COMMENT AND ANALYSIS

IN FAVOUR OF MAKING DUMPING PER SE ILLEGAL

Fred Lazar
Director, Graduate Programme in Economics
York University

Anti-trust laws have the objective of promoting/sustaining competition. Anti-dumping laws have as their objective the protection of domestic firms which may possess or develop a competitive advantage in the international market. In essence, both sets of laws attempt to encourage competition. However, as currently structured, neither can succeed in attaining their objectives.

There are several reasons why a firm may engage in geographic price discrimination (or dumping). For example, firms may dump their goods or services for purely predatory reasons; that is, to drive out foreign competition by forcing them into bankruptcy or lowering the price of acquiring them. Anti-dumping (hereafter referred to as AD) laws may be unable to protect domestic firms from predatory dumping by foreign companies. Although there are relatively low standards of proof (i.e., there is no need to demonstrate predatory intent), AD investigations are initiated after the dumping has occurred and thus, perhaps, after domestic firms have been irreparably damaged. On the other hand, domestic firms that are not likely to develop a competitive advantage may be inadvertently protected by the AD laws in cases in which foreign companies should drive them out of the market.

Anti-trust (hereafter referred to as AT) laws may be able to protect domestic firms from predatory dumping. But since AT also deals with the problem *ex post* and with much higher standards of proof, domestic firms may be out of business long before an investigation is completed. In addition, the existing AT laws may have to be amended to permit the initiation of actions against foreign firms that have no direct presence in the domestic market. (For example, they may sell in this market through independent wholesalers or retailers.)

Firms may dump in foreign markets in order to deter entry into their home market. Firms may deter entry by investing in excess capacity which can be used to flood the domestic market when entry occurs. Until entry is attempted, the excess capacity may be used and the output dumped in foreign markets. Dumping may be more profitable than leaving the excess capacity idle and, at the same time, may more effectively signal the existence of excess capacity to potential entrants. Dumping, with its lower prices in foreign markets, may also signal to prospective entrants that the incumbent firm has low costs and so deter entry into the home market.

AT may not be able to deal with this problem if there is no predatory intent against foreign competitors. For example, if a U.S. firm dumps in the Canadian market in order to deter entry into its home market but not to drive out Canadian firms, the Canadian AT law will not likely be able to prevent this behaviour by the U.S. firm since the anti-competitive effects occur in the U.S. market. Moreover, Canadian consumers will benefit from this action.

The AD rules may be able to stop this type of dumping and, in the process, indirectly assist one of Canada's trading partners in promoting competition in its home market. If production in the industry is characterized by learning/experience curves, then dumping, while nominally for entry deterrence reasons, may prevent foreign competitors from moving down the learning curve rapidly enough to develop a competitive advantage. AT laws are not structured to deal with this possibility. The AD law, by protecting domestic firms, may indirectly assist them in their efforts to create a competitive advantage internationally. But once again, since AD deals with the problem *ex post*, the protection may take effect too late.

Firms may also dump in order to encourage cooperation/collusion in their home market. Dumping may signal low costs and thus enable a firm to assume the leadership role in its industry. By attacking a foreign competitor in the latter's home market, a firm may deter that competitor from pricing aggressively in the former's home market. In effect, a temporary round of dumping may succeed in securing cooperative behaviour from foreign competitors. AT is likely to prove ineffective in dealing with this problem. AD, on the other hand, since it deals with the problem *ex post*, may not deter this type of behaviour even though dumping may have to end because of a "successful" AD investigation.

Another reason why firms may dump is to gain a beachhead in a foreign market. A firm may have a competitive advantage which it wants to exploit in foreign markets, but in order to overcome the reputation or information advantage (quality, performance, reliability) of incumbent firms in those markets, the entrant initially may have to set low prices to attract market share. AT, quite legitimately, will not deal with this type of dumping. AD laws, on the other hand, do not discriminate well among the various motivations for dumping, and so may protect domestic firms that no longer possess a competitive advantage. There is always the argument that, with some time, these firms may be able to recapture their competitive advantage. However, if these firms are unable to monitor developments in their industry and implement the strategies necessary to maintain their position without AD protection, then this suggests that they have lost competitive dynamism and AD protection will be insufficient to restore this. Furthermore, from a Canadian perspective, foreign AD laws may restrict the ability of Canadian firms that have succeeded in creating a competitive advantage to fully exploit that advantage, especially if production is subject to a learning curve phenomenon.

Finally, dumping may occur during cyclical downturns as firms faced with excess capacity and high fixed costs resort to quasi, marginal cost pricing in foreign markets. AT laws will not deal with this problem and AD laws will prove ineffective in preventing this temporary type of dumping because of the lags involved in initiating and conducting investigations. However, cyclical dumping may result in hysteresis (i.e. the persistence of effects resulting from a temporary change in conditions) and subsequent long-lasting negative effects on domestic firms. Domestic firms subject to cyclical dumping may be forced to lay-off trained workers whom they may lose permanently. Domestic firms may also experience financial losses during this period which may trigger loan covenants that impose restrictions on the operations of these firms and/or may result in higher borrowing costs because of a greater risk of bankruptcy. Investment expenditures may be significantly constrained and together with the loss of trained workers may adversely affect the ability of these firms to sustain a competitive advantage or create a new one.

AT laws cannot serve as a substitute for AD for the following reasons at least:

- predatory behaviour may escape the high standards of proof;
- the *ex post* application of the law may be too late to help companies adversely affected by dumping;
- these laws do not deal with cyclical dumping and thus cannot prevent hysteresis.

The current AD laws also appear to be inappropriate for achieving their objective of nurturing international competition. Among the more serious problems are the following:

- AD investigations begin after the fact;
- AD may prevent firms with a potential competitive advantage from testing this advantage in foreign markets by engaging in dumping to gain a beachhead; and
- political interference in AD decisions, the vagueness of current injury tests and inconsistency in decisions enhance the potential for AD complaints to be used to harass and deter foreign competitors.

Consequently, I suggest that the present AD regimes be completely replaced by a *per se* illegal rule. Government agencies would monitor, through random spot checks for example, the pricing behaviour of foreign firms. When dumping is spotted, the "guilty" party would immediately refrain from this pricing behaviour and, after an investigation to determine how long dumping had taken place, would

be subject to a penalty equal to the dumping margin times the sales volume during this period of time. There would be no injury test and no need for domestic firms to lodge dumping complaints to initiate an investigation. However, the new rule would permit foreign firms to demonstrate that they engaged in dumping to gain a beachhead. The burden of proof generally would be upon foreign firms. In essence, they would be guilty until they demonstrated themselves to be innocent, with the beachhead phenomenon being the only basis for a defence.

In order to simplify the task for foreign firms to prove their innocence, automatic exemptions from the new AD rule might be permitted. The exemptions would be based upon certain rules-of-thumb such as the sizes of the foreign firms involved in dumping (firms below a certain size, with the limit depending on the sizes of the market and domestic firms, would be considered innocent and the onus of proof to the contrary would fall on domestic firms); the number of competing firms in the domestic market (with more than a certain number of firms, the limits once again depending on the characteristics of the industry, foreign firms would be considered innocent).

Furthermore, the government agency responsible for monitoring pricing behaviour by foreign firms would also search for a "reverse" form of dumping in intermediate product markets. For example, a vertically integrated firm may sell an intermediate good or service to a downstream competitor, located in another country, at an artificially higher price than its internal transfer price because there are no other close suppliers for the competitor. The vertically integrated firm resorts to geographic price discrimination, with a higher price being charged to a foreign customer than to its own domestic subsidiary, in order to place the foreign competitor at a disadvantage in a downstream market. When cases of this type of "reverse" dumping are spotted, the country in which the vertically integrated firm is located should be required to demand and enforce that this firm refrain from dumping.

COMPLIANCE INTO THE 1990'S

The following is a reprint of a speech given by Howard I. Wetston, Director of Investigation and Research to the Insight Educational Services Conference in Toronto on December 4 . 1989

I am pleased to have the opportunity to speak today about the Program of Compliance of the Bureau of Competition Policy. Both the Bureau and the private sector have faced a challenging period since the *Competition Act* was passed in 1986. The compliance initiative was designed to provide business with greater awareness and increased certainty about the application of the provisions of the *Act*. I believe we've had a significant degree of success in meeting these aims. Through the 1990's we intend to continue to enhance the administration and enforcement of the *Act* in Canada, and I'd like to spend my time here today talking about how we will be approaching that job, and where I see some of the priorities for the next few years.

First, a little background may be helpful. In your material there is an Information Bulletin (no. 3) titled "*Program of Compliance*". The *Bulletin* outlines a number of ways in which we have attempted to provide interpretive information and guidance to those interested in the objectives and application of the *Act*. These measures include published material such as Information Bulletins, speeches, annual reports, press releases and backgrounders on specific cases. The Bureau also provides advisory opinions and makes use of information visits - by that I mean direct discussions with business people - to ensure that they are made aware of potential conflicts with the *Act*. Advance Ruling

Certificates are provided in merger cases which do not raise competition issues. All of these initiatives are intended to assist business in organizing its affairs to comply with the law. The Consultative Forum, on the other hand, allows groups of academics, consumers, business people and lawyers to provide feedback on issues relating to competition law and policy.

When conflicts with the *Competition Act* do arise, there are various alternatives available to resolve the problems. These include investigative visits, voluntary undertakings, prohibition orders on consent, orders on consent involving a plea of guilty, merger consent orders and, of course, litigation before the courts or the Competition Tribunal. The *Bulletin* describes some of the more important considerations that are taken into account in deciding which of these approaches is appropriate.

While the practical aspects of the Bureau's Compliance Program are listed in the *Bulletin*, I would like to spend some time focussing on the underlying philosophy of the expanded program that I intend to implement and discuss my views on how the Bureau will work with business toward the goal of compliance in the future.

First, it is worth emphasizing that inasmuch as the *Competition Act* is a framework law governing certain aspects of the conduct of business, the compliance approach works only by building upon co-operation among the various interested parties to a matter.

Obviously, it is cost-efficient to devote resources to educating the public and preventing contraventions of the *Act*, as opposed to conducting extensive inquiries and prosecutions. As I've just outlined, the Bureau has put great emphasis and considerable resources into providing information and guidance and devising a variety of instruments to resolve cases under the *Act*, but what is the responsibility of the business sector?

For the most part, business now has the tools to review, assess, understand and therefore comply with the law. Where businesspersons know that their proposal presents a problem in terms of the *Act*, we are receptive to discussing proposed solutions. If they make sense, are workable and do not contravene the objectives and standards of the *Act*, then a mutually acceptable solution is possible. However, I believe that the responsibility for preparing these solutions must rest with business, not with the Bureau.

For example, assume that the Director has determined that a particular merger is anticompetitive, i.e., is likely to prevent or lessen competition substantially. Parties should, if they wish to resolve the matter, approach the Bureau with a well-thought out workable solution. Unfortunately, companies often spend considerable time trying to "undo" the Bureau's finding or continuing to advocate a proposed solution that has not been well received by the Bureau. It may be worth repeating that settlements with the Director are matters of public policy, not private contract.

The Bureau has a heavy case load. At this time, in mergers alone, we have thirty-eight extensive ongoing examinations. While negotiations are necessary, continuing unfruitful or slowly moving discussions is not an efficient use of the Bureau's resources and exacerbates the environment of uncertainty for various third parties.

An evaluation of the circumstances which might influence the decision about full inquiry and formal proceedings should include careful consideration of the purpose clause of the *Competition Act*. The purpose clause is key to the compliance approach. It highlights the paramount objectives of the *Act* such as promoting the efficiency and adaptability of the Canadian economy and providing consumers with competitive prices and product choices. Business practices must be reviewed in this light.

Where there is unambiguous economic harm, there will be less scope for resolution through the compliance approach. Full inquiry is clearly justified in matters such as conspiracies in restraint of competition and bid-rigging, which are serious matters that are not accompanied by any redeeming features. The heart of any competition policy must include the goal of preventing competitors from subverting the competition process through collusion. This is reflected in the maximum penalty established by Parliament - 10 million dollars or five years in prison.

Conspiracy in restraint of trade can impose heavy costs on consumers in the form of higher prices, reduced output and restricted product choices. Generally speaking, this is not the kind of conduct where prohibition orders or undertakings adequately protect the public interest. The rigging of bids in connection with federal, provincial or local government procurement activities directly increases costs that are ultimately borne by taxpayers. Recent studies suggest that government agencies and regulated utilities may be particularly vulnerable to bid-rigging activities. In addition, conspiracies among firms that would otherwise be in competition seriously undermines public confidence in the competitive market system. We therefore intend to recommend stiff penalties when such matters are referred to the Attorney General for prosecution.

With respect to other matters, such as the non-criminal provisions, we will be most receptive to employing an approach which avoids costly litigation to deal with situations that have ambiguous, minimal, transitory or very local economic effects. Such situations are presented from time to time in relation to matters such as non-price vertical restraints, with respect to which there is currently a raging debate regarding their economic effects. As suggested above, our "economic approach" will focus upon the goals of section 1.1, such as promoting the efficiency and adaptability of the Canadian economy and ensuring competitive prices and product choices. Accordingly, where significant economic harm in these or other respects is clear, and in matters of broad public interest, a full inquiry and litigation may best serve the public interest.

There are some very recent visible examples of this we have recently filed cases before the Competition Tribunal against Xerox Canada Ltd. respecting its refusal to deal with an independent repair firm, and against the NutraSweet Company for alleged abuse of dominant position. The Tribunal has recently issued an order against Chrysler Canada Ltd. regarding the supply of auto parts to a small exporter.

Compliance involves individuals as well as corporate conduct. The question arises as to whether or not individuals should be charged in order to curb perceived corporate excesses. While this is ultimately in the discretion of the Attorney General, I believe that where the evidence is sufficient - particularly for planned and premeditated conduct appropriate criminal proceedings should be instituted against individual offenders. There is an obvious, very important, deterrent effect from such proceedings.

Increased compliance with the *Act* benefits everyone in the end. For our part, I recognize that the more we help inform the public, the more effective the Compliance Program will become. The Bureau will continue to develop methods to clarify questions of competition law and to better communicate them to interested parties. One area I have been giving considerable thought to, since assuming my new responsibilities, is the merger review process. I am now exploring the preparation of published merger guidelines as a framework for our merger enforcement policy. I believe that in the current environment, merger guidelines may be particularly helpful in order to increase business understanding, assist counsel in advising clients, clarify our enforcement policy and finally facilitate compliance with the law.

With the busy merger environment and the absence of jurisprudence, there appears to be an increasing need for a comprehensive statement setting out how we approach pivotal issues such as market definition, foreign competition, failing firms, barriers to entry, efficiency gains, and so forth. To provide a framework for our position in relation to these and other matters, we also want to develop a general policy statement regarding our approach to the anti-competitive threshold in section 92, that is, the prevention or lessening of competition substantially.

Until the Tribunal addresses these and other key issues relating to mergers and to merger analysis generally, guidelines can go a long way toward reducing uncertainty with respect to the interpretation of Canada's new merger law. After analysing in varying detail more than 500 mergers since June 1986, I believe we are now in a position to undertake such an initiative.

Our current thinking is that, to the extent possible, these guidelines should provide legal merger counsellors and businesspersons with clear and objectively ascertainable standards in the planning stages of developing transactions. Guidelines, however, are just that. They should not be rigid or inflexible in applications where strict adherence to the articulated standards would lead to inappropriate results. Competition policy is not a static concept. One must deal with constant change. As such, merger guidelines must reflect current enforcement policy but must maintain flexibility of approach.

Information Bulletins are a key element of our Compliance Program. With respect to criminal matters, we are now reviewing our enforcement policy regarding price discrimination and predatory pricing. We expect to issue draft Information Bulletins for discussion in the near future.

I think the development of corporate codes of conduct or corporate ethical standards can be of significant value. In the normal course of doing business, they will enhance the individual manager's consciousness of the law and its underlying spirit. Corporate compliance programs, combined with government initiatives such as the Bureau's compliance approach, make sense for the 1990's - an era when we all must deal with decreasing resources, technological change, demands for consumer protection, deregulation, and a changing legal environment. I believe that corporate codes are important as they set the tone from the "top" of an organization. If the market place of the 90's is to be effective, we must consider some rebalancing of the obligations of business, consumers and governments; the Bureau will certainly be active in this process.

I think we have a good example of a recent success story concerning the use of the compliance-oriented approach that should be mentioned. You might remember an inquiry commenced in 1987, respecting the real estate industry in Canada, and that a number of real estate boards were searched under the provisions of the *Competition Act* for evidence concerning an alleged price conspiracy. As the inquiry developed, the opportunity arose for the Director and the Attorney General of Canada to consult with the umbrella group for the industry, the Canadian Real Estate Association or CREA. By consulting with CREA, which represents a large proportion of real estate associations, compliance with competition law was possible beyond the market areas initially under investigation. After considerable discussion, a decision was taken to proceed by way of a prohibition order without a plea of guilty. This order results in compliance with the *Act*, allows the best allocation of scarce resources, and institutes an important change in market behaviour across Canada.

I am encouraged that CREA has made a significant attempt to make sure that their industry really understands the application of competition law. The Association has prepared an excellent videotape for use in the education of their members all across Canada.

The Bureau has done a considerable amount of work on its Compliance Program since the new *Act* was passed in 1986. In this regard, I hope I have succeeded in providing some additional clarification on the Program, on the philosophy and some of the priorities which will drive the Bureau in interpreting and enforcing the *Competition Act* in the 1990's.

NATURAL GAS EXPORTS AND FREE TRADE

N.J. Schultz[1]
Fraser & Beatty, Ottawa

Introduction

In the past few months the National Energy Board has denied five natural gas export applications and imposed restrictions on others.[2] Coming as they do in the context of a well-established, market-oriented, free trade energy policy and several years of upbeat talk by federal and Alberta energy ministers and senior government officials about Canada's export opportunities, these decisions invite careful examination.

The conclusion is that the NEB's approach to the economic evaluation through benefit-cost analysis of individual export applications may contain elements of interventionism, protectionism and nationalism which are not obviously consistent with the current policy and legal framework. The NEB's economic approach appears to have more in common with the economic thinking which lay at the root of energy policy in the 1970's and led ultimately to the National Energy Program (NEP) of 1980. The conclusion is tentative as the issue is only just emerging. One is left, however, with a question as to the appropriateness of a possible counter-current to the formal direction of energy policy welling up from the NEB's case-by-case decision-making process.

One thing is clear. Until the present confusing and possibly contradictory situation is clarified, the NEB's export approval process should be treated by investors as involving substantial risk. The risk is one of regulatory uncertainty.

Analysis of the NEB's decisions is made difficult for two reasons. First, the reasons for decision in the case of the denial of four gas export applications have yet to be released. It is, however, generally considered that the NEB's approach to benefit-cost analysis played a significant part in the denial of some, if not all, of these four applications. Second, the NEB has itself yet to articulate in any reasons for decision a comprehensive and detailed statement of the principles underlying the economic evaluation of natural gas exports. Insight as to the analysis that may underlie the NEB's decisions must be found in staff studies which have been made public. There are three staff studies of significance. The first is a September 1988 study entitled "Canadian Energy Supply and Demand 1987 - 2005". [3] The second is a September, 1989 paper entitled "Export Impact Assessment: Illustrative Analysis" which was issued as Appendix C to the NEB's September 7, 1989 letter inviting public comment on the Export Impact Assessment filing requirements and which, by virtue of a November 24, 1989 decision, will be used by the NEB in upcoming export licence hearings.[4] The last is a November 1989 staff paper entitled "NEB Benefit-Cost Methodology Used in the Assessment of Gas Export Licence Applications".[5] This last paper is particularly significant since it is the NEB's approach to benefit-cost methodology which has been a prominent issue in recent licence proceedings. The first two Staff studies are significant in that they provide a context to the staff's approach.

FTA Provisions

The *Free Trade Agreement*[6] (*FTA*) is a good starting point for analysis of the NEB's decisions on benefit-cost analysis. One misconception must be got rid of at the start if the NEB's approach to gas export licensing is to be understood. The euphoric reaction of some gas producers to the *FTA* was that the NEB was now reduced to a rubber stamp monitoring agency. That perception was always mistaken. The NEB's recent decisions must surely have popped the bubble of any who continue to hold this ill-conceived view. It is, therefore, not sufficient to attack the NEB's decisions on the basis that the NEB

lacks the authority in general terms to deny a gas export licence. The *NEB Act*[7] gives the Board that authority. Rather, the question is in what circumstances, given the current legal and policy framework, may the NEB deny and should the NEB deny a gas export application. A related question is, if the NEB has concerns which are not consistent with the present framework, how should those concerns be expressed.

The *FTA* does constrain Canada's ability to impose restrictions on natural gas exports. The *FTA*, through the combined effect of Articles 902:2, 903, and 904:(b) precludes the imposition of minimum export price requirements and discriminatory charges. The *FTA* contemplates that volume restrictions may be imposed on exports and that higher prices may result from the imposition, by any means, of volume restrictions; however, the imposition of higher prices for exports than the price charged domestically is prohibited. Where export restrictions are imposed pursuant to Articles XI:2(a) and XX:(g), (i), and (j) of the *General Agreement on Tariffs and Trade*[8] (*GATT*) the *FTA* provides, in addition to a prohibition on imposing a higher price for exports, that the restriction must not reduce the existing proportion of export shipments to domestic shipments of the energy good and must not require the disruption of normal channels of supply or normal proportions among specific energy goods.[9]

Articles XI:2(a) and XX:(g), (i) and (j) of the *GATT* are the articles which would most obviously apply to justify the restriction of energy exports. These articles contemplate, respectively, export restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting party; measures relating to the conservation of exhaustible natural gas resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; export restrictions related to domestic price stabilization schemes where domestic prices are held below world prices; and measures essential to the acquisition or distribution of products in general or local short supply. These articles are plainly sufficient to justify export restrictions imposed as a result of concerns for the adequacy of Canadian natural gas supplies. To the extent that any restriction involved the curtailment of existing gas export shipments, the curtailment would have to be applied proportionately to domestic gas shipments. However, to the extent that denial of the gas export application, for example, had no impact on the existing proportions of export and domestic shipments, this aspect of the *FTA* would not be offended. The *FTA* does, however, limit Canada to restricting exports through volume restrictions. It does not permit Canada to achieve export restrictions by imposing higher prices for export gas. This is so whatever measure is adopted to achieve the higher price whether it be licences, fees, taxation or minimum price requirements.

Background to the FTA

Canada has, in the past, imposed both volume and price restrictions on energy exports. From 1971 to 1979, no new natural gas exports were approved although existing gas exports continued to flow. Oil exports were curtailed during the latter part of the 1970's until the early 1980's when, for a period, no light crude was flowing to the export market. During this period, Canada also sought to achieve the full value for oil and gas in the export market while shielding domestic consumers from the full impact of world energy prices. Canada achieved this end through export taxes and minimum price requirements. The *FTA* plainly precludes any future attempt to impose discriminatory taxation or pricing on the U.S. export market.

There were many strands to Canada's gas export policies in the 1970's and early 1980's.[10] One important strand was the adequacy and security of Canada's natural gas supplies. The concern that Canada would not be able to meet both export and domestic gas demand emerged in the early 1970's. It was also recognized that the prices being received by producers were no longer adequate to provide an incentive for producers to develop new natural gas reserves to replace the gas flowing to market. Typically, producer contracts had been entered into a decade or more before with fixed prices or with provision for very small escalations in price. In short, the competitive market had undervalued the

resource to the prejudice of the public interest.[11] Steps were eventually taken by governments, both federal and provincial, to increase gas prices to producers above those provided in contracts. However, the 1970's also saw rapid increases in world energy prices as a result of the actions of the OPEC cartel. The market power of the cartel can be said to have distorted the competitive market to the prejudice of the Canadian public interest by extracting excessive prices.[12] The federal government took steps to insulate Canadian consumers from the full impact of those increases. This led to a two-price policy where the full value of gas was sought to be recovered in the export market while Canadian consumers paid a lower price. Overall, producers received the higher prices necessary to stimulate new development necessary for Canada's security of supply.

Natural gas supply responded quickly to increases in price (as did demand as consumers began to conserve) with the result that substantial reserves additions were made in the late 70's and early 80's. A substantial surplus of gas began to build up. The surplus position of Canadian producers was exacerbated as Canadian export prices became increasingly uncompetitive in the U.S. market. The OPEC-driven price spiral was a principal cause of this development, not only in Canada, but also in other countries including the United States.

The financial health of Canadian producers was put in jeopardy by the NEP which substantially shifted the fiscal burden of government onto the energy economy. These fiscal measures were also combined with nationalistic measures designed to achieve Canadian ownership of the petroleum industry together with Canadian energy self-sufficiency. World energy prices failed to live up to the expectation of NEP planners and, with the recession of the early 80's, the petroleum industry was simply unable to support the fiscal expectation of the federal government.

In 1983, the Canadian government began to move away from its uniform export price policy for natural gas[13] with significant steps taken in 1984[14] toward freely negotiated export prices. In September 1984, Canadians elected a new Conservative government which was committed to reducing regulatory intervention in the economy, to redressing the alienation of the Western provinces, and to achieving harmonious relations with the United States. The NEP was effectively dismantled in early 1985 when the Government of Canada entered into the *Western Accord*[15] with the Western energy producing provinces of Saskatchewan, Alberta and British Columbia. The *Accord* provided for the elimination of the taxes imposed through the NEP. Crude oil pricing and marketing became totally deregulated. Steps were taken to make the natural gas industry more market-oriented. On October 31, 1985, the same governments entered into the *Agreement on Natural Gas Markets and Prices.*[16] This agreement created the conditions for a market-oriented pricing regime for natural gas. The *Agreement* provided for deregulation by the federal government of domestic natural gas prices. Canadian gas producers were to be given enhanced access to the export market. All natural gas export prices became freely negotiated.[17] In addition, the agreement led to the adoption by the NEB of a market-based approach to the licensing of natural gas exports.[18] This new approach replaced approaches based on a formulistic and rigid calculation of the available surplus of gas relying on long-term forecasts. The new approach is based on the economics of supply and demand in a competitive market.

This commitment to a market-oriented natural gas policy was affirmed by the *FTA*. Against this background of established market-oriented policies in which previous restrictions on energy exports had either been eliminated or significantly reduced, the energy provisions of the *FTA* have more to do with security of access to energy supplies and markets than with access itself. In political terms, the *FTA* was designed to give comfort both to the United States and to Canadian producers that the interventionist measures which had caused so much irritation in the past were indeed things of the past.

The *NEB Act* has been amended[19] to require the NEB to give effect to the *FTA*. The NEB's broad jurisdiction to consider gas export licence applications in light of the Canadian public interest continues subject to the requirement to give effect to the *FTA* and specific amendments to the *NEB Act* to conform the NEB's jurisdiction to the *FTA*. It is against this policy and legal background that recent gas export decisions must be considered.

Export Restrictions for Supply Inadequacy

One of the considerations which has led the NEB to restrict a gas export has been the inadequacy of the supply dedicated to the export project. In two cases, the NEB has granted a licence for a shorter term than that requested.[20] In one case, involving Vector Energy,[21] the inadequacy of the evidence of supply supporting the project was a major factor in denying the export application.

Granting a licence for a shorter term than had been requested does not, in and of itself, offend the *FTA*. There is nothing expressly in the *FTA* which guarantees anyone a particular length of export authorization. In theory, a continuing series of short-term export authorizations could be consistent with the *FTA* since at no time would the export authorization actually be denied. There are cases, however, where the practical consequence of denying the full term requested would be to kill an export project. That would occur, for example, where the export project involved significant new capital expenditures and the financial viability of the project required a longer term licence. However, in both cases where the NEB granted licences for a shorter term, the NEB-approved term was still of a long-term nature sufficient in the judgment of the NEB to meet the commercial reality of the projects.

In the case of Vector, the NEB was dealing with an application for a 20-year licence where the NEB found that the supply available to the project represented less than 50% of the applied-for volumes. In cannot seriously be argued that Canada is obligated under the *GATT* or the *FTA* to authorize for export a quantity of energy goods which do not exist. This does not mean that the proposed exporter must have all the gas on the shelf at the time the application is made. The NEB, consistent with its market-oriented approach, has considered the potential for developing lands which are dedicated to the project in assessing the supply which will be available to satisfy the export. However, in the case of large volume exports the NEB decisions suggest that at least the lands to be developed must be identified and test information must be available to the NEB to assess the reserve potential of those lands.[22]

Since the Vector application involved a new incremental export, denial of the application did not affect the existing proportions of gas flowing to the export and domestic markets and, therefore, did not trigger the proportionality provision of the *FTA* and the related new provisions of the *NEB Act*.

Export Restrictions for Economic Reasons

The NEB's economic criteria for evaluating a gas export application are another matter. The NEB requires each applicant for a gas export licence to submit a social benefit-cost analysis of the proposed gas export. This analysis evaluates a project from a public interest perspective rather than from the private perspective of the applicant. The object of the analysis is to estimate all expected social benefits and costs to Canada as a result of the proposed export. The analysis compares the present value of the stream of revenues expected from the project against the present value of the stream of costs expected to be incurred by the project over its life.[23] Some of the data which go into a benefit-cost analysis are fraught with uncertainty since it depends on forecasts long into the future. The NEB hedges against this uncertainty by running various sensitivities on key variables used in the analysis.[24] The results revealed by sensitivity analysis permit the NEB to apply its judgment to determine whether the project is in the Canadian public interest.

One of the reasons for denying the Vector application was that the NEB considered that the project would not provide a net benefit to Canada as determined in accordance with benefit-cost analysis. In another case involving the Midland Cogeneration Venture (MCV),[25] the NEB imposed a condition restricting the export licence on the ground that, without the condition, the project would not yield a net benefit to Canada. The restriction ties the export to a related project in such a way that the combined export does yield a net benefit to Canada. An appeal by MCV to the Federal Court of Appeal is pending.[26] MCV has specifically raised the question of the validity of the NEB's decision in light of

the *FTA*. MCV has indicated in its appeal documents that the NEB's approach to benefit-cost analysis involves the imposition of a minimum export price contrary to the *FTA*.[27]

The NEB staff paper on benefit-cost methodology gives an indication of the approach which the NEB is taking. A key variable in the staff's calculation of benefits and costs is the determination of Total Incremental Production Costs (TIPC). In estimating TIPC, the staff states that they are attempting to capture the total cost of replacing produced reserves.[28] TIPC, being incremental costs, are determined by taking the difference between a "with export" case and a "without export" case. That is, the present value of the total production costs of meeting future natural gas demand, including the applied-for exports, i.e. the "with export" case, are calculated and then the present value of the total production costs of meeting future natural gas demand, excluding the applied-for exports, i.e. the "without export" case, are deducted.[29] In the calculation of TIPC, all costs are valued at their expected opportunity cost to society. This is intended to reflect the other opportunities which are available to the applicant in the absence of the proposed export.[30] The staff argument is that to measure the true opportunity cost to society of permitting the applied-for benefit, one must take into account the other uses to which the gas might be put. The applied-for export must be measurably better than the other opportunities which are assumed to be available if the export is to be considered as being of benefit to Canada. The staff argue that the economically established reserves supporting the proposed export would be available to satisfy gas demand without the proposed export and thus should be viewed as part of the pool of gas from which all gas demand would be satisfied.[31] The staff approach is to calculate TIPC on the basis of a forecast of exports where the proposed export is treated as if it were the last increment in that forecast. In addition, the staff approach involves the utilization of industry-aggregate rather than applicant-specific costs.[32]

The approach to this issue is explained by the staff by reference to a parkland/parking lot analogy.[33] The staff analogy involves a developer holding a non-renewable resource, namely, ten acres of designated parkland in a downtown metropolitan area which, under the applicable municipal law, can be used only to meet the expanding leisure needs of the local community. Any other uses require the approval of the Municipal Board. The developer has the opportunity to develop one acre of this land as a parking lot with a gross benefit of $3M. Development of the acre will require the acquisition of a replacement acre to meet the community's needs. Development of the acre as a parking lot excludes alternate future uses of the land such as high-rise condominium development. A host of such investment opportunities are likely in the future. The added demand on the non-renewable land resulting from the development of such future investment opportunities will increase the cost of the replacement acre of land by the time that acre is acquired from $2M today to $4M then. Taking into account the other opportunities available and the resulting dynamic progression of costs over time, it is appropriate to assign the $4M cost to the economic evaluation of the parking lot proposal. As a result, the proposal is seen not to yield net benefits to the community.

The staff state that the one acre to be developed is equivalent to the gas reserves which an applicant proposes to export. The parking lot investment is equivalent to an export sales contract. The alternate uses for the land are equivalent to alternate export opportunities. The economic decision of the Municipal Board is, thus, in the staff's view, directly analogous to the economic decision to be made by the NEB.

The analogy fails in several respects. In the analogy, the one acre to be developed has already been designated as parkland. It is, presumably, in a relatively undeveloped state since the acquisition of a replacement acre can wait for some time. However, it does have a designated use as parkland. It may be nothing more than rough open space at the moment but will, as the city grows, serve the more intensive leisure requirements of the public. The analogy, therefore, turns on the pressure to develop a recognized and valued urban resource, namely, downtown parkland. Canadians as largely urban dwellers are familiar with the tension between development for private use and the maintenance of a public resource such as parkland essential to the quality of urban life.

It may be said that gas in the ground is needed to meet future Canadian demand so that in this way it is like the park. That is fine so far as it goes. Unfortunately, it does not go far enough because it ignores the contemporary policy context. Current policies are market-based. Consumers must approach producers on a commercial basis and it distorts the policy context to permit Canadian consumers to view gas in the ground as a park reserved for their use. It is true that the NEB staff refer to other export opportunities when discussing opportunity costs but, in fact, the first beneficiaries of a failed export application are domestic consumers who can purchase gas without the NEB scrutiny to which an export is subjected. The consequence of a failed export application is to increase the surplus available to meet domestic demand. In addition, the staff argue elsewhere that reserves supporting a proposed export should be viewed as forming part of the pool of gas from which all demand will be satisfied.[34]

The analogy also relies heavily on the acceptability of refusing approval for the commercial development of a park. Given the designated use of the land as parkland, this is easy to accept. The land has a use and there is a need for parkland with the result that the community is seen to be justified in refusing to change the use until a demonstrably better proposal is presented. Gas in the ground, however, is more like raw land than a park. Development proposals for raw land raise the question of what use is to be made of the land rather than the question of changing land use designations on which the staff analogy turns.

The analogy weaves together and thus confuses two different aspects of value: the value to society of an existing use, such as a park, and the value to society of a resource, such as land.

The parkland/parking lot analogy makes no allowance for the complexity which comes from taking into account the expectations of developers. Because we know nothing about how the developer came to hold the land, it makes perfectly good sense to ask why the developer just does not simply continue to hold the land for its intended use, i.e. parkland. That question would be silly in the question of a gas producer. Exploration for and development of gas resources takes place for only one purpose - the sale of the gas. Refusing to approve an export frustrates the expectations of a gas producer in a way that refusing the parking lot development of parkland does not.

The analogy asks us to accept that there are a "host of other opportunities for this one acre of parkland". This is easy to accept not only on the basis of our common experience but also because the analogy speaks of one acre of land in a downtown location. The possibilities fairly boggle the mind. In a competitive gas market, however, the situation of sellers is not quite so favourable. Gas-producing acreage in one area can substitute for gas-producing acreage in another. Sellers must compete on the basis of a number of factors, one of which is price. Market opportunities in the gas industry, however, have not hung off every bush and sales to lower-valued markets may, in the aggregate of all sales, contribute to the continued health of the industry.

The analogy tells us nothing about the demand for parking which goes unsatisfied if the parking lot proposal is denied. If a lower-valued Canadian demand for gas was being evaluated, it could hardly be suggested that the need for that gas would play no role in the decision-making. It would appear that, on the NEB view, unsatisfied export demand for gas is literally a foreign concern in benefit-cost analysis. While NEB decisions must be taken in the Canadian public interest, the fact that NEB benefit-cost analysis excludes any consideration of export demand which goes unsatisfied underlines two things. Export decisions continue implicitly to involve an element of doing to others what one would not do to oneself. Second, the appropriateness of recovering an economic cost from the export market which one does not recover from the domestic market rests as much, if not more, on a perception of what is required in the Canadian public interest rather than on economic theory. In other words, it is not the economic theory which gives force to the staff's approach but rather the national basis for that approach. Theoretical economics should neither disguise nor be a substitute for more fundamental policy questions. If Canada is to adopt a policy of recovering from the export market a value for gas which is not recovered in the domestic market then that policy should be explicitly articulated by those responsible for policy formation.

Recovering the economic value of gas in the export market has been an issue of concern to Canadians since at least the *Gordon Commission Report* in 1956. [35] The *Free Trade Agreement* has, however, surely settled the matter. It is simply not open to Canada by virtue of the combined effect of Articles 902:2, 903 and 904:(b) to impose by any means discriminatory pricing on the export market. The NEB benefit-cost analysis, as used in export applications, is aimed only at the export market. No such analysis is done at the federal level in connection with gas destined for domestic markets. Indeed, in the same decision in which the NEB denied four export applications, it granted a licence to export and reimport Canadian gas for use in an electric generation facility without requiring the applicant to submit a benefit-cost analysis. As a result, even where the NEB had the opportunity to scrutinize a domestic project, it declined to do so.

There are two sides to the benefit-cost ledger: benefits and costs. Changes in either affect the final result. However, with the use of industry-wide aggregate costs, the only factor of significance in the "control" of the applicant is price. An applicant who fails the benefit-cost test has three alternatives: sell into the domestic market where the NEB export rules do not apply; wait for an export deal with a better price; or go back to the original export customer and renegotiate the price upwards. Vector Energy has done the latter and, in the meantime while a new export application awaits NEB approval, is selling gas into the domestic market.[36]

There may be various ways of arranging the price terms of a contract to achieve a stream of revenue which meets or betters the NEB calculation of costs with the result that there can be said to be no specific price which can be identified as a minimum price. This argument would substitute form for substance. The NEB approach to benefit-cost analysis contains at its heart a level of costs on a net present value basis which can be expressed, given the cost parameters presently in use and given any volume of proposed exports in dollars per unit of gas. The net present value of the revenues expected to be received per unit of gas, whatever price terms generate that revenue expectation, must equal or better the relevant cost figure. The formalism of this argument also obscures the simple policy reality that Articles 902, 903 and 904 of the *FTA* were intended to preclude Canada acting on export prices in a discriminatory way.

One need only consider the prospect of the government of Alberta adopting an approach to benefit-cost analysis similar to that of the NEB to see that discrimination is much easier to perceive when one is on the receiving end. Gas may only leave Alberta if the Alberta Government issues a removal permit.[37] At present, the Government of Alberta does an evaluation of each long-term removal permit application. This evaluation does not appear to employ the same theoretical constructs and, therefore, does not import into the analysis the same theoretical costs employed by the NEB. The result is that Alberta removal permits have either been recommended or issued in circumstances where the NEB has found that the export does not generate a net benefit to Canada.[38] Subsection 92(a)(ii) of the *Constitution Act* gives provinces such as Alberta the authority to make laws in relation to the export from the province of natural gas to other parts of Canada provided such laws do not authorize or provide for discrimination in prices or in supplies exported to another part of Canada. Suppose that Alberta determined that it wished to recover the full economic value of gas entering interprovincial trade and employed in the granting of removal permits a benefit-cost methodology similar to that of the NEB. Gas would continue to move in intra-Alberta trade without the constraint imposed by such an analysis. Gas moving out of the province would be required to recover the replacement cost of gas valued in accordance with the opportunity cost of the gas to society as measured on an industry-wide aggregate basis. It would surely be a rhetorical question to ask whether Ontario consumers would consider that they were being discriminated against. This is something on which Canadian consumers who may welcome the NEB's export denials would be well advised to reflect.

The increase in natural gas replacement costs that occurs as a result of the accelerated rate of depletion of the resource base is generally known as user costs. The September 1988 *Staff Supply Demand Study* discusses user costs in the following terms.

> Apart from producer direct costs of exploration, development, inventory and production, there is another component to the current value of natural gas which is particular to exhaustible natural resources. It is commonly known as a "user cost". Two factors give rise to the user cost. Firstly, the resource is the resource-owner's wealth; as that resource is consumed, the wealth base is diminishing, and all else equal, future earning potential from that resource is thereby diminishing. Secondly, the future value of the resource may be greater than its present value; this future value is determined by either the future cost of gas, or the future price of its most economic substitute fuel, whichever is less.
>
> The resource may be put on the market now, or held in the ground until a later time. The resource-owner wishes to earn the full economic present value of the resource, taking account of its exhaustibility and future value. The "user cost" at any time is the difference in present value between selling the next unit of gas in the future rather than selling it now. It is a valid component of the price for today's gas, because it compensates the resource-owner for selling the gas today rather than holding it in the ground until it becomes more valuable at some future date. In Canada, the major resource-owners are the provincial governments.
>
> It is reasonable to expect resource-owners (i.e. provinces) to wish to recover the user cost in royalties, therefore we use our calculation of user cost as a proxy for royalties. The user cost is separate from and additional to the producer's rate of return to capital employed in gas supply.[39]

In this context, user cost becomes the theoretically appropriate tax for the relevant government to extract from the sale of the resource. The replacement cost used in NEB benefit-cost analysis is calculated as a function, among other things, of user cost. In that the effect of benefit-cost analysis is to extract user cost from the export market, it amounts to extracting a theoretically correct tax from the export market which is not collected from the domestic market. This appears to be plainly contrary to the intent of the *FTA*.

The NEB staff approach to user cost as discussed in the 1988 *Supply Demand Report* is also interesting in that it substitutes at the federal level a view of what is in the interest of provincial resource owners which appears to be different from the actual approach to this issue by those provinces if the granting of removal permits to export projects turned down by the NEB is any indication.[40]

This is not to say that no form of benefit-cost analysis can be employed in the assessment of gas export applications. Land development, for example, may impose costs related to the need to upgrade services. We expect land developers to bear some responsibility for these costs. So also we expect the proponents of new natural gas developments to address, for example, environmental concerns. These, however, are not the sort of costs which are at issue. Indeed, the staff indicate that environmental costs are generally of too little significance to be included in NEB benefit-cost analysis.[41]

The NEB, as noted, has adopted a market-based approach to surplus determination.[42] The economic analysis in the 1988 *Supply Demand Report* in relation to the economics of supply and demand demonstrates the ability of the Canadian gas resource base to respond to price when prices, on average, are not less than the replacement cost of gas.[43] That is, gas reserves can be replaced as they are used provided adequate prices are received in the market. The 1988 *Supply Demand Report* also demonstrates that higher prices will be required in the future to bring on replacement supplies.[44] This is very much a "macro" issue, affecting the entire market for Canadian gas, both domestic and export. It is an issue which goes to ascertaining the adequacy of Canadian gas supplies to meet present and future demands. Such macro information is essential to assisting decision-makers in determining whether Canada is likely to have difficulty in satisfying the demand for gas. This does not, however, justify the extraction from individual export projects of the theoretical replacement cost of gas. At the "micro" level, and as a practical matter, one would expect a competitive market to generate a range of transactions at various prices above and below the theoretical price for gas in a competitive market. The industry-average price might well be at or above the average replacement cost of gas. To force all new exports to be priced at or above the theoretical industry-average replacement cost of gas simply distorts the competitive market.

The distortion is most evident in its impact on the domestic market. Domestic consumers who may acquire gas at freely-negotiated prices without federally imposed constraints are both shielded from the impact of paying the full economic value of gas and, because gas will not be sold into the export market unless it recovers its full economic value as calculated by NEB Staff, Canadian consumers are provided with potential access to larger established reserves of gas thereby increasing their bargaining position with producers. Both of these are inconsistent with a market-based approach to the supply and demand of natural gas. If recovering the full economic value of gas in the marketplace were determined to be in the public interest then policy-makers would be committed to abandoning the market-based approach. All indications are that such a possibility is remote from the current thinking of policy-makers.

The Board's September 1989 *Export Impact Assessment* considers the impact on Canadian consumers of increased gas exports at various assumed levels up to 2 EJ/year (approximately 2 Tcf/year as compared with current exports of 1.3 Tcf/year). With exports at 2 EJ/year over a forecast period to the year 2016, substantial development of frontier natural gas reserves will be, in the staff analysis, required to meet combined domestic and export demand.[45] If the pace of frontier development fits the pattern of export and domestic demand then Canadians will face no significant problems in adjustment to increased exports.[46] The analysis, however, notes that there is a high degree of uncertainty associated with projections as to the development including the pace of development of new reserves and, therefore, some doubt as to whether the level of development suggested by the staff analysis can reasonably be expected to occur in the timeframe required.[47] The paper suggests that "perhaps a greater level of concern about supply-side rather than demand-side adjustment difficulties" are indicated although both are related. The paper declines to make any firm conclusion about whether exports in the range of 2 EJ/year could be sustained without causing concerns about the adequacy of domestic adjustment processes.[49]

If there is concern about the adequacy of Canadian supply to meet increased exports, that is plainly a relevant consideration in determining whether new exports should be approved. However, there is a large gap in terms of policy development between an NEB Staff assessment which declines to make a conclusion about the ability of Canada to sustain exports in the range of 2 EJ/year and a decision as to whether Canada should be increasing exports. That is also a very different decision than a decision to deny one export because it does not yield a net benefit to Canada while approving another which is considered to yield such a net benefit.

Conclusion

Examination of the NEB approach to benefit-cost analysis as revealed through Staff studies suggests that the NEB is seeking to extract the full theoretical economic value of natural gas from the U.S. market while Canadian domestic consumers continue to acquire gas in a competitive market which is free from any such federally-imposed constraint. This is seen to be inconsistent both with current energy trade policy as well as the legal framework of the *FTA*.

The adequacy of supply and concern for the timely development of the natural gas resource base is, of course, a valid concern. It was concern for the failure of the competitive market to value natural gas at high enough levels to stimulate the replacement of gas reserves which justified government action in the 1970's to intervene to increase gas prices although that intervention became quickly subsumed in a more visible campaign to correct the effects of OPEC's market power. Current energy policy is founded on the one hand on faith in competitive energy markets and, on the other hand, on a basic mistrust of government intervention in the energy economy learned from past disasters. If we are to return to the economics of scarcity, it will require, as a first step, a radical rethinking of current energy policy. The *FTA* will also require that any government intervention in gas prices to correct perceived market failures be applied equally to the domestic as well as the U.S. export market.

Notes

1. N.J. Schultz is a lawyer practising energy law with Fraser & Beatty in Ottawa, Canada. The views expressed in this paper are the personal views of the author only.

2. The decisions are as follows:

(a) GH-1-89, November, 1989: four export applications denied with reasons to follow. It is generally considered that the NEB's approach to benefit-cost analysis played a significant part in the denial of some, if not all, of these four applications.

(b) GH-8-88, June ,1989: one export application denied primarily because of inadequate supply dedicated to the project and benefit-cost concerns; one export application granted for a reduced term because of inadequate supply dedicated to the project; and one export application restricted by a condition imposed in the interest of producing a net economic benefit to Canada from the export.

(c) GH-5-88, May, 1989: one export application granted for a reduced term because of inadequate supply dedicated to the project.

3. National Energy Board, "Canadian Energy Supply and Demand 1987 - 2005", September 1988, Minister of Supply and Services Canada Cat. No. NE23-15/1988E.

4. National Energy Board File No.: 1067-1. The November 24, 1989 decision amends the Board's Export Impact Assessment filing requirements.

5. The November 1989 Staff Paper was sent on November 17, 1989 to participants in a joint NEB/CERI Workshop on Benefit-Cost Analysis and Export Impact Assessment.

6. The *Free Trade Agreement* between Canada and the United States entered into between the Government of Canada and the Government of the United States and signed on January 2, 1988 the text of which is set out as Part A of the schedule to the *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c.65.

7. R.S.C. 1985 c.N-7, as amended.

8. General Agreement on Tariffs and Trade, *Text of the General Agreement*, Geneva, 1986.

9. *FTA*, Art. 904.

10. Canada's energy policies in this period are reviewed, and the NEP itself is the central focus, in *The Politics of Energy: The Development and Implementation of the NEP* by G. Bruce Doern and Glen Toner, Methuen Publications, 1985.

11. In a 1989 study prepared for the Economic Council of Canada, "Regulatory Failure and Renewal: The Evolution of the Natural Monopoly Contract", John R. Baldwin of Queen's University explains how contractual arrangements for essential public services evolved into government regulation or ownership. One main reason was the failure of long-term contracts to adjust to changed circumstances prejudicing the financial health of the producer and, thus, prejudicing the well-being of the public.

12. Market failure involving both the under- and over-valuation of goods supplied by private parties to meet public wants represent classic justifications for government intervention as discussed by Peter O. Steiner in "Public Expenditure Budgeting" published in *The Economics of Public Finance: Studies of Government Finance*, the Brookings Institution, Washington, D.C., 1974.

13. On April 11, 1983 the federal government reduced the export price from U.S. $4.94 MMBtu to U.S. $4.40 MMBtu and in July 1989 introduced the Volume Related Incentive Price (VRIP) program. Under the VRIP program sales above a base volume, generally 50% of annual licensed quantities, could be sold at a price of U.S. $3.40 MMBtu.

14. On July 13, 1984 the federal government announced that effective November 1, 1984 exporters would be free to negotiate export prices subject to seven criteria to be administered by the NEB. This policy was put into effect by an NEB Memorandum to All Gas Export Licence Holders dated October 2, 1984, NEB File No.: 1537-1.

15. *The Western Accord: An Agreement between the Governments of Canada, Alberta, Saskatchewan and British Columbia on Oil and Gas Pricing and Taxation*, March 28, 1985, Energy, Mines and Resources Canada Communique 85/37.

16. *Agreement among the Governments of Canada, Alberta, British Columbia and Saskatchewan on Natural Gas Markets and Prices*, October 31, 1985, Energy, Mines and Resources Canada Communique 85/162.

17. The *Agreement* revises the criteria of acceptability of export prices to remove constraints on free market negotiations contained in the 1984 policy (Note 14). Under an Interim Memorandum of Guidance of Nov. 8, 1985, the NEB continued to administer these criteria. In a further Memorandum of Guidance of November 14, 1986, the NEB, pursuant to Ministerial direction, removed the requirement for applicants to seek prior approval of the price for natural gas. Subsequent to FERC Opinion 256, the Minister of Energy, Mines and Resources Canada decided that the NEB should review export contracts to ensure that export price provisions continued to recover the appropriate share of costs incurred in Canada. Those costs were pipeline transportation costs plus a netback acceptable to producers as indicated by producer support for the contract. On July 27, 1987, the NEB amended the Memorandum of Guidance accordingly. NEB File No.: 1537-1.

18. GHR-1-87, July 1987, Review of Natural Gas Surplus Determination Procedures.
19. *Canada-United States Free Trade Agreement Implementation Act, supra.* Note 6.
20. GH-5-88, May 1989 and GH-8-88, June 1989, *supra.* Note 2(b) and (c).
21. GH-8-88, June 1989, *supra.* Note 2(b).
22. GH-5-88, May 1989, *supra.* Note 2(c).
23. November 1989 Staff Paper, *supra.* Note 5, p. 2.
24. *Ibid.*, p.4.
25. GH-8-88, June 1989, *supra.* Note 2(b).
26. *Midland Cogeneration Venture Limited Partnership v. National Energy Board,* Federal Court of Appeal File No. A-532-89.
27. *Midland Cogeneration Venture Limited Partnership v. National Energy Board,* Representations and Application for Leave to Appeal, Federal Court of Appeal File No. 89-A-327.
28. November 1989, Staff Paper, *supra.* Note 5, p.12.
29. *Ibid.*, p.11.
30. *Ibid.*, pp. 16-17, 19.
31. *Ibid.*, p.12.
32. *Ibid.*, p.12.
33. *Ibid.*, pp.17 18.
34. *Ibid.*, p.12.
35. Royal Commission on Canada's Economic Prospects, Interim Report, 1956.
36. TransCanada PipeLines Limited, 1990 Tolls Application, NEB Hearing Order RH-3-89, Transcript for December 6, 1989, Vol. 8, pp. 1100-1101.
37. *Gas Resources Preservation Act,* S.A. c.G-3.1, as amended.
38. Vector Energy, for example, is removing gas from Alberta under a long-term removal permit initially obtained for the export which the NEB denied. Under Alberta policies Vector will have obtained Alberta's approval for the sale of the gas into the domestic market.
39. *Supra.*, Note 3, p.24.
40. *Supra.*, Note 39.
41. *Supra.*, Note 5, p.3.
42. See Note 18.
43. *Supra.*, Note 3, p.132.
44. *Ibid.*, pp. 112-113.
45. *Supra.*, Note 4, pp. 13-14.
46. *Ibid.*, p.14.
47. *Ibid.*, p.16.
48. *Ibid.*, p.17.