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**COMPETITION POLICY AS A
DIMENSION OF ECONOMIC POLICY:
A COMPARATIVE PERSPECTIVE**

*Occasional Paper Number 7
May 1995*



Industry Canada Industrie Canada

ACKNOWLEDGEMENTS

This paper has benefitted from helpful suggestions provided by many persons, including officials of the Bureau of Competition Policy and several foreign competition agencies. Special thanks are due to Bruce Doern, Chris Green, Knud Hansen, Derek Ireland, Frank Mathewson, Russell Pittman, Someshwar Rao, Margaret Sanderson, Cecile Suchal and Val Traversy, who provided valuable comments on an earlier draft.

The views expressed are those of the authors and are not necessarily shared by the Bureau of Competition Policy, the Department of Industry Canada, the federal government or the foregoing individuals.

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EXECUTIVE SUMMARY

This Paper examines the relationship between competition policy and wider economic policy objectives relating to industrial restructuring and international competitiveness. While the primary focus is on Canada, the Paper also discusses the competition law and policy regimes of other major industrialized economies. In addition to existing policies, the Paper considers a number of issues relating to the future role of competition policy in the globalizing economy of the 1990s.

The Paper has seven parts. Part I introduces the issues and highlights the growing interest in the role of competition policy and its relationship to other economic policies in Canada and elsewhere. This interest derives from a growing recognition of the importance of microeconomic framework policies as determinants of economic growth and development; an international trend toward privatization and deregulation in the past decade; and a concomitant strengthening of competition laws in Canada and other countries in recent years. In addition, increasing globalization and recognition of the role of technological change in economic growth and development have prompted interest in the application of competition policies toward new forms of business arrangements, and the complementarity of competition policy with international trade and industrial policies. These developments provide the background for the Paper.

Part II examines the role of competition policy in light of economic literature on productivity and industrial performance as well as the structure of the Canadian economy. It points out that the role of competition policy is based on economists' understanding of the optimizing properties of competitive markets. It also discusses recent research by Michael Porter and others, indicating that vigorous competitive rivalry in domestic markets for goods and services fosters the upgrading of firms' ability to compete internationally. This supports the complementarity of competition policy and other policies designed to foster efficient industrial structure. While freer international trade has helped to discipline the exercise of market power, the Paper shows that it has not allayed the need for a vigorous domestic competition policy in most markets. This part of the Paper also reviews pertinent empirical literature on the structure of the Canadian economy and refers briefly to various institutional aspects of an effective competition policy.

Part III outlines key elements of Canada's present competition legislation and policy particularly as they relate to industrial restructuring. The discussion indicates that the goal of fostering efficiency is incorporated in several key provisions of the *Competition Act*. To begin with, the purpose clause of the *Act*, which guides its application, refers specifically to the objective of promoting the efficiency and adaptability of the economy and expanding opportunities for Canadian participation in world markets, in addition to the more traditional competition policy objective of ensuring competitive prices and product choices. The substantive provisions of the *Act* – particularly, the merger provisions – provide gateways for the realization of efficiency gains while preserving an appropriate emphasis on fostering competition in relevant markets.

The merger provisions also recognize the role of foreign competition in domestic markets as well as other factors (such as the existence of failing businesses) that are relevant to industrial adjustment. These factors have been applied in various cases under the *Act*. Part III also notes recent decisions of the Supreme Court of Canada that have upheld the constitutional validity of the *Act* and have thereby reinforced its role as a cornerstone of the market economy in Canada.

Part IV discusses the connections between competition policy and other economic policy fields. The analysis indicates that competition policy plays an important role in complementing diverse policies that have the objective of fostering an efficient and dynamic economy. These include intergovernmental arrangements relating to internal trade, industry-specific regulatory reform and privatization, intellectual property and innovation policy as well as international trade liberalization. Competition policy may also be regarded as an essential element of an effective industrial policy – to the extent that such policy is defined broadly to include the various measures through which governments pursue an efficient and dynamic industrial structure. By the same token, a key contribution of competition policy to national economic welfare lies in challenging potentially anticompetitive manifestations of industrial policy such as restrictive trade measures or market reservation through regulation.

Part V constitutes a brief survey of competition policy and its relation to broader economic policy issues in various foreign jurisdictions – notably the United States, the European Community, the United Kingdom, Germany, France and Japan. Specific developments in Sweden, Australia and several other countries are also noted. Each of these jurisdictions

provides useful insights into the role of competition policy as a dimension of economic policy in the globalizing context of the 1990s.

The survey of foreign jurisdictions indicates that competition policy is an increasingly important aspect of economic policy around the world. This is particularly evident in European jurisdictions, where competition policy is playing a central role in the forging of a unified European market. It is also apparent in Australia and various emerging market economies, where efforts are under way to strengthen the role of competition policy as an aspect of broader economic reform. In the United States, antitrust policy remains a cornerstone of the market system. Even in Japan, long regarded as favouring an interventionist approach to industrial policy, competition policy is being strengthened in response to international pressures to facilitate access to the Japanese market.

The survey also suggests that there has been at least a partial convergence toward economic efficiency as the core objective of competition policy in the OECD economies. It shows that Canadian competition legislation and enforcement policies are no less liberal with respect to industrial restructuring than those of other major industrialized countries. Indeed, the Canadian model represents a flexible, market-oriented example of competition policy that compares favourably with the other jurisdictions considered in the survey.

Part VI examines a number of issues regarding the future application of competition policy in Canada. Some of these relate to: the application of the *Competition Act* with respect to industrial restructuring and new forms of business arrangements; the international dimensions of competition policy; and institutional and process issues.

With regard to industrial restructuring, the issues considered include: the treatment of dynamic efficiency gains and rationalizing mergers; the joint venture and specialization agreements provisions of the *Act*; and the treatment of new business arrangements such as strategic alliances and industrial networks. The conclusion here is that the existing legislation generally provides an appropriate balance between competition and efficiency-related factors. The challenge for competition authorities lies in staying abreast of developments in economic theory as well as in the marketplace, to facilitate effective application of the various provisions of the *Act*.

As for the international dimensions of competition policy, this Part of the Paper takes note of the various efforts under way to facilitate international cooperation in competition law enforcement, and the factors prompting consideration of the scope for international convergence in competition policy, generally. It also comments on the potential usefulness of the Canadian model of competition policy in providing technical assistance for emerging market economies in various parts of the world. Finally, with regard to institutional matters, the Paper touches briefly on issues relating to the role of private parties in competition law enforcement.

Part VII provides concluding remarks. It observes that competition policy is playing an increasingly central role as a dimension of economic policy in Canada and elsewhere. This reflects fundamental developments in the economy and economic policy environment, such as growing recognition of the importance of interfirm rivalry in promoting dynamic change and competitiveness. Canadian competition legislation, policies and institutions are generally well adapted to meet the challenges that the stronger role for competition policy will entail. In Canada and elsewhere, a key challenge for competition authorities will be to participate effectively in extending the scope and reach of competition policy principles in related fields of economic policy while maintaining appropriate independence and impartiality in the core function of competition law administration.

PART I INTRODUCTION

The role of government in a free market economy is currently under review in Canada as well as elsewhere in the world. There is a broad spectrum of views.

On the one hand, there is the widely-held view that direct government intervention in markets has serious limitations. This view is most dramatically apparent in the formerly socialist countries in Eastern Europe, the Commonwealth of Independent States and parts of East and Southeast Asia, where there has been a continuing shift away from state ownership and control and towards implementation of market economies. Over the past decade a related trend has also been evident in the West, where the economic policies of the major industrialized countries have emphasized privatization and deregulation as key means of achieving a more efficient allocation of economic resources.¹

On the other hand, there are concerns about the vitality and competitiveness of the established industrial economies and their continuing ability to deliver high and rising standards of living for their citizens. In Canada, productivity growth in the manufacturing sector was stagnant for most of the past decade.² In the early 1990s, real disposable income was at or below levels achieved in the late 1970s, prior to the two recessions of the early 1980s and 1990s.³ Although economic growth in Canada has recently begun to move forward, following a decade of far-reaching restructuring,⁴ ensuring sustainable growth remains a critical concern for

¹ See OECD, *Regulatory Reform, Privatization and Competition Policy* (Paris: 1992).

² Richard Dion and Robert Lafrance, "Productivity and Competitiveness of Canadian Firms Since 1980," *Bank of Canada Review*, Spring 1993, pp. 43-56. For a more detailed analysis, see P. Someshwar Rao and Tony Lemprière, *Canada's Productivity Performance* (Ottawa: Canada Communication Group, 1992).

³ Statistics Canada, *Income After Tax, Distributions by Size in Canada, 1991* (13-210).

⁴ "Economy surges 6.4 percent: Consumers, business lead best quarterly growth in nearly 7 years," *Globe and Mail*, September 1, 1994, p. B1. For background on the underlying process of restructuring, see *Canada's Economic and Financial Prospects* (Royal Bank of Canada, Fall 1993), and Alexander Ross and Randall Litchfield, "The New Industrial Revolution," *Canadian Business*,
(continued...)

Canadian policy makers. In the United States there is also wide recognition of the need for measures to ensure future productivity and income growth.⁵

The implications of globalization and technological change for society's disadvantaged groups are also a continuing source of concern. Intense global competition for goods and services as well as specialized labour skills have generated extensive unemployment among less skilled workers and widening income disparities in the established industrial economies.⁶ Indeed, the inequality of both incomes and wealth in advanced industrial countries such as the United States has risen to levels not experienced since before World War II.⁷ Even for skilled workers, technological change and related trends are creating uncertainty with respect to previously stable career paths and family incomes.⁸

In this context, there is a renewed interest in the role of government in creating the conditions for promoting national competitiveness and prosperity.⁹ There is also increased interest in the role of competition (antitrust) policy and its implications for industrial restructuring.¹⁰ Michael Porter's work on the competitive advantage of nations argues that competition policy plays a key role in fostering innovation and the

(...continued)

December 1993, pp. 24-27.

⁵ See [U.S.] Competitiveness Policy Council, *Promoting Long-Term Prosperity* (Third Report to the President and the Congress, May 1994).

⁶ Robert Reich, *The Work of Nations* (New York: Knopf, 1991), pp. 208-224.

⁷ Paul Krugman, *The Age of Uncertainty* (1991), pp. 19-22.

⁸ A significant characteristic of the Canadian economy in the 1990s is the increased volatility of family incomes as compared to previous decades. See Economic Council of Canada, *The New Face of Poverty: Income Security Needs of Canadian Families* (Ottawa: 1992).

⁹ "Government has an important role to play in setting the stage and enabling the private sector to adjust to changing circumstances.... It is the job of government not to protect entrepreneurs against all failure but rather to create the best economic conditions and institutions to allow entrepreneurs to get on with the job." *Creating Opportunity: The Liberal Plan for Canada* (Liberal Party of Canada, September 1993), pp. 43-44. Related themes are expressed in U.S., Competitiveness Policy Council, *supra*, note 5.

¹⁰ See Calvin S. Goldman and Joel T. Kissack, "The Role of Competition Policy in Canada's Industrial Policy," *Canada-United States Law Journal*, vol. 19, 1993, pp. 105-130.

upgrading of products and production processes.¹¹ Conversely, others argue that competition policy may pose an obstacle to efficient industrial restructuring.¹² At a minimum, it is widely recognized that competition policy has become a key element of national and international economic policy and, consequently, it will play a significant part in the allocation of economic resources in the global economy of the 1990s.¹³

The growing importance of competition policy as an aspect of national economic policy is particularly evident in Canada. This reflects the overhaul and strengthening of Canadian competition legislation in 1986, a long-run trend toward acceptance of market-oriented policies and decreasing reliance on government ownership and industry-specific regulation.¹⁴ The central importance of competition law as an aspect of Canadian economic policy was recently recognized by the Supreme Court of Canada in a landmark decision upholding the validity of a key section of the legislation in relation to the *Charter of Rights and Freedoms*. In its decision, the Court observed that the *Competition Act* "is central to Canadian public policy in the economic sector".¹⁵

More broadly, the current interest in competition policy reflects growing recognition of the importance of business framework laws, policies and institutions as determinants of national economic prosperity and progress.¹⁶ In this regard, a consensus is emerging among economic theorists that institutions and framework policies are a critical – arguably,

¹¹ Michael Porter, *The Competitive Advantage of Nations* (New York: Free Press, 1990). For discussion, see Part II, *infra*.

¹² See, generally, Lester C. Thurow, *Head to Head: The Coming Economic Battle Among Japan, Europe and America* (New York: William Morrow, 1992).

¹³ See Sylvia Ostry, *Governments and Corporations in a Shrinking World: Trade and Innovation Policies in the United States, Europe and Japan* (New York: Council on Foreign Relations, 1990).

¹⁴ See Bureau of Competition Policy, *Canadian Competition Policy: Its Interface With Other Economic and Social Policies* (Consumer and Corporate Affairs Canada, September 1989), pp. 12-21.

¹⁵ *R. v. Nova Scotia Pharmaceutical Society et al* [henceforth the "PANS" decision] (1992) 43 C.P.R. (3d) (Supreme Court of Canada, July 9, 1992). For discussion of the specific implications of this case, see Part VI, *infra*.

¹⁶ In this paper, the term "framework laws and policies" refers to measures that set the broad parameters within which business operates (e.g., competition, intellectual property and international trade policies as well as regulations governing capital markets) as opposed to extensive, industry-specific regulations.

the most critical – factor in determining national growth rates.¹⁷ Framework policies have a direct effect on incentives for efficient capital accumulation, technological diffusion and the upgrading of firms' products, production processes and marketing arrangements. They also shape (and reflect) the evolution of societies in other more subtle ways, such as in influencing attitudes toward innovation and adjustment to change. The role of framework policies is not limited to the established industrial economies. It is increasingly recognized, for example, that the adoption of market-oriented framework policies – as opposed to more intrusive forms of government intervention – played a key role in the rapid growth of South Korea and the other Southeast Asian “Tigers” in the 1980s.¹⁸

Canadian competition law and policy already contain significant elements that respond to the needs of a globalizing economy. These include the provision of an efficiency gains defense and the recognition of the role of foreign competition as factors to be considered in merger cases, as well as specific statutory provisions relating to joint ventures and specialization agreements.¹⁹ These features of the legislation, which were adopted in 1986, anticipated developments such as regional and global trade liberalization as reflected in the Canada-U.S. Free Trade Agreement (FTA), the North American Free Trade Agreement (NAFTA) and the successful conclusion of the Uruguay Round of the GATT multilateral trade negotiations. They embody a clear intent to ensure that competition policy is supportive of efficiency gains.²⁰

Nevertheless, competition policy in Canada warrants the ongoing attention of policy makers, particularly in light of developments such as

¹⁷ This “institutional” perspective on economic growth derives in part from Mancur Olsen, *The Rise and Decline of Nations: Growth, Stagflation and Social Rigidities* (New Haven: Yale University Press: 1984).

¹⁸ See World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (New York: Oxford University Press For the World Bank, 1993). This report observes that “the appropriate role of government is to ensure adequate investments in people, *provide a competitive climate for private enterprise*, keep the economy open to international trade, and maintain a stable macroeconomy.” (p.10; emphasis added.) For a somewhat contrasting perspective, see Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 1992).

¹⁹ For detailed discussion of these provisions, see Parts III and VI *infra*.

²⁰ George N. Addy, *The Canadian Competition Act As A Model of Flexible, Forward-Looking Competition Law* (Address to the Conference on the Promotion of Competitiveness in Mexico, Monterrey, Nuevo Leon, Mexico, October 5, 1993).

globalization and accelerating technological change. Globalization entails increased reliance on aspects of competition policy that can facilitate efficient industrial restructuring. Past empirical literature on the structural aspects of the Canadian economy shows that the Canadian economy has previously suffered from extensive structural deficiencies in the form of sub-optimal plant scale, limited product specialization and other related factors. These deficiencies, along with the small size of the Canadian economy relative to the United States, provide the basis for the special treatment that has historically been given to efficiency gains in the design and application of Canadian competition policy.²¹

In reviewing the role of Canadian competition law and policy, it is important to take into account the experience of foreign jurisdictions. In the global economy of the 1990s, the design of economic framework policies and institutions has itself become an important means by which jurisdictions compete with each other for access to the scarce technology, capital and skilled labour inputs which are essential to continuing prosperity.²² In this respect, it is important to ensure that competition law and policy in Canada are compatible and *competitive* with corresponding regimes of other major industrialized countries.

This Paper examines the relationship between competition policy and wider economic policy objectives relating to industrial restructuring and international competitiveness. The primary focus is on Canada, although competition law and policy regimes and their relation to industrial restructuring in a number of other major industrialized economies are also examined. In addition to present policies, the Paper considers a number of issues relating to the future role of competition policy as a dimension of economic policy.

Part II examines conceptual aspects of competition policy and their relation to industrial restructuring and international competitiveness in a globalized era. This includes an examination of present concerns regarding the productivity and competitiveness of Canadian industry and the role that competition policy plays in addressing those concerns.

²¹ R.S. Khemani, "Merger Policy in Small vs. Large Economies," in R.S. Khemani and W.T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991), chapter 9, pp. 205-223, at p. 208.

²² Ostry, *supra*, note 13.

Part III provides an overview of pertinent aspects of competition policy as it is now applied in Canada. This includes consideration of the objectives and orientation of the *Competition Act*, as well as specific provisions of the legislation dealing with mergers, joint ventures and specialization agreements. Part IV discusses the growing links between competition policy and other fields of economic policy, including various aspects of domestic and international economic policy.

Part V considers corresponding aspects of competition policy in several foreign jurisdictions, notably the United States, the European Community, the Federal Republic of Germany, France, the United Kingdom and Japan. Each of these jurisdictions illustrates a somewhat different approach to competition policy and provides a useful basis of comparison with Canada. Part VI elaborates on a number of issues regarding the future role of competition policy in Canada. These include issues relating to the substantive application of the *Act*, institutional and process matters and the links between competition policy and other economic framework policies. Part VII provides concluding remarks.

PART II

COMPETITION POLICY IN A GLOBALIZING ERA: A CONCEPTUAL OVERVIEW

Competitive Markets, Efficiency and the Role of Competition Policy

The role of competition policy in modern capitalist economies is based directly on economists' understanding of the optimizing properties of competitive markets. Specifically, competition ensures that the prices paid by consumers are equivalent to the marginal costs of producing individual goods and services. This facilitates the efficient allocation of resources throughout the economy ("allocative efficiency").²³ Competition is also generally believed to encourage firms to minimize their costs by adopting the best available technologies and organizational forms. This is sometimes referred to as "X-efficiency".²⁴ From this perspective, the role of competition policy is to deter or remedy business transactions and practices that undermine efficiency by impeding the competitive process.²⁵

While the benefits of competitive markets are widely accepted, there has been considerable debate in the past as to the need for competition policy to ensure their continued existence and satisfactory performance. Indeed, the role of competition policy has been questioned on several

²³ See F.M. Scherer, *Industrial Market Structure and Economic Performance* (Boston: Houghton Mifflin, second edition, 1980), pp. 13-14.

²⁴ The concept of X-efficiency was originated in Harvey Leibenstein, "Allocative Efficiency vs. X-Efficiency," *American Economic Review*, vol. 56, June 1966, pp. 392-415. Although Leibenstein's modelling assumptions have been questioned by subsequent commentators, support for the existence of X-inefficiency using different theoretical assumptions is provided in Ulrich Kamecke, "The Role of Competition For An X-inefficiently Organized Firm," *International Journal of Industrial Organization*, vol. 11, 1993, pp. 391-405. Kamecke's analysis emphasizes the existence of incentives for managers to engage in excessive investments to strengthen their bargaining position in contract renegotiation within firms. In addition to the above-noted 'static' sources of efficiency, it is sometimes suggested that competitive markets foster a high degree of innovation (i.e., dynamic efficiency). There is, however, a wide divergence of views on this point. See, Part VI, *infra*.

²⁵ This normative view of the role of competition policy contrasts with the 'public choice' approach, which emphasizes that competition policy and legislation, like all forms of government intervention, may be viewed as the outcome of a process of bargaining among competing interest groups in a 'political marketplace.' See Frank Mathewson, "Competition Policy in the Menu of Government Actions," in Khemani and Stanbury, eds., *supra*, note 21, pp. 13-19.

grounds. On one level, critics such as Armentano argue that any threat of monopolization or cartelization is likely to be transitory, and consequently, that the benefits of competitive markets do not depend on continuing government intervention.²⁶ They also question the role of competition or antitrust law on ideological grounds (i.e., as a limitation on "natural" rights of private property and freedom of contract). On another level, "Chicago School" theorists led by Robert Bork have argued that, in the past, antitrust policy (particularly in the United States) has interfered unnecessarily with allegedly efficient business practices, notably in the area of vertical contractual relations.²⁷ These critics nonetheless support the core role of competition law and policy in dealing with interfirm agreements and mergers that restrict competition.²⁸

In the specific area of merger policy, analysts such as Eckbo and Weir have questioned the fundamental hypothesis that mergers or related anti-competitive practices create market power. This challenge is based primarily on empirical analysis of the effects of mergers on the stock prices of rival firms. On this basis, Eckbo and Weir argue that antitrust challenges of mergers should be abandoned.²⁹

Although scholarly debate surrounding the effect of antitrust policies will undoubtedly continue, recent research on industrial organization effectively challenges the premise that antitrust intervention to counteract the exercise of market power is superfluous. This analysis shows clearly that mergers and inter-firm agreements can indeed cause significant welfare losses.³⁰ Studies of industries with market power have also confirmed that

²⁶ Domenick Armentano, *Antitrust and Monopoly: Anatomy of A Policy Failure* (New York: John Wiley and Sons, 1984).

²⁷ Robert H. Bork, *The Antitrust Paradox* (New York: Basic Books, 1978). See also Frank H. Easterbrook, "Vertical Arrangements and the Rule of Reason," *Antitrust Law Journal*, vol. 5.3, Issue 1, 1984, pp. 135-173.

²⁸ This is certainly true of Bork. In discussing U.S. antitrust doctrine relating to horizontal price fixing and market sharing agreements, he states "Its contributions to consumer welfare over the decades have been enormous." See, *id.*, p. 263.

²⁹ See, e.g., B.E. Eckbo and P. Weir, "Antimerger Policy Under the Hart-Scott-Rodino Act: A Re-examination of the Market Power Hypothesis," *Journal of Law and Economics*, vol. 28, 1985, pp. 119-149.

³⁰ For a useful overview of pertinent theoretical developments, see Alexis Jacquemin and Margaret
(continued...)

such power is prevalent and is attributable, in good measure, to anti-competitive conduct.³¹

With regard to the specific contributions of Eckbo and Weir, more recent analysis suggests that their policy inferences are misplaced. Specifically, their failure to find evidence of anti-competitive effects of mergers by examining stock market data can be attributed to the multiproduct nature of many participating firms and/or to other factors.³² Indeed, it may simply reflect the effectiveness of existing merger policies in deterring genuinely anti-competitive mergers.³³ Analysis of individual mergers undertaken early in the history of the U.S. *Sherman Act* (before the legislation acquired an enforcement history sufficient to deter anti-competitive conduct) indicates the presence of significant anti-competitive effects.³⁴ In this context, merger enforcement in both Canada and the United States focuses on only a small minority of transactions that are considered to have potentially anti-competitive consequences.³⁵

Recent analysis also suggests that a vigorous competition policy can contribute substantially to the success and vitality of firms, as well as protecting consumers from the exercise of market power. This is a key finding of Michael Porter's research on the competitive advantage of nations. According to Porter, domestic rivalry contributes directly to the international competitiveness of a nation's firms:

(...continued)

E. Slade, "Cartels, Collusion and Horizontal Merger," in Richard Schmalensee and Robert D. Willig, eds., *Handbook of Industrial Organization* (Amsterdam: North-Holland, 1989), chapter 7, pp. 416-472.

³¹ Timothy F. Bresnahan, "Empirical Studies of Industries with Market Power," in Schmalensee and Willig, eds., *id.*

³² R.P. McAfee and M.A. Williams, "Can Event Studies Detect Anti-competitive Mergers?" *Economics Letters*, vol. 28, 1988, pp. 199-203, G. Werden and M.A. Williams, "The Role of Stock Market Studies in Formulating Antitrust Policy Toward Horizontal Mergers," *Quarterly Journal of Business and Economics*, vol. 28, 1989, pp. 3-21, and Laurence Schumann, "Patterns of Abnormal Returns and the Competitive Effects of Horizontal Mergers," *Review of Industrial Organization*, vol. 8, 1993, pp. 679-696.

³³ See Robin A. Praeger, "The Effects of Horizontal Mergers on Competition: The Case of the Northern Securities Company," *RAND Journal of Economics*, vol. 23, no. 1, Spring 1992, pp. 123-133.

³⁴ Praeger, *id.*

³⁵ See the discussion of Canadian and U.S. competition policies in Parts III and V, *infra*.

Among the strongest empirical findings from our research is the association between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry.... Domestic rivalry not only creates pressures to innovate but to innovate in ways that *upgrade* the competitive advantages of a nation's firms.³⁶

Porter goes on to say that "A strong antitrust policy ... is essential to the rate of upgrading in an economy".³⁷ He places particular emphasis on vigorous enforcement of competition laws in the areas of horizontal mergers, collusive behaviour (i.e., price fixing and market sharing) and strategic alliances.

Porter's view of the role of domestic rivalry and the specific contribution of competition policy in fostering competitive advantage has been questioned on various grounds. For example, McFetridge points out that the rapid growth of the Japanese and German economies following World War II was achieved without the benefit of vigorous competition law enforcement. On this basis, McFetridge suggests that causality may run from national competitive advantage to strong domestic rivalry rather than in the reverse direction (as Porter contends).³⁸

In response to McFetridge's observation, it should be noted that although over the past decade the enforcement efforts of the Japanese competition authorities have been characterized as weak, the post-war expansion was preceded by far-reaching structural deconcentration measures involving the systematic divestiture of previously highly concentrated enterprises. These measures had the specific purpose of creating a competitive industrial structure.³⁹ Furthermore, during the period of high growth, many leading sectors of the Japanese economy (e.g., autos) were highly competitive in structural terms. Thus, the Japanese experience

³⁶ Porter, *supra*, note 11, p. 117. Porter's theory of the competitive advantage of nations provides a new paradigm for understanding patterns of international trade and investment. It encompasses aspects of the classical theory of *comparative* advantage but emphasizes additional factors such as competitive rivalry, firm strategy, demand conditions and the existence of related/supporting industries. See Porter, chapters II and III.

³⁷ Porter, *supra*, note 11, p. 663.

³⁸ Donald G. McFetridge, *Globalization and Competition Policy* (Bell Canada Papers on Economic and Public Policy, September 1992), pp. 6-7.

³⁹ See Masu Uekusa, "Effects of the Deconcentration Measures in Japan," *Antitrust Bulletin*, Fall 1977, pp. 687-715, and Porter, *supra*, note 11, pp. 384-421.

does not necessarily contradict Porter's fundamental point regarding the relationship between domestic rivalry and dynamic efficiency, although it does suggest that the requisite degree of rivalry may be achievable through means other than conventional antitrust law enforcement.

The role of competition in fostering productivity improvement may also work through channels other than those identified by Porter. For example, recent research highlights competition as a specific factor in increasing the rate at which multinational enterprises transfer technology into host countries such as Canada. In particular, competition ensures a continuous inflow of the best available technology within individual enterprises, enabling them to keep pace with competitors.⁴⁰ This, in turn, enhances positive technological spillovers in the host country market, creating a "virtuous circle" of technological advancement and productivity growth.⁴¹ Competition may also foster productivity by spurring rapid adoption of improved managerial practices.⁴²

Further corroboration that competition policy has an important bearing on productivity growth and competitiveness is provided by the experiences of those countries that have, in the past, failed to maintain an effective body of competition law. For example, an OECD Economic Survey of Switzerland published in 1992 cites extensive restrictions on competition in tradable and non-tradable goods and services industries and the lack of a modern competition law as key impediments to achieving productivity improvement and economic growth.⁴³ The survey calls for "radical" strengthening of competition policy to remedy this deficiency and facilitate Swiss adaptation to the ongoing process of European economic integration.

⁴⁰ Magnus Blomstrom, "Host Country Benefits of Foreign Investment," in D. McFetridge, ed., *Foreign Investment, Technology and Economic Growth*, (Calgary: University of Calgary Press, Investment Canada Research Series, 1992), ch. 4, pp. 100-101.

⁴¹ Blomstrom, *id.*

⁴² Keith Newton, *Management Strategies For Productivity and Competitiveness: Organizational Innovation, Total Quality Management and Human Resource Management* (Industry Canada, mimeo, February 1994).

⁴³ *OECD Economic Surveys: Switzerland* (Organization for Economic Cooperation and Development, 1992), Part III, pp. 68-102.

In reflecting on the role of competition policy in a modern market economy, it is important to recognize that in some circumstances efficiency as an overall objective may justify arrangements that to some degree limit competition. Arrangements such as mergers and joint ventures which sometimes limit competition may nevertheless enhance overall economic welfare if they yield offsetting cost reductions through economies of scale, synergies or in other ways. Analytically, this is acknowledged in the "Williamson trade-off" between competition and efficiency in merger evaluations.⁴⁴

An approach to competition policy that takes into account possible cost savings for producers as well as changes in consumer surpluses resulting from business transactions is sometimes referred to as a "total welfare" approach. Such an approach can be contrasted with a "consumer surplus" approach, which gives no particular weight to cost savings for producers that are not passed on to consumers.⁴⁵ Arguably, a total welfare approach is particularly appropriate in small economies such in Canada, where large market shares and high levels of concentration may be necessary to achieve economies of scale and specialization.⁴⁶ Such an approach may not be necessary in large economies such as in the United States, where the relevant technical efficiencies can be achieved at lower concentration levels.

As discussed later in this Paper, competition policy aimed at industrial restructuring in Canada does embody a total welfare approach. In contrast, U.S. antitrust policy (at least as it applies to mergers) generally

⁴⁴ See Oliver E. Williamson, "Economies as an Antitrust Defense: The Welfare Tradeoffs," *American Economic Review*, vol. 58, March 1968, pp. 18-36, and Williamson, "Economies As An Antitrust Defense Revisited," *University of Pennsylvania Law Review*, 1977.

⁴⁵ Formally, a total welfare approach takes into consideration changes in consumer surplus as well as cost savings for producers (i.e., efficiencies) that accrue in either the relevant antitrust market or in other affected markets. For elaboration, see Paul S. Crampton, "Alternative Approaches to Competition Law: Consumers' Surplus, Total Surplus, Total Welfare and Non-efficiency Goals," *World Competition*, vol 17, no. 3, March 1994, pp. 55-86.

⁴⁶ As Khemani has remarked, "the possibility that inefficient plant size or insufficiently long production runs are endemic to Canadian industry cannot be ignored when administering competition policy." R.S. Khemani, "Merger Policy in Small vs. Large Economies," in Khemani and Stanbury, eds., *supra*, note 21, pp. 205-223, at p. 208.

reflects a consumer surplus approach.⁴⁷ In practice, however, the two approaches overlap considerably and are applied in ways that yield similar results in many cases.

In addition to its economic functions, it is sometimes suggested that competition policy serves wider, political-economic purposes.⁴⁸ For example, by making market access easier, competition policy can, in some circumstances, promote the growth of small and medium-sized enterprises as well as facilitate entry by foreign firms.⁴⁹ It can also help to promote a pluralistic economy and society.⁵⁰

Finally, Green has suggested that, by providing a set of basic "rules of the game," competition policy promotes public confidence in the competitive market system.⁵¹ This, in turn, helps to avoid other, more intrusive forms of government intervention (e.g., industry-specific regulatory controls) which can undermine the system. In this way, it may help to maintain a democratic political order.⁵² Arguably, these socio-

⁴⁷ See Part V, *infra*. For background, see Charles F. Rule, *Antitrust, Consumers and Small Business* (Remarks before the 21st New England Antitrust Conference, Harvard Law School, Cambridge, Mass., November 13, 1987).

⁴⁸ Paul K. Gorecki and W.T. Stanbury, *The Objectives of Canadian Competition Policy* (Montreal: Institute for Research on Public Policy, 1984).

⁴⁹ Reference to these objectives of competition policy is made in the purpose clause of the *Competition Act*. See Part III, *infra*.

⁵⁰ For related discussion, see R.S. Khemani, D.M. Shapiro and W.T. Stanbury, eds., *Mergers, Corporate Concentration and Power in Canada* (Halifax: Institute For Research on Public Policy, 1988).

⁵¹ C. Green, "Industrial Organization Paradigms, Empirical Evidence and the Economic Case for Competition Policy," *Canadian Journal of Economics*, vol. XX, no. 3, August 1987, pp. 482-505.

⁵² "Since unfettered free enterprise (capitalism) might not be acceptable to most of the citizens of western democracies, some limitations on the conduct of business may be necessary.... [An] appropriate set of antitrust laws may contribute to the acceptability of the [market system] while requiring a minimum degree of direct intervention or discretionary control by the legislature.... Ultimately, then the ... case for competition laws is that they are a public good, economizing on other forms of government intervention which threaten the capitalist system of equity and the viability of democracy." Green, *id.* Green's analysis builds on Joel B. Dirlam and Alfred E. Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* (Ithica, N.Y.: Cornell University Press, 1954) and on Dan Usher, *The Economic Prerequisite to Democracy* (Oxford: Basil Blackwell, 1981).

political aspects of competition policy are independent of its direct economic benefits.⁵³

The Implications of Globalization and Foreign Competition for the Application of Competition Policy

Globalization and growing foreign competition in many industries have raised important issues concerning competition policy. To begin with, some analysts are now suggesting that the pervasiveness of global competition may be reducing the need for a vigorous domestic competition policy in many industries.⁵⁴ Global competition has also generated interest in new forms of business arrangements which, it is argued, are necessary to compete in a global environment.⁵⁵ These include strategic alliances, industrial clusters and other, more limited cooperative arrangements such as R&D and production joint ventures.⁵⁶ According to some experts, the failure to facilitate such arrangements has been a principal factor impeding the performance of North American industries.⁵⁷

In reflecting on these questions, it must be emphasized that there are significant differences between competition policy in Canada and the other jurisdictions (most notably the United States) with respect to innovation and industrial restructuring. As elaborated in Part III, these include the way in which efficiency gains are treated in merger transactions, the availability in Canada of a special exemption for registered specialization agreements, and

⁵³ Green, *supra*, note 51.

⁵⁴ See, e.g., Thurow, *supra*, note 12.

⁵⁵ See, e.g., Joseph R. D'Cruz and Alan M. Rugman, *New Compacts for Canadian Competitiveness* (Kodak Canada Inc.: March 1992).

⁵⁶ Strategic alliances may be broadly defined as inter-firm arrangements that entail a closer relationship than mere contractual links, but something less than an outright merger. Industrial clusters are networks of related and supporting industries and users. See D'Cruz and Rugman, *id.*

⁵⁷ In a 1989 assessment of industrial competitiveness in the United States, Robert Solow and his colleagues observed that "Undeveloped cooperative relationships between individuals and between organizations stand out in our industry studies as obstacles to technological innovation and the improvement of industrial performance..." Michael L. Detouos, Richard K. Lester and Robert M. Solow, *Made in America: Regaining the Productive Edge* (Cambridge: MIT Press, 1989), p. 7. For related discussion, see Thomas M. Jorde and David J. Teece, "Innovation, Cooperation and Antitrust," in Jorde and Teece, eds., *Antitrust, Innovation and Competitiveness* (New York: Oxford University Press, 1992).

a different statutory regime respecting joint ventures. Nevertheless, the globalization-based critique of competition policy raises generic issues that merit careful consideration in Canada as well as in other jurisdictions.

There is no doubt that, where it is present, foreign competition helps to discipline the exercise of market power by domestic firms. This is a key factor taken into account by antitrust authorities in assessing business transactions and practices.⁵⁸ Indeed, in a 1989 interview in which he discussed the implications of internationalization for antitrust, Charles F. Rule, then U.S. Assistant Attorney General, remarked, "Effective foreign competition serves as a more expedient and efficient check on competitive abuses by domestic firms than U.S. antitrust enforcers can ever hope to be".⁵⁹ It is important to note, however, that this argument applies, at best, only to genuinely tradeable goods that are not subject to import restrictions. In particular, the effectiveness of foreign competition in constraining the exercise of market power with respect to individual product and geographic markets can be limited by tariff or non-tariff barriers to trade or other factors such as transportation costs and asymmetries in information relating to market opportunities for foreign competitors.⁶⁰ Such factors tend to preclude a rapid expansion of imports in response to domestic price increases – a condition which is necessary if imports are to prevent the exercise of market power. In other cases, imports may fail to satisfy the specific requirements of domestic users in terms of product quality, timeliness of delivery, etc. Imports can also be adversely affected if distribution channels are controlled by domestic distributors and are used for exclusionary purposes. Thus, global competition in a general sense is *not* sufficient to ensure vigorous competition in all markets for goods and services in a country.

Recent economic analysis affirms that in many circumstances foreign competition is not very effective in disciplining the exercise of

⁵⁸ The role of foreign competition is explicitly recognized as a factor to be taken into account in assessing transactions under the merger provisions of the Canadian *Competition Act*. It is also implicit in the delineation of relevant markets under other sections of the *Act*. See Part III, *infra*.

⁵⁹ "60 Minutes With Charles F. Rule," Proceedings of the American Bar Association, Section of Antitrust Law, Reprinted in *Antitrust Law Journal*, vol. 58, 1989, pp. 377-397, at 382.

⁶⁰ For discussion, see J.J. Leitzinger and K.L. Tamor, "Foreign Competition in Antitrust Law," *Journal of Law and Economics*, vol. XXVI, April 1983, pp. 87-102.

market power domestically.⁶¹ For example, in circumstances where foreign suppliers have market power, domestic prices will not be reduced to the full extent of a tariff cut. Indeed, in any circumstance where the supply of imports is not perfectly elastic, a reduction in tariffs is unlikely to be fully matched by a reduction in the domestic price.⁶² The impact of freer international trade on domestic prices can also be diluted by the strategic responses of domestic oligopolists. A tariff reduction can even lead to an increase in domestic prices if competition among domestic suppliers is imperfect and the tariff reduction makes import deterrence through low pricing unfeasible.⁶³ Such findings as these imply that trade liberalization and globalization should not, in general, be viewed as satisfactory substitute for an effective competition policy in constraining the exercise of market power domestically.

The globalization-based critique of the role of competition policy must also be qualified in light of Michael Porter's research on the competitive advantage of nations. As noted earlier, Porter's work is, in a sense, a re-affirmation of the X-efficiency view that competitive rivalry provides a necessary incentive for firms to minimize costs while maximizing the value of their output. This, in turn, enhances their competitiveness in international markets.

With regard to the new forms of business arrangements, in principle, these can serve important efficiency-related objectives. Strategic alliances, in particular, represent an intermediate level of integration that can achieve synergies or other gains while preserving a higher degree of flexibility than other forms of integration for the participating firms.⁶⁴ However, in order to assess their ultimate competitive significance, more empirical information is needed concerning the nature and purposes of such arrangements. The limited available evidence suggests that the new forms of business arrangement have not been unqualified successes. According to

⁶¹ For a survey of pertinent theoretical models, see Tim Hazledine, "Trade Policy as Competition Policy," in Khemani and Stanbury, eds., *supra*, note 21, pp. 45-60.

⁶² Hazledine, *id.*, p. 48.

⁶³ Thomas W. Ross, "Movements Toward Free Trade and Domestic Performance With Imperfect Competition," *Canadian Journal of Economics*, vol. 21, August 1988, pp. 507-524.

⁶⁴ R.S. Khemani and L. Waverman, *Strategic Alliances: The Implications For Competition Policy* (OECD: Background paper, November 1992), pp. 4-5.

one recent analysis of cross-border alliances, roughly two-thirds of such alliances encountered serious managerial or financial difficulties within the first two years, although a number of them subsequently solved their problems.⁶⁵

With these qualifications, globalization has unquestionably raised important issues concerning the role and application of competition policy in the 1990s. In circumstances where foreign competition *does* effectively discipline the exercise of market power in domestic markets for goods and services, this clearly should be taken into account by competition authorities when assessing particular corporate transactions. Globalization has also spurred the implementation of new forms of business arrangement such as strategic alliances. While such arrangements are hardly a panacea, competition policy should not stand in the way of new business relationships when they are clearly pro-competitive. The issue of competition policy and new forms of business arrangements is discussed further in Part VI.

The Relevance of Empirical Studies of Structure and Performance in the Canadian Economy

Any review of the role of competition policy in Canada would be incomplete without considering the key findings of past empirical literature on the structure and performance of the Canadian economy. Among other characteristics, this literature highlights the existence of significant sub-optimalities in plant scale and specialization in the Canadian manufacturing sector. It should be noted that aspects of this literature now appear to be out of date. In fact, there is evidence that Canadian manufacturing industries have recently undergone significant restructuring to achieve efficiency gains.⁶⁶ Nonetheless, a brief review of some of the key findings is appropriate. As elaborated later in this Paper, recognition of the need to facilitate structural rationalization leading to productivity gains has been a key factor in the design and application of competition policy in Canada.

⁶⁵ See, e.g., Joel Bleeke and David Ernst, "The Way to Win in Cross-Border Alliances," in *Bleeke and Ernst, eds., Collaborating to Compete* (John Wiley and Sons, 1993), pp. 17-34. In this context, it is worth emphasizing that mergers also frequently encounter unforeseen difficulties leading to subsequent restructuring and/or voluntary disposal of assets.

⁶⁶ See Royal Bank of Canada, and Ross and Litchfield, *supra*, note 4. For discussion, see below.

Much of the empirical economic literature of the 1970s and 1980s propounded the existence of significant sub-optimalities in plant scale and specialization in the Canadian manufacturing sector. This work centered on the classic paradigm of Canadian industrial structure developed by Eastman and Stykolt in the mid-1960s, which was subsequently adapted by Harris and others in studies conducted in the mid-1980s as background to the Canada-U.S. free trade negotiations.⁶⁷ The paradigm emphasizes the role that import protection has played in conjunction with small domestic markets for goods and services in shaping the development of Canadian industries. It holds that these factors working in combination encouraged high levels of market concentration while simultaneously preventing firms from achieving potential economies of scale and specialization. The Eastman-Stykolt-Harris hypothesis received broad support from a number of empirical studies.⁶⁸

The literature affirms that suboptimal plant scale and specialization have coincided with high levels of concentration in markets for goods and services. In terms of statistical measures of concentration, research undertaken for the Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission) indicated that the majority of Canadian manufacturing industries could at that time be characterized as oligopolies.⁶⁹ In 92 percent of five-digit SIC commodity classifications in the manufacturing sector, the leading four (or fewer) firms accounted for 60 percent or more of total sales; in 82 percent of the commodity classifications, the leading four firms accounted for 80 percent

⁶⁷ H. Eastman and S. Stykolt, *The Tariff and Competition in Canada* (Toronto: MacMillan, 1967), and Richard Harris with David Cox, *Trade, Industrial Policy and Canadian Manufacturing* (Toronto: Ontario Economic Council, 1984).

⁶⁸ See John R. Baldwin and Paul K. Gorecki, *The Role of Scale in Canada-U.S. Productivity Differences* (Toronto: University of Toronto Press for the Royal Commission on the Economic Union and Development Prospects for Canada, 1985), J.R. Baldwin and P. Gorecki, *Trade, Tariffs and Relative Plant Scale in Canadian Manufacturing Industries: 1970-79* (Ottawa: Economic Council of Canada, Discussion Paper No. 232, 1983) and Donald J. Daly, "Rationalization and Specialization in Canadian Manufacturing," in D.G. McFetridge, ed., *Canadian Industry in Transition* (Toronto: University of Toronto Press for the Royal Commission on the Economic Union and Development Prospects for Canada, 1986), chapter 4, pp. 177-209.

⁶⁹ R.S. Khemani, "The Extent and Evolution of Competition in the Canadian Economy," in McFetridge, ed., *id.*, pp. 135-76.

or more of total sales. These data represent substantially higher levels of industry concentration than are observed in most industrial countries.⁷⁰

Similarly, Khemani and Shapiro found that in conjunction with tariffs, high concentration levels facilitated oligopolistic coordination among incumbent firms.⁷¹ The combined effects of tariffs and market concentration on pricing and profit margins have also been analyzed. In his 1985 study, Hazeldine found evidence for a strong interactive effect of market concentration and tariffs on industry prices and profitability.⁷²

More recent literature on productivity in Canadian manufacturing industries in the 1980s has reinforced concerns regarding suboptimal scale and specialization in Canadian manufacturing industries. This literature calls attention to the deep slowdown in growth experienced by Canadian manufacturing industries during the 1980s compared to performance in other advanced industrial countries.⁷³ The gap between Canadian and U.S. manufacturing industries, in particular, has widened considerably over the past decade.⁷⁴

Three points should be emphasized regarding these findings of the classical empirical literature on the structure of the Canadian economy.

⁷⁰ SIC commodity classifications do not necessarily correspond to "relevant antitrust markets", which may be delineated for competition policy purposes. Unlike SIC classifications, relevant markets are specifically developed to facilitate the evaluation of whether market power can be exercised. U.S. evidence indicates that even five-digit SIC classifications tend to be larger than the corresponding relevant antitrust markets. Thus, the implications of high concentration levels as measured by SIC classifications are unclear. See Russell Pittman and Gregory Werden, "The Divergence of SIC Industries from Antitrust Markets: Indications From Justice Department Merger Cases," *Economics Letters*, vol. 33, 1990.

⁷¹ R.S. Khemani and D.M. Shapiro, "The Determinants of New Plant Entry in Canada," *Applied Economics*, vol. 18, no. 11, November 1986, pp. 1243-57.

⁷² Tim Hazeldine, "The Oligopoly Problem With Import Competition and Tariffs" (Paper presented to the Canadian Economics Association Meetings, Montreal, 1985).

⁷³ Rao and Lemprière, *supra*, note 2. See also Economic Council of Canada, *Pulling Together: Productivity, Trade and Innovation* (Ottawa: Supply and Services Canada: 1992). It should be noted that in recent months, there have been signs of renewed productivity growth. Much of this growth appears to be attributable to cyclical employment losses during the recent recession.

⁷⁴ Notwithstanding the phenomenal growth of the service sector in recent times, the manufacturing sector remains critical to export performance and the overall prosperity of Canadians. Roughly 80% of the value of Canadian exports consists of manufactured goods. Rao and Lemprière, *id.*, p. 15.

First, as noted, there is evidence that some Canadian manufacturing industries have recently undergone significant restructuring to achieve efficiency gains.⁷⁵ Nonetheless, the scope for restructuring remains limited by barriers to external and internal (interprovincial) trade as well as federal and provincial regulation in many industries. Second, the poor productivity record of Canadian manufacturing industries during the 1980s was attributable to a variety of factors – a number of which are outside the purview of competition policy.⁷⁶ Third, to the extent that suboptimal structure and performance in the Canadian manufacturing sector are relevant to competition policy, they do not necessarily favour more lenient approaches. Indeed, as already noted, the empirical literature re-affirms the direct relationship between the structural deficiencies of the Canadian economy and the apparent lack of competitive rivalry in many markets for goods and services.⁷⁷ The disaggregated industry case analyses carried out for the Canadian Porter study also point to the lack of vigorous competitive rivalry in Canadian manufacturing as a key factor in inhibiting the upgrading of Canadian firms to face competitive challenges abroad.⁷⁸ This suggests that, in general, the upgrading of industries will be facilitated rather than deterred by the appropriate application of competition law as well as by measures that provide Canadian firms with access to larger international markets.

Nevertheless, the extent of structural deficiencies in the Canadian manufacturing sector has in the past been taken by governments to justify special treatment for inter-firm arrangements that facilitate efficiency gains.

⁷⁵ See Royal Bank of Canada, and Ross and Litchfield, *supra*, note 4. These findings of business-oriented literature are reinforced by analysis of turnover statistics. For example, based on their analysis of firm-level turnover in Canadian manufacturing industries, Baldwin and Gorecki find that substantial competitive restructuring has occurred within the Canadian manufacturing sector in recent years, notwithstanding relative lack of change in market concentration measures. See John R. Baldwin and Paul K. Gorecki, "Firm Turnover and Market Structure: Concentration Statistics As A Misleading Practice," in Khemani and Stanbury, eds., *supra*, note 21, chapter 12, pp. 281-314. Arguably, these findings validate the role of competition policy in facilitating efficient competitive restructuring in Canadian industries.

⁷⁶ These factors include weak investment in human capital upgrading by firms as well as issues related to the taxation and education systems. See *Pulling Together*, *supra*, note 73.

⁷⁷ See, in particular, Khemani and Shapiro, *supra*, note 71.

⁷⁸ Michael E. Porter and Monitor Company, *Canada at the Crossroads: The Reality of A New Competitive Environment* (Study prepared for the Business Council on National Issues and the Government of Canada, October 1991).

There is no intrinsic conflict in a policy acknowledging that, normally, efficiency is likely to be fostered by vigorous competition, while recognizing that this may not always be the case.⁷⁹ A key challenge for competition policy authorities throughout the world is to clarify the circumstances in which inter-firm cooperation is indeed likely to foster greater efficiency in both a static and dynamic sense.

The Institutional Requirements For an Effective Competition Policy

The institutional framework of competition policy is crucial to its overall effectiveness. An effective competition agency has several attributes.⁸⁰ First, it is independent, in the sense of being insulated from political pressures in respect of its ability to investigate and prosecute individual cases.⁸¹ In this respect, competition agencies are much like other law enforcement agencies whose decisions bear directly on individuals and firms. Second, an effective competition agency is transparent, in the sense of following well-developed administrative procedures that are publicly disclosed. In this regard, many competition agencies (including the Canadian Bureau of Competition Policy) issue Guidelines to explain the bases of their enforcement decisions.⁸² The relatively high transparency of competition policy distinguishes it from other instruments of government policy.⁸³

⁷⁹ Arguably, the rationale for the present total welfare approach in Canada will become less compelling if at some point in the future the Canadian economy becomes fully integrated with the wider North American market. In such circumstances, it is more likely that the relevant technical efficiencies could be achieved without any lessening of competition in particular industries.

⁸⁰ For a useful summary of key institutional features of an effective competition policy, see R. (Shyam) Khemani, *Competition Law: Some Guidelines For Implementation* (The World Bank, FDP Note No. 14, July 1994), box on p. 4.

⁸¹ In Canada, the Director of Investigation and Research is an independent law enforcement official responsible for the administration and enforcement of the *Competition Act*. See the discussion and references in Part III, *infra*.

⁸² For examples of Guidelines issued by the Canadian Bureau of Competition Policy, see Part III, *infra*.

⁸³ See Arthur Kaell, *International Linkages: Competition and Industrial Policies* (Canadian Discussion Paper, OECD Committee on Competition Law and Policy, November 1992).

Competition agencies should also be subject to appropriate administrative checks and balances. Normally (as in Canada), this is achieved through the separation of the investigative and adjudicative functions in competition law administration, and the provision of rights of appeal to the courts regarding issues requiring legal interpretation.

A competition agency can also be made more effective by giving it statutory powers to intervene in the proceedings of industry-specific and other government regulatory bodies.⁸⁴ This is important since the proceedings of such bodies often have a direct effect on competition in specific markets. Finally, the ability to promote competition is also greatly enhanced where there are well established means for the agency to assess and contribute to broader government policies which have a bearing on the competitive market system.⁸⁵ The links between competition policy and related fields of economic policy are discussed in detail later in this Paper.

⁸⁴ In Canada, sections 125 and 126 of the *Competition Act* provide the Director of Investigation and Research with statutory powers to intervene in the proceedings of federal and (with consent) provincial regulatory agencies.

⁸⁵ Khemani, *supra*, note 80.

PART III

KEY FEATURES OF COMPETITION POLICY IN CANADA

This Part reviews the content and application of competition policy in Canada. The discussion focuses on policy design and experience subsequent to the major amendments to Canadian competition legislation in 1986. The first section discusses the basic institutional structure of competition policy in Canada. The next section reviews the objectives and orientation of competition policy as it is practised in Canada. The third section provides an overview of the key provisions of the present *Competition Act*. The last section is devoted to some aspects of the post-1986 experience relating to the *Act* and its implications for industrial restructuring.

The Structure of Competition Policy in Canada

Historically, competition policy in Canada has encompassed four inter-related functions:

- to administer and enforce the *Competition Act*, including both its criminal and civil provisions;
- to intervene before federal and provincial regulatory agencies responsible for making decisions that affect competition in particular markets;
- to provide input to the design and implementation of other government policies that affect the competitive market system; and
- to represent Canada's interests in relevant international forums.

Taken together, these functions embody a distinct model of competition policy, which recognizes that law enforcement is not the only means to foster competition, and that making a case for government policies that are

pro-competitive is a key means through which antitrust agencies can promote a more competitive environment.⁸⁶

The principal officials and agencies responsible for the administration of competition law and policy in Canada are:

- The Director of Investigation and Research under the *Competition Act*, who is responsible for the conduct of inquiries under the *Act*, the bringing of applications to the Competition Tribunal respecting civil (non-criminal) matters and the referral of criminal matters to the Attorney-General for prosecution.
- The Bureau of Competition Policy, which is the staff organization to the Director.
- The Attorney General, who prosecutes criminal matters in the courts, on behalf of the Director.
- The Competition Tribunal, which adjudicates civil matters on application by the Director.

The Director of Investigation and Research is an independent law enforcement official responsible for the administration and enforcement of the *Competition Act*.⁸⁷ He is appointed by, and serves at the pleasure of, the Governor in Council. The Director's role is to investigate, not to adjudicate and he is empowered to conduct investigations with respect to both the criminal and civil provisions of the *Act*. Evidence of criminal matters is referred to the Attorney General of Canada for possible prosecution in the criminal courts. With regard to civil matters, the Director makes applications to the Competition Tribunal for remedial orders designed to preserve competition.⁸⁸

⁸⁶ See Bureau of Competition Policy, *supra*, note 14, Chapter II. For a broader, institutional assessment of competition policy in Canada, see G. Bruce Doern, *Canadian Competition Policy Institutions: A Macro and Micro Political Analysis* (Paper prepared for the Conference on National Competition Policy Institutions in a Global Market, Ottawa, May 25-26, 1994).

⁸⁷ George N. Addy, *Private Rights and the Public Interest Under Canada's Competition Act* (Remarks to a Seminar on Antitrust in a Global Economy, Fordham Corporate Law Institute, October 21-22, 1993).

⁸⁸ Important procedural safeguards applicable to the exercise of the Director's powers are discussed in Addy, *id.*

The Competition Tribunal is a distinctly Canadian institution that adjudicates complex cases involving competition law.⁸⁹ It is comprised of judges drawn from the Federal Court, Trial Division, and lay members, who are typically economists or individuals with business experience.⁹⁰ The Tribunal operates at arm's length of the Director.⁹¹ Only the judicial members of the Tribunal may rule on questions of law.⁹²

The Bureau of Competition Policy has developed a program of compliance designed to inform the public regarding the application of the *Competition Act*.⁹³ Pursuant to this program, the Director issues enforcement guidelines that describe the agency's enforcement policies relating to merger review,⁹⁴ predatory pricing,⁹⁵ price discrimination⁹⁶ and misleading advertising.⁹⁷ At the case-specific level, the compliance program provides for a system of advisory opinions under which the Director invites parties to request an opinion on whether the implementation of a proposed business plan or practice would raise issues under the *Competition Act*. In the context of merger review, the *Act* sets out a formal process whereby the Director may issue an advance ruling certificate. The issuance of such a certificate is a signal to parties to a proposed transaction that, based on the information available, there are not

⁸⁹ "The specialized nature of the Tribunal provides the greatest potential for developing expertise in such complex issues as efficiency considerations and the effects of anticompetitive practices." Calvin S. Goldman, "Corporate Concentration and Canada's New Competition Act," in Khemani et al, *supra*, note 50, pp. 489-503 at p. 492.

⁹⁰ *Competition Tribunal Act*, R.S., 1985, c. 19 (2d Supp.), s. 3.

⁹¹ The Tribunal's statutory authority is specified in the *Competition Tribunal Act*, *id.*

⁹² *Competition Tribunal Act*, *id.*, ss. 10, 12.

⁹³ Director of Investigation and Research, *Compliance Bulletin* (Ottawa: Consumer and Corporate Affairs Canada, 1993).

⁹⁴ Director of Investigation and Research, *Merger Enforcement Guidelines* (Information Bulletin No. 5) (Ottawa: Consumer and Corporate Affairs Canada, 1991).

⁹⁵ Director of Investigation and Research, *Predatory Pricing Enforcement Guidelines* (Ottawa: Consumer and Corporate Affairs Canada, 1992).

⁹⁶ Director of Investigation and Research, *Price Discrimination Enforcement Guidelines* (Ottawa: Consumer and Corporate Affairs Canada, 1992).

⁹⁷ Director of Investigation and Research, *Misleading Advertising Guidelines* (Ottawa: Consumer and Corporate Affairs Canada, 1991).

sufficient grounds on which to apply to the Competition Tribunal for a remedial order.⁹⁸

In addition to its responsibilities to enforce competition law and to promote voluntary compliance, the Bureau of Competition Policy has another, separate institutional responsibility – competition advocacy. This responsibility is manifested by the Director's interventions before federal and provincial regulatory agencies and by the Bureau's efforts to make the case within government in favour of policies that provide maximum scope for competitive market forces.⁹⁹ This activity underscores the fact that government policies, regulations and legislation are often key factors affecting the competitive environment in particular industries. Conversely, competition policy can help to reinforce the effects of pro-competitive government policies, such as the liberalization of international trade rules and industry-specific regulatory reforms.¹⁰⁰

Regarding the conditions that may trigger enforcement operations, the *Competition Act* stipulates that the Director is required to commence an inquiry whenever he believes, on reasonable grounds, that an offence has been committed under the *Act*, that grounds exist for the making of an application under the civil matters provisions or that a person has failed to comply with an order under the *Act*. The Director is also obliged to commence an inquiry if the responsible Minister so directs, or when six Canadian residents make an application pursuant to the *Act*.¹⁰¹ The Director is required to report to the Minister if an inquiry is discontinued, and the Minister may instruct the Director to make further inquiry regarding a particular matter.¹⁰² There is, however, no provision in the *Act* for termination of inquiries or exercise of broader directive powers by the Minister.

⁹⁸ See the *Competition Act*, R.S., 1985, c. C-34, as amended, section 102.

⁹⁹ For an overview of the Director's regulatory intervention activities, see Joseph Monteiro, "Representations by the Bureau of Competition Policy: The First Fifteen Years," *Canadian Competition Record*, vol. 15, no. 1, March 1994, pp. 17-38.

¹⁰⁰ The relationships between competition policy and other government framework and sectoral policies are discussed in Part IV, *infra*.

¹⁰¹ Director of Investigation and Research, *Annual Report for the Year Ended March 31, 1993* (Ottawa: Supply and Services Canada, 1993), pp. 1-2.

¹⁰² Director of Investigation and Research, *id.*

The *Competition Act* also provides for private actions by persons who have suffered damages as a result of either a violation of the criminal provisions contained in Part VI of the *Act*; or a failure to comply with an order of the Competition Tribunal or a court under the *Act*. The constitutionality of this provision was upheld by the Supreme Court of Canada in 1989.¹⁰³ However, there is considerably less private competition litigation in Canada than in the United States. This has been attributed to a number of procedural and other factors, most notably the absence of statutory provision for treble (i.e., triple) damage awards in competition law cases in Canada as opposed to the United States.¹⁰⁴

Objectives and Orientation of Canadian Competition Policy

The purpose clause of the *Competition Act* summarizes the objectives of competition law in Canada. Specifically, the intent of the *Act* is to maintain and encourage competition in Canada, in support of four specific objectives: i) to promote the efficiency and adaptability of the Canadian economy; ii) to expand opportunities for Canadian participation in world markets (while at the same time recognizing the role of foreign competition in Canada); iii) to ensure that small and medium-sized businesses have an equitable opportunity to participate in the Canadian economy; and iv) to provide consumers with competitive prices and product choices.¹⁰⁵

Consistent with the *Act's* purpose clause, competition law and policy in Canada generally embody a "total welfare" approach. That is, relevant provisions of the *Competition Act* require consideration of potential cost savings for producers as well as the impact of business arrangements on

¹⁰³ *General Motors of Canada Limited v. City National Leasing* [1989] 1 S.C.R. 641. In this important decision, the Court held that the general scheme of the *Competition Act* is supportable under the general branch of the federal trade and commerce power. For commentary, see Douglas Rutherford, Q.C. and J.S. Tyhurst, "Competition Law and the Constitution: 1889-1989 and into the Twenty-First Century," in R.S. Khemani and W.T. Stanbury, eds., *Historical Perspectives on Canadian Competition Policy* (Halifax: Institute for Research on Public Policy, 1991).

¹⁰⁴ For related discussion, see Glenn Leslie and Stephen Bodley, "The Record of Private Actions Under Section 36 of the Competition Act," *Canadian Competition Record*, vol. 14, no. 4, 1993, pp. 50-64.

¹⁰⁵ This approach builds on historical statements of the objectives of competition policy in Canada by the Courts, Ministers of the Crown and public officials. See Gorecki and Stanbury, *supra*, note 48.

consumers.¹⁰⁶ This is particularly true of those provisions of the *Act* that focus directly on industrial restructuring – i.e., mergers, joint ventures and specialization agreements. For example, the merger review provisions (which are intended to deal with corporate restructuring that substantially lessens competition) contain an explicit exception for transactions that yield offsetting efficiency gains and meet other statutory tests.¹⁰⁷ As a result, mergers and certain other arrangements that have an adverse effect on competition can, in principle, be acceptable under Canadian competition law if they are shown to yield offsetting efficiency gains and otherwise meet the relevant statutory provisions.¹⁰⁸ As mentioned in Part II, the total welfare approach to merger analysis in Canada is somewhat more flexible than that of the United States, which, generally, follows a consumer surplus approach.¹⁰⁹

It is noteworthy that objectives i), ii) and iv) referred to above are clearly consistent with the total welfare approach. While the implications of objective iii) are less clear, arguably, it also contributes to total welfare to the extent that small and medium-sized enterprises have been major sources of innovation, efficiency and job creation in the Canadian economy. In practice, moreover, objective iii) appears to be framed within the context of the other objectives. For example, recent enforcement guidelines released by the Director of Investigation and Research respecting predatory pricing and price discrimination – two areas in which competition policy can protect the interests of small- and medium-sized businesses – stress competition and efficiency-related factors as well as the treatment of individual competitors.¹¹⁰

¹⁰⁶ Arguably, the cost savings that may be counted may occur in either the "relevant market(s)" under consideration in a particular case, or in other markets. See Crampton, *supra*, note 45, p. 13.

¹⁰⁷ See the *Competition Act*, *supra*, note 98, section 96. The *Merger Enforcement Guidelines* issued by the Director of Investigation and Research in March 1991 incorporate this approach and specify various types of efficiencies that may be considered in assessing particular transactions. See Director of Investigation and Research, *Merger Enforcement Guidelines* (March 1991), pp. 45-52 and Appendix 2.

¹⁰⁸ A useful discussion of these aspects of Canadian competition policy is provided in Christopher Green, "Merger Law, Policy and Enforcement Guidelines," *Review of Industrial Organization*, vol. 8, 1993, pp. 191-201.

¹⁰⁹ For related discussion, see Part V, *infra*.

¹¹⁰ Director of Investigation and Research, *Predatory Pricing Enforcement Guidelines* (1992), and Director of Investigation and Research, *Price Discrimination Enforcement Guidelines* (1992).

Overview of Key Statutory Provisions

The *Competition Act* contains provisions applicable to both criminal offences and "reviewable" civil matters. The criminal provisions are set out in Part VI of the *Act*, and they include provisions relating to conspiracies in restraint of trade, bid rigging, predatory and discriminatory pricing, price maintenance, misleading advertising and other deceptive marketing practices. Civil "reviewable" practices are covered in Part VIII of the *Act* and include matters such as abuse of dominant position, refusal to deal, exclusive dealing and mergers. The *Act* also contains detailed provisions relating to pre-notification to the Director of Investigation and Research of mergers that meet specific statutory thresholds.

As noted above, the intent of the merger review provisions is to control transactions that substantially lessen competition. They contain an explicit exception for transactions that yield offsetting efficiency gains and that meet other statutory tests. An important related feature of the Canadian approach to mergers is an explicit rejection of reliance solely on quantitative indicators such as concentration or market shares. Indeed, section 92(2) of the *Competition Act* states categorically that the Competition Tribunal shall not find that a merger prevents or lessens competition substantially solely on the basis of concentration or market share.

The provisions covering mergers also stipulate that, when considering whether a transaction is likely to reduce competition substantially, the Competition Tribunal (and, by extension, the Director of Investigation and Research) may consider factors such as whether a party to the merger is a failing business, the extent of foreign competition in the relevant market(s), and the nature and extent of change and innovation in the market.¹¹¹ These factors respond directly to such developments as the growth of foreign competition, the importance of innovation to Canada's future economic development and the need to facilitate the efficient restructuring of Canadian businesses.

Another key provision of the *Competition Act*, which also has implications for industrial restructuring, is the conspiracy provision. This is the oldest existing provision of Canadian competition legislation. The basic test under this section of the legislation is whether an agreement lessens or

¹¹¹ R.D. Anderson and S.D. Khosla, "Recent Developments in Canadian and U.S. Merger Policy," *Canadian Competition Policy Record*, vol. 7, no. 3, September 1986, pp. 47-65.

is likely to lessen competition unduly.¹¹² The *Act* lists several exceptions from the conspiracy provision, including cooperative arrangements relating to research and development, the exchange of statistics, product standards and other matters. These exceptions do not, however, apply in circumstances where an agreement is likely to lessen competition in respect of prices, the quantity and quality of production, markets or customers, or distribution channels.

The provisions of the *Act* pertaining to the abuse of dominant position provide a non-criminal vehicle for reviewing business practices that may lessen competition. The abuse provisions, which replaced the ineffective criminal monopoly provision in the old legislation prior to 1986, embody a flexible, case-by-case approach. They permit the Tribunal to consider whether particular business practices may be the result of superior competitive performance (as opposed to an exclusionary design or purpose).¹¹³

The *Competition Act* also makes special provision for qualifying joint ventures.¹¹⁴ The purpose here is to permit firms to enter into certain cooperative arrangements deemed to be beneficial even though they might otherwise raise issues under the merger provisions of the *Act*. The joint venture provision applies to both R&D and other types of joint venture activities (e.g., joint production and marketing ventures). In this respect, the Canadian joint venture provision is somewhat analogous to the protection afforded by the joint venture legislation recently adopted in the United States, the *National Cooperative Production Amendments of 1993*.¹¹⁵

Another section of the *Competition Act* that responds directly to broader economic concerns is the provision relating to the registration of specialization agreements. Under such agreements, one of the parties agrees to discontinue production of a good or service in order to facilitate

¹¹² For discussion of the interpretation of this test, see Part III, *infra*.

¹¹³ See Bruce C. McDonald, "Abuse of Dominant Position," *Canadian Competition Policy Record*, vol. 8, no. 1, March 1987, pp. 59-75, and R.D. Anderson and S.D. Khosla, "Reflections on McDonald on Abuse of Dominance," *Canadian Competition Policy Record*, vol. 8, no. 3, September 1987, pp. 51-60.

¹¹⁴ See Howard I. Wetston, *The Treatment of Cooperative R&D Activities Under the Competition Act* (Notes for an Address to the Committee on Science and Technology of the Canadian Manufacturers' Association, S-10064, March 4, 1988).

¹¹⁵ For discussion of the U.S. legislation, see Part V, *infra*.

the rationalization of production within an industry. Agreements registered pursuant to this provision receive a limited exemption from the conspiracy and exclusive dealing sections of the *Act*.¹¹⁶ The provision for registering specialization agreements grew directly out of recommendations in the Economic Council of Canada's *Interim Report on Competition Policy* which states that "market forces cannot always be relied upon" to ensure the exploitation of potential efficiency gains based on greater plant specialization and longer production runs.¹¹⁷

The Competition Act and Industrial Restructuring: The Experience To Date

Since the 1986 amendments, extensive experience has been gained in applying the merger and other provisions of the *Act*. A major effort has been made to apply the merger provisions in ways that maintain or enhance competition in domestic markets while simultaneously facilitating efficient competitive restructuring. The role of foreign competition has been recognized in several ways. For example, in the Michelin-Uniroyal tire merger case, the relevant geographic market was recognized as being continental (i.e., North American) in scope. On this basis, the merger was allowed to proceed.¹¹⁸ In addition, in at least two other cases, a decision by the Director of Investigation and Research not to challenge a merger or to seek a consent order from the Competition Tribunal was made (wholly or in part) on the basis of a commitment by the parties to apply for accelerated reduction of tariffs under the *Canada-United States Free Trade Agreement*.¹¹⁹ Potential efficiency gains have also been considered in a

¹¹⁶ See the *Competition Act*, *supra*, note 98, sections 85 to 90.

¹¹⁷ Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969).

¹¹⁸ Director of Investigation and Research, *Annual Report For the Year Ended March 31, 1991* (Ottawa: Supply and Services Canada, 1991), p. 7.

¹¹⁹ See, for example, the discussion of the Consumers Packaging Inc.-Domglas Inc. and Asea Brown Boveri-Westinghouse mergers in Director of Investigation and Research, *Annual Report For the Year Ended March 31, 1990* (Ottawa: Supply and Services Canada, 1990), pp. 12 and 17, respectively.

number of cases, although such gains have not been the sole deciding factor in the outcome of any particular case.¹²⁰

It is important to note that merger law enforcement in Canada constrains only a small percentage of all merger transactions – as can be seen from a review of the statistics contained in the annual reports published by the Director of Investigation and Research under the *Act*. For example, during the fiscal year ending March 31, 1993, a total of 204 mergers were examined by staff of the Director for a period of two or more days.¹²¹ In 198 such cases, staff concluded that the merger posed no issue under the *Act*;¹²² in four cases, mergers were allowed to proceed subject to ongoing monitoring. In two cases, mergers were contested before the Competition Tribunal. In three other cases, transactions were partially or entirely abandoned by the parties. Data reported for 1991-92 and 1990-91 are comparable.¹²³ These data should be considered in light of the much higher numbers of mergers occurring in the economy. (In 1992, 627 mergers were reported in financial and trade publications, down from 739 in 1991 and 944 in 1990.)¹²⁴ It appears, therefore, that less than one-half of 1 percent of all mergers in Canada have been directly constrained by merger law enforcement.

Further insights are provided by Khemani and Shapiro¹²⁵ in a recent empirical analysis of merger law enforcement in Canada. The study is based on an econometric analysis of the factors considered in horizontal merger cases dealt with by the Bureau of Competition Policy between June

¹²⁰ Analytical aspects of the trade-offs between competition and efficiency gains under the Canadian merger provisions are discussed in R.S. Khemani, "Merger Policy in Small Open Economies: The Case of Canada," in B. Dankbaar et al, eds., *Perspectives in Industrial Economics* (The Netherlands: Kluwer Academic Publishers, 1990).

¹²¹ Data taken from Director of Investigation and Research, *Annual Report For the Year Ended March 31, 1993* (Ottawa: Supply and Services Canada, 1993), p. 6, Table 2.

¹²² These figures do not correspond exactly since some of the merger examinations concluded in 1992-93 may have been initiated in a previous year.

¹²³ Director of Investigation and Research, *supra*, note 121, p. 6, Table 2.

¹²⁴ Director of Investigation and Research, *supra*, note 121, p. 5, Table 1.

¹²⁵ R.S. Khemani and D.M. Shapiro, "An Empirical Analysis of Canadian Merger Policy," *Journal of Industrial Economics*, vol. XLI, no. 2, June 1993, pp. 161-177.

1986 and July 1989.¹²⁶ The analysis shows that the cases considered during this period were dealt with by the Bureau in a manner consistent with the economic and related factors enumerated in the *Act*. While market shares and concentration levels were the most important factors relied upon in merger assessments, other factors (particularly import competition and barriers to entry) were also given significant weight. The study concludes that the *Act* is being applied "in a consistent manner in accordance with modern industrial organization economics."¹²⁷

In its 1992 decision in the *Hillsdown* case, the Competition Tribunal appeared to express disagreement with the total welfare approach as reflected in the *Merger Enforcement Guidelines* issued by the Director of Investigation and Research. Specifically, the Tribunal had difficulty accepting the Director's position that pure transfers of wealth from consumers to producers were not "effects" of a lessening of competition within the meaning of the *Act*.¹²⁸ The Tribunal did not, however, endorse an alternative approach. Subsequently, the Tribunal's comment has been criticized as potentially eroding the efficiency orientation of Canadian merger policy which facilitates business restructuring.¹²⁹

Experience has also been gained with respect to other provisions of the *Competition Act* that were added to the legislation in 1986. Two cases have been litigated under the abuse of dominant position provisions¹³⁰ and have provided ground-breaking jurisprudence for Canada with respect to

¹²⁶ This empirical study (an ordered probit analysis) is valuable since, as noted, the majority of merger cases have been resolved through negotiated settlements between the Director and the parties, rather than through litigation before the Competition Tribunal. In the past, this has tended to limit the availability of information regarding specific merger cases.

¹²⁷ Khemani and Shapiro, *supra*, note 125, p. 176.

¹²⁸ *DIR v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289. This observation was made as an *obiter dictum* and is not, therefore, necessarily binding on future cases.

¹²⁹ Lawrence P. Schwartz, "The 'Price Standard' or the 'Efficiency Standard': Comments on the Hillsdown Decision," *Canadian Competition Policy Record*, vol. 13, no. 3, September 1992, pp. 42-47, and Paul S. Crampton, "The Efficiency Exception For Mergers: An Assessment of Early Signals From the Competition Tribunal," *Canadian Business Law Journal*, Spring 1993.

¹³⁰ See *Canada (Director of Investigation and Research) v. The NutraSweet Co.* (1990) 32 C.P.R. (3d) 1 (Competition Tribunal, October 4, 1990) and *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992) 40 C.P.R. (3d) 289 (Competition Tribunal, January 20, 1992).

issues such as the treatment of exclusionary contractual practices and market definition in abuse cases.¹³¹

There have also been important developments regarding other aspects of Canadian competition legislation. Recently, the central importance of competition legislation as an aspect of Canadian economic policy was affirmed by the Supreme Court of Canada in its landmark decision in *R. v. Nova Scotia Pharmaceutical Society et al* (the *PANS* case). In its decision, the court upheld the validity of the conspiracy provision of the legislation in relation to the *Charter of Rights and Freedoms*.¹³² The Supreme Court also observed that Canada's competition legislation "is central to Canadian public policy in the economic sector, and [the conspiracy section] is itself one of the pillars of the *Act*."¹³³

A central element of the conspiracy section is the test of "undueness" which is applicable to agreements that lessen competition. The Supreme Court decision in the *PANS* case confirms that the test of the undueness embodies a partial "rule of reason" standard. This requires that the "seriousness" of the effect(s) of a particular anti-competitive agreement be considered (in effect, a qualitative test). The test does not go as far as to permit potential efficiency-related benefits (to consumers or producers) which derive from cooperative arrangements among competitors to be considered. This clearly strengthens the application of the conspiracy provisions with respect to conventional price fixing and similar agreements.¹³⁴ According to some critics, however, it simultaneously raises issues concerning consistency of approach (i.e., the approach under the conspiracy provision *vs.* the total welfare approach applicable under other provisions of the legislation).¹³⁵

One striking aspect of the post-1986 experience with the *Competition Act* is the lack of use of the provisions relating to joint ventures and specialization agreements. In fact, there has not been a single

¹³¹ On the latter, see Robert D. Anderson and Joseph Monteiro, *Market Definition in Abuse of Dominant Position Cases: The Pragmatic Approach of the Competition Tribunal* (forthcoming).

¹³² *PANS*, *supra*, note 15.

¹³³ *PANS*, *supra*, note 15.

¹³⁴ Howard I. Wetston, *Developments and Emerging Challenges in Canadian Competition Law* (October 1992).

¹³⁵ For discussion, see Part VI, *infra*.

case in which a specialization agreement has been registered with the Competition Tribunal or a joint venture has been approved on the basis of the provisions. The treatment of horizontal arrangements such as joint ventures and specialization agreements is discussed further in Part VI.

In addition to the above substantive aspects of competition law and policy, certain procedural issues relating to the application of the *Competition Act* should also be mentioned, particularly with respect to aspects of the Canadian merger review process.¹³⁶ As noted earlier, since 1986 most merger cases reviewed under the *Competition Act* were resolved without recourse to the Competition Tribunal. As a consequence, some observers have suggested that the process may involve the exercise of an excessive degree of administrative discretion on the part the Director.¹³⁷

The relatively small number of fully adjudicated merger cases reflects, first and foremost, the preferences of private parties who prefer to negotiate with the Director and/or to modify their plans rather than undergo a hearing before the Tribunal.¹³⁸ Arguably, this practice has been influenced by the formal (and time consuming) processes that were initially adopted by the Competition Tribunal for reviewing negotiated consent orders and other matters.¹³⁹ To some extent, such concerns will be

¹³⁶ For useful background on issues relating to the merger review process, see Calvin S. Goldman, "The Merger Resolution Process Under the Competition Act: A Critical Time in Its Development," *Ottawa Law Review*, vol. 22, no. 1, 1990, pp. 1-47. Issues have also arisen concerning the constitutionality of the Competition Tribunal and the merger provisions. In 1992, however, the Supreme Court of Canada upheld the constitutionality of both the provisions and the Tribunal's role in administering them. See Howard I. Wetston, *Decisions and Developments: Competition Law and Policy* (Remarks before the Canadian Institute, Toronto, June 8, 1992).

¹³⁷ Roy M. Davidson, "Independence Without Accountability Won't Last," in Khemani and Stanbury, eds., *supra*, note 21, chapter 25, pp. 561-582, and W.T. Stanbury, "An Assessment of the Merger Review Process under the Competition Act," *Canadian Business Law Journal*, vol. 20, no. 3, August 1992, pp. 422-463. See also Roy M. Davidson, "When Merger Guidelines Fail to Guide," *Canadian Competition Policy Record*, vol. 12, no. 4, December 1991, pp. 44.

¹³⁸ See Andrew Kleit and Margaret Sanderson, "The Perfect is Not the Enemy of the Good: A Response to Roy Davidson's Article 'When Merger Guidelines Fail to Guide'," *Canadian Competition Policy Record*, vol. 13, no. 2, June 1992, pp. 48-51.

¹³⁹ Stanbury, *supra*, note 137. The approach taken by the Competition Tribunal in the past regarding consent orders differs considerably from the U.S. approach, where negotiated orders are typically issued without extensive adversarial proceedings. See Goldman, *supra*, note 136.

alleviated by the new procedural Rules that were recently adopted by the Tribunal.¹⁴⁰

Beyond the enforcement of the *Competition Act*, the Bureau of Competition Policy has, since the mid-1980s, been an increasingly active participant in the development and implementation of other government policies affecting the competitive market system. For example, the Bureau participated extensively in the reform of regulatory policies in transportation, telecommunications, energy and agriculture in the mid to late 1980s.¹⁴¹ It provided background analysis for the Canada-U.S. Free Trade negotiations,¹⁴² and participated directly in the negotiations leading to the North American Free Trade Agreement (NAFTA). Bureau staff also undertook background analysis for the Uruguay Round of Multilateral Trade Negotiations.¹⁴³ More recently, the Bureau assisted in developing proposals to strengthen the Canadian economic union,¹⁴⁴ as well as in various interdepartmental policy review exercises such as the Canadian Porter study. The Bureau has also played an important role in examining the scope for the replacement of existing contingency trade remedies (especially anti-dumping), in reviewing competition policy rules in the context of follow-up negotiations under the Canada-U.S. Free Trade Agreement, and now in the NAFTA.¹⁴⁵ These initiatives reflect the growing links between competition policy and other economic policies such international trade and industrial policy, and industry-specific regulatory policies. These links are discussed further in Part IV.

¹⁴⁰ Among other things, the new Rules, which came into effect on May 1, 1994, incorporate new time limits and other pre-hearing case management procedures, and spell out the procedures applicable to intervenors in greater detail. See "Changes to the Rules for Regulating the Practice and Procedure of the Competition Tribunal," *Canadian Competition Record*, vol. 15, no. 2, Summer 1994, pp. 2-5.

¹⁴¹ Bureau of Competition Policy, *supra*, note 14. References to particular submissions, etc., are provided in Part IV, *infra*.

¹⁴² See M.F. Ronayne, R.D. Anderson and S.D. Khosla, *The Impact of Non-Tariff Barriers on Canada-U.S. Trade in the Steel Industry* (Bureau of Competition Policy, June 1987).

¹⁴³ See R.D. Anderson, P.J. Hughes, S.D. Khosla and M.F. Ronayne, *Intellectual Property Rights and International Market Segmentation: Implications of the Exhaustion Principle* (Bureau of Competition Policy: Working Paper, October 1990).

¹⁴⁴ Robert D. Anderson and S. Dev Khosla, "Competition Policy, the Canadian Economic Union and Renewal of the Federation," *Canadian Competition Policy Record*, vol. 12, no. 4, December 1991, pp. 57-77.

¹⁴⁵ See Derek Ireland, Don Partridge and Zulfi Sadeque, *Globalization, the Canadian Competition Act and the Future Policy Agenda* (Bureau of Competition Policy, May 1993).

With regard to the ultimate effect of competition policy on Canadian industrial structure and performance in the post-1986 period, it would be misleading to ascribe major structural developments in the economy to a single policy instrument or other set of factors. Clearly, since the new *Competition Act* has been in force, the Canadian economy has been influenced by a number of important factors including major macroeconomic fluctuations and a far-reaching process of trade liberalization. It is worth noting, however, that Canadian manufacturing and other industries have recently undergone a far-reaching process of restructuring to increase productivity, and that many are now poised to compete effectively in the global economy of the 1990s.¹⁴⁶ At a minimum, this development implies that the *Competition Act* has not been an impediment to necessary restructuring. Viewed in a more positive light, it can be argued that this development affirms the effectiveness of the *Competition Act* operating in conjunction with other framework policies and market forces in fostering a more competitive industrial structure in Canada.

¹⁴⁶ Royal Bank of Canada, and Ross and Litchfield, *supra*, note 4.

PART IV

THE LINKS BETWEEN COMPETITION POLICY AND OTHER ECONOMIC POLICIES

A salient feature of economic policy in the 1990s is the growing extent of linkages between competition policy and other economic policies. Indeed, the principles of competition policy are an increasingly important element in the design and implementation of a broad range of other economic policies – including industrial policy, policies pertaining to the Canadian economic union, aspects of international economic policy, industry-specific regulatory reforms and intellectual property rights. In each of these areas, competition policy contributes to wider government policy initiatives relating to efficient structural adjustment and economic governance.

The Relationship Between Competition Policy and Industrial Policy

In reflecting on the relationship between competition policy and industrial policy, it is perhaps helpful to clarify the different senses in which the term "industrial policy" is used. In the broadest sense, the term refers to the full range of measures that governments employ to promote an efficient industrial structure. These include, for example, direct support for R&D as well as training programs and tax or other measures to facilitate efficient structural adjustment. In a narrower sense, industrial policy also describes a subset of economic measures designed to provide special advantages or assistance to particular industries or firms. These may include direct or indirect subsidies, preferential government procurement arrangements, tariffs and other forms of trade protection.¹⁴⁷ In Canada, such manifestations of industrial policy have sometimes included the deliberate provision of monopolies through regulation and/or vertical integration between regulated and unregulated firms.¹⁴⁸

¹⁴⁷ See D.F. McFetridge, ed., *Industrial Policy in Action* (Toronto: University of Toronto Press for the Royal Commission on the Economic Union and Development Prospects For Canada, 1985).

¹⁴⁸ See, for example, the discussion of the historical relationship between Bell Canada and Northern Telecom in Royal Commission on the Economic Union and Development Prospects For Canada, *Report* (1985). For a useful overview of the evolution of industrial policy in Canada, see G. Bruce Doern, "The Department of Industry, Science and Technology: Is There
(continued...)

This raises the question of the relation of competition policy to these alternative concepts of industrial policy. On the one hand, if one focuses on the broader concept, competition policy itself constitutes a key element of an effective industrial policy.¹⁴⁹ As already discussed, it strengthens incentives for continual innovation and the systematic upgrading of products and production processes – a role for competition policy that is already recognized in a number of official policy statements.¹⁵⁰

On the other hand, some applications of industrial policy in the narrow sense (e.g., tariffs or the creation of monopolies through regulation) can clearly be antithetical to (and can compromise) marketplace efficiency objectives.¹⁵¹ Indeed, economic literature suggests that, in many cases, the effect of such policies is to frustrate the operation of competitive forces, thereby advancing the interests of specific groups within society.¹⁵² Arguably, an important contribution of competition policy to national economic welfare lies in challenging the need for such potentially anti-competitive manifestations of industrial policy. To appreciate this point, it is helpful to delve briefly into the theoretical basis for industrial policy.

Economists have long recognized legitimate theoretical rationales for government intervention for supporting particular industries or activities. These include, for example, arguments in support of infant industries and

(...continued)

Industrial Policy After Free Trade," in Katherine A. Graham, ed., *How Ottawa Spends 1990-91: Tracking the Second Agenda* (Carleton University Press, 1991), chapter 3, pp. 49-71.

¹⁴⁹ See also Goldman and Kissack, *supra*, note 10.

¹⁵⁰ Mr. Harry Swain [then Deputy Minister of Industry, Science and Technology Canada] (ISTC) remarked, "... on the policy side, I observe that markets work better for society as a whole when they are bigger and full of spirited competitors.... The adequacy of business framework legislation... should be a continuing concern of ours" Harry Swain, *ISTC Today - And Tomorrow* (January 29, 1993). See also Government of Ontario, *An Industrial Policy Framework For Ontario* (July 1992). The latter observes that [industrial policy] builds on the foundation of a market economy and on an appreciation of the important role that competition plays in innovation". These statements appear to represent a significant re-orientation of Canadian industrial policy viewpoints.

¹⁵¹ See, e.g., McFetridge, ed., *supra*, note 147.

¹⁵² Seminal contributions to this literature include Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies and Theft," *Western Economic Journal*, vol. 5, June 1967, pp. 224-32, and Anne O. Krueger, "The Political Economy of the Rent Seeking Society," *American Economic Review*, June 1974, pp. 291-303.

the existence of positive externalities (spillovers) in relation to labour force training and development.¹⁵³ Nevertheless, economists have traditionally been skeptical about the practical effects of industrial policies and their contribution to economic performance. One reason for such skepticism has to do with the concept of "rent seeking".¹⁵⁴ This concept recognizes that, in practice, government support for industries is influenced by pressures from interest groups. As a result, legitimate objectives related to efficiency may be supplanted by naked protectionism and the unwarranted preservation of inefficient industries.¹⁵⁵

Doubts have also been expressed as to the ability of government agencies to identify systematically those industries that merit support, given the nature and extent of economic change and innovation in the present era.¹⁵⁶ In Canada, the effects of direct industrial subsidies, preferential government procurement and other manifestations of industrial policy were considered in several of the background studies for the Macdonald Commission in the mid-1980s. In general, these studies highlighted the costs and cast doubt on the purported benefits of interventionist industrial policies.¹⁵⁷

In the latter part of the 1980s, proponents of industrial policy received fresh support from the economic literature on international trade and industrial organization. One of the key developments emerged from the

¹⁵³ For a "classical" analysis of such rationales, see, e.g., Max W. Corden, *Trade Policy and Economic Welfare* (Oxford: Clarendon Press, 1974). For discussion of modern "strategic" rationales, see below.

¹⁵⁴ See Krueger, *supra*, note 152.

¹⁵⁵ The theory further implies that potential economic rents (i.e., economic profits accruing to favoured industries) are often dissipated by the costs of lobbying and related activities to obtain them. Thus, the costs of rent seeking are likely to substantially exceed the traditional deadweight losses from monopoly/trade or output restrictions. Krueger, *id.* See also Richard A. Posner, "The Social Cost of Monopoly and Regulation," *Journal of Political Economy*, vol. 83, 1975, pp. 807-27.

¹⁵⁶ The difficulty of identifying "sunrise" industries is recognized even by many industrial policy advocates. Accordingly, recent proposals favour subsidizing perceived "winning activities" (e.g., R&D) as opposed to particular industries. See, e.g., Government of Ontario, *supra*, note 150.

¹⁵⁷ See, e.g., McFetridge, ed., *supra*, note 147. See also Donald G. McFetridge, "Rent-Seeking as Nation-Building: A Comment on 'Canada's National Policies: Reflections on 125 Years'," *Canadian Public Policy*, vol. XIX, no. 3, September 1993, pp. 255-259.

literature on "strategic trade and industrial policy"¹⁵⁸; this literature identified a number of situations not previously dealt with in the trade policy literature in which government intervention can theoretically improve national economic welfare. These situations typically involve imperfect competition, dynamic economies of scale and/or first mover advantages.¹⁵⁹ These conditions are widely postulated to be characteristic of many high-tech and other "new" industries. Thus, on the surface, the strategic trade policy literature provides a rationale for (extensive) government intervention in the form of subsidies, tariffs and other measures as a means of promoting economic growth.

In general, however, these developments in the theoretical literature have not generated wide support for interventionist industrial and trade policies – at least among economists. Indeed, it is particularly noteworthy that even economists who have played key roles in delineating the theoretical possibilities for efficient state intervention have warned against wide implementation of such measures.¹⁶⁰ This policy advice acknowledges that, all too easily, theoretically plausible rationales for limited intervention can lend themselves to rent seeking and protectionism.¹⁶¹ Furthermore, the potential welfare gains for individual countries identified in the initial contributions to the strategic trade policy literature can be lost or even reversed if other countries retaliate with similar policies.¹⁶² Relatively small, open economies like Canada would be particularly vulnerable to such retaliation.

In sum, competition policy in Canada has a dual role to play in relation to industrial policy. On the one hand, it contributes directly to an

¹⁵⁸ For a useful overview of the literature, see Richard Lipsey and Wendy Dobson, eds., *Shaping Comparative Advantage* (Toronto: C.D. Howe Institute, 1987).

¹⁵⁹ See James A. Brander, "Shaping Comparative Advantage: Trade Policy, Industrial Policy and Economic Performance," in Lipsey and Dobson, eds., *id.*, pp. 1-56.

¹⁶⁰ See, e.g., Paul Krugman, *Rethinking International Trade* (Cambridge, Mass.: MIT Press, 1990), pp. 248-54. See also Richard Harris, "The New Protectionism Revisited," *Canadian Journal of Economics*, vol. XXII, no. 4, 1989, pp. 751-78.

¹⁶¹ Krugman observes: "The simple fact is that there is a huge external market for challenges to the orthodoxy of free trade. Any intellectually respectable case for interventionist trade policies, however honestly proposed...will quickly find support for the wrong reasons." *Id.*, at p. 253.

¹⁶² See, e.g., Avinash Dixit and Albert S. Kyle, "The Use of Protection and Subsidies for Entry Promotion and Deterrence," *American Economic Review*, vol. 75, no. 1, 1985, pp. 139-52.

effective industrial policy through the maintenance of inter-firm rivalry. (Specific aspects of competition law, such as the treatment of efficiency gains and R&D joint ventures, can also contribute to efficient structural adjustment.¹⁶³) On the other hand, a key role of competition policy in a modern economy is to challenge industrial policy interventions that restrict competition without a sound efficiency-related basis. Paradoxically, this is vital to the overall effectiveness of industrial policy in its broader sense.

Intergovernmental Arrangements Relating to Internal Trade

Competition policy plays an important role in strengthening the Canadian economic union.¹⁶⁴ The economic union is embodied in the constitutional and other measures that governments employ to maintain and enhance the free flow of goods, services, capital and labour between provinces and territories across the country. In the past, Canada has suffered from a wide array of barriers to interprovincial trade and mobility.¹⁶⁵ Important measures to address these barriers are contained in the *Agreement on Internal Trade*, which was signed by federal and provincial trade Ministers in the summer of 1994.¹⁶⁶

Competition policy can contribute to an economic union in two ways. First, it can ensure that when government-imposed barriers are removed, they are not replaced by private arrangements that segment markets.¹⁶⁷ Second, experience with competition policy may suggest models that are relevant to the design of measures dealing with interprovincial trade barriers. In the European Community, competition policy has played a key role in dealing with subsidies and other “industrial aids” that may affect the free movement of goods and services across the

¹⁶³ Specific aspects of competition law that are relevant to industrial restructuring are discussed in Part VI, *infra*.

¹⁶⁴ Anderson and Khosla, *supra*, note 144.

¹⁶⁵ Conference Board of Canada, *Canada 1993: A Plan for the Creation of a Single Market in Canada* (April 1991).

¹⁶⁶ See *Agreement on Internal Trade: Summary* (July 18, 1994).

¹⁶⁷ In this connection, Safarian's classic study emphasizes "the need for a strong competition policy... if the benefits of the common market are to be realized." A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Information Canada, 1974).

Union. This role has gained importance with the continuing drive to unify the European market under the terms of the *Single European Act*.¹⁶⁸

Industry-Specific Regulatory Reform and Privatization

Direct government regulation of particular economic sectors has long been recognized as having an important interface with competition policy. For example, economic regulation often serves to limit competition in a particular industry.¹⁶⁹ Conversely, the application of competition policy can occasionally ameliorate inefficiencies resulting from regulation. A key thrust of microeconomic policy reform in both developed and developing market economies in recent years has been to reduce the extent of industries covered by direct regulatory controls, while maximizing the scope for operation of competitive market forces within the context of surviving regulatory regimes.¹⁷⁰

At present, there are three types of issues to be addressed with regard to economic regulation in Canada: i) issues stemming from the reforms implemented in the mid-1980s; ii) "newer" issues relating to the potential relaxation of regulatory controls in telecommunications, electrical energy, agriculture and other industries; and iii) issues related to regulatory procedures and "social" regulations that transcend particular industries.

With respect to the issues stemming from previous reforms, almost a decade has elapsed since the major reforms in the Canadian air, rail and trucking industries and, to a lesser extent, in the international ocean shipping industry, were adopted as a result of the "Freedom to Move"

¹⁶⁸ For discussion, see Mark F. Ronayne, *Industrial Aid and Competition Policy in Canada* (Bureau of Competition Policy, Working Paper, August 1993).

¹⁶⁹ Economic Council of Canada, *Reforming Regulation* (Ottawa: Supply and Services Canada, 1981). Among the original articles highlighting the restrictive impact of regulation on competition were George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics*, vol. 2, 1971, pp. 3-21, and William A. Jordan, "Producer Protection, Prior Market Structure and the Effects of Government Regulation," *Journal of Law and Economics*, vol. XV, no. 1, April 1972.

¹⁷⁰ OECD, *supra*, note 1. See also Janus A. Ordober and Russell W. Pittman, "Competition Policies for Natural Monopolies in a Developing Market Economy," in S. Rayner, ed., *Trade and Finance in Central and Eastern Europe* (London: Butterworths, 1993).

initiative of the Minister of Transport in 1985.¹⁷¹ Unquestionably, competition policy has played a key role in reinforcing the positive effects of deregulation in this sector.¹⁷² While the results of these reforms continue to be debated, there is a good case to be made in defense of the various reform initiatives.¹⁷³

The effects of deregulation in the passenger airline industry merit particular comment. For the past several years, the airline industry has been characterized by recurring high levels of excess capacity, fare wars and financial instability. It is sometimes argued that this is evidence of the "failure" of deregulation. There is a strong counter-argument, however, that the difficulties experienced by major air carriers in the recent past (in both the United States and Canada) are due not to intrinsic problems with deregulation, but to over expansion of capacity and other managerial decisions taken in the late 1980s.¹⁷⁴

With regard to "newer" regulatory reform issues, some of the key industries include telecommunications, electrical energy and agriculture. The role of regulation in these sectors is being reconsidered because of a combination of: i) far-reaching technological change; ii) reduced concerns regarding natural monopoly tendencies in some industries (or at least parts of some industries); and iii) major changes in the international policy environment (such as those stemming from the recent Uruguay Round Multilateral Trade Agreement which has implications for the agriculture sector). Moreover, each of these sectors constitutes a key input to the competitiveness of other Canadian industries. Thus, competition advocacy in these sectors can have a direct (positive) effect on the competitiveness of

¹⁷¹ For background, see Minister of Transport, *Freedom to Move* (1985).

¹⁷² See George N. Addy, *The Competition Act and the Transportation Sector in the 1990s* (Remarks before the Board of Directors of the Canada Ports Corporation, September 27, 1994).

¹⁷³ See Director of Investigation and Research, *Submission to the National Transportation Act Review Commission* (June 30, 1992). Regarding the U.S. experience, see Clifford Winston, "Economic Deregulation: Days of Reckoning for Microeconomists," *Journal of Economic Literature*, vol. XXXI, September 1993, pp. 1263-1289. Winston concludes that, notwithstanding a failure to capture all potential gains, "...microeconomists' predictions that deregulation would produce substantial benefits for [consumers] have been generally accurate".

¹⁷⁴ See William A. Jordan, "New Aircraft Orders: Still A Leading Indicator of Airline Profits," *Airfinance Journal*, no. 139, June 1992, pp. 42-47.

other key user industries.¹⁷⁵ In the telecommunications sector in particular, competition policy has a vital role to play in ensuring the efficient development of the so-called information highway.¹⁷⁶

In addressing these issues, Canadian policy makers can learn much from recent experience in other industrialized countries. For example, the experiences of the United Kingdom and Norway provide a wealth of insights into the feasibility of pro-competitive reforms in the electrical energy sector, including separate operation of power transmission and generation facilities and extensive price deregulation.¹⁷⁷ The U.S. experience in the telecommunications sector provides important insights into the possible effects of structural separation of monopoly and non-monopoly functions as well as more recent innovations such as incentive-based regulation.¹⁷⁸

There is also a broad set of "social" and process-oriented regulatory reform issues that transcend particular industries¹⁷⁹ and where competition policy can make a useful contribution.¹⁸⁰ These issues are an important dimension of the current interest in further improving the competitiveness of Canadian industries. To a large extent, they are concerned with promoting innovation and providing incentives to ensure that regulatory objectives such as pollution control are met at the lowest possible cost. In

¹⁷⁵ In his submission to the recent National Energy Board Review of Inter-utility Electricity Trade, the Director of Investigation and Research observed that "... the implementation of [new approaches being contemplated in the review process] would set the stage for further reforms to enhance efficiency in this vital infrastructure industry, thereby contributing importantly to the competitiveness of other Canadian industries". Director of Investigation and Research, *Submission to National Energy Board Review of Inter-utility Cooperation and Transmission Access and Wheeling* (February 1993), p. 10.

¹⁷⁶ See George N. Addy, *Notes For Remarks to the Advisory Council on the Information Highway* (Ottawa, June 15. 1994).

¹⁷⁷ See Edward P. Kahn, *Competition Issues in the Electricity Sector* (A paper prepared for the Bureau of Competition Policy, Hull, Quebec, April 1994).

¹⁷⁸ See, e.g., Tim Brennan, "Why Regulated Firms Should Be Kept Out of Unregulated Markets: Understanding the Divestiture in U.S. v. AT&T," *Antitrust Bulletin*, vol. 32, 1987, pp. 741-93. More generally, see Richard J. Schultz, *Regulatory Reform: A Hand-book of Possibilities* (Paper prepared for the Bureau of Competition Policy, July 1991).

¹⁷⁹ Schultz, *id.*

¹⁸⁰ Bureau of Competition Policy, *supra*, note 14.

appropriate circumstances, such controls may involve the use of market mechanisms such as tradeable emission control rights.

International Economic Policy

The rising profile of competition policy as an aspect of domestic economic policy is complemented by its growing importance as an instrument of international economic policy. This is a direct consequence of the increasing globalization of markets and business activity, generally. In this context, competition policy can help to ensure that the gains obtained from lowering government-imposed barriers to international trade and investment are not eroded by restrictive business practices. More broadly, competition policy can help to reinforce international trade and investment policies aimed at fostering the free operation of market forces.¹⁸¹

The role of competition policy in facilitating efficient economic integration is reflected in the NAFTA Agreement.¹⁸² Paragraph 1501(1) of the Agreement provides that each party shall adopt or maintain “measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the the objectives” of the Agreement. In addition, Article 1504 provides for follow-up negotiations with respect to the possible role of competition policy in further liberalizing trade within North America.

Competition policy has also figured prominently in recent bilateral trade initiatives in other parts of the world. For example, the U.S.-Japan Structural Impediments Initiative (SII) agreements provided for the strengthened application of competition policy as a vehicle for facilitating

¹⁸¹ See Derek Ireland, *Interactions Between Competition and Trade Policies: Challenges and Opportunities* (Bureau of Competition Policy, Economics and International Affairs Branch Discussion Paper, November 1992), and Arthur Kaell, Derek Ireland and Zulfi Sadeque, *Trade, Competition Policy, Innovation and Market Access* (Paper prepared for the OECD Trade Committee Roundtable on New Dimensions of Market Access in a Globalizing World Economy, August 1994).

¹⁸² For detailed analysis of competition aspects of the NAFTA Agreement, see American Bar Association, Section of Antitrust Law, *The Competition Dimension of the North American Free Trade Agreement* (forthcoming).

access to Japanese markets by foreign suppliers.¹⁸³ In addition, the agreement establishing the Australia-New Zealand Free Trade Area provides for the use of competition policy as an alternative to pre-existing anti-dumping regulations – a possibility that can also be considered in the context of the above-noted follow-up negotiations under the North American Free Trade Agreement.¹⁸⁴

Competition policy has several attributes that underlie its increasing application in international commerce; these include its statutory basis, its general adherence to the principle of national treatment, and its relative transparency compared to other instruments of trade and industrial policy.¹⁸⁵ As a result, in addition to bilateral arrangements, competition law and policy are also figuring in multilateral discussions regarding trade and investment in the international economy at the OECD and elsewhere.¹⁸⁶

The role of competition policy as an instrument of international economic policy may become even more important, as governments look for ways and means to address the too-often detrimental effects of contingency trade remedies (e.g., anti-dumping and countervailing duties) on business operations in transnational markets. It is now well established in the economic literature that antidumping actions, in particular, are often triggered by pricing practices that would not be considered predatory under standards of competition law and that they may, indeed, represent an efficient response to supply and demand conditions.¹⁸⁷ Such actions can be particularly disruptive with respect to regional trading areas, where natural markets often cut across borders and there may be a high degree of mutual

¹⁸³ For background on the SII negotiations, see Robert D. Anderson, "Competition Policy Aspects of the U.S.-Japan Structural Impediments Initiative: Implications For Canada," *Canadian Competition Policy Record*, vol. 12, no. 2, June 1991, pp. 39-50. See also Part V, *infra*.

¹⁸⁴ See, *infra*.

¹⁸⁵ See Kaell, *supra*, note 83. Broadly speaking, the principle of national treatment is a legal concept that implies neutrality with respect to country of origin. Competition (antitrust) policy is consistent with this principle insofar as competition authorities generally do not, as a matter of policy, apply more stringent standards to business arrangements or transactions involving foreign as opposed to domestic companies.

¹⁸⁶ See Kaell et al, *supra*, note 181.

¹⁸⁷ For an overview of the evidence, see, e.g., T.M. Boddez and M.J. Trebilcock, *Unfinished Business: Reforming Trade Remedy Laws in North America* (Toronto: C.D. Howe Institute, 1993), and references cited therein.

dependence between users and suppliers in adjoining countries.¹⁸⁸ Thus, there is a strong case to be made for replacing existing antidumping laws with competition law standards, at least in the context of the North American Free Trade Area.¹⁸⁹

The growing importance of competition policy as an instrument of international economic policy raises complex issues relating to international cooperation and the appropriate application of competition policy to particular market arrangements. These issues are discussed in Part VI.

¹⁸⁸ See Ronayne, Anderson and Khosla, *supra*, note 142.

¹⁸⁹ Boddez and Trebilcock, *supra*, note 187. See also Ireland, *supra*, note 181, and references cited therein.

The Relationship between Competition Policy and Intellectual Property

Intellectual property rights have long been recognized as having an important interface with competition policy. In the 1990s, this area is expected to give rise to increasingly complex issues.¹⁹⁰ The implications of intellectual property rights that permit rights-holders to segment international markets¹⁹¹ are expected to receive particular attention. Other issues relate to the treatment of domestic and international licensing arrangements and the availability of remedies for possible (anti-competitive) abuses of patents and copyrights. The resolution of these issues will have implications for the diffusion of new technology as well as the allocation of economic resources and incentives for innovation.

Social Policy

Any evaluation of the role of competition policy in Canada would be incomplete without a discussion of the relationship between competition policy and social policy.¹⁹² In general, competition policy does not take into account regional employment or other socio-economic factors in assessing business transactions and practices. This does not reflect a view that such factors are unimportant, but rather that incorporating such factors in competition law would tend to undermine the objectivity, justiciability and market orientation of the law. The orientation of competition policy also reflects the view that, in the long run, ensuring the efficiency and competitiveness of domestic industries contributes to domestic employment and prosperity. In addition, worker retraining programs and other such initiatives are thought to provide more direct ways of addressing concerns about employment prospects for workers who have been displaced by restructuring.

¹⁹⁰ See Robert D. Anderson, S. Dev Khosla and Mark F. Ronayne, "The Competition Policy Treatment of Intellectual Property Rights in Canada: Retrospect and Prospect," in R.S. Khemani and W.T. Stanbury (ed.), *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991), 497-538.

¹⁹¹ For background, see Anderson et al, *supra*, note 143.

¹⁹² "What binds Canadians together East-West is more and more a social policy railway, rather than an economic policy railway." Thomas J. Courchene, "What does it mean? For the Nation: Death of a Political Era," *Globe and Mail*, October 27, 1992, pp. A1 and A4.

Of course, competition policy does address social aspects of industrial restructuring to the extent that it helps to prevent the exercise of market power by firms *vis-à-vis* consumers and smaller firms. Competition policy also assists in responding to socio-economic concerns in other ways. For example, one of the recurrent issues in Canadian public policy debates is that of aggregate corporate concentration – i.e., the relative position of large enterprises in the economy as a whole. It must be noted here that aggregate concentration is only tangentially related to the maintenance of competition in individual product and geographic markets (which are the conceptual focii of competition policy¹⁹³). Nevertheless, by providing remedies to deal with abuses affecting individual markets, competition policy assists in responding to public concerns arising out of corporate concentration generally.¹⁹⁴

Implications of Growing Policy Linkages

The expanding links between competition policy and other fields of economic policy underscore the fact that competition policy is now an important part of Canada's legislative and policy framework for a dynamic market economy. As the range of competition policy grows, it is inevitable that government departments and constituencies representing other major areas of economic policy (notably industrial and trade policy) will show increased interest in the content and application of competition policy. In many respects, this will enhance the role of competition authorities and their ability to promote the efficient operation of markets. Interest in policy linkages must not, however, be permitted to erode the independence of competition agencies in their core functions of investigation and prosecution. Thus, a key challenge for competition authorities will be to participate effectively in extending the scope and reach of competition policy principles while maintaining appropriate independence and impartiality in administering competition law.

¹⁹³ R.S. Khemani, "The Dimensions of Corporate Concentration in Canada," in Khemani, Shapiro and Stanbury, *supra*, note 50, chapter 1, pp. 17-38.

¹⁹⁴ See Calvin S. Goldman, "Corporate Concentration and Canada's New Competition Act," in Khemani, Shapiro and Stanbury, eds., *supra*, note 50, chapter 21, pp. 489-503. Goldman observes that "... many of the concerns associated with high levels of corporate concentration can be traced back to the extent to which competition prevails in given markets."

PART V

COMPETITION POLICY IN FOREIGN JURISDICTIONS

This part of the Paper examines the competition law and policy regimes of major foreign jurisdictions, focusing particularly on: i) the United States; ii) the European Community; iii) the United Kingdom; iv) France; v) the Federal Republic of Germany; and vi) Japan. Pertinent developments in several other countries are also noted. With regard to each jurisdiction considered, the discussion focuses on general principles of policy orientation, noteworthy institutional features and special aspects of legislation or enforcement policies that relate to broader economic policy objectives.

The United States

The United States is a pre-eminent example of a highly developed economy which uses antitrust legislation as a prominent aspect of its national economic policy framework. Indeed, the U.S. antitrust laws have been a centerpiece of American economic policy for over one hundred years.¹⁹⁵ Vigorous enforcement of the U.S. antitrust laws, particularly during the first half of the twentieth century, is credited by Michael Porter as being a key source of U.S. economic growth and prosperity.¹⁹⁶

U.S. antitrust policy is often used as a benchmark for evaluating competition policy in Canada. Certainly, competition policy in the United States and Canada have much in common. In both countries, the broad

¹⁹⁵ As Areeda has observed, "For 100 years, the *Sherman [Antitrust] Act* has been at the core of America's industrial policy." Phillip Areeda, "Antitrust Law as Industrial Policy: Should Judges and Juries Make It?" in Jorde and Teece, eds., *supra*, note 57, chapter 2, pp. 29-46. Currently, there are signs that, following a period of relative retrenchment in the 1980s, the U.S. antitrust laws are being enforced with increased vigour by the Clinton Administration. See "Nasdaq Investigation Showcases New Moxie at Justice Department: Bingaman's Antitrust Crew Targets Many Practices Unchallenged in the 80s," *Wall Street Journal*, October 20, 1994, p. A1.

¹⁹⁶ In assessing the reasons for the U.S. surge past Europe and other economies in the 19th and 20th centuries, Porter observes: "Competition, combined with goals and attitudes, was what in many ways most set America apart.... American antitrust laws, particularly tough on monopolization, mergers, and price fixing, reflected a national consensus for competition. American rivalry stood in stark contrast to cartelized Europe and undeveloped and protected Asia." Porter, *supra*, note 11, p. 304. Porter's view of the effect of U.S. antitrust enforcement on American economic development is considerably more positive than that of certain other U.S. scholars. See, e.g., Bork, *supra*, note 27.

principles of competition policy transcend national borders in that they rest on a common appreciation of the role of competition in a market economy, and the need for measures to guard against anticompetitive practices. Between Canada and the United States, moreover, there is also considerable overlap in analytical approaches such as in areas of merger control. This reflects common policy objectives, as well as similarities in the wordings of relevant statutory provisions.¹⁹⁷

When considering the American experience with antitrust policy, it is important to make due allowance for the major structural differences (especially differences in size) between the U.S. and Canadian economies. As mentioned earlier in this Paper, because of the smaller size of Canada's internal market, it may be appropriate for Canada to give somewhat greater weight than the United States to efficiency enhancing aspects of mergers and other business arrangements. Reflecting this overall context, U.S. antitrust policies relating to restructuring also differ significantly from Canadian policies – the key difference being the overall standard for evaluating mergers. As already noted, in contrast to the total welfare approach reflected in Canadian merger provisions, U.S. merger enforcement policy generally embodies a consumer surplus approach.¹⁹⁸ Accordingly, in the United States, mergers are assessed principally in terms of their (anticipated) effect on consumer prices. Although the relevant enforcement guidelines permit potential efficiency gains flowing from a merger to be considered, such gains traditionally have not been permitted to override a finding that a merger lessens competition as manifested by its impact on consumer prices. This is different from the situation in Canada, where efficiency gains accruing to producers may be balanced against (and can potentially outweigh) deadweight losses in consumer surplus resulting from a merger.¹⁹⁹ Canadian and U.S. merger policies also embody technical

¹⁹⁷ Paul S. Crampton, "The DOJ/FTC 1992 Horizontal Merger Guidelines: A Canadian Perspective," *Antitrust Bulletin*, vol. 38, no. 3, Fall 1993. See also Green, *supra*, note 108. Key points of similarity in policy objectives as well as the relevant statutory provisions are discussed in Anderson and Khosla, *supra*, note 111.

¹⁹⁸ See Crampton, *id.*, and references cited therein, especially at pp. 695-96.

¹⁹⁹ See *Merger Enforcement Guidelines*, *supra*, note 94. The difference between the U.S. and Canadian approaches to efficiencies should not, however, be over-stated. In a 1989 address to the Practising Law Institute, Judy Whalley, then Deputy Assistant U.S. Attorney General for Antitrust, stated that a merger may not be challenged where it is expected to generate substantial efficiencies that "will directly benefit consumers over time" and other relevant criteria are met. See Judy Whalley, Deputy Assistant Attorney General, *Statement* (Before the 29th Annual Antitrust Seminar of the

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differences relating to matters such as the treatment of supply-side substitution possibilities.²⁰⁰

U.S. merger policy places somewhat greater emphasis than Canadian policy on quantitative indicators of a lessening of competition such as Herfindahl-Hirschman indices (a measure of market concentration) and market shares, as opposed to qualitative factors, such as an assessment of the nature of rivalry in the relevant market(s). In fact, while the quantitative standards in the U.S. *Merger Guidelines* delineate market situations in which mergers may be subject to challenge (depending on other factors), the corresponding thresholds in the Canadian *Merger Enforcement Guidelines* serve merely to take mergers “off the table” (i.e., to indicate circumstances in which they are unlikely to be challenged).²⁰¹ To the extent that they can be compared at all, the thresholds set out in the U.S. *Guidelines* embody somewhat stricter standards than the “safe harbour” indicators set out in the Canadian *Guidelines*.²⁰²

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Practicing Law Institute, New York, December 1, 1989), pp. 19-20. Furthermore, the 1992 *Merger Guidelines* issued jointly by the U.S. Department of Justice and the Federal Trade Commission indicate that “Some mergers that the Agency otherwise might challenge may be reasonably necessary to achieve significant net efficiencies”. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (April 2, 1992), reprinted in *Antitrust and Trade Regulation Report* vol. 62, no. 1559, April 2, 1992, Special Supplement. This approach appears to provide a significant role for efficiencies in the merger assessment process, in appropriate cases. More generally, in addition to collusive behaviour, the new U.S. *Guidelines* place greater weight on the risks of the exercise of market power through interdependent behaviour by firms in a market and the unilateral exercise of market power by a merged entity, as compared to the pre-existing *Merger Guidelines* issued in 1984. The latter change reflects recent advances in industrial organization theory, and is (broadly) consistent with the analytical framework of the Canadian *Guidelines*. See Crampton, *id.*

²⁰⁰ See Crampton, *supra*, note 197.

²⁰¹ The Canadian approach is based on underlying statutory requirements. As noted above in Part III(3), section 92(2) of the *Competition Act* explicitly prohibits the Competition Tribunal from finding that a merger lessens competition substantially based solely on evidence of concentration or market shares.

²⁰² For example, under the “General Standards” set out in 1992 U.S. *Guidelines*, markets in which the post-merger Herfindahl-Hirschman Index (HHI) is between 1,000 and 1,800 are regarded as “moderately concentrated”. In such markets, mergers resulting in an increase of 100 or more in the HHI are treated as potentially raising significant competitive concerns (and therefore subject to challenge) depending on other factors such as entry conditions. Markets having a post-merger HHI of 1800 or more are regarded as highly concentrated. In such markets, mergers producing an increase in the HHI of between 50 and 100 are treated as potentially raising significant concerns. In addition, there is a presumption that mergers in such markets that yield an increase of more than 100 in the HHI

(continued...)

Other aspects of American antitrust law and policy also have implications for industrial adjustment and restructuring. A particularly relevant aspect has to do with the treatment of horizontal restraints (i.e., interfirm agreements), which has long been viewed as a cornerstone of U.S. antitrust policy. For decades, "naked" price fixing, bid rigging and market sharing arrangements have been subject to *per se* prohibition in the United States, reflecting a belief that they have little, if any, redeeming social merit.²⁰³ Other types of interfirm arrangements that involve potential efficiencies are increasingly being subjected to case-by-case review.²⁰⁴

As in other countries, American antitrust policy has evolved in response to economic developments, the policy environment and advances

(...continued)

are likely to create or enhance market power, or facilitate its exercise. (This presumption may be overcome if other factors make it unlikely that the merger will have this effect.)

By contrast, in Canada, the *Merger Enforcement Guidelines* indicate that a merger will *not* likely be challenged on the basis of concerns relating to the unilateral exercise of market power, where the post-merger market share of the merged entity would be less than 35 percent. In addition, a merger will not generally be challenged on the basis of concerns regarding the interdependent exercise of market power where: i) the post-merger market share of the four largest firms is less than 65 percent; or ii) the post-merger market share of the merged entity is less than 10 percent.

Direct comparison of these standards is difficult due to differences in the relevant concentration indexes (unlike a simple market share or four firm concentration rates, the HHI takes account of the size distribution of all firms in the market) as well as other factors noted in the text above. Nonetheless, as an example, a market where the merged entity has a market share of 30 percent, and there are seven other firms with market shares of 10 percent each, would have an HHI of 1600. This would fall within the moderately concentrated range identified by the U.S. *Guidelines*, and therefore could be subject to challenge depending on other factors such as entry conditions and the extent of increase in the HHI due to the merger. Under normal circumstances, such a transaction would not likely be subject to challenge in Canada under either the 35 percent market share threshold for the merged entity in relation to concerns about the unilateral exercise of market power, or the 65 percent four-firm concentration ratio threshold in regard to concerns about the interdependent exercise of market power. Related issues are discussed in Green, *supra*, note 108.

²⁰³ See Bork, *supra*, note 27.

²⁰⁴ See Richard Schmalensee, "Agreements Between Competitors," in Jorde and Teece, eds., *supra*, note 57, chapter 5, pp. 98-118. Schmalensee discusses a series of U.S. Supreme Court decisions dating back to the 1979 case of *Broadcast Music Inc. v. CBS*, 441 U.S. 1 (1979) which have recognized that certain types of cooperative arrangements among competitors potentially serve valid, efficiency-related purposes and should, therefore, be evaluated on a case-by-case basis. Other key decisions relating to interfirm cooperation include *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Company*, 105 S. Ct. 2613 (1985) and *Federal Trade Commission v. Indiana Federation of Dentists*, 106 S. Ct. 2009 (1986). In reviewing the implications of these and other cases, in his 1986 opinion for the majority in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F. 2d 210 (D.C. Cir. 1986), then Judge Robert Bork observed that the Supreme Court had thus "effectively over-ruled [previous leading precedents] as to the *per se* illegality of all horizontal restraints."

in economic theory. One area which has had a particularly important influence on industrial restructuring and competitiveness is that of patent and other intellectual property licensing. Prior to the mid-1980s, U.S. antitrust laws were strictly applied to constrain the use of restrictive licensing practices (e.g., territorial or "field-of use" restrictions). Subsequently, antitrust authorities promoted a far-reaching liberalization of the treatment of licensing arrangements²⁰⁵ which resulted in a major reversal of U.S. policy in this area. This reflected new learning regarding the efficiency benefits of such practices. More recently, the U.S. Department of Justice has issued a set of draft *Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property*.²⁰⁶ These Guidelines embody a moderate approach, noting that while arrangements relating to intellectual property rights are subject to antitrust scrutiny, in general, they are no more suspect than arrangements made with respect to other forms of property rights.

Joint ventures have been another important focus of recent changes in U.S. antitrust policy. In 1984, the U.S. enacted special legislation, the *National Cooperative Research Act of 1984*, to provide limited protection from potential antitrust liability for qualifying joint ventures relating to research and development. This legislation was adopted as part of a package of measures to enhance the overseas competitiveness of U.S. firms.²⁰⁷ Among other things, the legislation provided for a reduction in potential civil liability under the U.S. antitrust laws from treble to single damages ("detrabling") for certain types of ventures that are duly notified under the Act.

More recently, in June 1993, the U.S. Congress enacted legislation to extend comparable protection to production-related as well as R&D joint

²⁰⁵ See Charles F. Rule [then U.S. Assistant Attorney General for Antitrust], *The Antitrust Implications of International Licensing: After the Nine No-nos* (Remarks before the Legal Conference of the World Trade Association and the Cincinnati Patent Law Association, October 21, 1986). In this address, Mr. Rule explicitly repudiated previous U.S. policy in this area, stating that: "The past paranoia [on the part of the U.S. Department of Justice and others] about patents and other intellectual property was unwarranted and irrational."

²⁰⁶ U.S. Department of Justice Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property (Draft, August 8, 1994). For background, see Anne K. Bingaman, Assistant U.S. Attorney General for Antitrust, *Intellectual Property and Antitrust in the Clinton Administration* (Phoenix, Arizona: February 25, 1994).

²⁰⁷ For background on the 1984 U.S. legislation, see William F. Baxter, "Antitrust Law and Technological Innovation," *Issues in Science and Technology*, vol. 1, no. 2, Winter 1985.

ventures.²⁰⁸ This legislation, the *National Cooperative Production Amendments [NCPA] of 1993*, responded to long-standing concerns on the part of U.S. high-tech companies that U.S. antitrust laws discouraged efficient cooperation in the development of new products.²⁰⁹ Some aspects of the legislation appear to embody a “strategic” effort to strengthen incentives for locating joint venture production activity within the United States as opposed to in other countries.²¹⁰ It has been suggested that along with other recent U.S. legislative initiatives relating to competitiveness, this may raise issues relating to non-discrimination requirements under the GATT and/or other international instruments.²¹¹

American antitrust policy has demonstrated sensitivity to wider economic policy objectives in other ways. During the past few years, U.S. antitrust authorities have participated extensively in efforts to enhance foreign companies' access to ostensibly protected domestic markets in Japan, including the so-called *Structural Impediments Initiative*.²¹² More recently, the Department of Justice supported a significant revision to previous U.S. policy respecting jurisdiction in international antitrust matters by permitting the outward application of U.S. antitrust laws to restraints encountered by U.S. exporters in foreign markets. This development

²⁰⁸ U.S., *National Cooperative Production Amendments of 1993*, reprinted in *Antitrust and Trade Regulation Report*, vol. 64, June 18, 1993. For a useful analysis of this and other recent legislative initiatives aimed at promoting U.S. competitiveness, see Mark A.A. Warner and Alan M. Rugman, "Recent U.S. Protectionist R&D Policies: Are Canadian Multinationals Exempted," *Canadian Business Law Journal*, vol. 23, no. 3, June 1994, pp. 395-431.

²⁰⁹ For background, see Jorde and Teece, *supra*, note 57.

²¹⁰ In particular, section 7(1) of the *National Cooperative Research and Production Act of 1993*, which was enacted as part of the NCPA legislation, indicates that the application of certain protections provided under the legislation is limited to joint ventures for which the principal production facilities are located in the U.S. In addition, section 7(2) of the legislation requires that qualifying joint ventures must be controlled by either: (i) a U.S. person; or (ii) a person from a foreign country which provides national treatment to U.S. persons in respect of the antitrust treatment of joint production ventures. See Warner and Rugman, *supra*, note 208, pp. 402-403.

²¹¹ Warner and Rugman, *supra*, note 208, especially at pp. 427-28. In reflecting on the NCPA and other recent U.S. legislative initiatives relating to R&D and competitiveness, these two authors refer to "a disturbing emergence of protectionism in the antitrust and R&D policy of the United States". They argue that, as a result of this trend, "Canadian-based MNEs may be precluded from entering into efficient cooperative strategic R&D alliances with their U.S. counterparts". Warner and Rugman, *supra*, note 208, at p. 428.

²¹² For background, see Anderson, *supra*, note 183.

responds to U.S. firms' impatience with the perceived slowness on the part of the Japanese to open their markets.²¹³

The U.S. experience also provides extensive insights into institutional aspects of competition policy. A particular area of interest concerns the feasibility of shared responsibility for antitrust enforcement in a federal state. Responsibility for developing and, particularly, enforcing antitrust laws is dispersed among various levels and institutions of government. To begin with, at the federal level, the U.S. Department of Justice and the Federal Trade Commission share responsibility for enforcement of federal antitrust laws. Although administrative arrangements exist to prevent duplication of enforcement efforts, a number of transactions or corporate practices can, in principle, be investigated by either agency. Many of the individual states of the U.S. also maintain their own respective antitrust statutes.²¹⁴

Private antitrust suits initiated by individual citizens or corporations provide a major additional vehicle for antitrust law enforcement in the United States. Such suits typically account for a substantially greater proportion of the total number of antitrust cases than federal and state efforts combined. Private enforcement is encouraged by some features of U.S. civil procedure – two of which are the availability of treble damages for successful plaintiffs in certain types of cases and contingency fees for attorneys. While such actions can certainly strengthen compliance with the antitrust laws, there is also a concern that they may, in some circumstances, be used by firms to harass competitors.²¹⁵ In sum, the United States exemplifies a highly developed and multifaceted system of competition law and policy which serves as a cornerstone of the market economy while continuing to evolve in response to economic and policy developments.

The European Community

The European Community (EC), provides another distinct model of competition policy as an instrument of economic policy. The European

²¹³ See "The Impact of Reconsideration of U.S. Antitrust Policy Intended To Protect U.S. Exporters," *World Competition*, vol. 15, no. 4, June 1992, pp. 5-16.

²¹⁴ For background, see American Bar Association, Section of Antitrust Law, *Antitrust Federalism: The Role of State Law* (ABA Antitrust Section, Monograph No.15, 1988).

²¹⁵ In this regard, see Bork, *supra*, note 27.

Community was established in 1957, under the provisions of the *Treaty of Rome*. The objectives underlying the creation of the common market, as set out in the *Treaty*, are to promote the harmonious development of economic activities, increased stability, a rising standard of living and closer relations between its member states. Recently, the EC has emerged as a leading player in shaping international economic policy.

The EC model exhibits a significantly higher degree of integration between competition policy and broader economic policy objectives than has traditionally been the case in either Canada or the United States. From its inception, EC competition policy has been deliberately employed as an instrument to foster the integration of the European market. The EC's recent initiative to complete the integration of its internal market has augmented the importance of an effective community-wide competition policy as an instrument of market unification.²¹⁶

Another distinct characteristic of EC competition policy is its wide ambit, which encompasses state aids to industry that distort competition as well as business practices.²¹⁷ The authority for the Commission to regulate state aids is provided by Articles 92 and 93 of the *Treaty of Rome*. In addition to ruling on the permissibility of state aids in individual cases, the Commission publishes regular reports on the incidence and effects of these aids.

In the area of merger enforcement, several points regarding the EU approach should be noted. The *Merger Regulation* that took effect in September 1990 grew out of the substantial differences in policies and institutions prevailing among the EU member states, and resulting concerns that these differences might distort intra-EU trade and investment flows. It represented a compromise between German demands for an independent rules-based regime with high concentration thresholds, and a public interest approach with political safeguards favoured by the United Kingdom.²¹⁸ To

²¹⁶ For discussion, see Europe 1992: *Working Group Report on Competition Policy* (External Affairs and International Trade Canada, 1991).

²¹⁷ For detailed discussion, see Ronayne, *supra*, note 168.

²¹⁸ Bruce Doern, *Competition Policy Decision Processes in the European Community and the United Kingdom: Politics, Public Interest and Discretion* (Bureau of Competition Policy, September 1992), pp. 16-17.

some extent, the *Regulation* also reflects industrial policy considerations which are considered to be important by other countries, such as France.²¹⁹

With regard to the substantive focus of the *Regulation*, the test set out in Article 2(3) refers to "concentrations" that create or strengthen a dominant position, "as a result of which competition would be significantly impeded in the common market or in a substantial part of it". Such concentrations are considered to be incompatible with the common market. Article 2 also lists a number of factors that the Commission may take into consideration in applying the basic test. These include barriers to entry, the market position and financial status of the relevant firms and the extent of the actual or potential competition remaining.²²⁰ Unlike the merger provisions under the Canadian *Competition Act*, the EC *Regulation* does not provide an explicit efficiency defense. The *Regulation* is not, however, devoid of references that permit factors other than competition to be considered. First, the *Regulation* requires that the Commission take into account "the development of technical and economic progress [an apparent reference to dynamic efficiency] provided that it is to consumers' advantage and does not form an obstacle to competition". Second, the preamble to the *Regulation* explicitly states that in applying it, the Commission will bear in mind the objectives of economic and social cohesion, and other fundamental objectives of the *Treaty*.²²¹

The evolution of EC competition policy as an instrument of market unification has entailed costs as well as benefits. In particular, it has led to the development of substantive rules that appear to be inconsistent in some respects with the market efficiency approach generally followed in North America. For example, in contrast to Canada and the United States, the EC has established a more-or-less *per se* approach to intrabrand territorial market restraints. This approach may entail some loss of efficiencies that potentially flow from such arrangements.²²²

²¹⁹ See the reference to "the development of technological and economic progress," in Article 2(1) of the *Regulation*, discussed below.

²²⁰ External Affairs and International Trade Canada, *supra*, note 216.

²²¹ External Affairs and International Trade Canada, *supra*, note 216.

²²² Anderson et al, *supra*, note 143, pp. 31-33, and Barry E. Hawk, *United States, Common Market and International Antitrust: A Comparative Guide* (Englewood Cliffs, N.J.: Prentice Hall Law and Business), vol. II, pp. 306-7.

Several institutional features of the EC competition policy system are also noteworthy.²²³ The *Merger Regulation* is administered by a special Task Force within the Directorate-General for Competition (DG-IV). The Task Force carries out its functions in the context of specific procedural requirements and institutional machinery that facilitate consideration of countervailing viewpoints. To begin with, in merger cases meeting the applicable thresholds, DG-IV routinely consults with the Directorate-General for Industrial Affairs (DG-III). All cases reaching the second stage of review by DG-IV must also be referred to the Advisory Committee of Member State Representatives. Finally, the EC Commission itself (which has the final authority in merger cases) represents a significant mediating mechanism. The Commission brings together as a corporate decision-making body all the EC Commissioners with their diverse policy mandates and regional loyalties.

Recently, the EC's merger control framework was the subject of a major study released by the London-based Centre For Economic Policy Research (CEPR).²²⁴ This study contends that merger assessments prepared by the DG-IV for public release are sometimes tailored to fit decisions reached by the Commission based on other (unstated) criteria. According to the authors, this results in a lack of clarity and interferes with the objective of providing consistent guidance for private parties. In response to these concerns, the CEPR study makes three principal recommendations: i) structural separation of investigatory and decision-making functions; ii) systematic publication of merger analyses and recommendations before they are considered by the decision-making body; and iii) incorporation into the Regulation of an explicit efficiency defense, to facilitate explicit (rather than implicit) consideration of potential gains from particular transactions. It is noteworthy that by following recommendations i) and iii) of the CEPR report, merger enforcement in the European Community would conform more closely to procedures followed in Canada. Recommendation ii) corresponds broadly to demands for more systematic provision of information regarding individual merger assessments and

²²³ See Doern, *supra*, note 218.

²²⁴ D. Neven, R. Nuttal and Paul Seabright, *Merger in Daylight: The Economics and Politics of European Merger Control* (London: Centre For Economic Policy Research, 1993).

negotiated settlements. Requests for such information have also been made in other countries.²²⁵

An important additional dimension of the EC 1992 exercise relating to competition policy has to do with the traditionally regulated sectors of the European economy (e.g., transportation, telecommunications, financial services and energy). Regulatory controls are now being significantly liberalized in these sectors, to facilitate intra-Community trade and investment flows. This, in turn, entails increased reliance on competition policy.²²⁶

The United Kingdom

The United Kingdom (U.K.) provides another intriguing model of competition policy. A salient feature of the U.K. model is its institutional and statutory complexity.²²⁷ The law comprises four main statutes, the *Fair Trading Act 1973*, the *Restrictive Trade Practices Act 1976*, the *Resale Prices Act 1976* and the *Competition Act 1980*.²²⁸ The various U.K. Acts are administered by a multiplicity of institutions including: the Office of the Director General of Fair Trading, which gathers information, carries out initial investigations, initiates references to the Monopolies and Mergers Commission (MMC) and monitors undertakings; the MMC, which carries out formal investigations to determine whether monopolies, mergers or anticompetitive practices are harmful to the public interest; the Restrictive Practices Court, which determines whether inter-firm agreements are contrary to the public interest; and the Secretary of State for Industry, who exercises ultimate decision-making power regarding mergers and certain

²²⁵ In Canada, the Bureau of Competition Policy has responded to these demands through systematic provision of press releases and backgrounders on key case decisions.

²²⁶ See Joseph Monteiro, *Europe 1992: The Regulated Sectors; The Scope for Expansion of Competition Policy; and the Implications for Canadian Businesses* (Bureau of Competition Policy, Economic Analysis Discussion Paper, March 1992).

²²⁷ Whish observes that "In the UK competition law has developed in the most extraordinarily haphazard way with little consistent thought being given to the formulation of policy." Richard Whish, *Competition Law* (London: Butterworths, 1985), p. 18. Recently, the Chairman of the House of Commons Treasury Committee has called for a comprehensive review of U.K. competition policy. See "Chairman of UK Parliamentary Committee Urges Evaluation of Competition Policy," *Antitrust and Trade Regulation Report*, vol. 66, no. 1653, March 3, 1994, pp. 251-52.

²²⁸ Statutory references are provided in Whish, *id.*

other matters.²²⁹ The direct involvement of the Secretary of State in U.K. merger enforcement represents a fundamental difference from North American approaches to merger enforcement.

Of all the major industrialized countries, the system of competition law in the United Kingdom is the most explicitly "public-interest" oriented. The *Fair Trading Act*, which governs merger investigations by the Monopolies and Mergers Commission, incorporates an explicit public interest approach. In addition to various competition-related criteria, section 84(4) of the Act requires that in reviewing a merger, the Commission shall consider the impact of the merger in: (i) "maintaining and promoting the balanced distribution of industry and employment"; and (ii) "maintaining and promoting competitive activity in overseas markets" [i.e., international competitiveness or export enhancement].²³⁰ As previously noted, agreements in restraint of trade are also evaluated under a public interest standard.²³¹

The institutional processes for administering competition law in the United Kingdom facilitate consideration of diverse viewpoints respecting corporate restructuring. Prior to undergoing hearings by the Monopolies and Mergers Commission, a merger may be reviewed by a non-statutory interdepartmental Mergers Panel and consisting of representatives of the Department of Industry and Trade, the Treasury, and other economic departments. The Panel is chaired by the Director-General of Fair Trading. Its purpose is to consider the full range of policy concerns associated with a major merger before a recommendation is made for investigation of the merger by the MMC.²³²

The U.K. Government recently announced several measures to streamline competition law enforcement procedures. These measures include: i) a reduction in the maximum statutory period for the Minister to decide whether a [pre-notified] merger will be referred to the MMC; and ii) a raising of the threshold for potential exposure to investigation under the

²²⁹ Whish, *id.*, p. 18.

²³⁰ Sir Gordon Borrie, "Merger Policy: Current Policy Concerns," in James A. Fairburn and John Kay, eds., *Mergers and Merger Policy* (Oxford: Oxford University Press, 1989), pp. 246-263.

²³¹ The UK law on interfirm agreements also differs from North American approaches in other key respects. See Whish, *supra*, note 227.

²³² Doern, *supra*, note 218, pp. 47-50.

Competition Act 1980.²³³ Earlier in 1994, the Government raised the asset threshold for scrutiny of mergers under the *Fair Trading Act* and undertook to place greater reliance on a “fix it first” approach in merger cases.²³⁴

Looking beyond its general competition statutes, the United Kingdom has been an international pace-setter in terms of reforms to introduce competition in formerly regulated industries. Strong measures have been introduced to foster competition in the telecommunications sector. In addition, the United Kingdom helped to pioneer and continues to provide a leading institutional model for introducing competition into the electrical energy sector.²³⁵

In sum, the United Kingdom represents a distinct public interest-based model of competition law and policy. It takes account of a wider range of interests and policy mandates affected by corporate restructuring than a pure competition or efficiency-oriented approach. This aspect of the law is viewed by some antitrust scholars as a potential liability, in that it may have the effect of blurring the focus of competition law, limiting its ability to promote the economic welfare of citizens.²³⁶ Nonetheless, other aspects of U.K. economic policy such as regulatory reforms implemented in key infrastructure industries demonstrate a strong commitment to competition policy principles.

France

Competition policy in France is now an important aspect of national economic policy.²³⁷ Prior to 1975, competition policy in France was largely

²³³ "UK Government Offers Measures to Reduce Delays in Antitrust Matters," *Antitrust and Trade Regulation Report*, vol. 66, no. 1670, June 30, 1994, pp. 751-52.

²³⁴ "UK Government Moves to Reduce Burdens of Compliance With Competition Regime," *Antitrust and Trade Regulation Report*, vol. 66, no. 1650, February 10, 1994, pp. 179-80.

²³⁵ See Edward P. Kahn, *Competition Issues in the Electricity Sector* (Paper prepared for the Bureau of Competition Policy, Industry Canada, April 1994), pp. 18-20.

²³⁶ See Doern, *supra*, note 218, and references cited therein.

²³⁷ See F. Jenny, "French Competition Policy in Perspective," in W.S. Comanor *et al*, *Competition Policy in Europe and North America: Economic Issues and Institutions* (Chur, Switzerland: Harwood Academic Publishers, 1990), vol. 43 in *Fundamentals of Pure and Applied Economics*, J. Lesourne and H. Sonnenschein, eds. in Chief, pp. 146-188.

displaced by interventionist economic policies including price controls, extensive subsidization of key industries and centrally planned restructuring of firms. Since then, however, competition has played an increasingly central role in French economic policy, and is now well entrenched in the legislative and policy framework.²³⁸ Nonetheless, the appropriate approach to competition policy – particularly the relative importance attached to dynamic efficiency gains as opposed to static competition – is still being debated.

Some aspects of the present French legislation dealing with competition date back to the immediate post-war period²³⁹ when provisions were enacted to deal with anti-competitive refusals to sell, vertical market restraints, horizontal agreements and abuses of a dominant position.²⁴⁰ Significant modifications to the legislation were adopted in 1977, to control enterprise concentrations (mergers), and to establish the Commission de la Concurrence²⁴¹ – an independent body specializing in adjudicating cases under competition law. The 1977 reforms also gave the responsible Minister the authority to impose fines on firms found by the Commission to have engaged in anti-competitive practices.

In 1986, French competition law was further clarified and refined by the enactment of the *Ordinance on Freedom of Pricing and Competition*.²⁴² The 1986 *Ordinance* stipulated that in general, "prices are freely determined through the competitive process." It also replaced an *Ordinance on Price Control* adopted in 1945. The new *Ordinance* established a new administrative body, the Conseil de la Concurrence, to investigate and prosecute offences against competition. The Conseil was also given the authority to impose fines and issue injunctive relief, subject to possible

²³⁸ "France now considers the fight against anticompetitive agreements and abuses of monopoly power to be a particularly important feature of its economic policy.... Because there is now a political consensus as to the usefulness of competition and economic freedom, it is unlikely that this trend will be reversed in the near future." Jenny, *id.*, p. 188.

²³⁹ Arguably, the historical antecedents of French competition law date back to the Napoleonic Code of 1810. A key provision of the Code, Article 419, made it a crime to promote "the rise... of the price of goods ... above ... the price which the natural and free course of competition would determine." See Chapter 1, "Historical Overview of French Antitrust Law," in Part IV, "France," in von Kalinowski, *World Law of Competition*, p. FRA 1-1.

²⁴⁰ Jenny, *supra*, note 237, pp. 148-150, and von Kalinowski, *id.*, p. FRA 1-3.

²⁴¹ Jenny, *supra*, note 237, p. 151, and von Kalinowski, *id.*, p. FRA 1-3.

²⁴² Jenny, *supra*, note 237, pp. 156-62.

appeal to the Paris Appeals Court (see below). Finally, the 1986 *Ordonnance* clarified aspects of the treatment of economic concentrations (mergers).

The key organizations involved in administering French competition law are the Conseil de Concurrence and the Direction-Générale de la Concurrence, de la Consommation et de la Répression des Fraudes. The Conseil de Concurrence is an independent body that investigates "domestic" mergers (i.e., those not subject to review by the EC Commission) referred to it by the Minister of Finance, usually on the recommendation of the Direction-Générale. Based on its investigations, the Conseil issues public reports and recommendations to the Minister, who has the authority to block domestic mergers. The Conseil also has parallel responsibilities for the investigation of cartel agreements and other quasi-criminal offences.

The Direction-Générale de la Concurrence, de la Consommation et de la Répression des Fraudes, which is a part of the Ministère de l'Économie, des Finances et du Budget, is responsible for advising the Minister of Finance on domestic merger issues. In addition, it represents France in meetings of the Advisory Council of EC Member States which meets periodically to advise the EC Commission on mergers that reach the "second stage" of review by the Commission.

The French approach to the analysis of mergers is outlined in a document titled *A Method For Analyzing Mergers From the Point of View of Competition Law*.²⁴³ The document states categorically that "a dominant position is not condemned in itself". It also emphasizes the importance of a dynamic approach to the analysis of mergers – which takes into account the role of potential competition in disciplining the exercise of market power, and the international competitiveness of the firms under examination.²⁴⁴ Broadly speaking, the French approach to competition policy seeks to provide for appropriate control of anti-competitive mergers and other arrangements while at the same time showing somewhat greater receptivity to arguments regarding their dynamic benefits than is evidenced in other jurisdictions.

The Federal Republic of Germany

²⁴³ *A Method For Analyzing Mergers From the Point of View of Competition Law* (Ministère de l'Économie, et des Finances, 1992).

²⁴⁴ *A Method For Analyzing Mergers, id.*, pp. 26-27.

The competition law of the Federal Republic of Germany provides another unique model of competition law and policy. It is noteworthy that it is German national law, rather than EC competition policy, which provides the operational framework for intra-German trade and commercial arrangements. In addition to its relevance as an alternative model of competition law and policy, the German approach is of interest in light of Germany's growing importance in world economic and political affairs.

The German competition law, the *Act against Restraints of Competition [ARC]*, was adopted in 1958.²⁴⁵ The *Act* initially focused on dealing effectively with the threat posed to Germany's economic recovery and reconstruction by cartels, other affiliated groups of firms and trusts. Thus, it incorporated a broad ban on cartels. In 1973, the scope of the *ARC* was broadened to include statutory provisions for control of anti-competitive mergers. These "structural" provisions of the German legislation are the linchpin of the law. Traditionally, behavioural concerns such as the control of exclusionary and discriminating practices of dominant firms have been given less emphasis in German competition law and policy.

In Germany, an effective competition policy is believed to contribute positively to industrial competitiveness.²⁴⁶ In terms of substantive enforcement policies, particularly in relation to mergers, the German Cartel Office adheres to strong antitrust principles. The basic test for disallowing a merger is based on the concept of creating or re-inforcing a dominant position in a market. The test is applied according to specific structural criteria. Efficiencies are recognized as a factor that may be considered – but not as a defense to an otherwise anti-competitive merger.

With regard to institutional structure, the German system is based primarily on bureaucratic and judicial rather than on Ministerial authority.²⁴⁷ The Bundeskartellamt (Federal Cartel Office) is the principal decision-making authority, and within the Bundeskartellamt that authority is extensively decentralized. Decisions respecting individual enforcement matters are normally taken at the level of individual Decision Divisions. Such decisions can be appealed to the Berlin Kammergericht (Court of

²⁴⁵ The 1958 legislation superseded the post-World War II decartelization laws which were adopted during the Allied occupation regime.

²⁴⁶ Interviews with staff of the Bundeskartellamt, June 1993.

²⁴⁷ Doern, *supra*, note 218.

Appeals) with respect to both matters of legal interpretation and economic-factual assessment. Subsequent further appeal to the Bundesgerichtshof (Federal Supreme Court) is also possible, with respect to matters of law only.

The regime of German competition law also incorporates elements of explicit Ministerial control. Subsection 24(3) of the *ARC* authorizes the Minister of Economics to override particular decisions by the Cartel Office prohibiting a merger. Such action must be deemed (by the Minister) to be necessary for the continued functioning of the German economy or essential to other aspects of the public interest, which may include matters relating to international markets.²⁴⁸ Before a Ministerial override can be imposed, however, the matter must first be investigated and publicly reported on by the German Monopoly Commission, a separate, independent agency. According to German political traditions, any Ministerial actions at variance with the Monopoly Commission's recommendations are subject to extensive public scrutiny and comment. The *ARC* also limits the Minister's authority by stipulating that the Cartel Office's decisions regarding particular mergers may not be overridden if the effect would be to undermine the competitive market system.²⁴⁹

The limited propensity for Ministerial intervention in assessing mergers in Germany is affirmed by empirical data. From 1973, when the merger control provisions were enacted, until the end of 1993, the Cartel Office disallowed a total of 105 mergers – less than 1 percent of the 17,750 mergers which were notified to the Cartel Office during this period.²⁵⁰ In 22 of the 105 disallowed cases, the decisions taken by the Cartel Office were subsequently overturned by the courts. In six other cases, Cartel Office decisions were reversed by Ministerial overrides under the public interest provision. The rationales advanced for Ministerial intervention in these cases included concerns relating to job losses resulting from a merger,

²⁴⁸ In addition, section 9 of the *ARC*, provides authority for the Minister to authorize a cartel if it is deemed necessary for overriding reasons related to the public interest and the economy as a whole. This provision has not been an important factor in German competition policy.

²⁴⁹ See *ARC*, section 24(3).

²⁵⁰ Information provided by the Bundeskartellamt. Note that the overall rate of merger prohibition is broadly comparable to the post-1986 experience with merger control in Canada. See Part III, *supra*.

future job gains, security of Germany's energy supply, the fostering of technical progress, and the need to compete in world markets.²⁵¹

Another area of interest regarding competition policy in Germany relates to horizontal (inter-firm) agreements. The ARC makes specific provision for exemption of certain rationalization agreements and other types of agreements utilized by firms. Under these provisions, rationalization agreements that are deemed to increase the efficiency of participating enterprises may be permitted even where they affect a substantial proportion of the relevant market(s). Authorization for rationalization and other agreements is normally granted for a period of three years, although the term can be extended. Authorization for agreements relating to prices and output is strictly controlled and is available only in exceptional cases.

Japan

The Japanese system of competition law and policy and its relation to broader economic objectives have been the subject of considerable interest in recent years. In the past, the apparent absence of effective antitrust enforcement in conjunction with interventionist industrial policies promoted by the Japanese Ministry of International Trade and Industry (MITI) has been cited by some observers as key factors in the "miracle" of Japan's post-war recovery and its rise to the status of an economic superpower.²⁵² Indeed, throughout the 1960s, 1970s and 1980s, Japanese competition policy was largely subordinated to policies promoting industrial and trade objectives. Significant sectors of the Japanese economy were covered by officially sanctioned cartels.²⁵³

Recently, however, the view that interventionist industrial policies were the fulcrum of Japanese growth has been effectively challenged. Analysts such as Saxonhouse have questioned both the *de facto* extent of

²⁵¹ Doern, *supra*, note 218, p. 25

²⁵² See, e.g., Chalmers Johnston, *MITI and the Japanese Miracle* (Stanford, Cal.: Stanford University Press, 1982).

²⁵³ R.E. Caves and M. Uekusa, *Industrial Organization in Japan* (Washington, D.C.: The Brookings Institution, 1976), and Masu Uekusa and Hideke Ide, "Industrial Policy in Japan," in Hiromichi Matoh et al, *Industrial Policies for Pacific Economic Growth* (Sydney: Allen and Unwin, 1987).

control exercised by MITI and the role of government in contributing to the international success of Japanese industries.²⁵⁴ More broadly, Porter attributes Japan's industrial and trade success to an entirely different set of factors.²⁵⁵ In his view, the principal sources of Japan's rapid growth beginning in the 1960s and throughout the 1980s were:

- i) demand conditions – particularly, sophisticated and demanding local buyers who raised quality standards and stimulated innovation;
- ii) intense rivalry among major firms in the high growth manufacturing sectors – rivalry which often existed despite rather than because of government efforts;
- iii) a proliferation of related and supporting industries that reinforced rivalry and innovation; and
- iv) selective *disadvantages* in factor endowment – particularly in energy, geographic space and labour – which accelerated the process of upgrading and the adoption of global strategies at the firm level.

Porter also argues that where present, MITI-sanctioned cartels created substantial inefficiencies and impeded rather than promoted the competitive success of Japanese industries.²⁵⁶ This viewpoint accords with the earlier assessment of Japanese industrial organization by Caves and Uekusa.²⁵⁷

Over the past several years, Japanese competition law and policy have themselves attracted extensive international scrutiny. The perceived laxity of the enforcement of competition law in Japan was a major concern pursued by the United States in the Structural Impediments Initiative (SII) – a major set of bilateral negotiations initiated in 1989 to address outstanding obstacles to trade and investment between the two countries. The SII negotiations were noteworthy in two respects: they are the most dramatic example to date of the increasing use of competition policy as an instrument of international economic policy; and, more generally, the negotiations

²⁵⁴ Gary R. Saxonhouse, "What Is All This About 'Industry Targeting' in Japan?" *World Economy*, vol. 6, no. 3, September 1983, pp. 253-273.

²⁵⁵ Porter, *supra*, note 11, pp. 384-421.

²⁵⁶ Porter, *supra*, note 11, p. 416.

²⁵⁷ Caves and Uekusa, *supra*, note 253.

clearly illustrated the non-sustainability of traditional distinctions between domestic and international policies in the global economy of the 1990s.²⁵⁸

As a result of the SII negotiations and other international pressures, Japan recently adopted several measures to strengthen its competition legislation and enforcement capabilities. These include:

- i) enactment of legislation to raise the level of fines available under the *Antimonopoly Act*;
- ii) issuance of detailed new Guidelines pertaining to the application of the *Act* in key areas such as Unfair Trade Practices in Distribution Systems, Patent and know-how Licensing Agreements and Joint R&D Activities; and
- iii) substantial augmenting of resources available to the Japanese competition authority, the Fair Trade Commission, to enforce the law.

While the effectiveness of the recent reforms of Japanese competition policy remains to be established, they suggest that Japan may now be moving into the group of major industrialized countries that employ competition policy as a cornerstone of national economic policy.

Other Jurisdictions

This section highlights select developments with respect to competition policy as a dimension of economic policy in other jurisdictions.

Sweden is another example of a country in which competition policy has recently begun to play a central role in national economic policy. In 1993, Sweden adopted a new (and stronger) competition law, as a key element in a move toward a market-oriented development strategy. The new law is also central to the process of Sweden's planned accession to full membership in the European Community.²⁵⁹

The new Swedish *Act* is modelled on and substantially replicates the corresponding articles of the European Community Treaty (i.e., Articles 85 and 86). In addition, block exemptions based on those in force in the EC

²⁵⁸ See Anderson, *supra*, note 183.

²⁵⁹ See Peter Wessman, "Competition Sharpens in Sweden," *World Competition Law and Economics Review*, 1993, pp. 113-119.

are being provided for specialization agreements, R&D agreements, exclusive distribution systems, motor vehicle distribution and servicing, patent and know-how licensing and franchising. The administering agency, the Swedish Competition Authority, also has a general responsibility for promoting a "competitive culture" in Sweden. In addition, the Swedish Competition Authority assists in the interpretation and enforcement of international commitments relating to competition such as the European Economic Area (EEA) Agreement, which sets out the rules of competition for trade between EC and EFTA countries.²⁶⁰

Australia has long been recognized as having a number of important economic and political similarities to Canada. Like Canada, Australia has a relatively small, resource-intensive industrialized economy that is dependent on international trade for its prosperity and growth. Competition policy in Australia was recently the subject of a major study undertaken by a Commission of Inquiry appointed by the Australian Prime Minister.²⁶¹ The Commission's report states categorically that competition policy is "central to microeconomic reform" and that its role is vital in meeting the major challenges currently facing the Australian economy. This view reflects those of the Prime Minister and various State Premiers who have also emphasized the need for an effective competition policy.

With respect to substantive competition rules, the Commission recommended several measures to strengthen competition policy by:

- i) strengthening existing prohibitions to fix prices under Australian law; and
- ii) eliminating (existing) artificial distinctions between "goods" and "services" in Australian competition law.

Potentially as important as the recommendations dealing with anti-competitive conduct, the report recommends measures to reduce the number and range of exemptions now available under competition law in Australia; and to make remaining exemptions more transparent. The Commission also made important recommendations concerning structural reform of public monopolies and access to essential facilities. These measures would represent a major strengthening of competition policy in Australia.

²⁶⁰ For background, see Wessman, *id.*

²⁶¹ Australia, *Report of the Commission of Inquiry on National Competition Policy* (August 1993).

Competition policy is also playing a central role in the ongoing process of establishing viable new market-oriented economies in the post-Communist regimes of Eastern and Central Europe. In the past few years, competition statutes have been enacted and/or strengthened in the Czech and Slovak Republics, Hungary, Poland and Russia as well in other countries in Eastern and Central Europe.²⁶² In virtually all of these so-called "Economies in Transition" or "Emerging Market Economies", competition policy is considered to be an important element in the total package of economic reforms.

Two trends evident in the competition policies of the Eastern and Central European countries are: relative leniency in the treatment of mergers and joint ventures, particularly in cases involving partnerships between domestic and foreign firms; and the attention focused on cases involving abuses of a dominant market position, in some cases for quasi-regulatory purposes relating to pricing in natural monopoly industries. In this regard, competition agencies may serve as a substitute for industry-specific regulatory agencies.²⁶³ One of the top priorities in these economies relates to the privatization and implementation of appropriate competitive checks and balances in natural monopoly industries (i.e., those industries in which existing production technologies favour the existence of a single dominant supplier in the relevant market).²⁶⁴

Mexico recently adopted a new *Federal Law of Economic Competition*, to provide a modern framework for controlling monopolistic practices and mergers, while avoiding direct economic regulation of industries. The new law is a key element of the country's ongoing drive to

²⁶² For background, see Saul Estrin and Martin Cave, eds., *Competition and Competition Policy: A Comparative Analysis of Eastern and Central Europe* (London: Pinter Publishers, 1993), Russell Pittman, "Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe," *The International Lawyer*, vol. 26, no. 2, pp. 485-503, and Russell Pittman, "Merger Law in Central and Eastern Europe," *The American University Journal of International Law and Policy*, vol. 7, no. 3, Spring 1992.

²⁶³ The potential benefits of this approach are discussed in Ordovery and Pittman, *supra*, note 170. The authors point out that a competition authority with responsibilities spanning an entire economy may be less susceptible to regulatory "capture" than an industry-specific regulatory authority. On the other hand, as Ordovery and Pittman also note, there may be risks involved in using a competition agency as a regulatory authority in that the agency could develop an institutional commitment to regulation which would be antithetical to its mission to promote reliance on free market forces.

²⁶⁴ See Ordovery and Pittman, *supra*, note 170, and Janusz A. Ordovery and Russell W. Pittman, *Restructuring the Polish Railway for Competition* (U.S. Department of Justice, Economic Analysis Group Discussion Paper, EAG 93-10, September 13, 1993).

establish a modern market economy. It also complements the external liberalization of the Mexican economy.²⁶⁵

Finally, a number of countries in South America and in the Asia-Pacific region have also implemented, or are in the process of implementing, competition policies. These include Columbia, Jamaica, Venezuela and Sri Lanka. In addition, new legislative initiatives, or revisions to existing laws, are under way in Argentina, Brazil, Equador and the Phillipines.²⁶⁶ In these countries, an effective competition policy is considered to be a complement to external liberalization and other market-oriented reforms.²⁶⁷ A number of African states are also implementing competition policies.²⁶⁸ All of these developments underscore the fact that increasingly, policy makers around the world are employing competition policy as a cornerstone of an efficient and dynamic market economy.

Summary of Findings From Comparative Analysis

This survey of competition policy regimes in foreign jurisdictions highlights several findings that are relevant to the role of competition policy in Canada. To begin with, the survey shows that, around the world, competition policy is increasingly recognized as a vital element of the framework for a dynamic market economy. This is evidenced by recent/ongoing efforts to strengthen competition policy in the European Community, France, Sweden, Japan and Australia as well as in the various economies in transition in Eastern Europe, Latin America and elsewhere. In established industrial economies such as the United States and the

²⁶⁵ "The enactment of the Federal Law of Economic Competition is part of this process of change towards a more participatory economy.... [It] eliminates artificial barriers to the entry of new competitors into divers sectors; penalizes anti-competitive conduct of economic agents...; fosters creativity in those involved in the production and marketing of goods and services...." Comision Federal de Competencia, *Annual Report 93-94* (Mexico: 1994).

²⁶⁶ See "Table I: Competition Law In Developing and Emerging Market Economies - A Few Examples," in R. Shyam Khemani and Mark A. Dutz, "The Instruments of Competition Policy and Their Relevance For Economic Development," in Claudio Frischtak, ed., *Regulatory Policies and Reform in Industrializing Economies* (Forthcoming, 1995).

²⁶⁷ See, e.g., Ana Julia Jatar, *Implementing Competition Policy on Recently Liberalized Economies: The Case of Venezuela* (Caracas: Office for the Promotion and Protection of Free Competition, October 1993).

²⁶⁸ Khemani and Dutz, *supra*, note 266.

Federal Republic of Germany, competition policy has long been treated as a cornerstone of the market system.

The review of foreign jurisdictions shows that there is no single, universally applicable model of competition policy in a modern industrial economy. While North American models embrace the goals of competition and efficiency, European models tend to emphasize the intrinsic value of market integration. The United Kingdom model of competition policy takes a distinctive public interest-based approach. The differing approaches reflect factors such as the various jurisdictions' economic circumstances, policy traditions and legal systems.

By the same token, it is noteworthy that the various jurisdictions surveyed have much in common in terms of their recent experiences with the application of competition policy. For example, there is a significant degree of *de facto* convergence in analytical methodologies and approaches, especially relating to merger control. In addition, in many countries, the role of competition policy has been enhanced by extensive privatization and/or the removal of industry specific regulatory controls.

Finally, the survey shows that, in many jurisdictions, competition policy is increasingly being employed as a tool for fostering international economic integration. This is in addition to its more traditional functions of stimulating healthy rivalry among producers and safeguarding the interests of consumers. The use of competition policy as an instrument of international economic integration is particularly evident in the European Community as well as in Sweden and, to a lesser extent, in the changes introduced in Japan as a result of the Structural Impediments Initiative. It is also noteworthy that Mexico's adoption of a modern competition law coincided with implementation of the NAFTA agreement.²⁶⁹ The emerging role of competition policy as an instrument of international economic policy is a key development that will reinforce its importance in the coming years.

²⁶⁹ As noted, the NAFTA agreement requires that parties adopt or maintain appropriate measures to deal with restrictive business practices.

PART VI ISSUES RELATING TO THE FUTURE EVOLUTION OF COMPETITION POLICY IN CANADA

This part of the Paper explores a number of issues relating to the future evolution of competition policy in Canada. These are *not* matters that necessarily require legislative action or policy adjustments at present. They do, however, derive from present concerns *vis-à-vis* industrial restructuring, as well as the international dimensions of competition policy and they do merit the ongoing attention of policy makers. In several cases, they also require further analysis and research.

Dynamic Efficiency Gains and Rationalizing Mergers

One of the issues that deserves ongoing study relates to the balancing of static market power and dynamic efficiency effects in the assessment of mergers and other interfirm arrangements. Promoting innovation is unquestionably a key element in stimulating higher productivity and economic growth, and there is no doubt that the economic welfare gains from innovation can in many circumstances outweigh deadweight losses from the exercise of market power. Furthermore, it has long been postulated by some economists that market structures which are optimal from the standpoint of static efficiency may not provide an optimal rate of investment in innovation.²⁷⁰

In a related vein, Jorde and Teece argue that, in innovative industries, the exercise of market power may be ephemeral. While at a given point in time, a single firm may be dominant in a structural sense, the firm's position can quickly be eroded by successful product or process innovations introduced by competitors. At a minimum, Jorde and Teece argue, innovation can have important implications for the definition of relevant markets in antitrust cases. Where competition occurs primarily on the basis of product innovation or service delivery, conventional procedures

²⁷⁰ The view that a high rate of innovation is likely to be facilitated by monopolistic market structures derives from Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper, 1942).

for defining relevant markets (which are often based on prospective price increases) may be misleading.²⁷¹

In considering these arguments, it should be emphasized that important questions remain regarding the asserted relationship between technological innovation and inter-firm cooperation or market concentration. The empirical evidence supporting this relationship is mixed.²⁷² In fact, the validity of this relationship is challenged by Porter's analysis which stresses the importance of competitive rivalry as a spur to innovation. Undoubtedly, any relation between technological innovation and market structure varies, depending on the industry being considered, intrafirm organization, the size of the national market and numerous other market-specific variables.²⁷³ Finally, it should be noted that the magnitude of dynamic efficiencies resulting from any particular transaction can be very difficult to predict.

In terms of present legislation and policies, in addition to the explicit efficiency defense, the merger provisions of the *Competition Act* also recognize "the nature and extent of change and innovation in a market" as a factor that may be considered in assessing particular transactions. The *Merger Enforcement Guidelines* also refer specifically to dynamic efficiency gains, while stipulating that these are to be given qualitative rather than quantitative consideration.²⁷⁴ This approach permits dynamic efficiency gains to be considered to the extent that they may be warranted in individual cases.

A related concern has to do with the assessment of "rationalizing mergers" (i.e., mergers that achieve cost savings through the reduction of capacity by the merged entity). Recent analysis suggests that the scope for cost savings from such mergers may be greater than has previously been recognized, in that it arises from the re-allocation of production towards

²⁷¹ Jorde and Teece, *supra*, note 57, pp. 7-11.

²⁷² Wesley M. Cohen and Richard C. Levin, "Empirical Studies of Innovation and Market Structure," in Schmalensee and Willig, eds., *supra*, note 30.

²⁷³ F.M. Scherer, "Schumpeter and Plausible Competition," *Journal of Economic Literature*, vol. XXX, no. 3, September 1992, pp. 1416-1433.

²⁷⁴ See Director of Investigation and Research, *Merger Enforcement Guidelines*, Appendix II, p. VI.

lower cost plants, and not merely from intrafirm savings or synergies.²⁷⁵ Game-theoretic models with only modest data requirements may assist in evaluating such gains in individual cases.²⁷⁶ It is important, however, to recall that in most cases such gains should be achievable in (indeed, they are likely to be encouraged by) a healthy competitive market environment.

Inter-firm Cooperation and the Law on Conspiracy

Another important issue for the future relates to cooperative arrangements among firms and the law on conspiracy. An effective law on conspiracy is a cornerstone of competition policy. Such a law is necessary to prevent price fixing, market allocation and other forms of collusion or cartel behaviour – all of which are recognized to be harmful to consumers and the overall efficiency of the market system.²⁷⁷ By the same token, recent theoretical developments also suggest that certain types of cooperative arrangements among firms can occasionally help markets to function more efficiently.²⁷⁸ In this connection, it is important to ensure that the law on conspiracy does not deter such beneficial arrangements, while ensuring that it also continues to provide effective sanctions against collusion.

Recent literature identifies a number of ways in which cooperative arrangements can enhance efficiency. To begin with, the literature recognizes that limited cooperative arrangements may be necessary to achieve efficient outcomes in so-called "network" industries. These are industries in which decisions that are optimal from the standpoint of individual "nodes" (i.e., locations in the network) may adversely affect the efficiency of the network as a whole. In such industries, limited

²⁷⁵ See Joseph Farrell and Carl Shapiro, "Horizontal Mergers: An Equilibrium Approach," *American Economic Review*, vol. 80, no. 1, March 1990.

²⁷⁶ Tim Hazledine and Patrick Hughes, *Rationalizing Mergers and the Merger Guidelines* (Bureau of Competition Policy, 1992).

²⁷⁷ See, e.g., Dennis W. Carlton and Jeffrey Perloff, *Modern Industrial Organization* (Glenview, Illinois: Scott, Foresman, 1990), chapter 5.

²⁷⁸ For a useful overview of developments, see Thomas W. Ross, "Proposals For a New Canadian Competition Law on Conspiracy," *Antitrust Bulletin*, vol. XXXVI, no. 4, Winter 1991, pp. 851-82. See also Richard Schmalansee, "Agreements Between Competitors," in Jorde and Teece, eds., *supra*, note 57, chapter 5, pp. 98-118.

coordination of services provided and (possibly) other variables can enhance the value generated by all participating firms. Some examples of network industries may include railroads and telephone service.²⁷⁹ Of course, even in such industries it is essential to provide appropriate competitive checks against the exercise of market power.

The "economic theory of the core"²⁸⁰ is another (theoretical) argument that purports to provide a rationale for cooperation in a (potentially) wide array of industries. According to this theory, in many industries with high fixed costs, a stable condition of competitive equilibrium does not exist. Some degree of cooperation is therefore necessary to overcome this problem. Examples of such industries range from seamless pipe manufacturing to ocean freight shipping.²⁸¹ The theory of the core also implies that, if firms in such industries are not allowed to collude, they may have no option but to integrate their operations through mergers.²⁸² The theory poses interesting challenges for conventional assumptions regarding competition and cooperation. Nevertheless, caution is the watchword in considering policy changes based on it. The empirical relevance remains open to question²⁸³ and permitting cartels to form – allegedly for core theory-related reasons – could result in the widespread exploitation of consumers. Elaborate regulatory structures would also be needed to prevent the abuse of legitimate functions.²⁸⁴

Recent economic literature also identifies a number of other situations in which limited forms of inter-firm cooperation can enhance efficiency. For example, Jacquemin and Slade contend that non-

²⁷⁹ See Dennis W. Carlton and J. Mark Klammer, "The Need For Coordination Among Firms, With Special Reference to Network Industries," *University of Chicago Law Review*, vol. 50, 1983, pp. 446-65.

²⁸⁰ See Lester G. Telser, "Cooperation, Competition and Efficiency," *Journal of Law and Economics*, vol. 28, May 1985, pp. 271-295.

²⁸¹ See George Bittlingmayer, "Decreasing Average Cost and Competition: A New Look At the Addyston Pipe Case," *Journal of Law and Economics*, vol. 25, 1982, and William S. Sjostrom, "Collusion in Ocean Shipping: A Test of Monopoly and Empty Core Models," *Journal of Political Economy*, vol. 97, no. 5, 1989.

²⁸² Bittlingmayer, *id.*

²⁸³ Ross, *supra*, note 278, at pp. 859-60.

²⁸⁴ John Shepard Wiley, Jr., "Antitrust and Core Theory," *University of Chicago Law Review*, vol. 54, 1987, pp. 556-89.

cooperative behaviour among firms can generate equilibria that are sub-optimal from the standpoint of both firms and consumers. They cite, as examples of such situations, the possibility of firms incurring excessive expenditures on advertising and wasteful duplication of R&D efforts. Such situations arise because, even though all firms (and, arguably, consumers) might benefit from reducing promotional or other expenditures, each would lose market share if it did so individually.²⁸⁵

Another important development in this area relates to the sharing of information among competitors – an activity long considered to promote collusion. Recently, Teece has argued that the systematic sharing of information among firms provides a critical stimulus to innovation and efficient industrial growth and development.²⁸⁶ Two possible examples of such beneficial cooperation are: i) the setting of industry standards; and ii) "benchmarking" – a process of organizational upgrading through a systematic sharing of information about production methods and costs to facilitate the adoption of best practices by firms across an industry.²⁸⁷ In Teece's view, benchmarking is likely to be a key source of industrial renewal in North America in the 1990s.

An important related issue has to do with strategic alliances. This is an amorphous concept which can include a wide range of relationships. Strategic alliances typically entail something more than a mere contractual relationship but something less than a merger in the traditional business sense. They are increasingly being touted as an important vehicle for achieving enhanced competitiveness and rapid diffusion of new technology in Canadian industries.²⁸⁸ In principle, strategic alliances can serve important efficiency-related objectives. They represent an intermediate level of integration that can achieve synergies and other gains while

²⁸⁵ See the discussion of "Industrial Policy" in Alexis Jacquemin and Margaret E. Slade, "Cartels, Collusion and Horizontal Merger," in Schmalensee and Willig, eds., *supra*, note 30, chapter 7, pp. 416-472.

²⁸⁶ David J. Teece, *Information Sharing, Cooperation and Antitrust* (Paper presented at the annual Spring meeting of the American Bar Association, Washington, D.C., March 1993).

²⁸⁷ For useful discussion, see Paul S. Crampton, *Benchmarking and Other Types of Information Sharing* (Paper prepared for the Insight Conference on Emerging Issues in Competition Law, March 10, 1994).

²⁸⁸ See, e.g., D'Cruz and Rugman, *supra*, note 55. See also V.R. Amanor-Boadu and L.J. Martin, *Enhancing the Competitiveness of Canadian Agri-food Industries Through Vertical Strategic Alliances* (George Morris Centre: November 1992).

preserving a higher degree of flexibility than other forms of integration for the participating firms. There is no *a priori* reason to rule out the purported benefits of such alliances, which are readily explainable in terms of "Williamsonian" analysis of contracting.²⁸⁹

A similar but more complex set of issues relates to the concept of "industrial networks". This concept is broader than the traditional notion of network industries (see above). It encompasses a variety of long-term relationships between leading firms, suppliers, customers and providers of community infrastructure.²⁹⁰

Here again, caution is the watchword when considering the policy implications of such conceptual developments. The basic prohibition of inter-firm conspiracies exists for sound public-policy reasons. It is important that the law not be undermined through efforts to accommodate theoretical arguments that have only limited empirical application. Nevertheless, it is appropriate to consider carefully the treatment of interfirm arrangements under the *Competition Act*, to ensure that it is consistent with current economic learning. In this vein, it has been suggested that Canada might be better served by a different statutory regime. One such alternative regime, which would encompass:

- i) a *per se* prohibition of "naked" restraints involving price fixing, bid rigging and market sharing, along with
- ii) a non-criminal "rule of reason" approach for other types of interfirm agreements, which can (depending on the circumstances) generate significant efficiency benefits.²⁹¹

Arguably, this would better serve to prevent harmful instances of collusion while at the same time providing an appropriate environment for efficient cooperative arrangements among firms.

²⁸⁹ R.S. Khemani and L. Waverman, *Strategic Alliances: The Implications For Competition Policy* (OECD: Background paper, November 1992), pp. 4-5. For further background, see Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (New York: Free Press, 1975).

²⁹⁰ D'Cruz and Rugman, *supra*, note 55.

²⁹¹ For pertinent discussion, see Ross, *supra*, note 278, and Paul S. Crampton and Joel T. Kissack, "Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities," *McGill Law Journal*, vol. 38, no. 3, September 1993, pp. 569-619.

With regard to the specific matter of strategic alliances, there is at present no indication that issues arising from such alliances cannot be adequately addressed under existing Canadian law.²⁹² Recently, the Bureau of Competition Policy issued a draft Information Bulletin that clarifies the broad scope for pro-competitive arrangements under the *Competition Act*, while reaffirming that anti-competitive arrangements will be aggressively pursued.²⁹³ By the same token, more empirical information is needed about the nature and purposes of such alliances in order to assess their ultimate competitive significance. While anti-competitive arrangements must be effectively deterred, it is equally important that potentially beneficial alliances are not inadvertently discouraged.²⁹⁴

The Treatment of Joint Ventures and Specialization Agreements

As discussed earlier, the joint venture and specialization agreement provisions of the *Competition Act* are intended to facilitate such arrangements by providing limited exceptions from the merger and conspiracy provisions, respectively. At the time of the 1986 amendments, it was thought that these provisions would facilitate innovation and foster the efficient restructuring of Canadian businesses. Since the *Act* was proclaimed, however, there has not been a single case in which a specialization agreement has been registered or a joint venture has been approved on the basis of these specific provisions.²⁹⁵ A number of possible explanations come to mind. Notably:

- In most cases, the general standards applicable under the merger and conspiracy provisions of the *Competition Act* probably provide sufficient scope for efficient cooperative

²⁹² Khemani and Waverman, *supra*, note 289. For related discussion, see Derek J. Ireland, *Strategic Alliances and Their Implications For Canadian Competition Policy* (Discussion paper based on a Roundtable at the University of Toronto, March 1993).

²⁹³ Director of Investigation and Research, *Strategic Alliances Under the Competition Act* (Information Bulletin, August 26, 1994). The preface to the draft Bulletin observes that "it is the Bureau of Competition Policy's experience that most forms of strategic alliances do not raise issues under the *Competition Act*" (p. 1).

²⁹⁴ Director of Investigation and Research, *id.*

²⁹⁵ It should be noted that several joint ventures have been dealt with under the general merger provisions of the *Act*.

arrangements, without the necessity of special registration or review procedures.

- The specific wording of the provisions may be perceived as limiting their application.
- There may be concerns about possible procedural delays or other difficulties, particularly in respect of the provisions governing specialization agreements which involves proceedings before the Competition Tribunal.
- In the case of transnational alliances, there may be a concern that even if a particular arrangement is sanctioned under the relevant provision(s) of the *Competition Act*, it might raise issues under the competition laws of other jurisdictions (e.g., the U.S.) in which one (or both) of the parties operate. This consideration touches on the issue of the extraterritorial reach of foreign antitrust laws and their ongoing effect on competitive restructuring in Canada.²⁹⁶

Notwithstanding these plausible explanations, policy makers may wish to give further consideration to the potential contributions of the provisions governing joint ventures and specialization agreements contained in the *Act*, to achieve a more efficient industrial structure in Canada.

International Trade Policy, Market Access and Vertical Restraints

As already discussed in various parts of the Paper, there is growing interest in the use of competition policy as a tool for facilitating international trade liberalization. A crucial matter for consideration in this area relates to the possibility of replacing existing anti-dumping rules with competition law standards in the context of regional trade arrangements such as NAFTA. There is also growing interest in the possible application

²⁹⁶ For discussion, see Calvin S. Goldman, Geoffrey P. Cornish and Richard F.D. Corley, *International Mergers and the Canadian Competition Act* (Paper prepared for the Fordham Corporate Law Institute, Seminar on International Antitrust Law and Policy, New York City, October 22-23, 1992).

of competition policy to broader "market access" issues.²⁹⁷ In this context, the term *market access* refers to framework rules and practices that govern the basic ability of foreign firms to participate in domestic markets.

To a large extent, interest in using competition policy to facilitate market access has grown out of the perceived role of vertical market restraints (particularly in connection with the *keiretsu* groupings) as a barrier to entry by foreign firms in Japan. The term *keiretsu* is used in reference to several fairly distinct forms of inter-firm groupings. These include:

- i) the major conglomerate groups such as Mitsubishi, Sumitomo, Fuyo, Sanwa and Daiichi-Kango;
- ii) vertical groups that link one or more of the major industrial concerns with subsidiaries (often suppliers); and
- iii) the distribution *keiretsu*, which tie retail and wholesale outlets to individual manufacturers.

The role of the *keiretsu* has been a major concern pursued by the United States in its *Structural Impediments Initiative* and subsequent negotiations with Japan.²⁹⁸

The use of competition law as a tool for facilitating access to foreign markets raises complex policy and enforcement issues.²⁹⁹ Present competition policies in Canada and the U.S. generally incorporate a case-by-case approach to non-price vertical market restraints.³⁰⁰ This reflects a consensus among economists that such restraints often serve legitimate pro-competitive purposes.³⁰¹ There has been some debate as to whether *keiretsu*-like arrangements would indeed be actionable under existing North

²⁹⁷ See Ireland, *supra*, note 181 and Kaell *et al*, *supra*, note 181.

²⁹⁸ For background, see Anderson, *supra*, note 183.

²⁹⁹ For useful discussion, see McFetridge, *supra*, note 38.

³⁰⁰ Ian Nielsen-Jones, S.D. Khosla and R.D. Anderson, *Product Distribution and the Competition Act: The Treatment of Reviewable Matters and Price Maintenance* (Presentation to the Distribution Law Seminar of the B.C. Continuing Legal Education Society, Vancouver, B.C. October 18, 1988).

³⁰¹ For background, see G.F. Mathewson and R. Winter, *Competition Policy and Vertical Exchange* (Toronto: University of Toronto Press for the Royal Commission on the Economic Union and Development Prospects for Canada, 1985).

American competition laws.³⁰² Nonetheless, in particular cases, competition law may provide an appropriate tool for addressing barriers to market access arising from restrictive business arrangements.

A related issue arising from globalization pertains to the various provisions of Canadian and foreign competition legislation relating to export and import cartels. Such cartels may represent an attempt by one country to shift the terms of trade against other countries (in effect, a "beggar thy neighbour" strategy).³⁰³ Arguably, the continued existence of special provisions sanctioning such cartels in many countries' legislation needs to be reconsidered – on the basis that eliminating such cartels would foster efficient international integration.³⁰⁴

³⁰² See McFetridge, *supra*, note 38.

³⁰³ For a comprehensive analysis of these issues, see McFetridge, *supra*, note 38. See also Calvin S. Goldman, Crystal L. Witterick and Richard F.D. Corley, "The Barriers Come Down and the Risks Go Up: Cartels and Globalization," *Export is our Business*, 1992.

³⁰⁴ For further discussion, see Ireland, *supra*, note 181.

International Cooperation and Convergence in Competition Law and Policy

An important related subject that is currently receiving attention from the international competition policy community concerns the prospects for greater international cooperation and, perhaps, convergence in competition law and policy.³⁰⁵ Various international instruments to facilitate cooperation are already in place. For example, Canada and the United States signed a *Memorandum of Understanding* in 1984³⁰⁶ regarding cooperation in the application of national competition laws. At the multilateral level, a revised Recommendation concerning cooperation among member countries was adopted by the OECD Council in 1986.³⁰⁷

Increased international cooperation has the potential to facilitate more effective enforcement of competition laws, particularly in the context of transnational mergers and other business arrangements. It can also help to reduce uncertainties arising from multi-jurisdictional review under potentially conflicting standards. The desirability of more and better international cooperation has been evident particularly since the *de Havilland*, *Institut Mérieux* and *Gillette* transnational mergers. All of these touched on the jurisdictions of several industrialized economies.³⁰⁸

Currently, efforts are under way in various forums to facilitate and/or review the scope for international cooperation in competition law enforcement both multilaterally and bilaterally. For example, the subject is being actively discussed within the OECD Committee on Competition Law

³⁰⁵ "Head of OECD Committee Sketches Agenda For Competition Policy and Enforcement," *Antitrust and Trade Regulation Report*, vol. 67, no. 1681, September 22, 1994, pp. 349-50.

³⁰⁶ *Memorandum of Understanding As to Notification, Consultation, and Cooperation With Respect to the Application of National Antitrust Laws*, March 9, 1994.

³⁰⁷ *Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade* (OECD Doc. No. C(86)44 (Final), May 21, 1986).

³⁰⁸ For discussion, see George N. Addy, *International Coordination of Competition Policies* (Hamburg: Institut für Wirtschaftsforschung, October 9-11, 1991), and Goldman et al, *supra*, note 296.

and Policy (CLP).³⁰⁹ In the United States, legislation to facilitate international cooperation in antitrust enforcement was recently passed by the Congress and signed by the President.³¹⁰ In Canada, the Director of Investigation and Research has released a draft Information Bulletin outlining his policy with regard to the disclosure of information to foreign agencies.³¹¹

In addition to cooperation in law enforcement, there is a need for increased cooperation in addressing broader competition policy issues. For example, in some cases, regulatory reform issues may require joint consultations among competition authorities and other interested agencies in Canada and other industrialized countries. One possible example relates to the role of "shipping conferences". These are cartels that regulate rates and conditions of service in the international ocean freight shipping industry. The continuing exemption of such conferences from many countries' competition legislation is at variance with the principles of reforms adopted in other transportation modes.³¹² It may, however, be difficult for any one country acting individually to implement substantial changes in this area, in view of the inherently international character of the liner industry.³¹³

Beyond international cooperation, the 1990s are also witness to growing pressures for international convergence or harmonization of competition laws. In principle, convergence can enhance transparency and facilitate international flows of goods, services and capital. It should be noted that convergence can also occur in various ways – including the adoption of common enforcement policies and analytical techniques – as well as through statutory amendments or other means. An interim report on convergence by the OECD CLP Committee concluded that a significant

³⁰⁹ "Head of OECD Committee Sketches Agenda for Competition Policy and Enforcement," *supra*, note 305.

³¹⁰ For background, see "Senate Passes Bill to Help Enforcers Obtain Foreign-Located Antitrust Evidence," *Antitrust and Trade Regulation Report*, vol. 67, no. 1684, October 13, 1994, pp. 445-46.

³¹¹ Director of Investigation and Research, *Confidentiality of Information Under the Competition Act* (Draft, July 22, 1994).

³¹² See National Transportation Act Review Commission, *Competition in Transportation: Policy and Legislation in Review* (1993), vol. 1, p. 138.

³¹³ See National Transportation Act Review Commission, *id.*, p. 138.

degree of convergence has already been achieved, to a large extent through the proliferation of common analytical techniques and policy goals.³¹⁴ At the same time, it is worth noting that a 1993 effort by a group of scholars to put forward a uniform antitrust code for GATT member countries met with considerable skepticism on the part of various countries' representatives.³¹⁵

Progress toward harmonization need not entail uniformity in national competition regimes. Indeed, substantial differences in national competition policies are likely to remain in place for the foreseeable future, because of continuing differences in national policy traditions, business and policy cultures, constitutional doctrines, etc.³¹⁶ In fact, the continued ability of individual jurisdictions to compete with each other by offering alternative policy configurations probably offers important benefits in terms of possibilities for policy innovation. From a national standpoint, it is important that Canada preserve the freedom necessary to apply competition policy in whatever way best suits the needs of the Canadian economy.

In addition to substantive legal and policy issues, the growing internationalization of competition policy raises important issues regarding the evolution of competition policy institutions. In the short run, it is transforming them from principally domestically-oriented agencies to ones with significant international responsibilities. In the long run, this shift may also have implications for the ways in which competition policy regimes are organized to respond to basic values in public administration such as transparency, representation and accountability.³¹⁷

Private Competition Law Enforcement

³¹⁴ "OECD Competition Committee Favors Convergence of Competition Policy," *Antitrust and Trade Regulation Report*, vol. 66, no. 1667, June 9, 1994, pp. 643-45.

³¹⁵ See "Antitrust Division Official Predicts Scant Prospect of International Code", *Antitrust and Trade Regulation Report*, vol. 66, no. 1650, pp. 181-82.

³¹⁶ For an insightful treatment of these issues, see Eleanor M. Fox, "The End of Antitrust Isolationism: The Vision of One World," *The University of Chicago Legal Forum*, 1992, pp. 221-240.

³¹⁷ See, generally, G. Bruce Doern, *The Political Economy of Internationalizing Competition Policy: From Regimes to Institutions?* (Paper prepared for the Conference on National Competition Policy Institutions in a Global Market, May 25-26, 1994).

Another important set of “process” issues relates to the scope for direct involvement in the application of competition law by private litigants. Traditionally, competition law in Canada has been administered by the Bureau of Competition Policy (or its predecessors), or by the Attorney General acting on behalf of the Bureau. Although in limited circumstances private actions for competition law violations have been available since 1976,³¹⁸ only a few such actions have ever been initiated.

In the United States, antitrust suits initiated by private individuals or corporations constitute a major additional vehicle for antitrust law enforcement and contribute to the development of significant case law. Such (private) suits typically account for a higher proportion of the total number of antitrust cases than those brought by government. State officials are also playing a growing role in enforcing antitrust law.

In general, expanding the present scope for private competition law enforcement actions could help to foster public awareness and involvement, and generally strengthen the enforcement of competition law in Canada. Of course, policy makers must be careful to ensure that any adjustments made with this purpose in mind do not alter the original intent of competition legislation or disturb the Canadian competition policy system itself. For example, expanding the rights of private parties should not create opportunities for individuals to harass competitors.³¹⁹

In addition, it is essential that the Bureau of Competition Policy continue to provide input to the evolution of judicial and Competition Tribunal doctrines – even in the context of privately-initiated proceedings. This could be accomplished through a simple amendment to the effect that the Director has standing to appear before the Tribunal or a court *in any actions* brought under the *Competition Act*. In this regard, the Director’s status would be comparable to the U.S. concept of *amicus curiae* (friend of the court).

Policy Development Responsibilities of Competition Agencies

³¹⁸ For details, see Part III, *supra*.

³¹⁹ The U.S. experience suggests that this may be a concern. See Bork, *supra*, note 27.

The growing importance of competition policy as a dimension of Canadian economic policy generally entails linkages with a number of other specialized fields of economic policy, including industrial policy, the Canadian economic union, sector-specific regulatory reforms, intellectual property rights and aspects of international economic policy. In each of these areas, competition policy can make a valuable contribution to wider government policy initiatives.

The analysis in this Paper demonstrates clearly that, in the future, competition policy in Canada and abroad will require continual updating and adaptation in light of new developments in the economic and policy environments as well as in the literature of industrial organization. In addition, competition agencies will increasingly be called upon to provide input to the formulation of related microeconomic policies. This calls for an ongoing program of research and policy development focused on the application of competition law and policy. Ongoing consultations with foreign competition agencies are also essential to ensure that Canadian competition policy makers are kept up-to-date and well equipped to meet the evolving needs of Canadian consumers and business firms.

There is also a case to be made for more systematic monitoring of industrial conditions by competition agencies – perhaps in collaboration with other agencies. As Scherer points out, economic research undertaken in universities today is biased toward theoretical innovation and the refinement of technical empirical methods. While obviously valuable, such research is not a substitute for the systematic analysis of particular industries and institutions. Both are needed for successful policy application.³²⁰ The value of economic research and policy development undertaken by antitrust agencies was specifically underscored in a 1989

³²⁰ F.M. Scherer, "Sunrise and Sunset at the Federal Trade Commission," *Administrative Law Journal*, 1991. Scherer observes, "Having a systematic, current, analytic, and critical body of knowledge on the structure, conduct and performance of U.S. industries is ... important to the effective functioning of government. ... For antitrust, knowing when not to intervene is as important as knowing when to intervene. ... Crisis often forces intervention decisions to be made quickly, with no time for a careful industry study. To inform the decision-making process, therefore, it is crucial to have a body of systematic knowledge already in existence and regularly updated, along with data bases that can be tapped on short notice to yield insight into special circumstances" (pp. 38-39).

report by a Special Committee of the American Bar Association on the Role of the [U.S.] Federal Trade Commission.³²¹

The Canadian Competition Model and Technical Assistance for the Emerging Market Economies

A final issue regarding the future role of Canadian competition policy concerns its use in the context of international technical assistance for countries undergoing a transition to a market-based economy. These include a large number of countries in Eastern and Central Europe, Latin America and the Asia-Pacific region.³²² As noted in Part V, the implementation of effective competition legislation and policies is widely regarded as a key element of this process. In addition to the countries themselves, the importance of effective competition laws is recognized by major world development agencies.³²³ Successful implementation of competition policy in these economies must, however, take into account potential efficiencies as well as adverse welfare effects flowing from existing industrial structures.³²⁴ The Canadian competition policy model is somewhat more flexible than its U.S. counterpart with respect to aspects of industrial restructuring. The Canadian model also emphasizes administrative law solutions and the role of specialized bodies (i.e., the Bureau of Competition Policy and the Competition Tribunal) in the application of the law. It is highly codified and therefore generally more transparent and adaptable than the models in certain other jurisdictions. Arguably, these features of the Canadian model are particularly appropriate to the needs of the emerging market economies.

³²¹ American Bar Association, Special Committee To Study the Role of the Federal Trade Commission, *Report* (1989).

³²² See the brief discussion and references in Part V, *supra*.

³²³ "Market-friendly government policies may mean more than removing barriers to internal competition. Governments may need to use antitrust provisions to ensure that producers and distributors do not collude or exploit market power." The World Bank, *World Development Report 1991: The Challenge of Development* (New York: Oxford University Press For the World Bank, 1991).

³²⁴ Sally J. Van Sichen, "Restructuring For Competition," in Estrin and Cave, eds., *supra*, note 262, pp. 109-129, at p. 112.

PART VII CONCLUSIONS

This Paper has examined the evolving role of competition policy as a dimension of economic policy in the global economy of the 1990s. The analysis demonstrates clearly that globalization has not removed the need for an effective competition policy in a modern industrial economy such as Canada's. On the contrary, recent research shows that competition policy has an important role to play in fostering the international competitiveness of domestic firms. This is in addition to its traditional role – which is to protect consumers from the undue exercise of market power by firms. At the same time, it is clear that, particularly in a relatively small, open economy such as in Canada, there is a good case for extending special consideration to mergers and other inter-firm arrangements that are shown to be necessary to generate important efficiency benefits.

This dual role of competition policy in relation to industrial restructuring is reflected in various provisions of the Canadian *Competition Act* of 1986. The *Act*'s purpose clause, which serves as a guide to its application, refers specifically to the objective of promoting the efficiency and adaptability of the economy and expanding opportunities for Canadian participation in world markets in addition to the more traditional policy objective of ensuring competitive prices and product choices. The substantive provisions of the *Act* – particularly the merger provisions – also recognize the role of foreign competition in domestic markets and provide gateways for the achievement of efficiency gains, while preserving an appropriate emphasis on fostering competition in relevant markets. The merger provisions also recognize the role of other factors – such as the existence of failing businesses – that are relevant to industrial adjustment. These factors have been applied in various cases under the *Act*. Recently, the *Act* has been affirmed and strengthened by several Supreme Court of Canada decisions that have upheld its constitutional validity and consistency with the *Charter of Rights and Freedoms*.

The analysis of the growing links between competition policy and other economic policies indicates that competition policy has a key role to play in supporting other policies aimed at fostering an efficient and competitive industrial structure. These include industry-specific structural and regulatory reforms as well as aspects of industrial policy. In addition, competition policy is increasingly being recognized as having important

applications in supporting international trade liberalization, particularly in the context of regional groupings such as the European Community and NAFTA.

The comparative analysis of competition policy regimes in major foreign jurisdictions indicates that competition policy is an increasingly central feature of economic policy in many countries. This reflects growing use of competition policy as an instrument of international economic integration as well as increased reliance on market-oriented economic policies, generally.

The survey of foreign jurisdictions also confirms the appropriateness of current Canadian competition legislation and policy *vis-à-vis* industrial restructuring and competitiveness. It shows clearly that there is no single, universally applicable model of competition policy and its relationship with industrial policy which Canada is obliged to follow. In sum, Canadian legislation and enforcement policies compare well with those of other major industrialized countries.

Notwithstanding the overall efficacy of the present *Competition Act*, a number of issues remain with respect to the future role of competition policy in Canada. These include:

- The application of competition policy with regard to industrial restructuring and new forms of business arrangements. A particularly important consideration relates to the possibility of implementing a *per se* prohibition of horizontal price fixing and market sharing under the *Competition Act*, perhaps in conjunction with a new civil review provision for dealing with other types of interfirm arrangements. Arguably, this might better serve to prevent harmful instances of collusion while providing an appropriate environment for beneficial cooperative arrangements among firms.
- The international dimensions of competition policy, including the scope for enhanced international cooperation and convergence as well as the application of competition policy as a tool for facilitating international trade liberalization and market access. A key matter for consideration here relates to the possibility of replacing the application of existing anti-dumping rules with competition policy standards in the

context of NAFTA. In addition, the role of competition policy as a general tool for ensuring access to markets warrants further consideration.

- Institutional and process issues relating to the application of competition policy. A key issue in this area relates to the possibility of expanding the scope for private actions to enforce the *Competition Act*.

Appropriate consideration of these and related matters necessitates an ongoing program of research in industrial organization, competition policy and related microeconomic framework policies. This is essential to ensure that competition policy is kept up-to-date and well adapted to meet the evolving needs of Canadian consumers and business firms. With due attention to these matters, the Canadian model of competition law and policy will continue to evolve, and to play an increasingly central role as an aspect of the framework for a dynamic market economy.

As the role of competition policy expands and the range of its applications widens, it is inevitable that government departments and constituencies representing other major aspects of economic policy (e.g., trade, industry, and science and technology) will take greater interest in the content and application of competition policy. In many respects, this will enhance the role of competition authorities and their ability to foster the efficient operation of markets. It will also entail increased pressures on competition authorities to embrace broader economic policy objectives. The challenge for competition authorities will be to participate effectively in extending the scope and reach of competition policy principles while maintaining appropriate independence and impartiality in the core function of competition law administration.