the table.

<sup>104</sup> The tariffication of quotas on imports into Canada of certain agricultural products under WTO rules effective January 1, 1995 resulted in a huge increase in tariffs, see *Financial Post*, August 22, 1996, p. 1. For the interim decision see Drew Fagan, "Canada triumphs in tariff battle," *Globe and Mail*, July 16, 1996, pp. A1-A2.

further changes to the Canadian Wheat Board. The changes being considered now essentially change the future of the governance of the organization.<sup>105</sup>

Continued pressure to harmonize any differences in technical regulations and to recognize the certifications of other countries are expected. This will likely continue whether or not the different treatment is "justified", or is seen as a barrier to trade. In any event, different treatment will be seen to cause "systemic friction" to the free flow of goods and services internationally. It is also expected that there will be continued pressure for harmonization and convergence in competition and antitrust legislation, largely from multinational firms. This will likely continue whether or not the different treatment is "justified".

What role might the Competition Bureau play in these developments? Obviously it will continue to be involved in the appropriate discussions concerning the harmonization and convergence of competition and antitrust laws. This may include, to the extent possible, the conclusion of a Memorandum of Understanding similar to the 1995 Agreement between Canada and the United States on cooperation with respect to enforcement activities.

At the other end of the scale, since the harmonization of technical regulations involves a large amount of rather specialized knowledge, the Bureau will probably not play much of a role in this area. It will continue to argue that governments should try to accomplish their goals at the least cost in terms of reductions in economic efficiency. In many cases this will involve trying to prevent government or private actors from creating unnecessary barriers to trade in the first place.

In the other two areas, the transition from "supply management" to more reliance on market forces and the future of the Canadian Wheat Board, advice from the Competition Bureau could be useful to the federal government. As mentioned above, the Bureau is not opposed to the use of direct regulation in principle. Rather, it believes that globalization, trade agreements and technological changes are obviating the need for much price and entry-type regulation. It is now possible to rely more heavily on market forces backed-up by the enforcement of the *Competition Act* to discipline anti-competitive behaviour in markets that are presently subject to direct regulation.

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<sup>105</sup>Scott Haggett, "Farmers to vote on wheat sale," *Financial Post*, October 5, 1996, p. 11. More generally, see Diane Francis, "Originally a savior, wheat board has become an oppressor," *Financial Post*, February 18, 1997, p. 21.