International Antitrust Cooperation in NAFTA: The International Antitrust Assistance Act of 1994

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INTRODUCTION

The drafters of the North American Free Trade Agreement (NAFTA) recognized that effective antitrust enforcement goes hand in hand with the lowering of governmental barriers in achieving open and competitive markets.1 This is the premise behind NAFTA Chapter 15, “Competition Policy, Monopolies and State Enterprises.” The first paragraph in Chapter 15 sets out a core commitment by each of the NAFTA parties to adopt or maintain, and to enforce, laws to deal with anticompetitive business conduct. The second proposition set out in the first article of the chapter is that cooperation and coordination in enforcing antitrust laws is essential among the NAFTA antitrust authorities.

Neither antitrust enforcement nor antitrust cooperation were new ideas among the NAFTA partners. Both the United States and Canada have antitrust histories that go back more than a century, although Canada’s modern antitrust history really dates back to the important 1986 amendments to its Competition Act.2 Along with this common history, our long common border, and extensive economic integration, the United States and Canada have developed an extraordinary record of antitrust cooperation. Aspects of this cooperation were an important inspiration for the innovative and forward-looking legislation adopted in the United States last year, the International Antitrust Enforcement Assistance Act (IAEAA) of 1994.3

Mexico’s antitrust regime is, of course, newer. The present state-of-the-art antitrust law became effective in 1993, and we have had a deepening relationship with our Mexican counterparts since then.4 We hope and expect that cooperation between Mexico’s Federal Competition Commission5 and its United States and Canadian counterparts will ripen into the kind

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5. Article 23 of the Mexican Competition Law creates the Comisión Federal de Competencia [hereinafter the Federal Competition Commission].
of day-to-day cooperation that now exists between the United States and Canada.

This note will describe the history and current state of antitrust cooperation among the NAFTA partners. The IAEAA will be described as well as the potential within NAFTA and beyond to integrate efforts of the United States and other foreign antitrust authorities to combat cartels and anticompetitive practices in ways that have never before been possible.

ANTITRUST COOPERATION WITH MEXICO AND CANADA

The story of U.S.-Mexican antitrust cooperation is a briefer and more recent story than that of our cooperation with Canada. Before agreeing in NAFTA to adopt an antitrust law, the Mexican government drafted an initial proposal recognizing that, independently of NAFTA, antitrust would be an important component of its own economic reform policies. It was in the course of those efforts, as the Mexican officials responsible for developing the new law collected the views and experiences of antitrust officials in the United States and elsewhere, that work was begun in Mexico City.

The Antitrust Division of the Department of Justice has hosted lawyers and economists from the Federal Competition Commission who have come to Washington for several weeks to take advantage of the United States' antitrust experience and to learn not to repeat our mistakes. The Department of Justice has responded to requests from the Commission to send experts to Mexico City to consult on issues of general application and issues that had arisen in particular cases with which we had developed expertise.

In addition to meeting in our respective capitals, we have met regularly in the Organization for Economic Competition and Development (OECD) Committee on Competition Law and Policy, where Mexican antitrust officials have made important and welcome contributions, initially as observers and now as full members. In fact, although there is as yet no bilateral antitrust agreement in place between the United States and Mexico, there is an OECD recommendation on antitrust cooperation that has contributed importantly to enforcement cooperation and conflict management among OECD countries. This recommendation dates back to 1967, and was revised and strengthened this year to emphasize the importance to effective enforcement of coordination and information sharing among antitrust authorities.

Mexico, Canada and the United States also take part in a working group established by Article 1504 of the NAFTA to examine the relationship between trade and competition policies in the free trade area. Its mandate is to develop a recommendation to the NAFTA Commission on these issues by the end of 1998. The analysis and recommendations

of the American Bar Association and its Canadian and Mexican counterparts have been of tremendous value to the working group.\textsuperscript{7}

The United States and Canada have been dealing with one another on antitrust matters for some time. In fact, both the United States' earliest and its most recent antitrust agreements have been with Canada. The first of these was the 1959 "Fulton-Rogers understanding," a publicly acknowledged but unwritten agreement that each country would notify the other of any antitrust enforcement action that might affect the other's interest, and would be prepared to consult about it if requested.\textsuperscript{8}

U.S.-Canada antitrust cooperation got a huge boost in 1990 when the U.S.-Canada Mutual Legal Assistance Treaty (MLAT) went into effect.\textsuperscript{9} MLATs are bilateral treaties, pursuant to which the United States and a foreign country agree to assist one another in criminal law enforcement matters. MLATs create a routine channel for obtaining a broad range of legal assistance including taking testimony or statements from witnesses, providing documents and other physical evidence in a form that would be admissible at trial, and executing searches and seizures.

Both the United States and Canada treat hard-core cartels such as price fixing, bid-rigging, market divisions and the like, as criminal offenses under our respective antitrust laws. We very quickly seized on the new MLAT's potential for antitrust enforcement, and have made good use of it, in both directions, for the past few years.

Within the past two years, close cooperation between the United States and Canada in criminal antitrust enforcement has led to prosecutions in separate industries such as fax paper\textsuperscript{10} and disposable plastic dinnerware\textsuperscript{11} or "plasticware". Both the fax paper and plasticware cases involved price-fixing, a hard-core antitrust violation. Our cooperation in connection with fax paper has resulted in prosecutions in both the United States and Canada. Cooperation in plastic dinnerware led to prosecutions in the United States. This process is not a one-way street, but has been

\begin{itemize}
\item \textsuperscript{7} Report of the Task Force of the ABA Section of Antitrust Law on The Competition Dimension of NAFTA (July 20, 1994).
\end{itemize}
one that benefits enforcement, and ultimately consumers, on both sides of the border.

In the fax paper matter, the United States Antitrust Division and the Canadian Bureau of Competition Policy have worked closely together under the terms of the U.S.-Canada MLAT to uncover and break up an international cartel in the $120 million a year thermal fax paper market. Most of the customers victimized by this price fixing scheme are small businesses and owners of home fax machines. This joint investigation has resulted so far in United States' prosecutions of five Japanese corporations and one of their executives, U.S. subsidiaries of two Japanese firms and one of their executives, the U.S. subsidiary of a British corporation and one of its executives, and the U.S. subsidiary of a Swedish corporation, for conspiring to charge higher prices to U.S. consumers of thermal fax paper. Defendants that have plead guilty in the case so far have agreed to pay more than $10 million in fines in the United States. Parallel prosecutions under Canadian antitrust laws have resulted so far in criminal fines of 3.5 million Canadian dollars. This joint investigation is still ongoing.

Coordination with Canadian officials was also essential to breaking up a price-fixing conspiracy in the $100 million plasticware industry. In that investigation, search warrants were simultaneously executed by over 50 agents of the Royal Canadian Mounted Police and the FBI at target offices in Montreal, Boston, Los Angeles, and Minneapolis. The result, to date, has been guilty pleas from seven executives and three corporations. The three corporations were fined in excess of $9 million, and each of the seven United States and Canadian individual defendants received jail sentences, with the United States ringleaders receiving 1-2 years in jail.

It is also worth noting here that two of the individuals who were fined and received jail time in this matter, four months in each case, are Canadian nationals who provided valuable cooperation and voluntarily submitted themselves to the jurisdiction of the United States courts. I think it fair to say that this would have been an unlikely occurrence only a few years ago.

Our Canadian colleagues announced the successful conclusion of another joint U.S.-Canadian investigation, this time in the ductile pipe industry. Following months of close cooperation between the U.S. Justice Department's Antitrust Division and our Canadian counterparts, we concluded that we did not have sufficient evidence to prosecute under the U.S. antitrust laws. But the evidence did establish a violation of Canadian antitrust law, and contributed to the successful prosecution and plea agreement announced in Ottawa.

12. Supra note 9.
13. Supra note 10.
These are not the only investigations in which we and the Canadian antitrust authorities are cooperating or coordinating our efforts. There are others, but because they have not yet resulted in public charges, I cannot describe them in more detail. But at the start of this decade, the idea of this kind of coordination and information sharing would have been unprecedented and seemed unachievable. Today it is the norm.

Last month the United States and Canada signed a new antitrust cooperation agreement. This agreement replaces the 1984 understanding, which both countries have recognized had grown obsolete in its emphasis on conflict avoidance, and its relative neglect of the enforcement cooperation that had become the main theme in our dealings with each other on antitrust. A measure of the closeness of the U.S.-Canada antitrust relationship is the fact that negotiations on this new agreement started in April, agreement had already been reached on most issues by June, and the agreement was formally concluded by the beginning of August. I can tell you from my own experience as a negotiator of our other antitrust agreements that this reflected an extraordinary and unprecedented commonality of approach.

The new agreement is similar in many ways to the agreement signed in 1991 between the United States and the European Community. It provides that both parties will take the other’s interests into account in antitrust enforcement. The agreement provides that each party can ask the other to enforce its antitrust laws against local conduct that adversely affects the other’s interests, something that has come to be referred to as “positive comity.” It calls for biennial meetings between U.S. and Canadian authorities. And of course, it provides for cooperation and coordination in our enforcement efforts whenever there is a potential for mutual assistance and reinforcement.

Our new agreement with Canada still does not take us where we ultimately want to be. It does not take advantage of the full potential of our new antitrust cooperation law although the Canadians have put out a public proposal for counterpart legislation.

THE INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT OF 1994

Antitrust has undergone the same “internationalization” in recent years as has the business and economic environment generally. The importance of international trade to the United States is beyond doubt. The tre-
mendous growth in transborder economic activity is reflected in our enforcement numbers. Just over two years ago the number of investigations and cases pending in the Antitrust Division with significant international aspects was sixteen, already a high figure when compared to prior years. When last counted, the number of investigations and cases pending in the Antitrust Division had grown to over forty. This number only includes the civil and criminal Sherman Act investigations. These statistics do not include mergers, where it is more the rule than the exception for companies whose mergers we are scrutinizing to have operations around the world.

But the Antitrust Division, like our sister antitrust agencies around the world, have worked under a limitation that has severely hampered our ability to cooperate with one another. Even our new agreement with Canada shares a limitation present in existing antitrust agreements. The agreement did not change or override provisions in either party's law designed to protect the confidentiality of information. Consequently, if the U.S. Department of Justice and a foreign antitrust agency are investigating the same international cartel we cannot share the most important fruits of our respective investigations.18 These confidentiality provisions in national laws serve legitimate purposes, but they had also become an impediment to the kind of cross-border cooperation required in the late twentieth century global economy. A further limitation was the absence in these agreements of a fully satisfactory mechanism to deal with the increasingly frequent need for foreign-located evidence in the hands of firms or individuals.

The Antitrust Division was acutely aware by the early 1990s that transnational conduct and cross-border transactions had become common antitrust enforcement concerns and that the tools available to us and to our foreign counterparts had not kept pace. The early international antitrust cooperation arrangements, the OECD instruments and the first generation of bilateral agreements, had once seemed advanced because antitrust had become a subject of international discussions long before other areas of economic regulation or economic crime. The Antitrust Division saw that international cooperation in other areas had leap-frogged the arrangements that prevailed in antitrust. Notably, securities regulators and tax authorities had developed effective networks of bilateral agreements. These agreements allowed the kind of powerful enforcement cooperation achieved under our MLAT with Canada but that was not possible under any of our other antitrust agreements.

The Antitrust Division believed that the time was ripe to move forward in antitrust. The need was great and the attitudes of governments seemed conducive to cooperation. It had become the norm rather than the exception for countries to embrace competition principles expressed through

18. This information is typically obtained through the grand jury process in the United States and through search and seizures or what are sometimes called “dawn raids” in many other jurisdictions.
antitrust laws as a central element of economic policy. Most countries accepted that these laws should apply in appropriate circumstances to foreign or transnational conduct as the realities of international business made strictly territorial views of jurisdiction unrealistic. Antitrust authorities in two or more countries often found themselves examining the same or related transactions and met each other with a will to cooperate that was impeded by limits in existing laws and international arrangements.

This sense of need and readiness for new modes of cooperation was reinforced by the pathbreaking joint settlement the Antitrust Division and the European Community achieved in our parallel cases against Microsoft last year. There, the Department of Justice and the European Commission shared investigative information (with Microsoft's permission) and jointly negotiated remedies.

The Antitrust Division was conscious that Canada, with whom we had been enmeshed in intense jurisdictional disputes at the beginning of the 1980s, had become our closest enforcement partner. The Antitrust Division was particularly struck that Australia, with whom we had also been at loggerheads over jurisdiction just over a decade earlier, had recently passed legislation to share confidential evidence in economic law matters with foreign authorities.

These considerations led last year to the introduction and enactment of the International Antitrust Enforcement Assistance Act of 1994. The legislation was introduced at the initiative of the Department of Justice's Antitrust Division. It was supported by both political parties, drafted in consultation with representatives of the business and legal communities and passed without opposition in both houses of Congress in a remarkably brief ten weeks from its introduction. Clearly the view that better tools were needed for international antitrust enforcement cooperation was widely held in the United States.

The IAEAA follows the basic outline of earlier legislation that authorized U.S. securities regulators to cooperate with their foreign counterparts. It allows the U.S. antitrust authorities to enter into agreements with foreign antitrust authorities to exchange information with one another whose disclosure would otherwise be prohibited by confidentiality laws, and allows use of their investigative powers at the request of a foreign authority to obtain evidence from private parties in their respective territories.

The basic concept of the bill, reciprocal cooperation, was never controversial but the IAEAA provisions reflect business concerns over the

risk of improper use or disclosure of confidential business information that could be given to a foreign authority. Before the U.S. agencies can provide confidential information they must be confident that the foreign antitrust authority can and will afford protection to the information comparable to that afforded by the U.S. agencies.

The IAEAA also requires that the U.S. agencies determine in each case that providing assistance is consistent with the interests of the United States. Presumably, agreements reached under the IAEAA will afford comparable discretion to the other party. By allowing this discretion, the IAEAA deals with concerns that the United States or the other party to an agreement might be required to give assistance in a case it viewed as antithetical to its interests. Thus agreements under the bill will provide a framework for cooperation that would not otherwise be possible, where there is a mutual desire to cooperate. But the agreements will also provide an escape door with a low threshold for instances in which a party believes it is against its interests to do so.

There are exceptions to the kinds of information that can be provided under the IAEAA. The principal exception is that information obtained by the U.S. authorities as a result of premerger notification requirements cannot be given to foreign authorities. The IAEAA does not exclude cooperation in merger investigations, however, it merely prevents disclosure of premerger filings and information obtained through "second requests" in merger investigations. Nevertheless, at the request of a foreign antitrust authority the U.S. agencies may address a request to the merging companies on the foreign authority's behalf, and the companies may be obliged to comply with the request.

The benefits of this kind of cooperation, whatever the nature of the investigation are clear. Antitrust authorities in two or more countries that are looking into the same conduct will be able to cooperate and coordinate their investigations fully, sharing critical evidence without being limited to what is publicly known. Evidence located in another country can be obtained through cooperation with the authorities of that country, eliminating disputes over unilateral methods of obtaining foreign-located evidence. Finally, there will be fewer cases in which antitrust authorities will be unable to deal with anticompetitive transnational conduct because the necessary facts are beyond their reach.

At this point, no agreements under the new law are yet in place. The Antitrust Division has started to visit antitrust authorities and other relevant departments in a number of countries to explain what is new possible and to encourage their interest. The Antitrust Division hopes the first agreements will be negotiated and implemented soon. A particularly encouraging fact is that Canada is actively and publicly considering amendments to its antitrust law that would parallel the IAEAA and pave the way for even closer coordination of our enforcement efforts.

CONCLUSION

Cooperation between the United States and Canada in the enforcement of our respective antitrust laws, particularly enforcement against cartels which are criminal offenses in both countries, is more advanced than cooperation between any other two countries. Antitrust cooperation with Mexico, whose law and enforcement institutions are newer and less developed, can be expected to expand significantly in the coming years. Beyond the NAFTA countries, it is increasingly evident that more extensive cooperation among the world’s antitrust authorities will be necessary to meet the challenges of today’s global economy.