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COMMENTS

The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes

I. INTRODUCTION

The extraterritorial enforcement of United States antitrust law against Canadian businesses has been a source of continual conflict between the two nations.¹ In spite of intervening periods of cooperation and occasional recognition of mutual benefits arising from such extraterritorial antitrust enforcement,² several obstacles to lasting conciliation periodically resurface.³ The practical necessities of growing international economic interdependence,⁴ combined with a divergence between views

¹ See Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL INT'L L.J. 165 (1978); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad*, 11 CORNELL INT'L L.J. 195 (1978), *Extraterritorial Antitrust Conference*, 2 CAN.-U.S. L.J. 152 (1979) [hereinafter cited as *Antitrust Conference*].

² See, e.g., Campbell, *The Canada-United States Antitrust Notification and Consultation Procedure: A Study in Bilateral Conflict Resolution*, 56 CAN. B. REV. 459 (1978); Stanford, *supra* note 1, at 195.

³ See Campbell, *supra* note 2, at 493. The author states that

... the continued presence of aggravating disputes. . . , the continued irritation over the issues of sovereignty and extraterritoriality, the residual bitterness and cynicism, are less a reflection of a failure of institutions, or technical arrangements or good will as they are a reflection of a failure in attitudes.

Id. See also *infra* notes 137-41 and accompanying text.

⁴ Gotlieb, *Extraterritoriality: A Canadian Perspective*, 5 NW. J. INT'L L. & BUS. 449 (1983). The author defines economic interdependence as "the complex patterns of international economic ties that bind countries together and make them mutually dependent. . ." *Id.* at 450. See also Campbell, *supra* note 2; *Commission on the International Application of the U.S. Antitrust Laws Act*:

and interests of the United States and Canada regarding the proper role of antitrust enforcement,⁵ have provided an environment ripe for conflict. In 1959, following differences that arose in the Radio Patents cases,⁶ the two countries responded by instituting an informal antitrust enforcement notification and consultation procedure, known as the Fulton-Rogers Understanding.⁷ In 1969, the Understanding was modified in accordance with EEOC international guidelines for resolution of antitrust enforcement issues.⁸ In spite of the existence of these guidelines, serious conflict again emerged in the context of the Potash⁹ and Uranium cartel¹⁰ disputes of the 1970's. A general lack of specificity in the procedural guidelines,¹¹ as well as a failure to appreciate the alternative perspectives and interests of the countries involved¹² have been cited as among the primary reasons for the failure of the Fulton-Rogers Understanding.

In 1984, Canada and the United States reached a new Understanding,¹³ representing the most recent attempt by the two nations to estab-

Hearings on S. 432 Before the Comm. on the Judiciary, 97th Cong., 1st Sess. 49, 61 (1981) (remarks of L. Cutler) [hereinafter cited as *Hearings*].

⁵ See *infra* notes 24-36 and accompanying text. Baker, *supra* note 1, provides an interesting analysis of how the different economic realities confronted by the two countries affect their attitudes toward antitrust enforcement and extraterritorial jurisdiction.

⁶ *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949), *modified*, 115 F. Supp. 835 (D.N.J. 1953).

⁷ See House of Commons Debates, 1959, Vol. 1 pp. 617-19 (hereinafter cited as *House of Commons Debates*). This Understanding is also known as the Basford-Mitchell Understanding, after the names of the officials who agreed to modifications in 1969. See *Canada-United States: Joint Statement Concerning Cooperation in Antitrust Matters*, reprinted in 8 I.L.M. 1305 (1969) [hereinafter cited as *Joint Statement*].

⁸ *Id.*

⁹ See *Indictment*, U.S. District Court Illinois, *United States v. Amax, Inc.*, Amax Chemical Corp., Duval Corp., Duval Chemical Corp., National Potash Co., Potash Co. of America. Criminal Action No. 76 CR 783, June 29, 1976; *United States v. Amax Inc., et al*, Civil Action No. 76 C 2393, June 29, 1976. For a discussion of the details of this case in relation to this Comment, see *infra* text accompanying notes 107, 132-33 and 156. For a detailed description of the case itself, see Campbell, *supra* note 2, at 486-87.

¹⁰ These suits were consolidated in *In re Uranium Antitrust Litigation*, 473 F. Supp. 382 (N.D. Ill. 1979). See also *Westinghouse v. Rio Algom, Ltd.*, 617 F.2d 1248 (7th Cir. 1980); *Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977); *Westinghouse Elec. Corp. v. Rio Algom, Ltd.*, 480 F. Supp. 1138 (N.D. Ill. 1979); *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 All. E.R. 434 (H.L. 1977). For a discussion of these cases in relation to this Comment, see *infra* text accompanying notes 108, 131, 156-57, 167 and 180. For detailed discussions of the cases themselves, see Campbell, *supra* note 2, at 487-90; Kohlmeier, *The Uranium Affair*, 13 J. INT'L L. & ECON. 149 (1978).

¹¹ Note, *A Comparative Analysis of the Efficacy of Bilateral Agreements in Resolving Disputes Between Sovereigns Arising from Extraterritorial Application of Antitrust Law: The Australian Agreement*, 13 GA. J. INT'L & COMP. L. 49, 65-68 (1983) [hereinafter cited as Note].

¹² See Campbell, *supra* note 2, at 493.

¹³ *Memorandum of Understanding Between the Government of the United States of America and*

lish a format for early identification of potential conflict arising out of extraterritorial antitrust enforcement,¹⁴ for consideration of alternative state interests in activities undergoing scrutiny,¹⁵ and for possible modification of enforcement plans in light of such divergent interests.¹⁶ The history of conflict between Canada and the United States, including previous failures to amicably and efficiently resolve such disputes,¹⁷ presents a useful context in which to assess whether the 1984 Understanding will succeed in alleviating the tensions that frequently surround national antitrust enforcement in the multinational arena.¹⁸

This Comment will first examine the fundamental policy differences and opposing perspectives underlying the conflict between Canada and the United States regarding extraterritorial antitrust enforcement. Particular conflict areas will then be discussed. Second, this Comment will explore the reasons underlying the failure of the Fulton-Rogers Understanding to prevent instances of serious disagreement concerning particular antitrust enforcement measures taken by the United States during the 1970's. Third, this Comment will analyze the 1984 Understanding, focusing on its departure from the weaknesses of the Fulton-Rogers Understanding, its specific provisions addressing concerns within the major categories of previous conflict, and its likely successes and failures in eliminating future conflict in light of the difficulties encountered in previous cases. Finally, this Comment will conclude that, while the 1984 Understanding is of great value as an expression of renewed interest in mitigating future conflict between the two nations,¹⁹ and while its de-

the Government of Canada as to Notification, Consultation, and Cooperation with respect to the Application of National Antitrust Laws, reprinted in 23 I.L.M. 275 (1984) [hereinafter cited as *1984 Understanding*]. The *1984 Understanding* supersedes the previous agreements of 1959 and 1969. *1984 Understanding*, at § 12.

¹⁴ Sections 2, 3, 4, and 5 establish procedures for various types of notification and consultation. *1984 Understanding*, *supra* note 13, at §§ 2-5. For a discussion of these provisions, see *infra* text accompanying notes 153-57.

¹⁵ Section 6 provides for consideration of the other party's significant interest. *1984 Understanding*, *supra* note 13, at § 6. For discussion of these provisions, see *infra* text accompanying notes 159-63.

¹⁶ Section 7 provides for elimination or minimization of conflicts arising out of antitrust investigative or enforcement activities. *1984 Understanding*, *supra* note 13, at § 7. For discussion of these provisions, see *infra* text accompanying notes 164-67.

¹⁷ See text accompanying *infra* notes 131-41, Campbell, *supra* note 2.

¹⁸ See Campbell, *supra* note 2. For an assessment of the international law implications of antitrust enforcement conflict between the United States and Australia, see Triggs, *Extraterritorial Reach of United States Anti-Trust Legislation: The International Law Implications of the Westinghouse Allegations of a Uranium Producers' Cartel*, 12 MELB. U.L. REV. 250 (1979).

¹⁹ The stated purpose of the *1984 Understanding* reads as follows:

This Memorandum of Understanding outlines arrangements for notification and consultation between the Parties with respect to the application of their respective antitrust laws, with the purpose of avoiding or moderating conflicts of interests and policies. The Understanding

tailed procedures for early identification, recognition, and evaluation of diverging national interests involved in transnational antitrust proceedings represent a vastly improved dispute settlement regime, it contains few meaningful substantive provisions which might serve as guarantors that the interests brought to light through implementation of the procedural guidelines will be fairly reconciled. The 1984 Understanding thus constitutes but one step toward the ultimate goal of establishing broadly applicable substantive provisions for resolution of multinational antitrust enforcement disputes.²⁰

II. SOURCES OF EXTRATERRITORIAL ANTITRUST CONFLICT BETWEEN CANADA AND THE UNITED STATES

Differing national economic needs and fundamental policy divergence have been identified as major sources of antitrust enforcement conflict between Canada and the United States.²¹ The two nations have different views regarding the appropriate role of government in regulat-

also establishes procedures for closer cooperation in order to enhance the substantial benefits which both derive from mutual assistance in the enforcement of their antitrust laws.

1984 *Understanding*, *supra* note 13, at § 1.

²⁰ The notion that procedural guidelines are alone insufficient for resolution of international antitrust enforcement conflicts is not without support. *See, e.g.*, Campbell, *supra* note 2. The author concludes that

Successful bilateral dispute settlement requires several critical features. First, a technical apparatus to allow the early identification and confrontation of problems, perhaps against a background of some sort of compulsory adjudication to encourage early resolution. Second, the participation of experts in the particular field in conjunction with other government representatives to ensure that a transnational identity of function does not inadvertently circumvent government policy. Third, an overriding appreciation of the differences in outlook and perception which characterize the policies of the participants and a willingness to give equal weight, equal credence to those perceptions.

Id. at 494. *See also* Stanford, *supra* note 1. The author states that

. . . the challenge facing the representatives of governments now involved in consultations to resolve these issues is to identify principles governing the extraterritorial application of antitrust law that will be generally acceptable to states engaged in or affected by such conduct. These principles, if they are agreed upon and respected, can provide the basis for a pattern of state conduct which could very well evolve into a body of customary international law in this area of large and growing importance to an economically complex and interdependent world.

Id. at 214. *See also* *Hearings*, *supra* note 4, at 61 (remarks of L. Cutler, calling for the creation of an international tribunal to adjudicate such disputes). Several suggestions for the infusion of substantive content into extraterritoriality dispute resolution methodology have been proposed, centering primarily on a conflict of laws approach. *See, e.g.*, Ongman, "Be No Longer a Chaos": *Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 NW. U.L. REV. 733 (1977); Note, *The Conflict of Laws and the Extraterritorial Application of the Sherman Act*, 4 CASE W. RES. J. INT'L L. 164 (1972); Comment, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach*, 70 YALE L.J. 259 (1960). *See also* *infra* notes 67-74 and accompanying text.

²¹ *See* Baker, *supra* note 1; Campbell, *supra* note 2; *infra* notes 22-40 and accompanying text.

ing the respective nations' economies.²² The theoretical underpinnings of each nation's economic policies are of great significance in the antitrust jurisdiction conflict, and are reflected in their respective attitudes toward antitrust enforcement.²³

United States antitrust law has been referred to as "a charter of economic liberty,"²⁴ the Sherman Act as the "Magna Carta of free enterprise."²⁵ In the United States, antitrust law has taken on an almost constitutional quality.²⁶ It has been said that United States antitrust law embodies frontier values, including "a strong sense of the worth of individual effort and the value of individual liberty,"²⁷ as well as a "solid distrust of government, a deep lack of respect for those in authority."²⁸ It is suggested that these values translate into a preference for an impersonal market as opposed to a paternalistic government; that antitrust law "embodies a populist suspicion of the big and distant enterprise and tries to curb or break up visible private economic power."²⁹ With respect to United States foreign economic policy, four broad goals have been identified:

The first of these goals is the promotion of open and competitive markets for both imports and exports. The second is the maintenance of amicable diplomatic relationships with the nations with whom we trade. The third is the assistance of American workers and enterprises when they suffer sudden, substantial, and sometimes unfair, but remediable hardship in international competition. The fourth goal—no less important for being only recently recognized—is the facilitation of export opportunities for U.S. goods and services.³⁰

These goals are reflected in United States antitrust enforcement policy in general, and it is useful to keep in mind their manifestation and interplay in the international antitrust enforcement context.

²² Baker, *supra* note 1; Campbell, *supra* note 2. See also *infra* notes 23-40 and accompanying text.

²³ Baker, *supra* note 1, at 172. The 1984 *Understanding* recognizes the contribution of these factors to previous conflict in its acknowledgement that "there are differences between the Parties on the appropriate application of national antitrust laws to conduct occurring wholly or partly outside the territory of the applying Party," and in its notation that "the application of United States antitrust laws in the past has occasionally conflicted with Canadian policies and has raised jurisdictional issues in Canada." 1984 *Understanding*, *supra* note 13 (introductory paragraphs).

²⁴ *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

²⁵ *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) [hereinafter cited as *Topco*].

²⁶ Baker, *supra* note 1, at 167. In the *Topco* case, the court analogized the Sherman Act to the Bill of Rights. *Topco*, 405 U.S. 596, 610.

²⁷ Baker, *supra* note 1, at 166.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Rosenthal, *What Should be the Agenda of a Presidential Commission to Study the International Application of U.S. Antitrust Law?*, 2 *Nw. J. INT'L L. & BUS.* 372, 372-73, (1980).

Canadian antitrust law³¹ occupies a far different place in the overall scheme of economic regulation. "The Canadian reality is shaped by a different economic history, characterized by a concern for the high degree of foreign involvement in the Canadian economy and a more charitable view of the role of government in the regulation of the economy."³² In Canada, restrictive trade practices are viewed as one problem among many which government regulation must address in considering the global economic picture.³³ Consequently, Canadian antitrust law is "unambitious and territorial in scope . . . reflecting the belief that the pure protection of competition must give way to the need to ensure the survival of Canadian industry. . . ."³⁴

The Canadian economy is also characterized by a relatively small number of firms within a given vital industry, which may require a relaxed or supportive antitrust regime and, frequently, the protection of government involvement to remain viable in the rigorous export trade environment.³⁵ In contrast, the primacy of the goal of independent and unrestrained markets in the United States economic scheme results in the view that businesses unable to compete on their own in the domestic or international marketplace are better sacrificed to the "god of competition" than propped up through government involvement.³⁶

In spite of these differing attitudes toward government regulation and antitrust enforcement, there is a great deal of commonality between the two nations,³⁷ and the benefits to Canada of having a contiguous neighbor with a vigorous system of domestic antitrust enforcement do not go unnoticed.³⁸ The close interrelationship between the economies of the two nations is frequently acknowledged, however, as providing both

³¹ Combines Investigation Act, Can. Rev. Stat. c. C-23 (1970) *as amended*.

³² Baker, *supra* note 1, at 169-71; *see also* Campbell, *supra* note 2, at 483.

³³ Campbell, *supra* note 2, at 483.

³⁴ *Id.* at 494.

³⁵ *Id.* at 484. This situation may be contrasted with predominantly domestic industries, in which oligopoly ordinarily requires more vigorous antitrust enforcement.

³⁶ *Id.*

³⁷ *See* Stanford, *supra* note 1, at 195, 197. *See also* Campbell, *supra* note 2, at 459.

³⁸ *See, e.g.,* Stanford, *supra* note 1, at 195, where the author states that

Fortunately for Canadians, the United States has a well-developed and vigorously enforced system of domestic antitrust law. The pattern of commercial conduct that this requires of the U.S. private sector has an effect on the conduct of U.S. corporations when they enter the Canadian economy. Because the antitrust policies of our two countries are so similar in their broad fundamental objectives, this spillover effect is welcomed in Canada as beneficial. My colleagues in the Canadian Department of Consumer and Corporate Affairs have spoken of the serious problems they would experience if they had to enforce Canadian anti-combines legislation next door to a cartelized U.S. economy.

See also Davidson, *The Canadian Response to the Overseas Reach of United States Antitrust Law: Stage I and Stage II Amendments to the Combines Investigation Act*, 2 CAN.-U.S. L.J. 166 (1979).

a vast conduit for application of United States antitrust law against Canadian firms,³⁹ and as constituting an environment within which multinational industries are frequently pressured by opposing economic interests of the two nations.⁴⁰

Conflict arising within the context of particular antitrust enforcement proceedings owes its genesis to these fundamental philosophical and political differences.⁴¹ Upon initiation of United States antitrust enforcement proceedings, in which these differences become manifested as constrictions upon foreign sovereignty, the infringement is usually attributed to excessive assertion of United States extraterritorial jurisdiction.⁴² Problems generically identified as "jurisdictional," however, comprise a number of conflict categories, some intimately related to assertion of jurisdiction, and some more closely tied to other procedural aspects of United States antitrust enforcement, or to substantive policy differences.

III. PRIMARY CATEGORIES OF ANTITRUST ENFORCEMENT CONFLICT

The conflicts that have arisen due to extraterritorial application of United States antitrust law can be divided into four major categories. First, several nations, Canada included, have taken exception to the unusually broad scope of United States extraterritorial jurisdiction in general.⁴³ Second, the allowance of private actions against foreign antitrust defendants and the accompanying threat of treble damage awards have engendered a great deal of international animosity.⁴⁴ Third, countries

³⁹ See Campbell, *supra* note 2, at 482. The author states that

... the overwhelming presence in Canada of American owned subsidiaries has provided vast transmission channels for the export of United States law and given rise to a fear that American owned Canadian subsidiaries will suffer a clash of loyalties which will resolve in favour of the stronger American economy.

Id. See also Stanford, *supra* note 1, at 201.

⁴⁰ See Gotlieb, *supra* note 4. The 1984 *Understanding* acknowledges the contribution of Canadian-U.S. economic interdependence to the potential for antitrust enforcement conflict, stating that "the close links between the economies of the two countries may lead to situations in which the application of the antitrust laws of one Party conflicts with the interests of the other Party. . ." 1984 *Understanding*, *supra* note 13 (introductory paragraphs).

⁴¹ Baker, *supra* note 1.

⁴² See, e.g., Gotlieb, *supra* note 4; Stanford, *supra* note 1; Triggs, *supra* note 18. See also *infra* notes 55-61 and accompanying text.

⁴³ Stanford, *supra* note 1 (Canadian view); Triggs, *supra* note 18 (Australian view); Ongman, *supra* note 20 (criticisms in general). In *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1979), the Governments of the United Kingdom, Australia, Canada, and South Africa each filed amicus briefs contesting U.S. jurisdiction over enterprises that had acted abroad. *Id.* at 1253. See also *infra* notes 56-61 and accompanying text.

⁴⁴ See *Hearings*, *supra* note 4, at 58, 62-63 (remarks of K. Brewster and L. Cutler, criticizing both the allowance of private actions and treble damage awards).

have been unable to resolve the difficult issues arising out of increased governmental participation in anti-competitive activities.⁴⁵ Finally, in response to what they perceive as excessive United States jurisdictional reach, several countries have enacted "blocking" statutes, which prevent the release of information to entities pursuing antitrust enforcement in the United States.⁴⁶ These statutes have been a major source of concern to courts and antitrust enforcement agencies in the United States.⁴⁷ Independent consideration of these primary categories provides a useful framework within which the likelihood of success of multinational antitrust enforcement guidelines in eliminating future conflict may be assessed.

A. The Extensive Reach of United States Extraterritorial Jurisdiction

1. United States Jurisdictional Principles

United States courts and government agencies have broadly interpreted the scope of United States extraterritorial jurisdiction.⁴⁸ Subject matter jurisdiction in the United States over parties engaged in conduct in foreign lands is based on the objective territoriality principle,⁴⁹ whereby jurisdiction is asserted on the basis of the "effects test."⁵⁰ The

⁴⁵ Baker, *supra* note 1, at 175-84. See also *infra* notes 88-108 and accompanying text.

⁴⁶ E.g., Business Records Protection Act, [1947] Ont. Stat. c. 10 (codified at Ont. Rev. Stat. c. 54 (1970)); Business Concerns Act, [1957-58] Que. Stat. c. 42 (1985) (codified at Que. Rev. Stat. c. 278 (1964)). These acts prohibit the removal of business records from the respective provinces pursuant to any request or order from any court outside the province. The acts impose criminal penalties for non-compliance under some circumstances. See also Uranium Information Security Regulations, SOR/77-836, 11 Can. Gaz. pt. II, at 4619 (1977) (replacing Uranium Information Security Regulations, SOR/76-644, 110 Can. Gaz. pt. II, at 2747 (1976)) [hereinafter cited as Uranium Information Security Regulations]; Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, No. 21 (Austl.), as amended by Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, NO. 202 (Austl.), as implemented by order of the Attorney General. Austl. Gov't Gaz. No. S.214 (Nov. 29, 1976).

⁴⁷ See Baker, *supra* note 1, at 187.

⁴⁸ See generally Antitrust Division, Antitrust Guide for International Operations, reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (1977) [hereinafter cited as *Antitrust Guide*]. See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161 (E.D. Pa. 1980) [hereinafter cited as *Zenith*].

⁴⁹ Ongman, *supra* note 20. The author states that

The legitimacy of objective territoriality follows from the fundamental assumption of equality among nation states. If an injury within a state is caused by the conduct of an entity associated with another nation, the injured nation state must have power to prescribe some rule of law. Without such power, the second state could injure the first with impunity—an indicium of superiority.

Id. at 749-50, citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 n.3 [hereinafter cited as RESTATEMENT OF FOREIGN RELATIONS LAW].

⁵⁰ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) [hereinafter cited as *Alcoa*]. See also RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 49, at § 18; *Antitrust Guide*, *supra* note 48, at 6 (which states the jurisdictional test as follows: "When foreign transactions

most famous expression of this principle is contained in Judge Hand's statement in the *Alcoa*⁵¹ case: ". . . any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."⁵²

The extensive jurisdictional reach allowed by this principle has been criticized by commentators both in the United States and abroad.⁵³ While at least two other nations or economic organizations apply the "effects test,"⁵⁴ it has been urged that the United States is "alone in attempting to enforce its antitrust laws in the territory of another state."⁵⁵

2. *Foreign and Domestic Criticism of United States Jurisdictional Reach*

Foreign officials and commentators criticize the extensive assertion of United States jurisdiction as an attempt by the United States to impose upon other sovereign nations its view of acceptable economic regulatory methods.⁵⁶ This perceived abuse is viewed as unacceptable interference with political, as well as economic, elements of national sovereignty. The vast and potent United States antitrust enforcement scheme is viewed as an elaborate legal and administrative apparatus employed by the United States government to implement its legislation abroad and to promote foreign policy objectives. This is considered by Canadian officials to be a serious restriction on their ability to exercise political decision-making

have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place."'). The *Antitrust Guide* further states that a firm

. . . which has no business activities at all in the U.S., may be more difficult to reach under the U.S. antitrust laws, but the Department will try to include all appropriate defendants in every case. If [the firm] has property in the United States, it may be seized under certain circumstances to induce consent to the jurisdiction of a U.S. antitrust court.

Id. at 56.

⁵¹ *Alcoa*, 148 F.2d 416.

⁵² *Id.* at 433.

⁵³ See *supra* note 42. For a domestic criticism, see Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U.L. REV. 323 (1981). For an early domestic critique of the jurisdictional principles established in the *Alcoa* case, see Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT'L L. 558 (1967).

⁵⁴ See W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 36-37 (2d ed. 1973) (the European Economic Communities as well as West Germany apply their antitrust laws extraterritorially). West German legislation against competitive restraints expressly applies to conduct occurring outside the nation which has effects on West German commerce. See Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983).

⁵⁵ Triggs, *supra* note 18, at 266.

⁵⁶ See *id.* at 264; Campbell, *supra* note 2, at 482. For the British point of view on this subject, see Silkin, *The Perspective of the Attorney General of England and Wales, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS* (Griffin ed. 1979) (publication of the A.B.A. International Law Section).

power with respect to economic relations involving American subsidiaries. One official thus concludes that "the essence of the extraterritoriality issue is not the economic cost . . . but rather the political loss of control over an important segment of Canadian economic life."⁵⁷

The assertion of far-reaching jurisdiction by United States courts and government agencies has undergone domestic criticism as well. The broad interpretation of United States jurisdictional scope has been called "shortsighted and legally indefensible."⁵⁸ Some critics have warned that the reciprocal nature of the relationships involved with our international trading partners may result in a rebound effect: given its present position, the United States cannot hope to defend against foreign assertions of equally broad jurisdiction, which would threaten some United States export activities.⁵⁹ Domestic criticism also centers on the unprincipled nature of United States jurisdictional reach, which represents unpredictability—an unacceptable environmental characteristic for those contemplating certain export activities, joint ventures, or other forms of international investment.⁶⁰ Also noted is the interference with the diplomatic process caused by both agency and private antitrust enforcement actions.⁶¹ In spite of these notable shortcomings, several commentators

⁵⁷ Foreign Ownership and the Structure of Canadian Industry, Report of the Task Force on the Structure of Canadian Industry, Government of Canada, Privy Council Office (1968). See also Campbell, *supra* note 2, at 485, where the author states that "it is the desire to safeguard Canadian sovereignty and autonomy which lies at the heart of Canada's rejection of the extraterritorial reach of American law."

⁵⁸ Feinberg, *supra* note 53, at 324. It has also been argued that this broad assertion of jurisdiction is contrary to established principles of international law. Triggs, *supra* note 18, at 260-63. The RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 49, qualifies the *Alcoa* test in the following provisions, according to which, in order for U.S. jurisdiction over conduct occurring abroad to exist:

- (1) The conduct and its effect must be generally recognized as constituent elements of a crime or tort under the laws of states with reasonably developed legal systems, or
- (2) the consequences within the territory must be substantial and occur as a direct and foreseeable result of the conduct outside the territory, and
- (3) the law prescribing the effect must not be inconsistent with the principles of justice generally recognized by states with reasonably developed legal systems.

Id. at § 18. For a judicial discussion of U.S. jurisdictional principles in relation to international law, see *Zenith*, 513 F. Supp. at 1178-79. See also Ongman, *supra* note 20, at 737.

⁵⁹ See *Hearings*, *supra* note 4, at 60 (remarks of L. Cutler, referring to the extensive extraterritorial reach of U.S. antitrust law as "a two edge sword.").

⁶⁰ See, e.g., Snyder, *Foreign Investment and Trade: Extraterritorial Impact of United States Antitrust Law*, 6 VA. J. INT'L L. 1, 22 (1965). See also Haight, *International Law and the Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639, 649 (1954).

⁶¹ *Hearings*, *supra* note 4, at 30 (remarks of J. Griffin, stating that "the commencement of an agency enforcement action generally preempts [diplomatic] consultations and even when they take place, undercuts their utility."). In questioning the propriety of judicial evaluation of the policies involved in a jurisdictional determination in a private suit, one judge has stated that "[w]hen the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk dis-

support some form of extraterritorial jurisdiction.⁶²

From the United States perspective, extraterritorial jurisdictional reach is viewed as a necessary corollary to effective, comprehensive antitrust enforcement.⁶³ One commentator has succinctly stated that "[t]he relevant markets of antitrust concern are not neatly arranged according to national boundaries. A nation seeking an effective antitrust policy must be concerned with restrictive activities off-shore which interfere with its own economy and society."⁶⁴ It is also claimed that to eliminate such jurisdiction would be to

. . . cede to those foreign interests so inclined the opportunity to have an anticompetitive extraterritorial impact within U.S. borders, regardless of the clarity of the anticompetitive intent, the harm caused, the importance of U.S. economic policies thereby undermined, or the contacts of those persons with U.S. domestic commerce. It would also open a loophole permitting U.S. multinational corporations to encourage their foreign subsidiaries to do what U.S. domestic corporations would be forbidden from doing.⁶⁵

From the Canadian perspective, the role of the multinational corporation in international antitrust enforcement is far different: "The multinational becomes a conduit for the extraterritorial application of domestic antitrust law, and the antitrust investigation and civil or criminal proceeding become unilateral dispute settlement procedures in what is clearly a policy conflict between the producer and consumer governments."⁶⁶

Out of these divergent viewpoints, some recommendations for limitations on the scope of United States extraterritorial jurisdiction have emerged.

ruption of our country's international diplomacy." *International Ass'n of Machinists v. O.P.E.C.*, 649 F.2d 1354, 1358 (9th Cir. 1981).

⁶² See *infra* notes 63-65 and accompanying text.

⁶³ Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT'L L. & BUS. 336 (1980). As opposed to elimination of U.S. extraterritorial jurisdiction, the author states that a more profitable exercise would be to establish limitations on U.S. jurisdictional reach:

Neither Section 18 of the Restatement [of Foreign Relations Law] nor the Department of Justice Antitrust Guide require [sic] proof of actual intent on the part of a foreign combination to affect U.S. commerce, whereas intent was a part of Judge Learned Hand's formula.

Id. at 341, citing *Alcoa*, 148 F.2d at 444 (footnotes omitted). See also *infra* notes 67-69 and accompanying text. Another commentator has stated that "[t]he United States has an extremely broad view of the necessary jurisdictional reach of national legislation which is a result of a conscious policy choice nurtured by a belief that, in an interdependent world, truly effective national regulatory law requires extraterritorial impact." Campbell, *supra* note 2, at 480.

⁶⁴ Rahl, *supra* note 63, at 341.

⁶⁵ Rosenthal, *supra* note 30, at 376.

⁶⁶ Stanford, *supra* note 1, at 201.

3. *Suggested Limitations on United States Jurisdictional Reach*

It has been suggested that the United States should limit assertion of jurisdiction to conduct that has a “*substantial* impact on U.S. import trade, or . . . where there exists a substantial and direct private restraint on the export trade opportunities of firms operating in the United States.”⁶⁷ Other suggestions are that a plaintiff be required to prove that the foreign entity intended to adversely affect the United States market,⁶⁸ or that a conflicts of laws approach be adopted to reconcile alternative state interests where jurisdictional conflicts exist.⁶⁹

Significantly, several of these recommendations were adopted by the court in the *Timberlane*⁷⁰ case, wherein the court employed a jurisdictional “rule of reason” analysis in deciding whether to assert its jurisdiction over foreign defendants once the effects test was met.⁷¹ The “rule of reason” involves a comity analysis whereby the interests of a foreign country involved in a United States antitrust enforcement proceeding are balanced against the domestic interests in enforcement.⁷² While this development has been considered a singularly important step in limiting the expansion of United States extraterritorial jurisdiction,⁷³ it appears that this comity analysis is neither easy to implement nor necessarily fair to a foreign nation’s interests.⁷⁴

The jurisdictional rule of reason has not been consistently followed,⁷⁵ which has given rise to further criticism, foreign and domestic,

⁶⁷ Baker, *supra* note 1, at 173. The U.S. Justice Department appears to have adopted these suggestions. See *Antitrust Guide*, *supra* note 48.

⁶⁸ Rahl, *supra* note 63, at 342.

⁶⁹ See *supra* note 20.

⁷⁰ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) *cert. denied*, 53 U.S.L.W. 3895 (U.S. June 25, 1985) (No. 84-1761) [hereinafter cited as *Timberlane*].

⁷¹ *Timberlane*, 549 F.2d at 613-14. For some other limitations adopted by the court, and for further explanation of the rule of reason analysis, see *infra* note 72.

⁷² In his opinion, Judge Choy stated that

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Timberlane, 549 F.2d at 614. See also *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), where the court employed an analysis similar to that in *Timberlane*, but treated the balancing process as part of the jurisdictional determination itself, rather than as an independent evaluation of whether jurisdiction, once found, should be asserted.

⁷³ Feinberg, *supra* note 53, at 345.

⁷⁴ See *infra* notes 75-80 and accompanying text.

⁷⁵ See, e.g., *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980).

that United States jurisdictional rules are imprecise and unpredictable.⁷⁶ The legitimacy of judicial adoption of the comity analysis has been questioned as an assumption of discretion requiring Congressional approval.⁷⁷ A particularly poignant criticism is that institutional weaknesses inherent in the courts limit their ability to gather and assess the relevant evidence and to fairly evaluate the national interests revealed.⁷⁸ In addition, other countries may be justifiably reluctant to divulge certain sensitive information through a private participant in a court proceeding, or without guarantees of confidentiality and use limitation.⁷⁹ Standing alone, then, courts are simply not equipped to receive and evaluate evidence of economic policy interests of other nations, with the consequence that the comity principle may frequently fail to achieve the desired equitable result. These problems are particularly troublesome in the context of private antitrust actions against foreign defendants, where there is no governmental participation to facilitate consideration of alternative state interests.⁸⁰

B. Private Suits and Treble Damages

United States legislative provisions allowing private parties to bring actions for treble damages against foreign defendants have been heavily criticized.⁸¹ A United States commentator has observed that "[t]he ease with which private plaintiffs can threaten foreign companies not only

⁷⁶ See Note, *supra* note 11, at 56-57 and n.30.

⁷⁷ Rahl, *supra* note 63, at 363. For a Canadian perspective on the comity analysis, see Stanford, *supra* note 1, at 213 n.46, where the author states that it is inappropriate for a court, "having identified a foreign national policy clearly expressed as such by the government, to look behind that policy and make the application of the principle of comity dependent on whether the manner of the formulation or the implementation of the policy conformed to U.S. domestic procedures."

⁷⁸ Rahl, *supra* note 63, at 363; *Hearings, supra* note 4, at 27-28. See also *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979), in which Judge Marshall stated that "the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country. . ." *Id.* at 1148.

⁷⁹ Stanford, *supra* note 1, at 205.

⁸⁰ See *Timberlane*, 549 F.2d at 613.

⁸¹ See, e.g., *Hearings, supra* note 4, at 58 and 62. See also Note, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213 (1982). For the British Government's views on private antitrust actions, see United Kingdom Response to U.S. Diplomatic Note concerning the U.K. Protection of Trading Interests Bill, No. 225, (Nov. 27, 1979), reprinted in 21 I.L.M. 847 (1982). The Response states that

. . . two basically undesirable consequences follow from the enforcement of public law in this field by private remedies. First, the usual discretion of a public authority to enforce laws in a way which has regard for the interests of society is replaced by a motive on the part of the plaintiff to pursue defendants for private gain thus excluding international considerations of a public nature. Secondly, where criminal and civil penalties co-exist, those engaged in international trade are exposed to double jeopardy.

Id. at 849.

with the heavy costs of litigation but the possibility of three times the recovery of actual damages outrages even those of our foreign friends and allies who understand us best.”⁸² This “unleashed prosecutorial discretion” granted to private litigants in the United States is not conducive to consideration of comity and alternative state interests.⁸³ Treble damage awards, unknown in most foreign countries, are viewed as unjust.⁸⁴ Because of these deficiencies, elimination of both private actions against foreign defendants⁸⁵ and treble damage awards⁸⁶ has been suggested. Other commentators have concluded, however, that these measures, even if beneficial, would fail to address the ultimate issue. The United States, in addition to taking such conciliatory measures, must persuade other nations to consider United States interests. An important element of such a solution is the formulation of “agreed international standards for the application of national competition laws. . . .”⁸⁷

C. The Role of Government in Anticompetitive Activities

There has been a trend toward increased government involvement in conduct that is the subject of United States antitrust proceedings.⁸⁸ In no other situation is the direct policy conflict between sovereign nations so apparent, leading one commentator to conclude that “[t]he most difficult and important problem [in the international antitrust area] is whether United States antitrust jurisdiction should be exercised over extraterritorial acts that are incompatible with United States antitrust law and policy, but are nonetheless consistent with and in furtherance of the law or economic policy of a foreign sovereign.”⁸⁹

1. *Particular Areas of Conflict: United States Restriction of the Act of State and Sovereign Compulsion Defenses*

Government involvement in anticompetitive behavior raises sub-is-

⁸² *Hearings*, *supra* note 4, at 58 (remarks of L. Cutler).

⁸³ *Id.*

⁸⁴ See *Commonwealth Nations Adopt Resolution Criticizing United States Treble Damage Judgments*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 963, at A-10 (May 8, 1980). In response to awards of treble damages against its nationals, Great Britain enacted a so-called “clawback” statute, providing a cause of action on behalf of treble damage judgment debtors to recollect all but compensatory damages. Protection of Trading Interests Act, 1980, ch. 11, § 6, reprinted in 1 *Current L. Stat. Ann.* 11/5. See also *supra* note 81.

⁸⁵ Snyder, *supra* note 60, at 36.

⁸⁶ *Hearings*, *supra* note 4, at 71 (remarks of L. Cutler).

⁸⁷ *Id.*

⁸⁸ Cira, *Current Problems in the Extraterritorial Application of U.S. Antitrust Law*, 13 J. INT’L L. & ECON. 157, 160 (1978). See also Davidson, *supra* note 38, at 170 and 174.

⁸⁹ Rosenthal, *supra* note 30, at 376.

sues with respect to defenses such as the act of state and sovereign compulsion doctrines.⁹⁰ The act of state doctrine provides that “[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment of the acts of the government of another done within its territory.”⁹¹ Thus, “a U.S. court cannot entertain any action that calls into question the validity of conduct or policies of a foreign government acting within its sovereignty.”⁹² The sovereign compulsion doctrine operates similarly, except that private conduct allegedly compelled by the sovereign is at issue, rather than conduct of the sovereign itself.⁹³

Officials and courts in the United States have interpreted these doctrines narrowly. For example, a rule has evolved that in order for immunity from antitrust liability to obtain, compulsion by the foreign state must be such that the private party could not possibly have chosen to implement the state directives in a manner that would not have restrained competition.⁹⁴ Mere authorization or approval by the foreign state is insufficient to justify a grant of immunity.⁹⁵ Moreover, under the Sovereign Immunities Act of 1976,⁹⁶ governmental participation which will result in immunity must not be “commercial” in nature.⁹⁷

In addition to pointing out the undesirable ambiguity in the term “commercial,”⁹⁸ commentators have criticized these limitations as focusing not on the interests of the foreign government involved, but rather on the means chosen by the government to promote those interests.⁹⁹ Thus, it has been suggested that United States courts should balance the impact of the restraint in the United States against the importance of the foreign state interest as expressed in its approval of the anticompetitive behav-

⁹⁰ See Baker, *supra* note 1, at 175-84; see also Campbell, *supra* note 2, at 469-70.

⁹¹ Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

⁹² *Zenith*, 513 F. Supp. at 1194 n.123.

⁹³ *Id.* The sovereign compulsion doctrine originated in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

⁹⁴ *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1961). The Court stated that “[t]here is nothing to indicate that [Canadian] law in any way *compelled* discriminatory purchasing. . . .” *Id.* at 707 (emphasis in original). See also *Zenith*, 513 F. Supp. at 1194-95.

⁹⁵ *Zenith*, 513 F. Supp. at 1194-95.

⁹⁶ 28 U.S.C. §§ 1602-1611 (1977).

⁹⁷ *Id.* at §§ 1603(d), 1605(a)(2).

⁹⁸ Triggs, *supra* note 18, at 278; Griffin, *American Antitrust Law and Foreign Governments: An Introduction to the Problem*, 12 J. INT’L L. & ECON. 137, 140-41 (1978). In the Act, a “commercial activity” is defined as “either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the *nature* of the course of conduct or particular transaction or act, rather than by reference to its purpose.” 28 U.S.C. § 1603(d) (1977) (emphasis added).

⁹⁹ See Stanford, *supra* note 1, at 203, 213 n.46.

ior.¹⁰⁰ The outcome of this balancing process would determine whether one of the doctrines should apply.

A related criticism focuses on the internal inconsistency of the United States antitrust regime, stemming from the preferential treatment accorded United States firms involved in export activity.¹⁰¹ Under the Webb-Pomerene Act,¹⁰² for example, United States firms may be exempt from antitrust prosecution for export cartelization. While most nations provide similar exemptions, they generally do not simultaneously prosecute identical activities promoted by other nations. Two alternatives have been suggested for dealing with this inconsistency. First, the United States could reach agreements with other nations to the effect that United States export cartel activities having adverse economic effects within the territory of a nation that is party to the agreement will not be granted exemption from prosecution under the Webb-Pomerene Act.¹⁰³ Second, it has been suggested that other countries should pursue vigorous prosecution of United States export cartel activities existing under the Webb-Pomerene exemption.¹⁰⁴ As between the two suggestions, it would appear that the conciliatory approach of non-exemption agreements would be most conducive to conflict avoidance.¹⁰⁵

¹⁰⁰ Baker, *supra* note 1, at 183.

¹⁰¹ See Note, *supra* note 11, at 55. But see Letter from Donald I. Baker, then Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, to Senator Edward M. Kennedy (Feb. 16, 1977) partially reprinted in TRADE REG. REP. (CCH) No. 274 (1977), which states that "[W]e have generally followed for some years a policy against suing members of a foreign export association for conduct which the U.S. would permit under the Webb-Pomerene Act. . . ." It has also been suggested that Webb-Pomerene exemptions are insignificant in the context of international antitrust law enforcement. See Rahl, *supra* note 63, at 345, where the author states that only about 1.5% of U.S. export activity is covered by such exemptions.

¹⁰² 15 U.S.C. §§ 61-64 (1976).

¹⁰³ See, e.g., Davidson, *supra* note 38, at 173, where the author states:

For example, if the United States agreed with Canada that it would provide no exemptions for Webb-Pomerene arrangements when the Canadian market was affected, it would be open to Canada to make a reciprocal agreement that export exemption under Canadian law would be lost if the arrangement played against the United States market.

¹⁰⁴ Baker, *supra* note 1, at 193.

¹⁰⁵ This is not to say that conflict avoidance is the only, or even the paramount, goal of United States export policy. See *supra* text accompanying note 30. To the contrary, where encouragement of a particular United States export activity is perceived as important, United States authorities may choose to sacrifice a measure of international economic tranquility by granting an export cartel exemption in spite of foreign protestations. In such a case, an affected foreign nation will be obliged to seek recourse through enforcement of its own antitrust law against the United States cartel, resulting in a direct clash between the foreign and United States governments. Where a non-exemption agreement has been reached, on the other hand, a foreign challenge to the cartelized United States export activity would be unlikely to produce conflict with United States authorities.

2. *Canadian Government Involvement in Anticompetitive Activity: The Potash and Uranium Cartel Cases*

Issues of government involvement in suspect activities have arisen in several of the most bitterly contested United States antitrust enforcement proceedings, including the Potash case and Uranium cartel cases.¹⁰⁶ The Potash case involved the Canadian provincial government of Saskatchewan. The United States government brought suit against American potash producers, alleging a conspiracy to limit the amount of potash produced in the United States. Certain high-ranking Saskatchewan officials were named in the suit as unindicted co-conspirators, causing outrage among Canadian citizens.¹⁰⁷ The Uranium cartel cases included allegations that a Canadian subsidiary of Gulf Oil Corporation had participated in the international uranium cartel. The Canadian government refused to deny the existence of the cartel, and a government official indicated that the cartel activities had been regarded by the Canadian government as falling within its national interest, and that the Canadian subsidiary's compliance with quota and price provisions had been at the insistence of the Canadian government.¹⁰⁸

Differing attitudes toward acceptable methods of economic regulation played a significant role in exacerbating the conflicts involved in these cases. In light of Canada's more tolerant attitude toward government regulation, state participation in or approval of the challenged activities could be expected to aid significant Canadian export industries. One could similarly expect opposition from the United States antitrust authorities, intensely protective of consumer interests and devoted to maintaining a high level of competition, especially in staple energy and raw materials industries.

D. Foreign Blocking Legislation

In response to perceived overly broad assertions of United States antitrust jurisdiction, several countries have enacted "blocking" statutes, which prohibit compliance by foreign nationals with United States court orders, decrees, subpoenas, other forms of process, or requests for information relevant to an antitrust proceeding in the United States.¹⁰⁹ While

¹⁰⁶ *Potash* case, *supra* note 9; *Uranium* cases, *supra* note 10.

¹⁰⁷ Campbell, *supra* note 2, at 487. U.S. officials assert that they were very sensitive to the implications of official involvement in the case, and insist that it was the defendant's request for a bill of particulars that forced public revelation of the names of the Canadian unindicted co-conspirators. *Id.* at 491.

¹⁰⁸ *Id.* at 489.

¹⁰⁹ See *supra* note 46.

the effectiveness of such measures is questionable, and detrimental consequences to the foreign parties have been suggested,¹¹⁰ United States courts and agencies have been very concerned about the conflict-oriented implications of such restrictions.¹¹¹

From the United States point of view, such legislation appears precipitous and premature, directed toward hindering mere investigative activities, rather than enforcement activities.¹¹² It is also suggested that the measures may derogate, rather than promote, the interests of foreign parties, since exculpatory information may unwittingly fall within the restrictions of such legislation.¹¹³ In addition, blocking statutes may simply force United States authorities to proceed on the basis of less reliable evidence.¹¹⁴

In order to prevent the disabilities caused by foreign blocking legislation, it is imperative that confidentiality and use limitations apply to information sought by parties in the United States. Moreover, because such legislation is enacted as a response to perceived overreaching on the part of United States courts or antitrust enforcement authorities, the problem of foreign blocking legislation will only dissipate when foreign nationals perceive that United States extraterritorial antitrust proceedings are undertaken pursuant to a fair regime of jurisdictional reach, which includes consideration of foreign interests and respect for state sovereignty.

IV. THE FULTON-ROGERS UNDERSTANDING

While officials from both Canada and the United States insist that notification procedures, as outlined in the Fulton-Rogers Understanding, were followed in the Potash and Uranium cartel cases,¹¹⁵ these disputes generated a high degree of animosity between the two countries.¹¹⁶ In spite of their recognized value in facilitating information exchange and in

¹¹⁰ Campbell, *supra* note 2, at 471; Baker, *supra* note 1, at 187. Blocking statutes may be ineffective or ill-advised principally for two reasons: First, data relevant to antitrust proceedings may be available from other, non-foreign sources. Thus, American antitrust investigations or prosecutions may go forward in spite of the blocking laws. Second, in those cases where blocking laws are effective, the international goal of prohibiting restrictive business practices is compromised. *See also* text accompanying *infra* notes 112-114.

¹¹¹ *See, e.g.,* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 939-42 (D.C. Cir. 1984).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Campbell, *supra* note 2, at 490.

¹¹⁶ *Id.* at 486, 490; *see also* Stanford, *supra* note 1, at 204-06; *Antitrust Conference*, *supra* note 1.

alleviating some tensions on other occasions,¹¹⁷ the notification and consultation procedures failed to diminish the intense conflict surrounding these incidents.¹¹⁸

A. Background and Development of the Understanding

The first Understanding reached between Canada and the United States regarding antitrust notification and consultation¹¹⁹ evolved out of a series of United States antitrust enforcement proceedings known collectively as the Canadian Radio Patents cases.¹²⁰ The cases involved allegations that the defendants (General Electric, Westinghouse, and Philips) had participated in an unlawful restraint of trade in violation of sections 1. and 2. of the Sherman Act. Participation by a Canadian company, Canadian Radio Patents Limited, was also alleged.¹²¹ The Canadian Minister of Justice, however, pointed out that the company had never violated Canadian law, and that only as a result of the company's allegedly illegal participation in the restraint did Canada have a viable electronics industry.¹²² The Minister further suggested to United States authorities that if any actions in Canada had been inimical to United States interests, diplomatic consultation, rather than unilateral resort to the courts, was the appropriate remedial measure.¹²³ United States Attorney General Rogers responded that initiation of the suits was not intended to infringe Canadian sovereignty, but rather to ensure that all those subject to United States antitrust law were made to comply therewith.¹²⁴

From the discussions held between Minister Fulton and Attorney General Rogers, the informal Antitrust Notification and Consultation Procedure emerged.¹²⁵ The Understanding provided that, in the future, discussions would be held between the two governments "when it be-

¹¹⁷ Campbell, *supra* note 2, at 469. See also Stanford, *supra* note 1. The author states that the previous Understanding has served both countries well by increasing bilateral cooperation. Nonetheless, he states, the previous Understanding was not designed to confront the types of problems that have arisen more recently between the two countries regarding antitrust enforcement. *Id.* at 196-97.

¹¹⁸ Campbell, *supra* note 2, at 490, 493.

¹¹⁹ See *supra* note 7.

¹²⁰ See, e.g., *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949).

¹²¹ *Id.* For a short summary of the developments in the case, see Campbell, *supra* note 2, at 460-62.

¹²² Campbell, *supra* note 2, at 461-62. See also *House of Commons Debates*, *supra* note 7.

¹²³ Campbell, *supra* note 2, at 462.

¹²⁴ *Id.* This response by the United States official begs the question at issue: what is the appropriate scope of U.S. antitrust laws; i.e., were the Canadian parties involved subject to U.S. law?

¹²⁵ For a concise history of the developments leading to the Fulton-Rogers Understanding, see *id.* at 460-63. See also *Antitrust Conference*, *supra* note 1.

comes apparent that the interests of one of our countries are likely to be affected by the enforcement of the antitrust laws of the other." The discussions would be designed to "explore means of avoiding the sort of situation which would give rise to objections or misunderstandings in the other country."¹²⁶ Notification of impending antitrust enforcement would take place prior to initiation of any suit that would involve the interests of the other country. This would provide an opportunity for consultation. Each party would also be kept informed of developments in pending suits. Each party reserved the right, however, to proceed in any manner it saw fit, regardless of the outcome of consultations.¹²⁷

In 1969, the Canadian Minister of Consumer Affairs, Ron Basford, and United States Attorney General John Mitchell agreed to modify the Understanding in accordance with the recommendations of the OECD.¹²⁸ Consequently, in addition to notification and consultation, the parties agreed that each country would, insofar as its laws and interests permitted, provide the other with information in its possession of activities affecting international trade, as required by the other in order to enforce its restrictive business practices laws. Of primary concern were cartel and other restrictive practices of multinational companies affecting international trade. The enforcement agencies of the two countries were also to coordinate enforcement activities, each within its own jurisdiction.¹²⁹ The range of possible results stemming from these procedures has been summarized as follows:

While it is true that antitrust officials of one state might flatly refuse to alter a course of action in any way, it has often been the case that officials have been persuaded to modify their course of action somewhat. After consultation, it may be agreed to shape an indictment in a less offensive manner, to change the ground rules of an investigation so as to require only "voluntary" testimony from foreign witnesses, or that officials of government initiating an investigation or action will keep their antitrust counterparts informed of progress in a case and allow them to voice their concerns. In exceedingly rare circumstances, one state may be led to "close a file" at the other state's urgent request.¹³⁰

B. The Failure of the Understanding

The failure to maintain harmonious relations in the Potash and Uniraium cartel cases resulted from both a procedural breakdown and an inability to reconcile opposing substantive economic policies. The ab-

¹²⁶ *House of Commons Debates*, *supra* note 7, at 619.

¹²⁷ Campbell, *supra* note 2, at 462.

¹²⁸ See *Joint Statement*, *supra* note 7.

¹²⁹ *Id.*

¹³⁰ Campbell, *supra* note 2, at 468.

sence of an established procedure for consideration of government involvement in suspect behavior was apparent in the reaction of the United States Court of Appeals in the Uranium cases. The court was noticeably disturbed that the Canadian arguments opposing jurisdiction were made through government authorities as "surrogates" for the true parties in the case—private businesses against which default judgments had been entered.¹³¹ The parties' inability to reconcile alternative state policies was intimately related to the jurisdictional question. In the Potash case, for example, the Canadians responded to United States allegations by claiming that the suit was merely an attempt by the United States to subject Canadian resources to United States law rather than Canadian law, by virtue of the circumstance that the shares of the potash developing companies were held by United States citizens.¹³² United States authorities, on the other hand, felt they had a right and a duty to prosecute activities occurring in foreign territory having an adverse effect on United States commerce.¹³³

In the absence of clearly defined procedures and mutually accepted substantive principles for reconciliation of these opposing views and interests, adversarial positions were assumed and each party unilaterally acted against the other. In both instances, the Antitrust Division of the United States Department of Justice persisted in its investigations in spite of apparent sovereign compulsion issues.¹³⁴ In the Uranium cartel cases, Canada, in turn, attempted to circumvent prosecution by enacting the Uranium Information Security Regulations,¹³⁵ preventing Canadian nationals from complying with American requests for information relevant to the cases.

The failure of the Fulton-Rogers Understanding to alleviate the tensions arising in these cases led one commentator to conclude that

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

¹³¹ *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1256 (7th Cir. 1980). See also Davidson, *supra* note 38, at 174, where the author notes that "one of the developments not fully taken into account by Fulton-Rogers and Basford-Mitchell was the growing involvement of governments in industrial policies."

¹³² Campbell, *supra* note 2, at 487.

¹³³ See *id.* at 490.

¹³⁴ *Id.* at 471.

¹³⁵ Uranium Information Security Regulations, *supra* note 46.

development of the Antitrust Notification and Consultation Procedure, but things appear to have changed little.¹³⁶

Among the general reasons cited for the failure of the Fulton-Rogers Understanding are a "basic misapprehension of national policies and perceptions, [an unwillingness] to give equal weight, equal credence to those perceptions,"¹³⁷ and a fundamental misunderstanding by each side of what the other expected to accomplish by means of the notification and consultation procedures.¹³⁸ The Canadians expected that the procedures would constitute a means by which United States authorities could be made aware of Canadian national interests in certain activities, and thereby be dissuaded from pursuing a meddling course of antitrust enforcement.¹³⁹ The Americans, on the other hand, viewed the procedures as a means for providing Canada with an "opportunity to be heard and an opportunity to preview upcoming American actions so as to avoid embarrassment to the Canadian Government."¹⁴⁰ The general lack of specificity in the procedures outlined, as well as a failure to address specific areas of concern such as the role of government in anticompetitive activities, have also been noted as contributing to the failure of the Understanding to harmonize relations between the two nations.¹⁴¹

IV. THE 1984 UNDERSTANDING

In contrast to the Fulton-Rogers Understanding, the 1984 Understanding contains an explicit statement of purpose.¹⁴² The statement greatly diminishes the chance that misunderstandings will arise due to misconceptions regarding the expectations of the parties. The 1984 Understanding also outlines detailed procedures for advance notification and consultation with respect to initiation of antitrust enforcement proceedings by one party which may affect the interests of the other.¹⁴³ It includes provisions dealing with efforts by one party to withhold infor-

¹³⁶ Campbell, *supra* note 2, at 490.

¹³⁷ *Id.* at 494. The author further states that

The observations of participants [in the notification and consultation process], past and present, expose a sociological nightmare of cross-purposes, misunderstandings and misperceptions. At the bottom of much of the confusion will be found fundamental disagreements about the proper limits of national sovereignty, the related jurisdictional scope of statutes and the role of government in the regulation of the economy.

Id. at 480.

¹³⁸ See *id.* at 492.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See Note, *supra* note 11, at 67-68; Davidson, *supra* note 38, at 170, 174.

¹⁴² 1984 Understanding, *supra* note 13, at § 1.

¹⁴³ *Id.* at §§ 2-4. See *infra* text accompanying notes 153-57 for a discussion of these provisions.

mation from the other,¹⁴⁴ and a much needed provision for government participation in private antitrust suits.¹⁴⁵ The relative strengths and weaknesses of these provisions can be assessed in terms of whether they would have reduced the tensions that arose in foregoing disputes between the two countries, and whether they are responsive to the significant underlying causes of previous conflict.

Foremost among previous causes of disagreement has been the question of appropriate jurisdictional reach. In light of the practical necessities of modern international economic interdependence and the transcendence of national boundaries by multinational corporations,¹⁴⁶ even Canadian commentators agree that a strict territoriality principle of national jurisdiction is unworkable.¹⁴⁷ Given that the jurisdictional reach of a nation must extend at times to acts committed outside its territory, the "jurisdictional" problem becomes one of concurrent assertions of jurisdiction by nations whose enforcement or non-enforcement interests diverge.¹⁴⁸ It thus appears that a balancing of those asserted divergent interests is the appropriate means by which to alleviate jurisdictional conflict. As noted previously, there has been a trend in United States courts, albeit an erratic one, toward adoption of such a comity analysis.¹⁴⁹ The United States Justice Department's Antitrust Division has also approved such an approach.¹⁵⁰

One of the barriers to resolution of jurisdictional conflict in the past has been a lack of consistent, detailed implementation procedures by which alternative state interests could be evaluated.¹⁵¹ The 1984 Understanding establishes such procedures in its notification and consultation

¹⁴⁴ 1984 *Understanding*, *supra* note 13 at § 5. See *infra* text accompanying notes 175-80 for a discussion of these provisions.

¹⁴⁵ 1984 *Understanding*, *supra* note 13, at § 11. See *infra* text accompanying notes 168-74 for a discussion of these provisions.

¹⁴⁶ See Gotlieb, *supra* note 4, at 450-52.

¹⁴⁷ *Id.* at 459.

¹⁴⁸ *Id.* at 460.

¹⁴⁹ See *supra* notes 70-79 and accompanying text.

¹⁵⁰ *Antitrust Guide*, *supra* note 48.

¹⁵¹ Rahl, *supra* note 63, at 363. See also Note, *supra* note 11, at 67-68; *supra* notes 75-79 and accompanying text. The existence of such procedural barriers to consideration of comity factors is apparent in the following pre-1984 Understanding comment:

Foreign governments often ask a number of questions about comity. One such question involves when a foreign government should raise the issue of comity. Is it at the very beginning of a case, as soon as it is learned that a problem does exist, that there is some investigation and some questions are being raised? Is it raised after an investigation is launched, indictments are issued, and complaints are filed? Or is it proper to just stonewall forever, let the complaint be issued and have a default judgment entered?

Griffin, *supra* note 98, at 147. The 1984 *Understanding* should be very helpful in eliminating such questions of timing. See *infra* text accompanying notes 153-57.

provisions.¹⁵²

A. Notification and Consultation

The 1984 Understanding contains a detailed list of situations requiring notification to the other party. Inclusion of these provisions alone represents a great improvement over the vagueries of the Fulton-Rogers Understanding. Situations requiring notification include those in which "[a]n antitrust investigation is likely to inquire into activity carried out wholly or in part in the territory of the other Party," where "there is reason to believe that the activity is required, encouraged, or approved by the other Party," where "it is expected that information to be sought is located in the territory of the other Party," or is "sought to be gathered by the personal visit of antitrust officials to the territory of the other Party," or where any investigation "may reasonably be expected to lead to a prosecution or other enforcement action likely to affect a national interest of the other Party."¹⁵³ Details with respect to timing, recipient authorities, and content of notification are also delineated.¹⁵⁴

Consultations may be requested by either party whenever it "believes that an antitrust investigation, proceeding. . . , business review, advisory opinion or compliance procedure, or action relating to an antitrust investigation or proceeding, is likely to affect its significant national interests or require the seeking of information from its territory."¹⁵⁵

The explicit delineation of these several procedural guidelines should be of great assistance in preventing conflicts such as those which arose in previous cases. In the Potash case, for example, the notification provision would have been invoked as soon as United States officials learned that suspect activity had been carried out in Canadian territory. This would have given the Canadians an opportunity to request consultations, where the involvement of Saskatchewan officials in the activities, as well as Canadian national interests in the alleged restraint, could have been discussed. This course of conduct would have been far more respectful than simply naming the Saskatchewan officials as unindicted co-conspirators. In the Uranium cases, the Canadian Gulf Oil Subsidiary, an alleged participant in the international cartel, carefully ensured that its conduct was consistent with Canadian government policy.¹⁵⁶ Canadian officials also insisted, albeit after enforcement proceedings had been

¹⁵² 1984 Understanding, *supra* note 13, at §§ 2-4.

¹⁵³ *Id.* at § 2.(2).

¹⁵⁴ *Id.* at § 2.(3).

¹⁵⁵ *Id.* at § 4.

¹⁵⁶ Campbell, *supra* note 2, at 489.

initiated, that the firm's adherence to cartel price and quota requirements was in the Canadian national interest.¹⁵⁷ Government enforcement proceedings and private suits nonetheless continued, and it appears that these Canadian interests were never given adequate consideration. Effective procedural guidelines would have involved the governments in consultations at a far earlier stage, with the increased likelihood that the disputes would have been more amicably and fairly resolved.

B. Consideration of National Interests

It is apparent from the failure of the Fulton-Rogers Understanding that consideration of alternative state interests is a problem of substance as well as of procedure.¹⁵⁸ The "substantive" provisions of the 1984 Understanding are limited to the characteristically vague, but well intended statements that "[e]ach Party will give careful consideration to the significant national interests of the other at all stages of an antitrust investigation, inquiry or prosecution."¹⁵⁹ Such interests may be "general or specific in nature depending on the activity in question and may vary in significance according to the importance of the goals of the relevant government policies and the extent to which achievement of those goals may be impaired by acceding to the expressed interests of the other Party."¹⁶⁰

Consideration of national interests is intimately related to the problem of government participation in anticompetitive activity. The 1984 Understanding only hints at how this difficult issue will be resolved in particular case. Section 6. states that "[w]hile a significant national interest may exist even in the absence of any governmental connection with the activity in question, it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by the competent authorities."¹⁶¹ This provision suggests that national interests expressed in an open, formalistic manner may be accorded greater weight than those averred informally. It will almost certainly continue to be the case that interests asserted only after enforcement proceedings have begun will not be given great weight.¹⁶² The existence of the 1984

¹⁵⁷ *Id.* at 489-90.

¹⁵⁸ *Id.* at 493-95. The author states that "[s]mooth working technical agreements and the best of intentions will be insufficient to guarantee the success of any bilateral framework as long as one or both sides exhibit a failure to appreciate differences 'in national policies, priorities and unspoken assumptions.'" *Id.* at 493, quoting Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid 1970's*, Canada-United States Law Institute, University of Western Ontario, Sept. 30, 1977, p. 2.

¹⁵⁹ 1984 *Understanding*, *supra* note 13, at § 6.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² The danger of allowing a government simply to claim a national interest in a given activity

Understanding thus may not have produced a more amicable resolution of some of the conflicting interests in the Uranium cases. It is at least clear, however, that an inquiry will no longer focus solely upon the manner of governmental approval, rather than the substance of the avowed national interest. This development is in accord with the recommendations of several commentators,¹⁶³ and should alleviate some of the tensions that arise in this particularly sensitive area.

C. Minimization of Conflicts

Following consideration of alternative national interests, the parties will attempt to eliminate or minimize conflicts in the following manner: First, following notification, and before continuing any investigative or enforcement measures, the party pursuing enforcement must afford the other party a reasonable opportunity to request consultations. During consultations a party believing that its significant national interests will be affected by the proceedings must "explain in sufficient detail its significant national interest and its role, if any, in the activity in question. . ."¹⁶⁴ Second, "serious consideration" must be accorded any information or views brought to light during consultations.¹⁶⁵

The duty of the Parties to attempt to resolve conflict, even in the face of an apparent standoff, is expressed in the following provision:

The good faith consideration that is to be accorded the national interest of the other Party during consultations may lead to the avoidance or minimization of a conflict of national interests. If each Party asserts that its own national interest is predominant and it is unable to defer to the expressed national interest of the other, they will nonetheless seek to reduce, by accommodation and compromise, the scope and intensity of the conflict and its effects.¹⁶⁶

The 1984 Understanding appears to contemplate any modification of investigative or enforcement plans necessary to reconcile the opposing state interests. The possible modifications available would thus presumably be the same as those extant under the Fulton-Rogers Understanding, in-

after enforcement proceedings have begun, and thereby retroactively immunize certain conduct from prosecution, has been frequently noted. See, e.g., Stanford, *supra* note 1, at 211-13. Most commentators suggest, therefore, that defenses such as the act of state and sovereign compulsion doctrines be limited to interests averred before the activities are questioned by a foreign authority. See *id.* at 211, where the author suggests that

The state being asked to exercise forbearance in the extraterritorial application of its law will wish to assure itself, first, that "national interest" is not being invoked ex post facto to cloak what was essentially a commercially motivated combine or a deliberate attempt to evade its law.

¹⁶³ See *supra* notes 99-100 and accompanying text.

¹⁶⁴ 1984 Understanding, *supra* note 13, at § 7.(2).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at § 7.(3).

cluding modification of an indictment (e.g., the Potash case), alteration of investigative measures to protect confidentiality interests, maintenance of open channels of communication to keep official counterparts informed and to allow for expression of concerns at any stage of the proceedings, or, possibly, complete abstainance from investigation or enforcement.

Unfortunately, circumstances may still arise where the parties are unable to reconcile their opposing interests. In the uranium cases, for example, it is possible that no Canadian interests or degree of government involvement would have been considered substantial enough by the United States to allow an international uranium cartel to continue to adversely affect vital United States energy resource markets.¹⁶⁷ Under such circumstances, not even the best intentions coupled with the most effective procedural guidelines can ensure that the interests of the parties will be objectively evaluated and fairly reconciled. When the parties arrive at this realization, and the only available forums for resolution are those controlled by one of the parties, unilateral action will again be their only recourse.

D. Government Consultation in Private Suits

One of the major problems with the jurisdictional "rule of reason" lies in the difficulty of implementing the balancing process in the context of a private antitrust suit. This situation affords little opportunity for the expression and evaluation of alternative state interests.¹⁶⁸ In an effort to address this problem, the 1984 Understanding incorporates provisions, one imperative¹⁶⁹ and one permissive,¹⁷⁰ for government participation in private suits. The imperative provision becomes operative only with re-

¹⁶⁷ Judge Marshall noted that interests involved in the case seemed so inherently contradictory that reconciliation appeared impossible:

... a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy. Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where those producers conduct their business. In specific response to this and other related litigation in the American courts, three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.

In re Uranium Antitrust Litigation, 480 F. Supp. at 1148. This statement, and the Uranium antitrust cases themselves, substantiate the notion that the difficulties encountered in international antitrust enforcement can involve more than just judicial incapacities, and more than just procedural barriers. Indeed, it appears that perhaps only an established impartial tribunal applying agreed upon substantive principles could have resolved the issues arising in these cases to the satisfaction of all parties. See *supra* note 20.

¹⁶⁸ See *Timberlane*, 549 F.2d at 613.

¹⁶⁹ 1984 Understanding, *supra* note 13, at § 11.(1).

¹⁷⁰ *Id.* at § 11.(2).

spect to those proceedings which have been the subject of prior notification and consultation. According to section 2., however, a party may institute notification, and thereby invoke consultation, whenever it feels its national interests so warrant.¹⁷¹ Consequently, government participation in a private suit is within the control of a party who feels its interests are implicated as long as the procedures outlined in the 1984 Understanding are followed. The guidelines should thus provide an incentive to engage the notification and consultation procedures whenever a possibility that national interests may be impaired by an antitrust proceeding arises. Participation by the government of the forum nation would simply consist of the requested government agency informing "the court of the substance and outcome of the consultations."¹⁷²

Under the permissive participation provision, when the conduct in question in a private antitrust suit has not been the subject of notification or consultation, "the Party in whose court the suit is pending *may*, at the request of the other Party or on its own initiative, inform the court of how the national interest of the other party may be implicated by the suit or may offer to the court such other facts or views as it considers appropriate in the circumstances."¹⁷³ In accordance with the spirit of the 1984 Understanding, government officials in the forum country are likely to respond favorably to a request that they participate in a private suit under the permissive clause.

Certainly one of the major problems of the past centered on the irrelevance of the diplomatic process in private suits. The provision for government participation in private suits should prove extremely helpful in alleviating tensions arising in that type of proceeding, provided that the interests revealed are given proper consideration by a court in its comity analysis. More than one federal judge has already acknowledged the institutional deficiencies of courts attempting to apply the balancing process.¹⁷⁴ This acknowledgement suggests that interests of the opposing country, as disclosed to the court by officials of the forum state following consultations, would be given considerable weight. This important development should result not only in more effective evaluation of national interests in private suits, but also in increased harmony between the prosecutorial policies of federal agencies and the jurisdictional policies of

¹⁷¹ *Id.* at § 2.

¹⁷² *Id.* at § 11.(1).

¹⁷³ *Id.* at § 11.(2).

¹⁷⁴ See *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138; *International Ass'n of Machinists v. O.P.E.C.*, 649 F.2d 1354 (9th Cir. 1981); see also *supra* note 61.

the courts. Unfortunately, there is no similarly effective provision in the Understanding addressing foreign concerns about treble damage awards.

E. Restriction of Access to Information Relevant to Antitrust
Enforcement Proceedings

The approach of the 1894 Understanding to the issue of restriction of access to information relevant to an antitrust proceeding is similar to that taken with respect to the question of jurisdiction. That is, it is largely procedural. The 1984 Understanding provides that “[i]f one Party seeks to obtain information located within the territory of the other in furtherance of an antitrust investigation or inquiry, the other Party will not normally discourage a response.”¹⁷⁵ Where a party finds that disclosure of information is contrary to a significant national interest, any action relating to access “will normally be made only after notification and consultations within the framework of, and after taking account of the purposes of this Understanding. Where, because of an exceptional circumstance, immediate action must be taken, an opportunity for consultation will be provided immediately thereafter.”¹⁷⁶

The 1984 Understanding also includes certain conflict-minimizing clauses, requiring that a party first seek desired information within its own territory, that it attempt to obtain information from the territory of the other first through voluntary, rather than compulsory, process, and that it frame requests for information as narrowly as possible.¹⁷⁷ A provision for general cooperation in antitrust enforcement through exchange of information between the two governments is also included,¹⁷⁸ as are necessary confidentiality clauses and use limitations.¹⁷⁹ While there is no provision dealing with information requests in the context of private suits, it would appear that government participation could be invoked in response to a subpoena requesting sensitive information.

There is an implicit conciliation observable in the similarities between the information restriction provisions and the general substantive sections noted above. The 1984 Understanding appears to center around a compromise whereby Canada has agreed not to restrict access to information in exchange for a commitment by the United States to consider Canadian national interests before initiating an enforcement proceeding, and to help bring those interests to light in the context of private suits.

¹⁷⁵ 1984 Understanding, *supra* note 13, at § 5.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at § 8.

¹⁷⁸ *Id.* at § 9.

¹⁷⁹ *Id.* at § 10.

The existence of this scheme would have been particularly valuable in the Uranium antitrust litigation. There, Canadian information access restrictions appear to have been enacted as a direct response to the failure on the part of agencies and courts in the United States to fairly evaluate Canadian interests in the alleged cartel activities, or to consider modification of their enforcement and jurisdictional determinations in light of those interests.¹⁸⁰ To the extent that the parties manage a fair consideration of those interests throughout notification and consultation procedures in the future, both the "substantive" and information restriction sections of the 1984 Understanding should result in improved relations between the two nations.

V. CONCLUSION

From the foregoing review, it may be observed that Canada-United States conflict over extraterritorial application of antitrust law derives from both procedural and substantive elements. Differing attitudes toward appropriate economic regulatory methods have played a significant role in precipitating conflict, as have the goals of each nation's foreign economic policy. In the United States, the goal of maintaining open and competitive markets for both imports and exports is paramount. Unfortunately, realization of this goal with respect to imports conflicts at times with the objectives of Canadian export policy, which include government support where necessary to maintain the viability of Canadian industries. In view of such conflict, it appears that the second goal of United States foreign economic policy—the maintenance of amicable diplomatic relations with our trading partners—has been given inadequate consideration. In addition, promotion of the United States' third and fourth goals—protection of domestic industries in international competition and facilitation of export opportunities—often directly conflicts with the interests of foreign nations. Such "protection," when it involves prosecution of activities occurring in foreign lands, is viewed by other nations as interference with national sovereignty. Facilitation of export opportunities, particularly when accomplished through preferential treatment under domestic antitrust law, is considered hypocritical. In light of the failure of the Fulton-Rogers Understanding to avoid conflict arising out of the Potash and Uranium cartel cases in the 1970s, it is apparent that any attempted long term bilateral resolution of the difficulties inherent in international antitrust enforcement must account for the possibility of alternative views of appropriate regulatory methods and the sometimes

¹⁸⁰ See *supra* note 167.

conflicting underlying economic needs and policies of the nations involved.

As previously noted, both countries insist that notifications were made under the Fulton-Rogers Understanding in both the Potash and Uranium cartel cases. It appears, however, that the possibility of diplomatic resolution of these disputes was given rather cursory consideration. In light of the renewed commitment of the parties to resolve such conflicts amicably and efficiently, as expressed in the 1984 Understanding, it is reasonable to assume that the diplomatic alternative will be given far greater attention in the future. The 1984 Understanding should also be an improvement of great value to the extent that it departs from the procedural weaknesses inherent in the Fulton-Rogers Understanding. The existence of the new procedural guidelines alone would have contributed substantially to the reduction of hostilities that arose in previous cases. Because the 1984 Understanding contains little internal substance, however, it would appear that its procedural guidelines are only valuable to the extent that the participants remain willing to fairly reconcile alternative state interests brought to light during the notification and consultation procedures. The differing economic realities confronting the two nations will undoubtedly come to bear in the context of future disputes over antitrust enforcement within industries vital to both parties. To the extent that it merely reflects a transient *laisse faire* attitude on the part of United States antitrust enforcement authorities, the 1984 Understanding will prove ineffective in preventing such future fundamental policy conflict.

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