FOREIGN AND INTERNATIONAL

UNITED STATES AND AUSTRALIA REACH ANTITRUST AGREEMENT

An executive agreement on United States-Australian antitrust cooperation was signed in Washington on June 29 by the Attorney General of the United States, the Chairman of the U.S. Federal Trade Commission and the Attorney General of Australia. The agreement, the full text of which is appended hereto, breaks new ground in a number of respects.

An executive agreement does not require U.S. congressional approval. Like the U.S.-German executive agreement, the informal U.S.-Canada understandings and the OECD Recommendation of 1979, the new agreement provides essentially for notificaiton, consultation and a degree of cooperation and mutual forebearance in antitrust matters.

One feature of the agreement which will undoubtedly be studied carefully in Ottawa and other capitals is a commitment by the United States to intervene in private actions under certain circumstances. Unlike in other countries, most antitrust litigation in the United States consists of private civil suits rather than government actions, and previous antitrust agreements have not encompassed that very significant aspect of American antitrust at all. The U.S. has now agreed that, where a pending private suit has been a subject of notification and consultation under the agreement it shall, upon request by Australia, report to the court on the subject and on the outcome of the consultations. This could well be of assistance in a case where the United States Government considers that a court should take international comity into account.

A novel feature of the agreement is that Australia, in return for certain commitments by the United States to take Australian interests into account in its antitrust enforcement decisions, has made certain commitments in respect of the application of its policies concerning resource-based exports. This is in addition to an Australian undertaking not to block automatically attempts by U.S. antitrust authorities to seek documents in Australia by legal process. Thus, there is provision for notification and consultation in respect of Australian policies "which may have antitrust implications for the United States", and in addition:

> "The Government of Australia shall give the fullest consideration to modifying any aspect of the policy which has or might have implications for the United States in relation to the enforcement of its antitrust laws. In this regard, consideration shall be given to any harm that may be caused by the implementation or continuation of the Australian policy to the interest protected by the United States antitrust laws;"

Also, according to press reports, Australia is now considered unlikely to proceed with legislation it was contemplating whereby Australian companies could sue for recovery of damages awarded against them in an American antitrust suit. Australian law already enpowers the government to prohibit disclosures to foreign courts where the case infringes on Australian soverignty.

For its part, the American side undertakes to "give the fullest consideration" to modifying or discontinuing its antitrust action, including consideration of Australian interests in general and any involvement of Australian authorties in the matter at hand.

Australian Attorney General Peter Durack is reported to have said that "The agreement goes as far as you possibly can without changing American law". Anyone who regards antitrust extraterritoriality as an unmixed evil and who had hoped that Australia could be isolated from its effects may well be disappointed with the agreement. What the agreement accomplishes is to provide an early warning system and a procedure for confidential negotiations when competition-related actions emanating from one of the two friendly powers may affect the interests of the other adversly. Australia's bargaining position was somewhat weakened by the fact that its counter measures concern about American antitrust policies was not entirely balanced by American concern about Australian counter measures. In order to obtain modest concessions from the United States, the Australians had to agree, not only to soften their approach to American extraterritoriality, but also to consult on their marketing policies respecting resource-based exports which often tend to have an anti-competitive aspect.

CANADA CEMENT LAFARGE NEARS ACCORD WITH FTC OVER U.S. ACQUISITION

The Federal Trade Commission announced in August a proposed consent order to settle its challenge under s. 7 of the Clayton Act of the acquisition by Canada Cement Lafarge (CCL) of a United States cement company. the order was to become final after a sixty day period for public comments.

CCL acquired General Portland Inc. in 1981. Portland, which has ten plants, is the third largest cement producer in the United States. The FTC alleged that its aquisition by CCL would lessen competition in the southeastern states. CCL also owns Citadel Cement Corp of Atlanta, and Lafarge Coppée of France also has interests in the area.

The agreement involves the sale by CCL of Portland's plant in Tennessee along with certain raw material sources and terminals. CCL would also offer to supply the buyer with some cement for five years and to provide technical assistance. It would also sell cement and clinker to an independent

producer in Florida. Should the transaction not take place, CCL must sell the plant of Citadel Cement in Alabama within one year. CCL is also barred from acquiring any other cement manufacturing or distribution facilities in the general area for ten years.

ECC COMMISSION TAKES FIRST ACTION ON COMMUNITY CAR TRADE RESTRICTIONS

The Commission of the European Economics Communities issued an interim order in August that Ford of West Germany must resume its normal supplies of right hand drive cars to dealers in Europe. It is the first order to be issued in what is expected to be a complex struggle to remove widespread restrictions on automobile trade within the community. The EEC investigation was launched following a formal complaint by the Bureau of European Consumer Unions in May.

The effect of the order, unless its validity is unsuccessfully challenged, will be to enable British visitors from the U.K. and Ireland to buy right hand cars from dealers in West Germany where the prices are considerably lower than in their home countries. (See Canadian competition Policy Record, march, 1982, pages 16-17 for some of the background). The West German subsidiary of Ford has launched an appeal against the order to the European Court of Justice.

PUBLICATIONS NOTED

Ontario Law Reform Commission, Report on Class Actions, Ministry of the Attorney General, Toronto, 1982. This report, which is in three volumes and took some five years to complete, recommends a class action procedure for Ontario. The Chairman of the Commission, Derek Mendes Da Costa, has inserted a reservation about one very important part of the recommended procedure, namely the introduction of a modified contingency fee system to deal with the difficult problem of costs.

David M. Simon, Extraterritorial Service of Administrative Subpoenas; Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson, Journal of Law and Policy in International Business, Vol. 13, No. 3, 1981. The author analyzes at some length a 1980 decision by the U.S. Court of Appeals for the District of Columbia which held that the Federal Trade Commission is not authorized by s. 9 of the FTC Act to serve subpoenas upon foreign nationals outside the United States by registered mail. According to the author, the decision appears to indicate that the only permissible method of extraterritorial service of compulsory process is through channels of international judicial cooperation. He points out that such cooperation may not be forthcoming where foreign nationals are under investigation.