Energy trade between the United States and Canada has averaged ten to fourteen billion dollars annually over the last few years.\(^1\) This represents approximately ten percent of the total trade in goods between the two nations, which have the largest trade relationship in the world.\(^2\)

The policies now governing energy trade, not only between Canada and the United States, but also within each country, contrast with those of the 1960s and 1970s when energy trade was subject to a variety of interventionist and protectionist policies. The Canada/United States Free-Trade Agreement (FTA)\(^3\) is a landmark in the commitment of both countries to market-oriented trade policies and the achievement of fair and free trade between the two countries.\(^4\) In addi-
tion to its substantive provisions, the FTA introduces dispute resolution mechanisms, including specific mechanisms to deal with energy matters, that will influence both domestic competitive behavior and the evolution of free trade under the FTA itself.5

The development of the energy provisions of the FTA was the culmination of several years of work in both countries toward significant deregulation of the oil and gas industries and, more recently and modestly, of electricity production. The establishment of market-oriented energy policies affected not only domestic trade but also has led to the adoption of market-oriented standards for Canada/U.S. energy trade. The FTA solidifies this progress and marks a point of departure for future developments in trade between the United States and Canada.

The FTA energy provisions affirm and expand principles of equity and openness in international trade found in the General Agreement on Tariffs and Trade (GATT).6 The FTA also affirms existing GATT concepts of fair competition in international trade regarding dumping and subsidies, although a process and timetable is established for the development of common standards for each country’s antidumping and countervailing duty practices.7

Energy trade between the two countries is influenced at the national level by the policies of three different types of government agencies: those responsible for foreign policy and international trade; those responsible for national energy policy; and agencies responsible for energy regulation specifically, principally the Federal Energy Regulatory Commission (FERC) and Canada’s National Energy Board (NEB).8 The interaction between these agencies, and its effect on cross-border competition, was illustrated by FERC’s 1986-87 “as billed” decisions on the pricing treatment of Canadian gas imports under FERC’s regulation of U.S. pipelines.9

The FTA leaves the antitrust laws of each country intact. This result is not surprising because antitrust laws are designed to protect and foster fair competition, which is one of the objectives of the FTA.

---

5 See Battram & Lock, supra note 4, at 371-82 (explaining the dispute resolution mechanisms contained in the FTA).
6 FTA, supra note 3, 27 I.L.M. at 343.
7 Id. at 386.
8 This complexity is compounded by the considerable regulatory authority of Canadian provinces and U.S. states over these energy industries. Battram & Lock, supra note 4, at 340-42.

https://scholarship.law.upenn.edu/jil/vol11/iss2/5
This article will examine and compare the recent development of market-oriented energy policies in both countries and the growing importance of antitrust issues, as regulators in both countries rely increasingly on market forces to discipline economic behavior in the oil, natural gas and electricity industries. The complexity of developing and enforcing effective standards of competition\(^{10}\) in the regulated energy context in each country is discussed, as are some possible implications for the international trade relationship under the FTA.

2. Protecting Growing Competition in Regulated U.S. Energy Markets\(^{11}\)

2.1. Introduction: The Institutional Structure

As the oil, natural gas, and electricity industries in the United States have become partly deregulated,\(^{12}\) two trends have become evident. The first is a growing tendency of each industry, under pressure from competition, to restructure, both horizontally and vertically.

The second is the development of competitive pressures on markets hitherto dominated by strong, state-sanctioned monopolies. Deregulation, however, has permeated all segments of these industries.\(^{13}\) Hence, regulators face immediate challenges on two fronts. The first challenge is nurturing developing competition in some sectors of an industry and protecting it from monopoly power pervasive in other sectors. This is essentially an antitrust problem in a new context. The second challenge, which arises in sectors still subject to significant regulation, such as natural gas pipelines and electric utilities, is the problem that state-sanctioned monopolies are no longer strong, but rather weak or rivalrous.\(^{14}\) This poses a challenge to the traditional rate regulation

---

\(^{10}\) The term "standards of competition" is the term typically used in Canada to mean "antitrust."

\(^{11}\) The authors acknowledge and are grateful for the helpful comments on this part of the paper by Jade A. Eaton, Esq., Newman & Holtzinger, P.C., Washington, D.C.; Professor Richard A. Pierce, Columbia University Law School; and Donald A. Kaplan, Esq., Special Litigation Counsel, Antitrust Div., U.S. Dep't of Justice.

\(^{12}\) Recognizing that major functions of these industries, especially electricity and natural gas, will probably continue to be dominated by state-sanctioned monopolies for the foreseeable future, many U.S. regulators prefer to refer to efforts to introduce more competition into these industries as "regulatory reform" rather than "deregulation." "Deregulation" will be used herein as a convenient shorthand to cover all developments in this direction.

\(^{13}\) Some level of economic regulation of the transportation or transmission function is the feature common to the oil, natural gas, and electricity industries.

model because regulators have relied on the monopoly power of the regulated entities to achieve important regulatory objectives.

Both challenges raise basic questions as to the continued viability of traditional approaches to regulation. These questions are currently the focus of industry-specific regulatory reform efforts. They will not be the subject of this part. Instead, we will identify more overt antitrust concerns confronting economic regulators, such as FERC and state public utility commissions (PUCs), and confronting the traditional antitrust enforcement agencies, such as the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC).

An initial issue is essentially institutional. Where should the primary responsibility for assuring compliance with antitrust standards lie—with regulatory agencies, traditional antitrust agencies, or some combination of the two? Current practice appears to be evolving, haphazardly, towards the last of these, but it is not clear that this combination will be effective if subjected to pressure.

The traditional antitrust enforcement agencies, the DOJ and the FTC, while steeped in antitrust expertise in unregulated markets, are less able to monitor on a day-to-day basis complex and distinctive market developments in regulated industries, or to monitor the rapid and complex realignment of regulation where competition is being introduced. Moreover, as the dichotomy between tightly-regulated industries and free markets breaks down, many novel and unresolved antitrust and regulatory issues arise.

Nevertheless, the DOJ has sporadically intervened, usually with limited resources, in generic FERC proceedings in the oil pipeline and natural gas areas. As yet, however, the DOJ has not intervened significantly in the more time-consuming and demanding, but critical, case-by-case implementation of generic decisions, such as FERC's mid-1980s natural gas initiatives, Orders 380, 436, and 500. For instance, the traditional antitrust agencies did not intervene before FERC in an

---

note 98.


However, the DOJ did file comments in the order 436 rulemaking process itself, and in a related rulemaking proceeding concerning the relationship between natural gas pipelines and their marketing affiliates. Inquiry into Alleged Anti-Competitive Practices Related to Marketing Affiliates of Interstate Pipelines, 3 F.E.R.C. Stats. & Regs. (1988).
important merger proposal by two major Pacific Northwest electric utilities, for which FERC subsequently conditioned approval on the merged company's accepting stringent transmission access conditions designed to prevent potential abuses of monopoly power in wholesale markets.\(^{16}\)

FTC intervention has also been very limited in the major areas of energy regulation. However, it has been expanding its "competition advocacy" program to "persuade organs of federal, state and local government of the virtues of competition and the costs of regulation."\(^{17}\) Much of this effort has been directed at opposing state legislation that would limit retail gasoline marketing by integrated oil companies.\(^{18}\) More recently, the FTC has filed comments with FERC "admonish[ing] it to discount competitor opposition to [pipeline] certification applications" on the grounds of potential non-price predation.\(^{19}\)

The FTC's principal focus, however, is currently upon its more traditional antitrust role of reviewing natural gas pipeline merger proposals.\(^{20}\) Some of the general dissension over merger review standards and enforcement under the Reagan Administration split over into the natural gas merger area, where the rapidly-evolving regulated markets pose a special problem for merger oversight.

One can draw the tentative conclusion from this pattern of antitrust enforcement that the DOJ and the FTC recognize the special expertise necessary for effective antitrust policy in regulated industries. They have tended to assume, and indeed the DOJ has advocated, that the economic regulators will themselves play a major role in developing and implementing such policy, especially in areas where resource constraints limit their own ability to do so. The DOJ and the FTC prefer to intervene selectively in regulatory proceedings to help mold regulatory policy, rather than to undertake the formidable analysis necessary to develop their own antitrust policies for each of the industries concerned. Where their traditional enforcement functions have been triggered, as in merger reviews, their role has been largely reactive and their level of scrutiny has varied.\(^{21}\)

---


\(^{17}\) See T. Calvani, Remarks at the Third Annual ABA Conference on Canada/U.S. Trade in Energy 153, 158 (May 18-20, 1988) [hereinafter Calvani].

\(^{18}\) Id.

\(^{19}\) See infra note 94 and accompanying text.

\(^{20}\) Calvani, supra note 17, at 154-58.

\(^{21}\) The level of scrutiny appears to be influenced by both the general approach to antitrust enforcement of the administration in power and by the perceptions of the enforcement agencies as to how effective oversight is at the regulatory level. For instance, in cases involving mergers of electric utilities, where FERC has actively been exercising its broad review authority under Section 203 of the Federal Power Act, 16
On the other hand, the economic regulatory agencies such as FERC do not have special antitrust expertise. However, they are familiar with the structure and characteristics of the industries they regulate and the pricing models for the economic regulation they impose. A full understanding of the latter tends to be critical, for instance, in evaluating claims of price discrimination. Typically, these agencies do not view themselves as having an antitrust enforcement role. This is certainly the case with FERC. However, the courts have generally ruled that FERC must take into account the policies underlying the antitrust laws in performing its responsibilities. Moreover, economic regulatory agencies such as FERC operate under statutory mandates of pertinence to competition, such as those proscribing "undue discrimination" in utility rates and practices. These mandates resemble antitrust standards in some respects, and they suggest a prophylactic antitrust role for such regulatory agencies. The courts have been pressing FERC for over a decade to evaluate utility rate filings for wholesale electric requirements customers in terms of their potential to create a "price squeeze" for these customers. Over the last two years, FERC has re-

U.S.C. § 824b (1982), action by the enforcement agencies has been limited to a low-involvement DOJ intervention in one case. In contrast, in natural gas merger cases, where FERC authority is limited, the FTC has assumed a significant antitrust enforcement role.

22 See, e.g., Texas Gas Transmission Corp., 35 F.E.R.C. ¶ 61,231 (1986) (Stalon, Comm'r, dissenting) (explaining why an individual transportation certificate granted pursuant to the Natural Gas Act § 7(c) was unduly discriminatory and not in the public interest, and developing standards of "due" and "undue," discrimination). See also infra part 2.2.1.


24 See supra note 23. See also FPC v. Conway Corp., 42 U.S. 271, 279 (1976); Gulf States Utilities v. FPC, 411 U.S. 747, 758-59 (1973); Maryland People's Counsel v. FERC, 761 F.2d 953, 959-61 (D.C. Cir. 1985); Northern Natural Gas Co. v. FPC, 399 F.2d 768, 786 (D.C. Cir. 1968). This duty has long been explicitly recognized by the FERC. See, e.g., Connecticut Light & Power Co. 8 F.E.R.C. ¶ 61,187 (1979).


26 In Gulf States, the Supreme Court held that the Federal Power Commission (FPC) (FERC's predecessor) should consider antitrust and anti-competitive issues before authorizing issuances of securities under section 204 of the Federal Power Act in order to establish "a first line of defense against those competitive practices that might later be the subject of antitrust proceedings." 411 U.S. at 760. See also Mishawaka v. Indiana & Mich. Elec. Co., 560 F.2d 1314, 1323 (7th Cir. 1977) (interpreting the ruling in Gulf States).

27 While owning distribution systems and, hence, technically, utilities, these entities are typically dependent upon other utilities for all or part of their power supply needs.

28 See, e.g., FPC v. Conway Corp., 426 U.S. 271 (1976) (holding that the FPC's
sponded by addressing price squeezes more explicitly and has placed greater reliance on traditional antitrust analysis.\textsuperscript{29}

Moreover, the increased evidence of competition in electricity wholesale markets and FERC's administrative efforts to realign the natural gas markets,\textsuperscript{30} which have become partially deregulated under the Natural Gas Policy Act of 1978,\textsuperscript{31} has led to a new awareness of the relevance of antitrust scrutiny in the course of economic regulation. It has also lead to some recognition of the need to enhance FERC's antitrust expertise.\textsuperscript{32}

Thus, over the last two years, FERC has utilized antitrust standards in meeting its broader "public interest" charge in its regulation of rates and corporate structures of regulated entities.\textsuperscript{33} In addition, the FTC and the DOJ have a propensity for intervening in the regulatory arena to foster competition. Despite overlapping responsibilities and the

jurisdiction to review a petition to set aside or reduce a public utility's wholesale electric rate increase permits consideration of the utility's alleged purpose to forestall its customers from competing with it on the retail level); Boroughs of Ellwood City v. FERC, 731 F.2d 959 (D.C. Cir. 1984) (holding that the decision not to ameliorate a proven price squeeze ordinarily must be based on FERC's determination that the anticompetitive effect of the "price squeeze" on the wholesale customer and retail competitor is outweighed by the effect of a remedy on the supplying utility's financial viability and its ability to serve all its customers). \textit{See also} Mid-Tex Elec. Coop. v. FERC, 773 F.2d 327 (D.C. Cir. 1985) (holding that FERC's reasons for adopting a rule allowing electric utilities to include in their rate bases amounts equal to 50\% of their investment in construction work in progress were valid, but also holding that FERC's consideration of potential "price squeeze" and "double whammy" effects of the rule was inconsistent and inadequate; thus, FERC had to reconsider the rule), \textit{petition for review granted}, 864 F.2d 156 (D.C. Cir. 1988) (holding in part that FERC's decision to address regulatory "price squeeze" created by disparity in treatment of costs of construction work in progress by state regulatory agencies and FERC was reasonable, but that it was unreasonable to place the burden of proof on a wholesale customer seeking preliminary relief from anticompetitive "price squeeze").

\textsuperscript{29} Southern California Edison Co., 40 F.E.R.C. ¶ 62,147 (1987). \textit{But see} 46 F.E.R.C. ¶ 61,300 (1989) (Stalon, Comm'r, dissenting in part). Moreover, the DOJ has contended that FERC's efforts to remedy a price squeeze should be more narrowly focused on those price squeeze situations revealing predatory intent and not on all situations where differences in FERC and state regulatory treatment lead to a price squeeze. DOJ's Reply Comments, Electric Utilities, Construction Work in Progress and Anticompetitive Implications, III F.E.R.C. Stats. & Regs. ¶ 30,689, 30,692 (1986) (F.E.R.C. No. RM86-6) [hereinafter DOJ Price Squeeze Comments].

\textsuperscript{30} FERC Order Nos. 380, 436, 500, \textit{supra} note 15.


\textsuperscript{32} FERC, for instance, created a new position of Visiting Fellow and Special Advisor for Antitrust Analysis. For a perspective on the significance of this step, see Head, \textit{supra} note 23, at 9. Another indication of this recognition is an increased emphasis on hiring economists with antitrust expertise in FERC's newly-named Office of Economic Policy.

potential for policy conflicts between the DOJ, the FTC, and FERC, the executive and legislative branches of the federal government have not yet recognized a need for a cohesive strategy towards antitrust compliance as competition develops in the regulated energy industries. This overlapping presents two dangers: regulatory “overkill” or “layering” when several agencies act, and potential vacuums when none act. Both of these dangers could hamper effective antitrust monitoring and effective economic regulation. Where Congress has intervened, apparently motivated to fill vacuums, it has often achieved regulatory layering.

However, the executive branch has several means of influencing competition policy at regulatory agencies such as FERC: statutory mandate, appointment of commissioners and DOJ or FTC intervention in regulatory proceedings. In practice, the alert exercise of the last function can raise issues FERC has overlooked and avoid most regulatory vacuums. Moreover, these agencies, through the exercise of their discretion not to prosecute or investigate, can generally avoid “layering.” Hence, the dangers of vacuums and regulatory layering should not be overstated. Moreover, for the executive branch to impose a formal mechanism to assure policy cohesion would require reconciling the quite different functions of all of these agencies and raise questions as to the “independent” status of FERC.

From this brief institutional survey, several increasingly important, and as yet unanswered, questions emerge:

(1) Can the growing tendency of FERC to use antitrust standards in its broad evaluation of “the public interest” in regulation, or in setting “just and reasonable” rates, comfortably coexist with the increasingly important and complex duty of the DOJ and the FTC to assure compliance with the antitrust laws as competition grows in these industries? Congress has generally assumed it can. FERC’s mandate,

---

34 Both the FTC and FERC appear sensitive to this danger. See Calvani, supra note 17, at 276-77; Utah Power & Light Co., 45 F.E.R.C ¶ 61,095 (1988).

35 There is, however, some evidence that the antitrust and regulatory agencies tend to avoid obvious omissions in governmental oversight through some mutual awareness of the roles each will play in an individual case. For instance, the DOJ has assumed only a limited intervention role in electric merger cases where FERC has broad authority, and, where the reverse is true in the natural gas company merger area, the FTC has assumed a significant enforcement role. See supra note 21.


37 The courts have typically declined to find an implied repeal of the antitrust laws in the regulatory statutes. A few of the statutes explicitly address the relationship of the regulatory regime to the antitrust laws. E.g., Natural Gas Policy Act of 1978 §
broader than that of the antitrust enforcement agencies, requires balancing various public interest criteria of which competition is but one, however important. By its nature, economic regulation implies the sanctioning of potentially-anticompetitive practices in some circumstances. Indeed, one role of FERC is to weigh the respective merits of competitive and monopoly power in any given area of the industries it regulates against the yardstick of some higher norm, such as economic efficiency. In contrast, the specific mandate of the DOJ and the FTC is to foster competition. The potential for overlap and for conflict in different applications of pro-competitive standards, and for a more direct confrontation between pro-competition policies and regulatory standards, is obvious. However, this potential also should not be overstated. In general, the goals of the antitrust laws and of economic regulation are complementary; both seek the result that maximizes economic efficiency. True conflicts are unlikely to arise except in a narrow range of circumstances where the DOJ and the FTC disagree with the economic regulators as to the best means to achieve economic efficiency, or where a regulator seeks to further regulatory goals other than economic efficiency. Clear inter-institutional relationships, especially as to primary or exclusive jurisdiction, and clear expressions of legislative intent can help to resolve such conflicts.

(2) Can one draw an appropriate line between the antitrust enforcement role of the DOJ and the FTC and FERC's broader regulatory role, which includes enhancing pro-competitive structures and conduct?

(3) To what degree can FERC, the DOJ, and the FTC afford to focus on regulation of conduct as opposed to the creation of structures providing pro-competitive incentives?

(4) What role should FERC play if the antitrust enforcement agencies abdicate their responsibilities, and vice versa? In other industries, such as telecommunications, judicial industry restructuring initiatives have not been entirely successful. Arguably, they should have been handled by a regulatory agency more alert to and familiar with the industry.

Given the rapid evolution of competition in energy sectors that are still regulated, the next few years should bring more conscious efforts to confront these questions. We may see the evolution of antitrust doctrine more tailored to the economic regulation area than that developed by the courts for unregulated markets.

---


2.2. Substantive Antitrust Doctrine in Economic Regulation

The ensuing discussion will identify some emerging antitrust concepts in regulated markets. Due to space limitations, this article will focus on just four areas of concern, and will do no more than identify the principal issues in each.

2.2.1. Price Discrimination and Price Squeeze

Until recently, FERC (and its predecessor, the Federal Power Commission (FPC)) has concentrated its price discrimination efforts in attempting to apply the antitrust doctrine of "price squeeze" to the FERC's wholesale electric ratemaking jurisdiction. That effort was initiated in response to a 1976 Supreme Court decision, Federal Power Commission v. Conway Corp., which rejected an FPC claim that it had no jurisdiction to address "price squeeze" claims. The Court held that FERC was required to consider the potential anticompetitive effect of a price squeeze in determining whether wholesale rates were "just and reasonable" and that FERC had the discretion to push wholesale rates to the lower end of a "zone of reasonableness" to remedy a price squeeze.

Taking advantage of this discretion, FERC first determines the "just and reasonable" rate or zone on "cost-based" principles, and then examines allegations of price squeeze.

After a decade-long struggle to develop a methodology for analyzing price squeeze, which initially received tolerance and then growing impatience from the reviewing courts, FERC finally made a major price squeeze finding in 1987. In Southern California Edison Co., FERC required the supplying company to reduce its rates and to make refunds. In dissent, Commissioner Stalon criticized FERC's methodology for determining price discrimination, the first major element of a

---

39 United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 436-38 (2d Cir. 1945) (applying a "transfer price" test to identify price squeeze as existing when a vertically integrated entity could not purchase at its own wholesale rates and still realize a profit at its own retail rates, that price would injure wholesale customers who are its retail competitors). See Illinois Cities of Bethany v. FERC, 670 F.2d 187, 189 (D.C. Cir. 1981) (adopting the test advanced in Alcoa).
41 Id. See also Illinois Cities of Bethany, 670 F.2d at 191 (emphasizing FERC's broad discretion in the "inexact science" of ratemaking).
42 A "zone of reasonableness" is based on the company's rate of return on equity, the element of the "cost of service" as to which the most regulatory discretion is exercised.
43 E.g., Boroughs of Ellwood City v. FERC, 731 F.2d 959, 979 (D.C. Cir. 1984) (vacating a FERC decision not to remedy a price squeeze, and describing FERC's decision as "illogical" and "irreconcil[ible]" with the "very purpose" of the doctrine).
price squeeze finding. He argued that this methodology is fundamentally flawed because it is likely to increase the obstacles to competition where competition can be constructive, and at the same time increase pressures for competition in areas where regulatory policy has traditionally encouraged, partly on economic efficiency grounds, tight limits on competition.

The price squeeze doctrine applies to a special form of price discrimination that emanates from the dual regulatory status of fully-integrated utilities operating under both state retail and federal wholesale ratemaking jurisdiction. Moreover, its application has been limited to wholesale electric "requirements" rates, where competition is not viewed as a major element in regulatory oversight. Indeed, it is the very lack of competitive supply options for "captive" requirements customers that typically justifies "cost-based" rate regulation in the first place. Wholesale requirements service comprises an increasingly narrow part of the wholesale electric markets. The price squeeze doctrine has not been applied to the wholesale "coordination" markets, which comprise mostly trades of power between "non-captive" utilities. It is the coordination markets that have grown substantially over the past two decades and that have demonstrated increasingly-competitive characteristics.

Ironically, then, most of FERC's attention to price discrimination has been devoted to a doctrine of price squeeze developed in an era of little wholesale competition in the electric industry. Moreover, FERC attempted to apply antitrust concepts in the context of a ratemaking model that does not contemplate competition, in order to protect competition in markets where its presence and desirability were marginal at best. Not surprisingly, the effort has been strongly criticized on these

46 Id.
47 The "competition" for retail customers allegedly occurs in the one area of electricity regulation that has typically been dominated by state sanctioned, franchised monopolies and where general competition is viewed as least likely to occur, and potentially inefficient should it occur. See id. (Stalon, Comm'r, dissenting); Joskow, Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition, in ANTITRUST AND REGULATION 173 (F. Fisher ed. 1985).
48 These utilities tend to refer to themselves as "Transmission Dependent Utilities" (TDUs). See Utah Power & Light, 45 F.E.R.C. at 61,291 n.165, 61,310.
49 Conceptually, this would also include sales to utilities by non-utility generators.
50 Today, about 38% of all kWh sold to end users under regulation have previously been traded at least once in the wholesale market. ENERGY INFORMATION ADMIN., U.S. DEPT OF ENERGY, FINANCIAL STATISTICS OF SELECTED UTILITIES, Public Doc No. DOE/EIA-0437(86).
FERC's effort to develop a workable analysis of the complex and far more important question of price discrimination in previously regulated markets experiencing some level of deregulation is embryonic at best. Its first serious effort to confront the issue in the natural gas area was strongly criticized by Commissioner Stalon, who attempted to set forth standards for evaluating price discrimination. As yet, FERC has not significantly broadened the focus of its price discrimination analysis; however, that development is probably inevitable as wholesale competition develops.

2.2.2. Essential Facilities

At first blush, the "essential facilities" doctrine would seem to have considerable significance in the natural gas and electricity industries, which are widely viewed as strong "natural monopolies," at least in part, with "bottleneck" characteristics in the transmission and transportation functions. However, partly because of this natural monopoly status, while the wholesale supply markets were tightly regulated, monopoly control over the transmission and transportation functions was viewed as necessary to the orderly development of these industries and was sanctioned by the regulatory agencies. The need to open up access to bottleneck transportation/transmission facilities for competing suppliers, if the competition that had begun to develop in these markets was to be fair and efficient, became evident. Nevertheless, the regulatory agencies found that they had limited direct authority to mandate greater access by competing suppliers. Nevertheless, FERC, spurred by incremental legislative deregulation of natural gas production, has moved to encourage open access to gas pipelines through a complex package of administrative reforms. These reforms condition certain

51 See supra text accompanying notes 45-47. See also DOJ Price Squeeze Comments, supra note 29.
53 For instance, FERC has not yet acted on the April 1987 petition of the Cogeneration Coalition of America, Inc. asking FERC to declare illegal under section 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (1982), the growing practice of electric utilities offering industrial customers rate discounts in exchange for those customers agreeing to defer or cancel decisions to self-generate through cogeneration. Cogeneration Coalition of America, Inc., No. EL87-34-000 (April 28, 1987).
54 See C. Stalon, Opportunities and Risks in Regulating the Rejuvenated Natural Gas Industry (unpublished manuscript).
56 FERC Order Nos. 380, 436, 500, supra note 15. This approach was essentially endorsed by the reviewing court in Associated Gas Distributors v. FERC, 824 F.2d 981
liberalizations of pipeline regulation on "voluntary" grants of access to other suppliers by the pipelines.

FERC has moved cautiously in the electricity industry despite well-developed theories that FERC could order access to remedy undue discrimination in ratemaking. However, FERC recently advanced the essential facilities doctrine in a surprising context — FERC review of utility mergers and acquisitions. In *Utah Power & Light*, a proposed merger between two Pacific Northwest utilities would have given the surviving utility sufficient control of bottleneck transmission facilities to monopolize the interregional wholesale markets between the Pacific Northwest and California. As a condition of approving the merger, FERC required that the merged entity meet stringent transmission access conditions on its system. The companies accepted these conditions.

Because transmission access is central to the debate over competition in these industries, and especially to the creation of competitive markets that would justify relaxing economic regulation in the wholesale area, transmission access is likely to be the focus of reform debates in the near future. The degree to which it will be introduced through the more traditional antitrust essential facilities doctrine, as in *Utah Power & Light*, as opposed to regulators' reform initiatives, is less clear.

2.2.3. *State Action*

Because major parts of the electric power and natural gas industries are subject to both rate and market entry regulation at the state level, the state action doctrine has played, and may continue to play, a significant role. This doctrine is based on principles of federalism and a

(D.C. Cir. 1987).


68 The doctrine had also received some support in FERC approval of two agreements between Pacific Gas & Electric Co. (PG&E) and two of its wholesale partial requirements customers, the Modesto and Turlock Irrigation Districts. In these agreements, PG&E agreed to firm transmission access in exchange for relief from some of the traditional regulation of its relationship with these customers. See *Pacific Gas & Elec. Co.* 42 F.E.R.C. ¶ 61,406 (1988); 43 F.E.R.C. ¶ 61,403 (1988); 44 F.E.R.C. ¶ 61,010 (1988). The reasoning behind the doctrine is playing an increasing role in FERC analyses of the "market power" of entities seeking liberalization of rate regulation, primarily because of the central role control over transmission assets plays in such analyses. See, e.g., *Public Service Co. of Indiana*, 49 F.E.R.C. ¶ 61,346 (1989).

69 *Utah Power & Light*, 45 F.E.R.C. at 61,284, 61,286.

70 Id. at 61,291.

71 Id. at 61,286, 61,287.
1943 Supreme Court decision that the Sherman Act,62 was directed at "individual not state action" and reveals no congressional intent to prohibit states from imposing restraints on competition.63

The parameters of this doctrine, which creates an exemption from federal antitrust liability, have been the subject of considerable judicial development. Two major Supreme Court cases in the 1980s have refined its scope. In *California Retail Liquor Dealers Association v. Midcal*,64 the Court found that California's statutorily-sanctioned resale price maintenance scheme for the wholesale wine trade did not afford state-action immunity to producers from vertical and horizontal price fixing liability under the Sherman Act. While the first requirement for immunity, a "clearly articulated and affirmatively expressed goal of state policy," was met, the second requirement, that "the policy must be 'actively supervised' by the state itself," was not.65 The State "simply authorize[d] price setting and enforce[d] the prices established by private parties"; it "neither establishe[d] prices nor review[ed] their reasonableness."66 Nor did the State monitor the program or engage in any "pointed reexamination" of it.67 The Court found that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a price-fixing arrangement."68

This conclusion, coupled with the Court's citation with apparent approval of an earlier decision, which appeared to require that the anticompetitive conduct "be compelled by direction of the State acting as sovereign,"69 led some observers to conclude the doctrine had been drastically reduced in scope. Furthermore, the Court in another prior decision,70 which was cited in *Midcal*, ruled that no immunity was conferred "when a state agency passively accepted a public utility's tariff."71

However, in *Southern Motor Carriers Rate Conference, Inc. v. United States*, the Court found that state statutes authorizing but not compelling collective ratemaking, which were intended to displace price competition, immunized joint rate setting by private motor carriers.72

---

64 445 U.S. 97 (1980).
65 Id. at 105.
66 Id.
67 Id. at 106.
68 Id.
Because this private activity could be attributed to a "clearly articulated state policy," it passed muster under the first prong of the *Midcal* test; and there was no dispute that there was adequate state supervision to satisfy the second prong.

Furthermore, anticompetitive conduct need not be specifically sanctioned by a state legislature to trigger immunity. It is sufficient if a state "clearly intends to displace competition in a particular field with a regulatory structure" and if the conduct is sanctioned by "an anticompetitive regulatory program." This is particularly significant for energy regulation, where such "anticompetitive programs" abound.

Hence, the state action doctrine retains special vitality in the area of economic regulation. Its application is likely to continue to test judicial ingenuity as competition develops within segments of the electric and natural gas industries still subject to rigorous regulation, especially where the pro-competitive policies of the federal antitrust laws and some federal regulatory programs conflict with traditional state economic regulation. The doctrine, unlike its Canadian counterpart, applies only to actions of the states. It is "an attempt to resolve conflicts that may arise between principles of federalism and the goals of the antitrust laws — unfettered competition in the marketplace." However, analogous approaches could develop towards conflicts between federal antitrust law and federal regulatory programs. Most federal economic regulation statutes contain provisions speaking specifically to the role of the antitrust laws, and the judiciary usually strives to avoid finding conflicts between statutes passed by the same legislative body. Therefore, those asserting that anticompetitive conduct is sanctioned by a federal statute that partially repeals the antitrust laws would have a heavy burden to meet.

Whether an analogous doctrine should apply to foreign commerce has recently been debated. The DOJ's Antitrust Enforcement Guidelines for International Operations recognize "foreign sovereign compulsion" as "an implied defense to application of the U.S. antitrust laws" to the acts of foreign governments, but only in a specified range of circumstances, where the anticompetitive conduct is actually "compelled

---

73 *Id.* at 61.
74 That, presumably is the basis for distinguishing *Cantor*, where the regulatory oversight was too passive to meet the test.
75 *Southern Motor Carriers*, 471 U.S. at 63-64.
76 *Id.* at 64-65.
77 The regulated conduct defense is discussed *infra* part 3.1.
78 *Southern Motor Carriers*, 471 U.S. at 61.

by a foreign sovereign.\textsuperscript{80} It is not as broad as the state action doctrine, which also extends to cases of "clearly articulated state policies" that are "subject to active state supervision," although in such circumstances, "considerations of international comity may lead the [DOJ] not to challenge the conduct in question."\textsuperscript{81}

Because the FTA essentially leaves the structure and substance of domestic federal and state or provincial energy regulation intact in each country,\textsuperscript{82} and does not itself effect changes in or harmonize either country's antitrust or competition laws, the state action doctrine should remain largely unaffected by the FTA. The only conceivable effect is that the national treatment provision requiring states to afford treatment to Canadian imports "no less favorable" than that accorded domestic goods,\textsuperscript{83} could displace state regulation because this provision has been interpreted as importing a non-discrimination standard.\textsuperscript{84} However, since most state economic regulation schemes have similar standards proscribing "undue discrimination," it appears improbable that a state action issue would arise in this context. Cases of discrimination against Canadian goods are more likely to be addressed directly as violations of Article 502 of the FTA than to be attacked under the U.S. antitrust laws.

2.2.4. Non-price Predation

While U.S. antitrust enforcement agencies no longer view price predation as a seriously credible threat to competition, certain forms of non-price predation are receiving increasing attention.\textsuperscript{85} Broadly de-
fined, non-price predation encompasses any strategic behavior designed to increase a rival’s costs. However, the current regulatory focus is on the abuse of governmental and regulatory processes to raise a rival’s costs, both the direct costs of the regulatory process and the indirect costs caused by regulatory delays that exacerbate business uncertainties. One example of such strategic behavior would be opposing a rival’s pipeline certification request at every step of the regulatory process. Another example would be first asserting that a project is not needed and subsequently filing an application for a similar project, suggesting that the original opposition was based on frivolous grounds.

Regulatory agencies cannot proscribe such predatory behavior unless the rather narrow “sham” exception to the Noerr-Pennington doctrine applies. The essence of that doctrine is that lobbying or other efforts by businessmen to obtain legislative or executive action, however anticompetitive in intent or effect, are exempted from antitrust liability as the exercise of the constitutional right to petition or otherwise engage in political activity. The Supreme Court eventually extended the Noerr-Pennington doctrine to administrative and judicial processes in California Motor Transport Co. v. Trucking Unlimited, with essentially the same rationale — that the right of access to the courts and to administrative agencies is part of the right to petition. However, the Court in Trucking Unlimited also firmly established the “sham” exception, which had been recognized in dictum in Noerr. That exception draws a delicate conceptual line between using the decisional process to influence a government agency, which Noerr-Pennington protects, and using it “to bar [a] competitor from meaningful access” to the government, thereby subverting the decisional process.

While this distinction is conceptually elegant, it will be extraordinarily difficult to apply in practice in the context of economic regulation. The courts usually find a “sham” more readily where illegal, fraudulent, or other unethical means accompany the effort to petition government or where the public official is himself a co-conspirator. In such cases, the integrity of the decisional process itself is undermined. However, in the regulatory non-price predation context, such clarity is

86 Rule, supra note 85, at 423-26.
87 Id.
89 404 U.S. 508 (1972).
90 Id. at 512.
rare. Allegations of excessive use of procedural challenges, or unduly burdensome discovery to delay a competitor’s application, are more common. As most agency processes have intrinsic protections against such excesses, a complainant must allege that the agency afforded the defendant an excess of due process at the expense of the complainant’s rights. Few regulatory agencies would embrace such complaints with enthusiasm.

Two possible avenues exist to deal with non-price predation in the regulatory context:

(1) Direct FTC investigation and prosecution. This could involve sensitive issues of evidence and proof that would require a regulatory agency to lay bare its procedural interstices, which would probably cause considerable inter-agency tension.

(2) FTC advocacy of regulatory agency self-policing against non-price predation. Similarly, a quasi-judicial agency as anxious to grant plentiful due process as is FERC, is unlikely to take up such a challenge enthusiastically. Nevertheless, the FTC filed an intervention with FERC in 1987, suggesting that FERC curtail undue procedural opposition to pipeline certification applications by handling such opposition through such means as summary proceedings. The FTC also urged that FERC treat with “appropriate . . . skepticism” a series of arguments, ranging from increased costs to customers to environmental concerns, raised by competing pipelines to a proposal by Texas Gas to expand pipeline capacity to serve a distribution company exclusively served by one of the intervening competitors. While FERC did not directly respond to the FTC’s arguments, it did recite them in some detail in its order. FERC also rejected most of the intervenors’ arguments that the FTC had debunked; and it approved the Texas Gas proposal as likely to increase competition. FERC’s treatment of this issue, in an era in which regulatory delay is an increasing obstacle to the creation of more efficient, competitive markets, may portend the

---

92 Calvani, supra note 17, at 287.
93 Id.
94 Motion of FTC Staff for Leave to Intervene, In re Texas Gas Transmission Corp., FERC No. CP87-205-000 (July 30, 1987).
96 Id.
97 Id. at 61,054.
debut of another chapter in a growing saga of interaction between economic regulation and the antitrust laws.

3. ENERGY DEREGULATION AND THE PROTECTION OF COMPETITION IN CANADA

3.1. Competition and Energy Markets in Canada

The evolution of competition in energy markets in Canada has taken place against a constitutional and regulatory background markedly different from that of the United States. Consequently, Canadian energy markets are of interest more by way of contrast to the U.S. markets than by way of comparison.

The Competition Act is the general legislation governing competition in Canada. Part V provides that the following acts, inter alia, are criminal offenses: conspiracies to lessen competition, bid rigging, predatory pricing, misleading advertising, or price maintenance. Part VII contains non-criminal provisions involving refusals to deal, consignment selling, exclusive dealing, tying, and market restriction, abuse of dominant position, delivered pricing, and mergers. These non-criminal matters are subject to review by the new Competition Tribunal, but only on the application of the Director of Investigation and Research (the Director) appointed under the Competition Act.

The Director is responsible for enforcing both the criminal and the non-criminal provisions of the Act, and is authorized to intervene before federal or provincial regulatory agencies to advocate the Act’s pro-competitive policy. Private civil action is preserved not-

100 Id. at § 45(1).
101 Id. at § 47(2).
102 Id. at § 50.
103 Id. at § 52.
104 Id. at § 61.
105 Id. at § 75.
106 Id. at § 76.
107 Id. at § 77.
108 Id. at § 78.
109 Id. at § 80.
110 Id. at § 92.
112 Competition Act § 7.
113 Id. at pts. I, VII.
114 Id. at § 125.
115 Id. at § 126.
116 Id. at § 1.1.
withstanding criminal prosecution.\textsuperscript{117} The Act provides civil redress for persons injured by conduct prohibited by Part VI, but damages are limited to losses actually suffered.\textsuperscript{118}

The heavy regulation of energy markets in the 1970s and early 1980s and the preoccupations that drove regulation precluded any meaningful advocacy of competition in energy regulatory processes. The Director's criminal enforcement activities were also limited by the "regulated conduct defense."\textsuperscript{119} This judicially-created defense applies to activities or conduct regulated pursuant to federal or provincial legislation if the regulator has exercised authority over the activity or conduct in question. Essentially, the defense is that the general public interest in competition has been superseded by a legislative scheme in which the particular conduct or activity is subject to a different public interest standard. However, as energy markets are deregulated and increasingly exposed to competition, the role of the Competition Act, and therefore of the Director, in maintaining and encouraging competition grows in importance. The increasing importance of the Competition Act must be considered by those who have not yet needed to consider the application of the Act to activities in energy markets. To understand the role of the Director, one must appreciate that the Director seeks to administer and enforce the Competition Act in the context of the prevailing energy policy, which is established by others.

Competition is now the established policy for buying and selling oil and natural gas. In March 1985, the Government of Canada reached a historic agreement with the Governments of the Provinces of British Columbia, Alberta, and Saskatchewan: the Western Accord.\textsuperscript{120} This agreement, which deregulated crude oil marketing and pricing, contemplated the need to achieve a market responsive policy for marketing and pricing natural gas. The Western Accord was followed later in the same year by the Agreement on Natural Gas Markets and Prices\textsuperscript{121} between the same four governments.

Restrictive crude oil export policies have been abandoned. All crude oil is moving to the export market under short-term orders issued

\textsuperscript{117} Id. at § 62.

\textsuperscript{118} Id. at § 36.


\textsuperscript{120} Western Accord, Mar. 28, 1985 (agreement among the Governments of Canada, Alberta, Saskatchewan, and British Columbia on oil and gas pricing and taxation) (text published by Energy, Mines and Resources Canada).

\textsuperscript{121} Agreement on Natural Gas Markets and Prices, Oct. 31, 1985 (agreement among the Governments of Canada, Alberta, British Columbia, and Saskatchewan) (text published by Energy, Mines and Resources Canada).
under the National Energy Board Act (NEB Act). These orders are issued on a non-restrictive basis and are not limited as to volume or price. Essentially, the National Energy Board (NEB) has reduced its regulatory activity to a monitoring function.

Pipeline capacity is the primary limitation on transporting oil to the marketplace. In this environment, fair access to scarce pipeline capacity is essential to competition. This issue is not, however, new. Oil pipelines are common carriers and must transport all oil offered for transmission. The apportionment of space among all those wanting service is an issue whenever the demand exceeds the pipeline capacity.

Trade in electricity presents a rather different picture. Electric power in Canada is generated and distributed domestically almost entirely by provincial utilities. The market is not currently competitive to any significant extent, although there are the beginnings in Ontario, for example, of independent power production by such means as cogeneration. The Minister of Energy, Mines and Resources has announced a new policy on electric power exports, providing for less scrutiny of electric power export applications under the NEB Act. Public hearings will be required only in limited circumstances, such as where there is concern about the ability of Canadians in neighboring provinces to obtain power on fair terms. Generally, electric power exports will be subjected to limited scrutiny and routinely approved.

The new electric power export policy illustrates nicely the distinction between establishing the conditions for a competitive market and loosening federal export restrictions. Under the new policy, the producing province will continue to regulate its electricity production and distribution as before and will continue to decide when and to what extent it will export power. The change is simply that the federal government will not intervene in an export transaction except under special circumstances.

---

124 For example, Interprovincial PipeLine (IPL), a division of InterHome, which transports Alberta oil east to the United States and eastern Canada, is experiencing capacity constraints. New pipeline capacity will require approval under the NEB Act. The ultimate test of the need for new capacity will be the ability of the market to generate revenues to support the cost of the construction. IPL, for example, has recently completed a phased expansion of its line, increasing capacity by about 400,000 barrels a day at a cost of Cdn. $350 million. The next 200,000 barrels a day will require a full system expansion at a cost of Cdn. $1.1 billion. ENERGY ANALYSIS, May 16, 1988 & February 27, 1989.
125 NEB Act § 71(1).
126 ENERGY, MINES AND RESOURCES CANADA, CANADIAN ELECTRICITY POLICY (1988).
The Agreement on Natural Gas Markets and Prices was intended to create the conditions for a competitive natural gas market. The Agreement recognizes that, even when a functioning competitive gas market is achieved, the market will not be completely deregulated. Transportation of gas will remain subject to regulation.\(^{127}\)

In Canada the means of transportation of gas between and among the provinces are operated under almost complete monopoly conditions. The large commitment of capital required for major pipeline projects, the efficiency of a uniform system, and other social issues arising from pipeline construction suggest that significant unregulated pipeline construction is unlikely to occur.

Given the regulated character of the means of transportation, the facilitation of competition in the buying and selling of natural gas called for by the Agreement must be a fundamental principle of gas pipeline regulation. It is here that the Director, as a statutory advocate of competition, has a role to play.

Two issues have been fundamental to the position of the Director on gas pipeline regulation. First, there must be open access to transportation from the producer to the ultimate consumer. If consumers are to have the benefit of competitive gas purchases, they must have direct access to gas supplies. Otherwise, gas prices will be subject to the distorting influence of provincial regulation. Likewise, if producers are to have the benefit of competitive gas sales, they must have direct access to final consumers. Otherwise gas sales will be subject to the distorting influence of a market in which there are only a few very large customers.\(^{128}\)

Second, given that sellers of gas often control the means of transportation, sales activities must be clearly separated from transportation activities. This separation is necessary to prevent the transporter from cross-subsidizing competitive activities from the regulated business, or giving its own gas preferential treatment. Separation can be achieved through many methods, but the objective is always the same, preventing anti-competitive behavior.

Regulating pipelines in a manner consistent with the competitive gas market is not sufficient in itself to achieve competition. In Canada, the gas trade is subject to divided federal and provincial jurisdiction.

---

\(^{127}\) Agreement on Natural Gas Markets and Prices, supra note 121, at ¶ 4.

\(^{128}\) In that regard, the Ontario end use market of some 800 Bcf per year—the largest market east of Alberta—is almost entirely divided between three local distribution companies (LDCs). In Quebec there is one single franchised LDC of note. In Manitoba, there are two LDCs, which operate under common control.
Therefore, policies and practices at the federal and provincial levels must be in harmony. Producing provinces must permit the removal of gas, and consuming provinces must permit the entry of gas into local distribution systems, under conditions not conflicting with the objective of competition. Furthermore, federal practices must not restrict competition. This harmony has not yet been achieved.

A commitment to competition requires a commitment to permitting supply and demand to respond to free market forces. It involves the recognition and acceptance of risks as well. One would think that a country that has been a net exporter since 1983 of all energy commodities\(^{129}\) — crude oil, natural gas, electricity, coal, and uranium — could make such a commitment. It cannot be said, however, that all governments in Canada have wholeheartedly embraced competition in energy markets.

Following the Agreement on Natural Gas Markets and Prices, the federal government amended the Energy Administration Act\(^{130}\) to eliminate mandatory regulation of natural gas prices in interprovincial and international trade. In addition, various regulations and orders made under the Energy Administration Act were revoked.\(^{131}\) The federal government thus substantially withdrew from the regulatory field.

The NEB, which had traditionally determined the surplus of natural gas available for export in a formulistic manner based on long-range forecasts, has adopted a market-based procedure for approving gas exports.\(^{132}\) This procedure is premised on the ability of gas purchasers to purchase required supplies under competitive conditions and on the balancing of supply and demand in response to competitive market forces.

The Alberta government has not loosened its regulatory regime to the same extent. The Agreement on Natural Gas Markets and Prices contemplated end users acquiring gas directly from producers through open access to connecting transportation systems. It was recognized that such direct sales would displace gas sold to local distribution companies (LDCs) under existing long-term contracts.\(^{133}\) The Agreement does not


\(^{131}\) Energy Administration Act Sections 53 to 63 Non-application Order 1986, SOR/DORS/86-1049.

\(^{132}\) National Energy Board, Review of Natural Gas Surplus Determination Procedures (1987). This review was undertaken at the request of the Minister of Energy, Mines and Resources Canada, Id. at 1.

\(^{133}\) Agreement on Natural Gas Markets and Prices, supra note 121, at ¶ 7.
restrict end users from choosing the direct sales option.

However, the Alberta government interpreted the Agreement to restrict the circumstances under which end users may exercise this direct sales option. These restrictions are enforced through the removal permit process. The effect was to segment the market, resulting in substantially lower prices in the industrial markets than in other end-use markets. More recently, Alberta has argued that long-term contracts are essential for security of supply to residential, institutional, and commercial end-users, and that direct sales that provided equivalent security to long-term contracts with LDCs may be permitted. The Alberta policies are designed to prevent the erosion of producer and provincial royalty revenues that would result from free competition.

The lesson learned by Alberta producers is that regulated markets provide stability and that regulation can bring about social and economic consequences different from those produced by competitive markets. While other standards may support Alberta's action, it cannot be justified by competitive standards alone.

Another lesson is that, in a federal system where the policies of a province such as Alberta can affect market outcomes in other provinces, the federal government's withdrawal from regulating the field may be insufficient to achieve a competitive market. Instead, the federal government may have to continue to occupy the field with the object of actively creating and fostering competitive markets. The weight of federal authority may be essential to counteract provincial interests, which can threaten the implementation of policies of benefit to the nation as a whole. Inter-governmental agreement has been, and probably will continue to be, the avenue for progress on natural price deregulation and other competition issues.

The NEB cannot and will not pronounce on this issue. While it has considerable statutory authority over pipelines, the NEB has no power to regulate the prices at which gas is bought and sold in inter-

---


137 Alberta is the major source of gas for eastern Canada, with all Alberta gas moving to eastern markets through the TransCanada PipeLine system.
provincial trade,\textsuperscript{138} and no power over the production of gas or its removal from a province.\textsuperscript{139} Moreover, the initiative towards competition was taken, as discussed, by agreement between federal and provincial governments. The NEB, unlike FERC, has not initiated change and has confined itself to interpreting and implementing the policies flowing from the Agreement on Natural Gas Markets and Prices.\textsuperscript{140} The NEB can do little to influence Alberta government policy.

3.2. Enforcement of the Competition Act

The regulated conduct defense has limited the Director’s ability to enforce the criminal provisions of the Competition Act. However, as the scope of regulation is reduced, activities previously protected by the defense may become subject to the Competition Act. While this is an easy principle to assert, the application of the Competition Act in the present state of energy regulation in Canada is a complex matter.

A number of factors affect the availability of the defense. First, the Alberta government limits consumer choice in a competitive market as a matter of public policy. This policy is given legal force through the removal permit process and the prohibition on removing gas from the province without a permit.\textsuperscript{141} A prosecution under the Competition Act, or an application to the Competition Tribunal, would surely fail if the defendant or respondent could demonstrate that he failed to meet the Competition Act’s requirements to avoid transgressing Alberta law.

Second, the Alberta policies directly affect the workings of the market since they determine the terms under which, and influence the price at which, Alberta gas may be bought and sold. This makes the identification and analysis of possibly anti-competitive behavior difficult.

Third, the availability of the regulated conduct defense in an environment where a regulatory framework exists, but the regulator forebears from exercising authority, or exercises it in a passive way, is unclear. Federal regulation of gas prices has ceased only because of an order\textsuperscript{142} declaring the non-application of various Energy Administration Act provisions. The federal government can reintroduce the regulatory machinery at a moment’s notice if desired. The question is

\textsuperscript{139} The Constitution Act, 1987, amended by SI/87-11 § 92A.
\textsuperscript{140} NATIONAL ENERGY BOARD, TRANSCANADA AVAILABILITY OF SERVICES (1986).
\textsuperscript{141} Gas Resources Preservation Act § 19.
\textsuperscript{142} See supra note 121 and accompanying text.
whether the absence of action implies a current determination as to the public interest or whether the field is unoccupied, permitting the successful operation of the Competition Act. Even more difficult is the case of passive regulation, in which, as in the case of oil exports, authorizations are given on a non-restrictive basis. In other words, the field is only partially occupied. The difficulty is the result of Canadian criminal law jurisprudence, which, unlike U.S. state action doctrine, suggests the availability of the defense where the regulator exercises general authority over a matter, even if the regulator does not specifically address the aspect that is at issue.

Fourth, the application of the defense outside of the criminal law context to practices reviewed by the Competition Tribunal is unclear. In broad terms, the argument that the public interest, as reflected in a particular regulatory scheme, supersedes the general scheme of the Competition Act has force. At the same time, the Competition Tribunal does not impose punishments. Its jurisdiction is remedial in nature. Thus, it is exercising concurrent jurisdiction with regulatory authorities, giving way only in the face of specific and conflicting decisions of the authority having specific jurisdiction in the matter. This argument is, in the absence of jurisprudence, speculative.

3.3. Merger Review

The Competition Act contains important new merger provisions. Since June 1986, when the Director began to actively review merger activity under the Competition Act, the oil and gas industry has had one of the highest levels of merger activity.

The Competition Tribunal, on application by the Director, may dissolve a merger if it would likely lessen competition substantially. In making this determination the Tribunal must consider a number of factors:

1. The extent to which foreign products or competitors provide, or are likely to provide, effective competition;

2. The Federal Court of Appeal has held that, where a statute requires such matters as the filing of rates, the regulator may shape its requirements in light of competition in the market, but cannot, because some competition exists, absolve a company of the requirement to file its rates. See Telecommunications Workers' Union v. CRTC, 98 N.R. (FCA) 93 (1989).

3. Notable are the acquisition of Bow Valley Industries Ltd. by British Gas PLC, the acquisition of Encor Energy Corporation by TCPL Energy Limited, the acquisition of Sulpetro by Esso Resources, and the acquisition of Dome Petroleum Limited by Amoco Canada Petroleum Company Ltd.

4. Therefore, the Director should consider these factors as well prior to making an application to dissolve a merger.
(2) The existence of any barriers to entry into a market, including both tariff and non-tariff barriers to international trade, or any regulatory barriers to trade;
(3) Whether the business of a party to a merger has failed, or is likely to fail;
(4) The extent to which acceptable substitutes for products supplied by the parties to the merger are, or are likely to be, available; and
(5) The extent to which the market would remain competitive following the merger.

One should note that a determination that a merger will be anti-competitive cannot be based solely on evidence of market share or industry concentration. In addition, the negative effects of the merger on competition must be weighed against any gains in efficiency resulting from the merger. In weighing efficiency, any likely increase in exports, or any likely substitution of Canadian products for imports, must be considered. The introduction of export considerations into this calculus reflects the importance to Canada of the ability of Canadians to compete in international markets, even at the expense of lessening competition within Canada. The rationale is that Canadians benefit from more efficient world-class enterprises able to expand export sales.

The Director's approach to mergers is compliance-oriented. The Competition Act provides for notification of mergers to the Director, providing the Director with an opportunity to review the merger and determine whether it will comply with the Competition Act. If the Director has concerns about the legality of the merger, he will seek to resolve these concerns with the affected parties, perhaps resulting in some restructuring of the transaction. The Director may also monitor the merger for a period of time to determine if it will have anti-competitive effects; the Competition Act provides a three year limitation period for challenging a merger. Where serious and contentious issues are raised that cannot be otherwise resolved, the Director may apply to the Competition Tribunal for an order preventing or dissolving the merger.

The acquisition of a business involving foreign investment may attract the attention of Investment Canada, as well as that of the Director. Investment Canada currently reviews direct acquisitions involving assets of at least five million Canadian dollars and indirect acquisitions involving assets of at least fifty million Canadian dollars. Investment Canada will consult with the Director with respect to com-

---

146 Competition Act §§ 92(2), 93, 96.
147 Id. at §§ 92(1), 97.
petition issues. However, Investment Canada is not bound to reject a proposed acquisition merely because the Director assigns it a negative weight. Investment Canada looks at the broad net benefit to Canada of the investment. At the same time, the Director is not bound by any Investment Canada assessment. The merger provisions of the Competition Act apply even if a foreign acquisition of a Canadian business has been approved by Investment Canada. Consequently, a U.S. purchaser of a Canadian business, in addition to obtaining any required Investment Canada approval, should also ensure that the Director will not challenge the transaction on competition grounds.

4. **Conclusion: The Bilateral Context — Harmonization of Domestic Laws and the United States-Canada Free-Trade Agreement**

4.1. **Comparison of the Domestic Antitrust Regimes in Energy**

Despite the coexistence for close to a century in the United States and Canada of the two oldest domestic antitrust/competition law regimes, the evolution of these regimes in each country in the regulated energy area reveals some striking differences. Some are products of differences in the antitrust/competition laws themselves: the statutory scheme, judicial evolution, and the enforcement mechanisms. Some are the product of differences in the regulatory regimes for energy in both countries, although those differences have diminished dramatically, philosophically if not institutionally, over the last five years. Perhaps the most striking difference is in the institutional responsibility for antitrust monitoring and enforcement in each country.

In the United States, FERC began in the late 1980s to assume a far more active role in applying antitrust and regulatory standards designed to serve antitrust goals, as competition developed, pursuant to a judicially enunciated statutory charter to protect competition in its jurisdictional markets. In Canada, deregulation of energy markets has been achieved largely through federal/provincial agreement and cooperation with regulatory action taken at both the federal and provincial levels in the context of policies emanating from these agreements.

---


150 Such a trend is not yet evident in state economic regulation of energy, under which a good deal of the state sanctioned monopoly power, especially of electric utilities, has developed. Indeed, one of the cutting edges of the state action doctrine has been the protection of such state prerogatives against the pro-competitive force of the U.S. antitrust laws. As the importance of competition is increasingly accepted by state regulators, this general picture may change.
Another interesting comparison is between the intervention role exercised by the Director in Canadian federal and provincial regulatory proceedings and the similar role of the DOJ and the FTC in U.S. federal and state regulatory proceedings. In both countries, that role has been asserted selectively and sporadically. However, in the United States, the courts have assumed a greater role than in Canada. Indeed, in areas such as price squeeze, the interaction between FERC and the courts has been tense. This has usually, but not always, occurred in the context of a court reviewing an agency action, rather than in an antitrust enforcement context.

The bifurcation of antitrust decisional authority in these regulated industries in the United States has not gone without criticism. At least one leading commentator has asserted that FERC should exercise plenary and exclusive authority and that the courts should be limited to an agency review role. On the other hand, the potential for direct court involvement could create healthy tension, inducing the regulatory agency to do its antitrust job more rigorously. Whichever pattern prevails, FERC is starting to ask broader antitrust questions as part of a broader market structure analysis as it considers reforming its regulation of oil pipelines, natural gas pipelines, and electric power utilities to meet new market realities.

The power of the provinces in Canada over energy regulation is greater than that of the states. However, the scope of the Canadian

---

152 In City of Mishawaka v. Indiana & Mich. Elec. Co., 560 F.2d 1314 (7th Cir. 1977), the Court of Appeals entertained an antitrust action for price squeeze in the regulated electric power area and refused to defer to the alleged primary jurisdiction of the FPC over the matter.
154 See, e.g., R. Cudahy, Justice, U.S. Court of Appeals (7th Cir.) at ABA Electricity Conference, supra note 153.
155 For instance, the U.S. Supreme Court has struck down natural gas producing state "ratable take" regulations as preempted by the partially-deregulated post-NGPA federal statutory scheme and FERC's regulation of rates thereunder. Transcontinental Gas PipeLine Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986). Of special significance to evolving competition and deregulation in the U.S. energy markets, the Court rejected arguments that NGPA deregulation of wellhead markets created a void that state regulation could fill. Such a "federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate." 474 U.S. at 422. (quoting Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384 (1984)) (emphasis in original). In Canada, in contrast, there is no comparable preemptive decision limiting the powers of producing provinces. In fact, the Canadian Constitution now contains guarantees of the legislative competence of the
regulated conduct defense is less well defined than that of the U.S. state action doctrine. The judicial vitality of the latter is symptomatic of the continual pressure of U.S. antitrust laws on state regulation.

A final striking contrast between the Canadian and U.S. antitrust regimes is the limited role privately-instituted suits can play under Canada's statutory scheme and the largely unlimited role permitted in the United States under Section 4 of the Clayton Act. While private suits in the United States tend to build upon DOJ or FTC initiatives, they can become the cutting edge of judicial development, especially where government enforcement is relatively inactive. There is already some evidence of this in the natural gas area. In the regulated energy area in general, Section 4 suits could become a significant complicating factor in any effort to create a rational, cohesive structure of antitrust enforcement and monitoring between federal and state antitrust law enforcement and federal and state economic or production regulation. Such suits could likewise complicate the creation of any such structure between the FTC and the DOJ, and the regulators and the courts. In Canada, this prospect appears to pose less of a threat to the cohesiveness of an already less complex enforcement structure.

4.2. Harmonization of the Bilateral Antitrust/Competition Regimes for Regulated Energy Industries under the FTA

The FTA says much about liberalization of trade but very little about harmonization of antitrust laws. Canadian and U.S. antitrust laws have pursued similar objectives, albeit in different ways, for nearly a century. The objectives of antitrust laws are compatible with the goal of fair competition envisaged by the FTA. Indeed, the antitrust and competition laws and the FTA are essentially complementary. The primary focus of the former is, in fact, fair competition in domestic markets, while the latter deal with international trade between those markets.

Notwithstanding some differences in approach to antitrust issues

provinces in this area. See supra note 139.

Neither of the state action doctrine requirements, a sanctioning by state policy of the anticompetitive conduct and active supervision by the state agency, are as clearly defined under the regulated conduct defense. See supra part 3.2.


Professor Pierce, for instance, views the existence of the private right of action as inimical to the development of a rational antitrust and regulatory scheme in this area. See supra note 153.

See Battram & Lock, supra note 4, at 382-84; Schultz, supra note 4.

FTA, art. 102(b). One of the objectives of the FTA is to "facilitate conditions of fair competition within the free-trade area." Id.

https://scholarship.law.upenn.edu/jil/vol11/iss2/5
in Canada and the United States, there is no reason to believe the two regimes cannot continue to coexist with reasonable comfort in the free trade environment. On the whole, there has been relatively little conflict between the Canadian and U.S. governments on antitrust matters, especially in light of the huge trade relationship between two countries with strong, competitive private sectors and long traditions of antitrust enforcement. Moreover, mechanisms predating the FTA have been established to provide for consultation and the exchange of information.\textsuperscript{161}

The FTA leaves the energy regulatory regimes of each country intact\textsuperscript{162} and establishes a consultation mechanism in the event one country's regulations are perceived to discriminate against the other country's energy goods in violation of the FTA.\textsuperscript{163} Differing approaches to energy regulation may present a greater challenge to harmonious energy trade than any differences in approach to antitrust enforcement. The controversy over FERC Opinion 256 (the "as billed" decision)\textsuperscript{164} indicates the impact regulatory decisions will continue to have on the two countries' energy trade.

However, the growing interdependence of the domestic and world economies and the need to maintain international competitiveness are putting pressure on antitrust standards, which have tended to focus only on the domestic economy. The Canadian Competition Act already recognizes international competition as a factor in assessing mergers.\textsuperscript{165} A merger having the effect of lessening competition to some extent in Canada may be found acceptable if the scale of the enterprise is necessary to compete effectively at the international level.\textsuperscript{166} Any resulting tendency towards concentration in the energy industries should at least be offset by, and probably exceeded by, the tendency of domestic energy deregulation towards increasing the opportunities of smaller enterprises to produce and market energy.

Similar changes may be introduced into U.S. antitrust laws. The present asymmetry in the level of recognition is, however, not likely to be a serious issue in energy trade between the United States and Ca-

\textsuperscript{161} Battram & Lock, \textit{supra} note 4, at 383-84.
\textsuperscript{162} The FTA contemplates a few specific changes in particular policies or regulations, as specified in Chapter 9.
\textsuperscript{163} FTA, art. 905.
\textsuperscript{164} \textit{See supra} note 9. \textit{See also} Battram & Lock, \textit{supra} note 4, at 384-87.
\textsuperscript{165} Competition Act §§ 1.1, 96.
\textsuperscript{166} \textit{Id.} To somewhat similar effect is the Investment Canada Act, which includes the effect on competition amongst its criteria for review of proposed foreign investments. Investment Canada Act, ch. 20, § 20(d). \textit{See also} Kennish, \textit{Developments in Canadian Competition Law Affecting U.S. Investments in Canada}, 57 \textit{Antitrust L.J.} 459, 482-83 (1988).
nada. Moreover, the current DOJ position that potentially legitimizing actions of foreign governments should only in limited circumstances be recognized by U.S. courts as defenses in determining antitrust liability, through exemption doctrines such as act of state, is under attack and apparently on the retreat.

This article has not dealt with the complex relationship between the antitrust and competition laws and the international trade laws of the two countries, especially their antidumping (AD) and countervailing duties (CVD) laws, nor the all important relationship of the AD and CVD laws to the future of the FTA. However, two points emerging from these relationships are critical to the future relationship between the U.S. antitrust and Canadian competition laws in the energy area:

1. Under the FTA, Canada and the United States are to establish a Working Group “to develop more effective rules and disciplines” for government subsidies and a “substitute system of rules for dealing with unfair pricing and government subsidization,” some of the major

---

167 The act of state doctrine essentially states that the courts in one country will not sit in judgment of the acts of another government within that government’s territory. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

168 The DOJ’s Antitrust Enforcement Guidelines for International Operations, supra note 80, would substantially limit applications of the state action or Noerr-Pennington doctrines in the international arena and would narrowly apply the act of state doctrine in the context of extraterritorial conduct that otherwise violates the antitrust laws. As noted supra Part 2.2.3, these proposed guidelines were strongly criticized by the ABA. ABA on Draft Guidelines, supra note 81, at 664-71; ABA on Final Guidelines, supra note 81, at 965-69. See also Rosenthal, Antitrust Implications of the Canada-United States Free Trade Agreement, 57 ANTITRUST L.J. 485, 493-95 (1988). See generally Griffin, The Impact on Canada of the Extraterritorial Application of the U.S. Antitrust Laws, 57 ANTITRUST L.J. 435 (1988).


In addition to countervailing duty and antidumping actions available to protect U.S. producers from unfair international competition under sections 701 and 731 of the Tariff Act of 1930, 19 U.S.C. §§ 1671, 1673 (1982), Canadian trade may be subject to action under section 337 of the Tariff Act of 1930 on the grounds of unfair competition among private competitors. Moreover, section 301 of the Trade Act of 1974, 19 U.S.C. § 2411 (1982), provides for retaliation against government unfair trade practices. Schultz, supra note 4, at 9. These trade remedies have also been left untouched by the FTA, and while neither type of action has played a role in past energy trade, one cannot rule out the use of either in the future, as competition in energy markets increases. Actions under section 201 of the Trade Act of 1974 against imports that are a substantial cause of serious injury to a U.S. domestic industry have been curbed insofar as Canada is concerned by chapter 11 of the FTA. This provision requires that imports must be substantial and contributing importantly to the serious injury alleged.

170 See generally Battram & Lock, supra note 4, at 348-49, 375-79.

171 Id. at 384 (quoting FTA art. 1907, ¶ 1(a), 1(b)).
pieces of unfinished business in the FTA. The success of the Working Group, which is given five to seven years to complete its task, is important to the long-term success of the FTA. The energy chapter of the FTA contemplates that government incentives will continue to maintain the oil and natural gas reserve base. However, no express immunity from AD or CVD laws is given to energy goods. The harmonization of AD and CVD practices is therefore important in the energy area.

(2) In the negotiations that led up to the conclusion of the FTA, one proposal was that the AD laws should be abandoned altogether and that cross-border price discrimination should be dealt with by each country’s antitrust or competition laws, suitably amended to apply to sales in both countries under essentially similar standards. While that proposal was not accepted, it is still a potential approach for the Working Group, whose efforts are intended to fill a major gap left by the FTA negotiations.

These points emphasize the close relationship between the domestic antitrust and competition laws and reform of the AD and CVD laws under the FTA. One commentator has asserted that the Working Group, which “provides an extraordinary opportunity for melding the concerns of trade and competition law,” might itself become an instrument for harmonization and rationalization in the bilateral context of the two countries’ domestic antitrust and competition laws.172

In view of the importance energy played in the final negotiations of the FTA, how antitrust and competition law and enforcement develops in the regulated energy context in each country could have an important influence on future FTA implementation and Working Group negotiations. That development may in turn be significantly influenced by FTA implementation and the outcome of these negotiations.

---

172 See Rosenthal, supra note 168, at 488, 492-93.