Developments in American Antitrust Law: Deregulation under the *Staggers Rail Act* and the Implications for Canadian Railroad Rate-Making

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Synopsis

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Introduction

On 1 October 1980 the United States Senate passed the *Staggers Rail Act*,[1] thereby deregulating all railroads operating in the United States. This Act, preceded by similar deregulation legislation with respect to trucking and airlines, reflects the present transportation policy of the United States which endorses a siguificant move in the direction of free market competition.

The proponents of the *Staggers Rail Act* believe that deregulation will prove to be less expensive and more efficient for American railroads. Putting questions of economic theory and justification aside, several important legal problems remain to be solved. The new legal regime under which deregulated American railroads will operate will be governed by antitrust law whose application traditionally has been extra-territorial in scope. In particular, the enforcement of the *Staggers Rail Act* will have serious consequences for Canadian railroads and Canadian-American trade relations because the *Act* expressly terminates the American antitrust immunity to set rates collectively which Canadian railroads have enjoyed since 1948 under the *Reed-Bullwinkle Act*.[2] Under the *Staggers Rail Act*, Canadian railroads which continue to engage in collective rate-making on international through routes, pursuant to s. 279 of Canada's *Railway Act*[3] and s. 32(2) of Canada's *Transport Act*,[4] will be in violation of s. 3 of the *Sherman Act*,[5] and therefore subject to criminal prosecution in the United States, where the courts can execute their judgments against both the assets of such companies and their American subsidiaries.

This article will begin by providing the legal background against which the curtailment of United States antitrust immunity is set. By reviewing relevant case law, it will discuss how American courts have interpreted the extra-territorial reach of American antitrust law on the basis of considerations of foreign policy and international comity. These particular factors will be analysed in a case study of the extra-territorial effect of the *Staggers Rail Act* on the rate-making practices of Canadian railroads. The study will closely examine the arguments of the Canadian railroads which have been incorporated into the recent order of the Interstate Commerce Commission (I.C.C.) to extend antitrust immunity. This decision is interpreted as establishing an important precedent for future decisions of the I.C.C. affecting through rates between Canada and the United States, and for other commissions dealing with different aspects of international trade and commerce.

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[1] *Act of Oct. 14, 1980*, Pub. L. No. 96-448, §101(c), 94 Stat. 1895, (to be codified in 49 U.S.C. §10101a).

[2] *Act of June 17, 1948*, 49 U.S.C. §5b (1976).

[3] R.S.C. 1980, c. R-2, s. 279.

[4] R.S.C. 1970, c. T-14, s. 32(2).

[5] *Act of July 2, 1890*, 15 U.S.C. § 1-7 (1976).

I. A Statement of the Law

A. *The American Law*

The *Sherman Act* governs antitrust matters in the United States and s. 3 of the *Act*, in particular, provides for the extra-territorial jurisdiction of American antitrust law:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanour, and, on conviction thereof, shall be punished by fine ... or by imprisonment ... .[6]

The original criminal penalties of s. 3 of the *Sherman Act* were amended by the *Antitrust Procedures and Penalties Act of 1974*[7] which changed the offences from misdemeanours to felonies, increased the maximum fine to $1 million for corporations and $100,000 for any other person, and increased the maximum term of imprisonment to three years. A corporation which violates s. 3 can be fined up to $1 million per count and the corporate officers who participated in or supervised the alleged collusion can be assessed $100,000 in personal fines. This legislation is penal in nature, therefore such personal fines are non-assurable. By virtue of the doctrine of "treble damages", a shipper who feels he has been detrimentally affected by price fixing can attempt to prove that his company has suffered damages because of the higher rate which it has had to pay in consequence of the collusion. If he succeeds in establishing the amount of his loss, the court will triple it and condemn the defendant company to pay this sum to the plaintiff.[8]

B. *The Canadian Law*

In Canada, the execution of foreign judgments is governed by s. 31.5 of the *Combines Investigation Act*.[9] This section expressly provides that if a judgment, decree or order is issued by a foreign court and the implementation in whole or in part of the judgment in Canada would

> (b) (i) adversely affect competition in Canada,
> (ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore and improve such efficiency;

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[6] 15 U.S.C. §3 (1976).

[7] *Act of Dec. 12, 1974*, 15 U.S.C. §§1, 2, 3 (1976).

[8] 15 U.S.C.S. 15 (May 1981 Supp.): "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee".

[9] S.C. 1976-7, c. 28, s. 31.5.

(iii) adversely affect foreign trade of Canada without compensating advantages, or

(iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages,

the Commission may order that

(c) no measures be taken in Canada to implement the judgment, decree, order or process, or

(d) no measures be taken in Canada to implement the judgment, decree, order or process except as to avoid the effects of (b)(i) to (iv).

In such a situation, American courts may only execute their judgments within the territorial jurisdiction of the United States. They may prosecute the directors of Canadian corporations living in or visiting the United States and seize the assets of Canadian corporations located in the United States. These remedies have potentially grave consequences for the railroads of Canadian Pacific (C.P.) and Canadian National (C.N.), which both own American subsidiaries. The execution of judgments by seizure is highly attractive, given the considerable amount of rolling stock which both railroads have in the United States. In sum, although the execution of American judgments may be barred in Canada, there is little, short of a political solution, which can prevent the execution of an American judgment against both the officers and the assets of a Canadian corporation located in the United States.

C. *International Efforts to Resolve Conflict of Laws*

The broad repercussions of the application of American antitrust law have been a matter of much concern for the governments of Canada and the United States. To avoid conflicts over its enforcement, the *Fulton-Rogers Understanding of 1959*[10] was negotiated to provide for discussions in the event of a conflict. Ten years later, the *Basford-Mitchell Understanding*[11] was reached to allow for the exchange of information between Canadian and American antitrust authorities as well as to give effect to the 1967 O.E.C.D.[12] recommendation on restrictive business practices.

Canadian-American relations with respect to the extra-territorial enforcement of antitrust laws have become strained as a result of the recent uranium cartel case in the United States.[13] This development prompted the introduction in the House of Commons on 11 July 1980 of Bill C-41, the

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[10] [1959] 1 H.C. Debates, 24th Parl., 2d Sess., 617.

[11] [1969] 1 H.C. Debates, 28th Parl., 2d Sess., 574-5.

[12] Organization for Economic Cooperation and Development, *Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade* (1967).

[13] *In Re Uranium Antitrust Litigation* 480 F. Supp. 1138 (N.D. Ill. 1979), *aff'd* 617 F. 2d 1248 (7th Cir. 1980).

Foreign Proceedings and Judgments Act.[14] If passed, the Bill will prevent discovery of records located in Canada in an extra-territorial antitrust case[15] and will block recognition of foreign judgments in Canada.[16] A Canadian corporation which is forced to pay antitrust damages in a foreign court for an extra-territorial antitrust violation will be able to sue in Canada against the plaintiff who prevailed in the foreign court to recover all, or in some instances only the punitive damage portion, of such an antitrust award.[17] At the present time, Bill C-41 has not been introduced for second reading and it is not certain whether this retaliatory legislation will be reintroduced during a forthcoming session of Parliament.

II. Judicial Interpretation of the Extra-territorial Reach of the *Sherman Act*

The United States Supreme Court's interpretation of the extent of extra-territorial jurisdiction flowing from s. 3 of the *Sherman Act* has undergone considerable revision. There are essentially three categories of decisions which correspond to three specific periods in the twentieth century. The early Supreme Court judgments rely on the "act of state" doctrine and the doctrine of "sovereign compulsion" to limit effectively the scope of extra-territorial jurisdiction under the *Sherman Act*. This approach was for all practical purposes discarded with the adoption of the "intended effects" test introduced by Learned Hand J. in *United States* v. *Aluminum Co. of America (Alcoa)*.[18] It was under this test that the *Sherman Act* was given its greatest extra-territorial effect. Finally, the more recent decisions in *Timberlane Lumber Co.* v. *Bank of America*[19] and *Mannington Mills, Inc.* v. *Congoleum Corp.*[20] reflect a greater concern for the need to strike a balance between the enforcement of antitrust laws and considerations of international comity.

A. *The Act of State Doctrine and Sovereign Compulsion*

The first case to raise the question of the extra-territorial effect of the *Sherman Act* was *American Banana Co.* v. *United Fruit Co.*[21] in which Holmes J. gave a narrow interpretation to s. 3 based upon the act of state doctrine enunciated twelve years earlier in *Underhill* v. *Hernandez*. In the latter case, the Supreme Court recognized that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the

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[14] 32d Parl., 1st Sess., 11 July 1980, 1st reading.
[15] Section 3(1)(a).
[16] Section 7(1)(a).
[17] Section 8(1).
[18] 148 F. 2d 416 (2d Cir. 1945).
[19] 549 F. 2d 597 (9th Cir. 1976).
[20] 595 F. 2d 1287 (3d Cir. 1979).
[21] 213 U.S. 347 (1909).

courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[22] In *American Banana*, the Supreme Court held that the *Sherman Act* did not cover actions occurring outside the territorial jurisdiction of the United States and that American courts could not examine the acts of a foreign government done within its territory.

After *American Banana*, a long list of cases expanded the *Act's* extra-territorial reach. Subsequent Supreme Court decisions in *United States* v. *Sisal Sales Corp.*, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, and *United States* v. *The Watchmakers of Switzerland Information Center, Inc.* distinguished mere foreign governmental involvement from true acts of state. An act of state, it was established, is the means by which a foreign government gives effect to its national interests, and such an act remains a complete defence to alleged violations of American law. Mere involvement by a foreign nation, however, is not an act of state, and therefore is not a defence.

In *Sisal Sales*,[23] the defendants conspired to control the sisal trade between Mexico and the United States by inducing Mexican officials to recognize the conspirators as exclusive traders and to impose discriminatory taxes on rival sellers. The Supreme Court rejected the defendant's claim to act of state protection, ruling that a conspiracy entered into in the United States for the purpose of monopolizing sales to the United States was not protected simply because one element of the conspiracy involved securing favourable action by foreign officials. In *Continental Ore*,[24] a Canadian corporation called Electromet—the Canadian government's sole purchasing agent for vanadium—used its position to exclude Continental Ore from the Canadian market. The Supreme Court held that Electromet was not entitled to immunity since there was no indication that any Canadian government official "approved or would have approved of the monopolizing efforts". In *The Watchmakers of Switzerland Information Centre, Inc.*,[25] the defendant Swiss watch manufacturing industry engaged in a private conspiracy with their American subsidiaries for the purpose of restraining the manufacture and sale of watches in the United States. The American Court held that the defendants' activities were not required by the law of Switzerland and that the Swiss government's approval of the effects of this private activity could not convert what was essentially a private conspiracy into an unassailable system resulting from foreign governmental mandate.

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[22] 168 U.S. 250, 252 (1897) *per* Fuller C.J.
[23] 274 U.S. 268 (1927).
[24] 370 U.S. 690 (1962).
[25] 1963 Trade Cas. 70,600 (S.D.N.Y. 1962).

A recently recognized corollary to the act of state doctrine in the foreign trade antitrust field is the principle that corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability, as if it were an act of the state itself. In *Interamerican Refining Corp.* v. *Texaco Maracaibo Inc.*, the Court held that the defendants refused to sell oil to the plaintiffs out of compliance with a boycott which the Venezuelan government had imposed and that their refusal was not an illegal restraint of trade. The Court adopted sovereign compulsion, reasoning that "[w]hen a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign."[26]

B. *The Effects Test*

Historically, in the absence of a defcnce of "act of state" or "sovereign compulsion", the defendant will be convicted if its activities fulfill the requirements of the "effects test". At the basis of the act of state doctrine is the territorial principle that a state has exclusive and absolute authority within its own territory. American courts, however, have applied the objective territorial principle which states that "a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done".[27] The *Restatement of Conflict of Laws (Second)* says of the "objective" territorial principle that "[a] state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."[28] Consequently, American courts have not purported to exercise extra-territorial jurisdiction but only jurisdiction over acts which are effective within the territory of the United States. Whenever acts committed in foreign countries have a substantial effect upon American foreign commerce or operate within American territory, the courts have tended to hold the offender criminally as well as tortiously responsible.

The United States Supreme Court formulated the "intended effects test" in the *Alcoa* case, thereby virtually overruling *American Banana* by eliminating the requirement that some part of the conspiracy or combination occur within the United States. Instead, Learned Hand J., relying on "Congressional intention", stated that the consequences or effects of the conspiracy on commerce in the United States were a sufficient basis for extra-territorial antitrust jurisdiction: "It is settled law that any state may impose liabilities, even upon persons not within its allegiance, for conduct

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[26] 307 F. Supp. 1291 (D. Del. 1970).

[27] W. Fugate, *Foreign Commerce and the Antitrust Laws*, 2d ed. (1973), 35.

[28] American Law Institute, *Restatement of the Law* [:] *Second* [:]*Conflict of Laws*, (1969), vol. 1, §37.

outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[29] If the conduct of the defendant is intended to affect imports and exports, then the *Sherman Act* will apply. The test has been cited with approval by the Supreme Court in *United States* v. *Imperial Chemical Industries, Ltd*[30] and *United States* v. *Timken Roller Bearing Co.*[31]

The *Alcoa* case represents the furthest extension of the extra-territorial jurisdiction of the United States under the *Sherman Act*, and since this decision, the courts have generally accepted the concept of "effects" jurisdiction as a ground for exercising extra-territorial jurisdiction in antitrust cases. At the basis of the intended effects test lies the application by the court of the "direct and substantial" standard.[32] It must be determined whether the restraint of trade results directly from the foreign conduct or activities of the defendant and whether American commerce has been substantially affected.

C. *The Balancing of Interests Test*

The strict application of the effects test advocated by Learned Hand J. in the *Alcoa* case has been attacked for its failure to consider other operating factors such as international comity and foreign policy. It was observed in *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*:

> If ... [American antitrust] policy cannot extend to the full sweep of American foreign commerce because of the international complications involved, then surely the test which determines whether United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports or imports.[33]

A major shift in the judicial interpretation of the exercise of extra-territorial antitrust jurisdiction occurred in 1976 when the Ninth Circuit Court of Appeals criticized the effects test in *Timberlane*. The Court believed that the test was incomplete because "it failed to consider other nations' interests."[34] Nevertheless, the test which the Court applied to the facts of the case retained Learned Hand J.'s intended effects test, thus making it necessary to establish that the "alleged restraint affected or was intended to affect, the foreign commerce of the United States"[35] and that the effect was "of such type and magnitude so as to be cognizable as a violation of the *Sherman Act*".[36]

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[29] *Supra*, note 18, 443-4.
[30] 105 F. Supp. 215, 241-2 (S.D.N.Y. 1952) *per* Ryan J.
[31] 341 U.S. 593, 597-8 (1951) *per* Black J.
[32] *Supra*, note 19, 610-2 *per* Choy J.
[33] 404 F. 2d 804, 815 (D.C. Cir. 1968) *per* Levanthal J.
[34] *Supra*, note 19, 611-2 *per* Choy J.
[35] *Ibid.*, 615.
[36] *Ibid.*

The Court, however, did modify the effects test by requiring that it consider the appropriate comity and fairness factors when determining whether the extra-territorial jurisdiction of the United States should be asserted.[37] The elements to be weighed include:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm, or affect American commerce, the foresecability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asseted .... Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extra-territorial jurisdiction.[38]

The act of state doctrine and the balancing of relevant considerations, which the courts undertake before deciding whether to apply the doctrine as a defence, provide the real source for the new rule of extra-territorial jurisdiction. In *Timberlane*, the Court acknowledged the basis for the new rule when it stated that "the act of state doctrine ... demonstrates that the judiciary is sometimes cognizant of the possible foreign implications of its action. Similar awareness should be extended to the general problems of extra-territoriality."[39] Thus, the Court recognized that the act of state doctrine and the exercise of extra-territorial jurisdiction share the need for comity among nations as a common conceptual basis.

The most recent decision to adopt the jurisdictional test introduced in *Timberlane* was the 1979 decision of the Third Circuit Court of Appeals in *Mannington Mills*.[40] The Court took the view that it had to balance the enforcement of American antitrust law against the interest of international comity in deciding whether to exercise extra-territorial jurisdiction. *Mannington* and *Timberlane* represent a tendency on the part of the American judiciary to show increased deference to foreign policy considerations. These decisions reflect an increased judicial cognizance of the new context of United States foreign relations, wherein a weaker economic position and increasing dependance on foreign states mean that the United States can no longer afford to issue many judicial decisions that will be unpopular with foreign governments. It also means that the judiciary will have to perform some of the functions of the executive branch by having to act as policy-maker.

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[37] *Ibid.*
[38] *Ibid.*, 614.
[39] *Ibid.*, 613.
[40] *Supra*, note 20.

III. The *Staggers Act* Case Study: Antitrust Immunity for Railroads — the 5b Cases

Under s. 10706(a)(2)(A) of the revised *Interstate Commerce Act*,[41] railroads which are party to I.C.C. approved collective agreements relating to "rates..., classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them" are exempt from the antitrust laws "with respect to making or carrying out the agreement". The I.C.C. only has statutory authority to approve such an agreement "when it finds that the making and carrying out of the agreement will further the national transportation policy ... and may require compliance with conditions necessary to make the agreement further that policy as a condition of its approval".[42]

The statute prohibits the I.C.C. from approving, and thereby conferring antitrust immunity upon, any agreement which permits voting or agreement on single-line rates or charges, and on specific interline rates and charges by railroads which cannot "practicably participate" in the particular movements. Agreements which permit joint action to protest or seek suspension of another railroad's rate or classification established by independent action may also not be approved.[43]

In 1976, Congress passed the *Railroad Revitalization and Regulatory Reform Act of 1976*[44] which deleted s. 5a of the *Interstate Commerce Act* — under which the major American rate bureau agreements had been filed — and added s. 5b, which governed rate-making agreements among railroads. The *Interstate Commerce Act* was recodified, with new section numbers, so that the industry still refers to antitrust immunity decisions of the I.C.C. as "5b decisions" despite the new codification.[45]

A. *The Decision in 5b Case I*

There have so far been few major I.C.C. decisions interpreting the recodified s. 5b. The first decision involving s. 5b was *Western Railroads — Agreement*,[46] or *5b Case I*, which disapproved of the rate bureau agreements tendered by the Western, Eastern and Southern railroads. The I.C.C. ruled that, in view of "evidentiary deficiencies", it was "unable to find that approval of the proposed agreements would be in furtherance of the national transportation policy or that the benefits of the agreements outweigh the disadvantages so that the parties to these agreements should be relieved from the operation of the antitrust laws".[47] Because the I.C.C. was "aware that

[41] *Act of Oct. 17, 1978*, 49 U.S.C. §10706(a)(2)(A) (Supp. II 1978).
[42] 49 U.S.C. §10706(a)(2) (Supp. II 1978).
[43] 49 U.S.C. §10706(a)(3)(A) (Supp. II 1978).
[44] *Act of Feb. 5, 1976*, §208(a), 49 U.S.C. §5b (1976).
[45] *Act of Oct. 17, 1978*, §4(b), (c), a49 U.S.C. §10706 (Supp. II 1978).
[46] 358 I.C.C. 662 (1978).
[47] *Ibid.*, 668.

applicants did not fully understand their burden of proof concerning the national transportation policy issue",[48] however, it agreed to "afford applicants an opportunity to present additional evidence relating to the issue of whether Commission approval of these agreements would be in furtherance of the national transportation policy".[49] Additional evidence was filed by the American railroads and submitted for the I.C.C.'s decision.

B. *The Decision in 5b Case II*

The I.C.C.'s decision in *5b Case II*, served 13 August 1980, considered the railroads' additional evidence but nevertheless concluded that "the agreements must be disapproved".[50] The I.C.C.'s general conclusion with respect to the tendered rate bureau agreements was expressed as follows:

> Based on all the evidence and argument of record presented by the numerous parties at various stages of these proceedings, we conclude that we are unable to approve the collective rate-making agreements here under consideration in their present form. Applicants have demonstrated that certain elements in collective rate-making, particularly in the setting of joint rates for through movements, do further specific goals set forth in the national transportation policy. The perceived advantages to the public interest, however, are outweighed by the unacceptable degree to which the means chosen to further these goals result in frustration of the fundamental values expressed in the antitrust statutes. As a result, we cannot find that the making and carrying out of the agreements before us will further the national transportation policy.[51]

The railroads were ordered to file new agreements in conformance with the I.C.C.'s decision by 13 October 1980.

The decision in *5b Case II* sets forth the scope of the agreements which it will approve, thereby conferring antitrust immunity. Under s. 10706(a)(3)(A)(i) of the *Interstate Commerce Act*[52] the I.C.C. may not approve of any agreement which permits voting or agreement on single-line rates or changes. Furthermore, where carriers are under the same management and control, such as in the case of C.N. and its American subsidiary, Vermont Central, the I.C.C. will deem joint line rate proposals as single-line proposals:

> It is highly unlikely in an interline proposal between affiliates that one carrier would make a decision to the detriment of the other. Because their traffic policies will generally be the same, interline proposals of affiliates should be treated as single-line proposals rather than as joint-line proposals.[53]

The I.C.C. deeided in *5b Case I* that "discussions" of single-line and joint-line proposals by all rate bureau members could take place but only

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[48] *Ibid.*, 668.
[49] *Ibid.*, 662.
[50] 364 I.C.C. 1, 26 (1980).
[51] *Ibid.*, 12.
[52] 49 U.S.C. §10706(a)(3)(A) (Supp. II 1978).
[53] *Supra*, note 50, 15.

insofar as these discussions dealt with the prevention of discrimination, preference and prejudice. In *5b Case II*, however, the I.C.C. re-considered its earlier holding and concluded that such discussions would no longer enjoy antitrust immunity:

> In light of our responsibility to approve only those collective rate-making activities that will promote the national transportation policy, without duly frustrating the public policy expressed in the anti-trust statutes, we must decline to extend immunity to any discussions on single or joint line rate proposals by carriers prohibited from voting or agreeing on them.[54]

Section 10706(a)(3)(A)(i) prohibits rate bureaus from allowing voting or agreement on rates relating to a particular interline movement by railroads which cannot "practicably participate" in that movement. Under the definition of "practicably participate" set out in *5b Case I*, all carriers that had participated during the previous two years in joint-line movements between an origin and a destination could collectively set the joint-line rules applicable to other movements between those points. In *5b Case II*, the I.C.C. found:

> Thus the present definition would permit a carrier participating in a joint line movement between two points to have a voice in the setting of the rate for a movement between the same two points over a completely different joint-line route. But in our view a carrier that does not participate in a specific joint-line routing should not be able to vote in or influence a rate that will apply to that routing.[55]

Accordingly, the I.C.C. held that "practical participants in an interline movement are only those carriers who are direct connectors to a specific joint-line movement of a specific commodity".[56]

Finally, the *5b Case II* established that single-line rates could no longer be charged by including them in general revenue increases[57] and that a cost-based zone of reasonableness would replace the general increase with respect to single-line rates.[58] To ensure the disclosure of the determination of such rates, the I.C.C. required that rate committee meetings of the rate bureaus be open to the public.[59]

C. *A.N.P.R. and s. 219(a) of the* Staggers Act

Pursuant to its decision in *5b Case II*, the I.C.C. issued an *Advance Notice of Proposed Rule-Making (A.N.P.R.)*[60] on 1 May 1980 which stated that it intended to introduce a zone of reasonableness for the determination

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[54] *Ibid.*, 19.
[55] *Ibid.*, 16.
[56] *Ibid.*, 17.
[57] *Ibid.*, 20.
[58] *Ibid.*, 21.
[59] *Ibid.*, 22.
[60] 45 Fed. Reg. 29103 (1980).

of general rate increases. The A.N.P.R. created economic penalties which were meant to discourage the collective setting of joint rates in rate bureaus, which would be limited to a smaller cost increase than independently set rates.

Section 219 of the *Staggers Act*, which amends s. 10706(a)(1) of the *Interstate Commerce Act*, prevents a rate bureau, with respect to all rate matters coming before the bureau other than a general rate increase or a broad tariff change, such as a single-line rate, from permitting a railroad:

> (1) to discuss, to participate in agreements related to, or to vote in single-line rates proposed by another carrier;
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> (2) to discuss, to participate in agreements related to, or to vote on rates related to a particular interline movement unless that rail carrier practicably participates in that movement; or
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> (3) if there are interline movements over two or more routes between the same end points, permit a carrier to discuss, to participate in agreements related to, or to vote on rates except with a carrier which forms part of a particular single route.[61]

The I.C.C. will promulgate rules implementing these prohibitions if they are accepted after a formal hearing into their feasibility.

D. *Impact of s. 219(a) of the* Staggers Act *on the Canadian Railroads*

Section 219(a) of the *Staggers Act* contains the s. 5b provisions of the old *Interstate Commerce Act* which now can be found in the recodified *Interstate Commerce Act*.[62] In short, *5b Case II* has for the moment determined the interpretation of s. 219(a) of the *Staggers Act*.

The *5b Case II* decision radieally alters the manner in which international through rates have traditionally been made and exposes Canadian railroads to the extraterritorial effect of American antitrust law. The Canadian railroads will no longer enjoy antitrust immunity with respect to discussions of single-line international through rates, which include interline rates where the interline parties are under common control. For example, the CP-SOO Line or the CN-Grand Trunk Western will constitute a single-line. Under *5b Case II*, Canadian railroads will not be able to discuss such single-line rates in connection with joint-line rates. Moreover, Canadian railroads will only be permitted to discuss or agree on interline movements in which they are participants and then only with the actual carriers participating in those routes.

Although the Canadian railroads might comply with the ratemaking procedures allowed by *5b Case II*, there remains the possibility of antitrust violations arising from their dealings with American lines. Unless the

[61] 49 U.S.C. §10706(a)(3) (Supp. II 1978).
[62] 49 U.S.C. §10706 (Supp. II 1978).

holding of *5b Case II* is altered, the American lines will virtually cease their collective rate-making activity outside of the general rate increase context. Thus, Canadian railroads will no longer be able to meet with more than one American railroad at a time except when discussing a particular interline route involving a Canadian railroad and two or more American lines. In addition, the *5b Case II* forbids Canadian and American railroads from discussing single-line international through rates in general revenue increases or in broad tariff changes.

E. *The Impact of the* Staggers Act *on Canadian Shippers*

Unless antitrust immunity is extended to Canadian railroads, joint international through rates will disappear because Canadian railroads will not be able to set such rates jointly from Canadian origins. Similarly, American railroads would be unable to deal with such joint rates even if immunity were maintained for the Canadian portion of international movements. The alternative would be proportional or combination rates which historically have proven more expensive to shippers.

Canadian shippers would not be able to meet as a group with railroads without inviting antitrust allegations of collusion. C.P. and C.N. have traditionally set their rates jointly and, in any case, it is likely that in a duopolistic environment one railway will know what the other is planning. Thus, any shipper who deals with even one Canadian railroad would theoretically be open to the allegation that he had participated in "conscious parallelism". Shippers cannot expect that there will any longer be parity on rates. The purpose of the *Staggers Act* was to enforce competition within the railway industry and therefore, the Canadian railroads, once subject to this extra-territorial reach, could no longer protect the existing rate relationship between groups of origins and destinations. Lastly, shippers can no longer expect to be able to go to a centralized agency in order to obtain information. Given that the *Staggers Act* prohibits discussion or even knowledge of joint rates except between "principal participants", there will be as many rates between two end points as there are routes. This will make it especially difficult for the smaller shipper to become aware of which rate constitutes the lowest combination, unless he has a sizeable traffic department with which to gather daily information.

IV. Canadian Reaction to s. 219(a) of the *Staggers Act*

By virtue of s. 5b of the *Interstate Commerce Act*, Canadian railroads were given an opportunity to present arguments before the I.C.C. to try to persuade the Commission to maintain the antitrust immunity with respect to joint international through rates. The Canadian railroads demonstrated their strong disapproval of s. 219(a) of the *Staggers Act* at hearings held in

November 1980.[63] They enlisted the support of Canadian shippers such as the Canadian Manufacturers' Association and the Canadian Pulp and Paper Association[64] as well as the Canadian government in their lobbying efforts to have antitrust immunity extended.

During the summer of 1980, the Ministry of Transport had communicated to the United States State Department and the I.C.C. its fears that the *Staggers Act* would unduly effect the free flow of goods and the continuance of harmonious Canadian-American relations.[65] The Canadian position was that an abolition of American antitrust immunity, pursuant to s. 219(a) of the *Staggers Act*, would operate as "a direct challenge to the sovereignty of Canada" and pose serious problems to the Canadian economy.[66] Section 279 of the Canadian *Railway Act* specifically encourages railroads operating in Canada to "agree upon and charge common rates" and directs them to "exchange such information with respect to costs as may be required under this Act" among themselves.[67] To enforce American antitrust law would have the effect of terminating collective rate-making on international through rates thereby undermining the operation of s. 279 which forms the basis of the *National Transportation Act* of 1967.[68]

The Canadian government argued that the exchange of costs between railroads assures that rates will be set at compensatory levels. Second, collective rate-making allows selective rates to be adjusted according to the specific conditions of individual commodity groups, geographic location, and producer and consumer markets. Moreover, s. 32(2) of the Canadian *Transport Act* obliges competing railroads to engage in collective rate-making.[69]

Section 219(a) of the *Staggers Act* was seen as a direct challenge to Canada's sovereigu authority to legislate and regulate its transportation sector within Canada. It was evident from *5b Case II* that Canadian railroads could be prosecuted in American courts for collectively setting the Canadian portion of an international through rail rate. Thus, Canadian railroads' compliance with Canadian transportation policy in Canada could be challenged as an antitrust violation in a United States court. Furthermore, if Canadian railroads continued to comply with Canadian transportation policy by collectively setting the Canadian portion of an international through rate, their American connections would refuse to deal

[63] Interstate Commerce Commission, *Comments of Canadian Railroads before the Interstate Commerce Commission, Exhibits 1 and 2, respecting Western Railroads Agreement, Section 5b Application, No. 2* (26 November 1980).

[64] *Ibid.*, Exhibit 4.

[65] *Ibid.*, Exhibit 5.

[66] *Ibid.*, Exhibit 7.

[67] R.S.C. 1970, c. R-2, s. 279.

[68] R.S.C. 1970, c. N-17.

[69] R.S.C. 1970, c. T-14, s. 32(2).

directly with them for fear of antitrust prosecution. As a result, the system of joint international through rates would disintegrate.

It was also argued that by applying antitrust penalties to railroads which participated in the establishment of joint rail rates between points in Canada and the United States, the free flow of commerce across the border would be disrupted to the detriment of mutual trade and to the detriment of Canadian railroads, which rely on international traffic for 25-30 per cent of their revenue. If international through rates were to disintegrate, shippers would be required to pay proportional or combination rates and they could face the task of having to ascertain on their own available routes and rate levels.[70]

A. *The Position of Canadian Railroads*

The arguments of the Canadian railroads at the November 1980 hearings were essentially based on considerations of international comity and foreign policy. In particular, they drew the I.C.C.'s attention to the adverse effects that the termination of immunity would have on Canadian railroads, Canadian shippers and the Canadian economy. The railroads suggested that the imposition of American transportation policy was territorially constrained to the United States, and that to lift antitrust immunity would permit a foreign regulatory body, the I.C.C., to exercise its regulatory powers outside the United States. Such extra-territorial jurisdiction, it was argued, was contrary to s. 10501(a)(2)(G) of the *Interstate Commerce Act* which limits the jurisdiction of the I.C.C. "to the extent the transportation is in the United States".

The United States Supreme Court has recognized that the I.C.C. lacks jurisdiction over the Canadian portion of international through movements. In *Louis-Simas Jones Co.* v. *Southern Pacific Co.*, the Court held that the *Interstate Commerce Act* "does not empower the Commission to prescribe or regulate [international through] rates. It applies to international commerce only insofar as transportation takes place within the United States."[71] This holding was reaffirmed in *United States* v. *Pennsylvania Ry Co.*[72] where the Supreme Court decided that the I.C.C. could only prescribe or regulate international joint through railroad rates for the American portion of such through traffic.

In *Thermoid Co.* v. *Baltimore & O.R.R.*,[73] the I.C.C. itself held that its jurisdiction to prescribe international through rates did not apply within Canada. Moreover, the I.C.C. has considered international comity with respect to Canada in its decision in *Rates on High Explosives to Grand Trunk Railway System Stations* where it ruled that "obviously no definite

[70] *Supra*, note 63, Exhibit 7, 1-4.
[71] 283 U.S. 654, 660 (1931) *per* Butler J.
[72] 323 U.S. 612, 620 (1945) *per* Black J.
[73] 303 I.C.C. 743, 752 (1958).

ruling upon questions involving a possible conflict of authority as between the rate-regulating bodies of this country and of Canada should be announced ... without the most ample consideration of the matter in all of its phases."[74] The Canadian railroads reminded the I.C.C. that international comity has become an important consideration in the decisions of other commissions concerned with matters of international trade and commerce. In the area of carriage of goods by sea, for example, the District of Columbia Circuit Court had held in *Trailer Marine Transport Corp.* v. *Federal Maritime Commission* that the scope of the Federal Maritime Commission's jurisdiction must be tempered by considerations of international comity:

> For reasons of international comity, regulation of carriers involved in foreign commerce has often been less stringent than that of carriers in domestic commerce; for carriers in foreign commerce, by definition, either cross or touch upon the shores of foreign countries, where an extension of jurisdiction by the country of the carrier may be problematic. [See *United States* v. *Pennsylvania Ry Co.* 323 U.S. 612 (1945)]. Certainly, also, because of complexities presented by the possibly overlapping regulatory schemes of a multitude of countries, there is need for maximal consistency in whatever regulation there may be of carriers involved in foreign commerce.[75]

Similarly, when the *International Air Transportation Competition Act of 1980*,[76] which deregulated civil aviation in the United States, became law, the Civil Aeronautics Board granted a two year period of antitrust immunity to foreign carriers based on considerations of international comity and foreign policy.[77]

The Canadian railroads submitted that the enforcement of s. 219(a) of the *Staggers Act* against Canadian railroads operating within Canada was totally repugnant to the purposes of the Canadian regulatory scheme. Section 279 of Canada's *Railway Act* encourages railroads to "agree upon and charge common rates" and "exchange such information with respect to costs as may be required under this Act" among themselves.[78] Canadian railroads, therefore, can more easily assure that rates are set at compensatory levels. Moreover, collective rate-making has allowed selective individual pricing which is more responsive to specific market conditions.

Furthermore, s. 219(a) of the *Staggers Act* is incompatible with s. 32 of Canada's *Transport Act*, which authorizes a Canadian railroad and shipper to enter into contract rates within Canada: "Notwithstanding anything in the *Railway Act* or in this Act, a carrier may make such charges for the transport

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[74] 33 I.C.C. 567, 570 (1915).

[75] 602 F. 2d 379, 392 (D.C. Cir. 1979).

[76] *Act of Feb. 15, 1980*, Pub. L. No. 96-192, §11, 94 Stat. 39 (to be codified in 49 U.S.C. §1382).

[77] United States Civil Aeronautics Board, *Agreement Adopted by the International Air Transport Association Relating to the Traffic Conferences*, Docket No. 32851 Agreement 1175, (15 April 1980), 20-1.

[78] R.S.C. 1970, c. R-2, s. 279.

from one point in Canada to another point in Canada of goods of a shipper as are agreed between the carrier and the shipper."[79] Section 32(2) of the *Transport Act* expressly requires that all agreed charges be set collectively: "No agreement for an agreed charge for the transport by rail from or to a competitive point, or between competitive points, on the lines of two or more carriers by rail shall be made unless the competing carriers by rail consent thereto in writing or join in making it."[80] The Canadian railroads contended that if antitrust immunity with respect to international through rates were terminated, then Canadian-American international contract rates would be seriously undermined. Canadian railroads are compelled by s. 32(2) of the *Transport Act* to set agreed charges collectively, provided that competing carriers agree. Unless American railroads are free to meet collectively with their Canadian connections and the relevant shippers, it will be practically impossible to obtain the agreements necessary to set contract rates on international through traffic.[81]

B. *The Economic Argument for the Maintenance of Antitrust Immunity*

The aim of public transportation policy in Canada is to give the various modes of transportation a fair chance to find their proper place within a competitive system. Section 3 of the *National Transportation Act* of 1967 seeks to achieve "an economic, efficient and adequate transportation system making the best use of all available modes of transportation at lowest total cost . . . to protect the interests of the users of transportation and to maintain the economic well-being and growth of Canada".[82] Regulation ensures that there is free intermodal competition and that user charges are set at levels that cover the costs of facilities and services which have been provided at public expense. It also ensures adequate compensation for services provided by carriers as a matter of imposed public duty.

Professor Trevor Heaver appeared before the I.C.C. on behalf of C.P. and C.N. and defended collective rate-making on the ground that it is responsive to shippers' needs and that railway service conditions are tailored through negotiations to serve such needs.[83] Although there is a regulated rate structure, a fair amount of room for competition still exists. Under s. 279 of the *Railway Act*, railroads may agree upon and change common rates in accordance with regulations or orders made by the I.C.C. Shippers are free to meet together for the purpose of preparing strategies and

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[79] R.S.C. 1970, c. T-14, s. 32(1).
[80] R.S.C. 1970, c. T-14, s. 32(2).
[81] *Supra*, note 63, Exhibit 7, 34-9.
[82] R.S.C. 1970, c. N-17, s. 3.
[83] Interstate Commerce Commission, *Statement of Professor Trevor Heaver before the Interstate Commerce Commission* (26 November 1980), 1-22.

conducting negotiations with railroads, which might include plans to use jointly alternate modes of transport.

Heaver argued that collective rate-making has led to more efficient railway pricing and carriers' services in Canada. Without collective negotiation, Canadian railroads would be forced to negotiate only on an individual company basis so that the cost and effectiveness of negotiations would be adversely affected, particularly for small shippers. Negotiating hours would increase in number and the effectiveness of the negotiations would decrease proportionately. This would be a great disadvantage to the long-run development of innovative service and rate arrangements. For example, economy can be achieved for carriers and shippers by developing logistics systems which both consolidate freights and make joint use of railway equipment by shippers. However, this requires considerable joint research and analysis as well as evaluation against existing rates and service levels. The prohibition of collective rate-making procedures would significantly slow down such technological innovation and provide large firms with a substantial advantage.[84]

Collective rate-making has specific advantages for small shippers since collective negotiation provides disunited shippers with countervailing power against the duopolistic market power of the railroads. The existence of two strong negotiating interests helps to ensure that shippers will not artificially suppress rates to low levels or that railroads will dominate to the point where less intramodal rate competition results. All rates, acts or omissions of the carriers are subject to appeal as contrary to the public interest under s. 23 of the *National Transportation Act*, which ensures that the railroads do not through collective action adhere to rates above a level consistent with National Transportation Policy objectives.[85]

V. The *Section 5b Application No. 2* Decision and the Current Legal Regime

On 14 January 1981 the I.C.C. decided to extend the American antitrust immunity enjoyed by Canadian railroads by 90 days. The I.C.C. offered these reasons for its decision:

(1) section 219(a) of the *Staggers Act* is "fundamentally inconsistent with Canadian transportation policy" and its enforcement will cause a breakdown in the international joint rate structure;

(2) American carriers will be reluctant to deal directly with Canadian railroads which collectively set the Canadian portion of a particular international through rate or group of rates;

(3) section 219(a) of the *Staggers Act* is incompatible with section 279 of the Canadian Railway Act;

[84] *Ibid.*, 23-33.

[85] R.S.C. 1970, c. N-17, s. 23.

(4) 49 U.S.C. 11501(a)(2)(g) provides that the Commission has jurisdiction over transportation to the extent the transportation is in the United States;

(5) the Commission has no jurisdiction over the Canadian portion of a Canadian-American movement;

(6) it is ... extremely important that the Insterstate Commerce Commission in implementing the rate bureau provision ... take into account international comity and foreign policy considerations;

(7) the Civil Aeronautics Board granted antitrust immunity based on considerations of international comity and foreign policy;

(8) the implementation of section 10706(a)(3)(A)(iii) is not feasible for these particular routes;

(9) to disregard the Canadian limitation on intramodal competition would be tantamount to disregarding foreign policy and international comity;

(10) the U.S. State Department's request that the Commission grant interim approval of international through route agreements beyond the expiration date of January 15, 1981.[86]

On 6 April 1981, C.N. and C.P. jointly filed an *Agreement* with the I.C.C., pursuant to s. 10706(a) of the *Interstate Commerce Act*. The preamble to the *Agreement* clearly stipulates that the national transportation policies of the United States and Canada must be pursued in accordance with the requirements of existing national transportation legislation such as the *Interstate Commerce Act*, the Canadian *Railway Act* and the Canadian *Transport Act*.

The express purpose of the *Agreement* is contained in art. 1, s. 2(a) which states:

> The purpose and intent of the parties in making and carrying out this Agreement are to enable them to deal with traffic matters relating to international through routes in such a way that the parties' and other Canadian railroads' handling of such matters are consistent with Canadian transportation policy to the extent such traffic matters relate to transportation within Canada and are consistent with American rail transportation policy to the extent such traffic matters relate to transportation within the United States. Differences in American and Canadian antitrust and transportation policies with respect to the collective treatment of traffic matters involving international through movements require an accommodation of the conflicting policies of Canada and the United States... .[87]

The *Agreement* represents the culmination of a long series of representations and negotiations, on the part of the Canadian railroads, to define the jurisdiction of the I.C.C. with respect to the extra-territorial application of American antitrust law. It is in agreement with the s. 5b decision of the I.C.C. in which the Commission extended antitrust immunity

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[86] *Interstate Commerce Commission decision concerning the Section 5b Application No. 2 of the Western Railroads Agreement*, Washington (14 January 1981), 40-3.

[87] Canadian Pacific Railroad & Canadian National Railroad, *Draft Agreement of the Canadian Railroads* (February 1981), s. 2.

to Canadian railroads on the grounds of foreign policy and considerations of international comity.

The I.C.C. has not yet approved the C.N.-C.P. *Agreement*. Meanwhile, the 90 day immunity period has expired and international rail movement between Canada and the United States must now comply with American antitrust law. In so far as C.N. and C.P. are members of the Eastern and Western American rate bureaus, however, they are entitled to the antitrust immunity provided for by them, and may discuss those international rates processed by the bureaus.[88] At the same time, they are prohibited from discussing certain specific subjects over which antitrust immunity is not extended. The exceptions include surcharges, contract rates, single-line rates, intramodal traffic, independent announcements and exempt commodities such as fresh fruits and vegetables. Any discussion of these subjects by C.N. and C.P. would constitute a violation for which they could be prosecuted in the United States, even though such discussion is legal in Canada.

Should the I.C.C. decide to approve the C.N.-C.P. *Agreement* of April 1981, however, it is still not clear whether that approval will be recognized. The United States Department of Justice believes that the I.C.C. no longer has the jurisdiction to grant antitrust immunity over a matter which deregulation has removed from its jurisdiction.

The Department's position is derived from the Supreme Court's decision in *Federal Maritime Commission* v. *Seatrain Lines Inc.*[89] which allegedly established a general rule that regulatory supervision is the *quid pro quo* for antitrust immunity. The Department holds that the I.C.C. has no jurisdiction to grant antitrust immunity to conduct over which it exercises no regulatory jurisdiction. The Canadian railroads, however, assert that the *Seatrain* case establishes no general rule applicable to all immunity statutes, including the *I.C.C. Act*, and that regulatory supervision is the necessary precondition for a grant of antitrust immunity. Instead, they argue that the *Seatrain* decision is limited in its application to the *Shipping Act* and is based, not on general overriding principles of law, but on the specific text

[88] In its decision served and dated 21 January 1981 the I.C.C. extended the interim antitrust immunity granted by order of 26 October 1976 to the "old" Western, Eastern and Southern rate bureau agreements until 21 April 1981 so long as bureau operations conform with the statute and the decision: *Western Railroads — Agreement* 364 I.C.C. 635, 663 (1981). By order decided 2 March 1981, the I.C.C. further extended interim antitrust immunity until 21 May 1981: 46 Fed. Reg. 16150 (1981). Finally, by order decided 19 May 1981, the Commission extended interim antitrust immunity under the "old agreements" until "a decision is reached regarding the new agreements, subject to the compliance with the terms of the January 21, 1981 decision": 46 Fed. Reg. 28525 (1981).

[89] 411 U.S. 726 (1973).

and purposes of that statutory scheme.[90] Furthermore, there are precedents to support the claim made by C.N. and C.P. that the I.C.C. may still exercise the immunity granting power which it once formally possessed.[91]

If the I.C.C. does not grant antitrust immunity to C.N. and C.P., the probable course of action would be for the Canadian railroads to request a "business review letter" from the United States Department of Justice.[92] In the meantime, C.N. and C.P. await the decision of the I.C.C. and the reaction of the United States Department of Justice, in the event that the C.N.-C.P. *Agreement* is approved.[93]

Conclusion

If accepted, the C.N.-C.P. *Agreement* would represent a significant recognition of foreign policy and international comity considerations by a foreign regulatory body. The judiciary in the United States has been slow to respond to foreign policy considerations, and the absence in the *Staggers Act* of specific provisions for antitrust immunity for foreign railroads is indicative of the legislator's lack of concern for international comity in this area. Canadian critics of the proposed legislation have lobbied intensively since the summer of 1980 to have the *Act* amended. It was indeed proposed that the end of s. 218(iii) be amended to permit the Commission to "take into account international comity or foreign policy considerations in the case of transportation through, to or from a foreign country."[94] However, the amendment never received the support which it needed to be adopted.

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[90] See Interstate Commerce Commission, *Comments of the Canadian Railroads in Reply to Protests before the Interstate Commerce Commission re the Canadian Railroads Agreement — Section 5b Application No. 11.* (25 November 1981), 9-14.

[91] Besides distinguishing the *Seatrain* decision the Canadian Railroads contend that the I.C.C. exercises more than supervisory control over international joint through rates. For example, they argue that the United States Supreme Court in *Canada Packers Ltd* v. *Atchison, Topeka & Santa Fe Ry Co.* 385 U.S. 182 (1966) held that the I.C.C. has jurisdiction to determine the reasonableness of an entire international joint through rate. See also *Canadian Pacific Ltd* v. *United States* 379 F. Supp. 128, 133 (D.D.C. 1974) *per* Robinson J. cited in *Comments of the Canadian Railroads, ibid.*, 18.

[92] A "business review letter" issued by the United States Department of Justice to the Canadian Railroads would only state the enforcement intention of the Antitrust Division as of the date of the letter. Notwithstanding the protection offered by the letter, the Antitrust Division of the Department of Justice is completely free to bring whatever action or proceeding it believes is required by the public interest. Any deviation, however slight, from the facts on which the business review letter is predicated, removes all protection.

[93] On 20 August 1981, the I.C.C. served an order setting the Canadian Railroads' agreement down for expeditious handling but refused to grant antitrust immunity pending Commission consideration of the agreement "because of the serious jurisdictional questions involved": 46 Fed. Reg. 42536 (1981).

[94] 126 Cong. Rec. H10083 (1980) (statements of Sen. Cannon and Rep. Madigan).

The decision of the I.C.C. in *Section 5b Application No. 2* corrected this failing of the *Staggers Act* by making foreign policy and international comity sufficient grounds on which to apply for exemption from the extra-territorial effect of American antitrust laws. This decision now serves as an important precedent for any future matter concerning rate-making practices for interline international through routes between Canada and the United States.

It is generally conceded that the intervention of the United States State Department on the side of the Canadian railroads was the decisive factor which won the railroads their temporarily extended immunity.[95] Had the Canadian railroads' application for immunity been rejected by the I.C.C., an appeal lay to the courts. It is unlikely that the decision of the courts would have been any more favourable. The conflict of laws could be best resolved at the political level for its origins are essentially rooted in the differences which exist between the national transportation policies of Canada and the United States. Had a judge adjudicated the case, he would have been placed in the unfamiliar and uncomfortable position of policy-maker.

It is suggested that a regulatory commission like the I.C.C., upon which political pressure can be directly applied, is better suited to deal with a matter of international trade and commerce. The courts have no tradition of formulating national or international transportation policy. It is submitted that the courts ought to give more consideration to matters of foreign policy and international comity in their judgments: however, they ought to leave to the political and regulatory bodies those matters which best lend themselves to a workable solution on these levels.

This approach assumes greater significance given the doubts which have been raised with respect to the interpretation of the I.C.C.'s jurisdiction under the deregulation provisions of the *Staggers Rail Act*. It is possible that this matter may also be brought before the courts. A more expedient and mutually accommodating solution could, it is submitted, be reached if the I.C.C. and State Department resolved their differences through negotiation.

[95] Statement by Me R. Lande, legal counsel to Canadian Pacific, Montréal, 4 March 1981.