FOREIGN AND INTERNATIONAL

U.S. PRESIDENT SIGNS LAWS SHIELDING LOCAL AUTHORITIES AND R&D JOINT VENTURES FROM ANTITRUST ATTACK

President Reagan signed the Local Government Antitrust Act, H.R. 6027, on October 24 and the National Cooperative Research Act of 1984, S. 1841, on October 11.

The Local Government Antitrust Act places an absolute ban on monetary recoveries under the antitrust laws from any local government such as a municiplaity, school board or sanitary district and officials or employees thereof acting in an offical capacity. The Act provides more limited protection for private parties in claims based on "official action directed by" a local government. The Act does not apply to suits seeking only injunctive relief.

The enactment follows Supreme Court decisions in 1978 (City of Lafayette v Louisiana Power & Light Co.) and in 1982 (Community Communications Co. v City of Boulder). They substantially reduced the local government antitrust immunity which had been assumed to exist under the state immunity doctrine as articulated by the Supreme Court in 1943 (Parker v Brown). According to an address on October 25 by Charles F. Rule, Deputy Assistant Attorney General of the Antitrust Division, some 30 antitrust cases were filed against local governments after the 1978 decision and another 200 to 300 suits had been filed since the 1982 decision. He referred as an example to a damages award against a small Illinois community which was equivalent to over $5,000.00 for every person in the village. While supporting the Act, he recalled earlier Justice Department support for a version which would have left local governments fully subject to the antitrust laws when they entered commercial activities in competition with private enterprises except to the extent they were shielded by state immunity.

The National Cooperative Research Act of 1984 reduces the antitrust hazards for joint R&D ventures by requiring the courts to apply rule of reason, providing only for single rather than treble damages and permitting recovery of defendants' attorney fees. To qualify, a joint venture must be reported in advance to the Justice Department and the Federal Trade Commission.

J. Paul McGrath, Assistant Attorney General in charge of antitrust, revealed a considerable softening of his Department's position in respect of joint ventures in general during his remarks to the Annual New England Antitrust Conference on November 2. He noted that the courts have held that joint ventures may violate s. 7 of the Clayton Act by threatening to eliminate

actual competition among joint venture partners or by discouraging joint venture participants from entering a new market on an individual basis. While also noting that the Supreme Court in United States v. Penn-Olin Chemical Co. 378 U.S. 158(1964) held that where a joint venture creates a new competitive unit it involves essentially the same considerations as merger analysis, he stated:

> "This does not suggest, however, that joint ventures and mergers should be treated identically for antitrust purposes. A merger by its very nature totally eliminates competition between independent firms. In contrast, a joint venture represents only a partial integration of productive facilities. Companies may continue to compete vigorously in a number of product markets after entering into a joint venture -- even sometimes in the line of business where the joint venture operates. For example, "one-shot" joint ventures with a limited focus -- such as the creation of a new product, or the joint operation of a state-of-the-art plant -- may have little or no impact on the intensity of competition between coventurers. Thus, a joint venture between two parties may pass antitrust muster where their merger would not. Of course, at the same time we recognize that a joint venture may not be as efficient as a merger, and we do not intend to discourage mergers when they make more economic sense to the firms and are not anti-competitive."

With regard to R&D joint ventures, he indicated that the Department would adopt a higher concentration threshhold in terms of the Herfindahl Index than those in the merger guidelines. He stated:

> "If a joint R&D venture is sufficiently small so that several other sizable ventures -- perhaps four -- can be formed in the market, it is unlikely to have significant anticompetitive effects. I might note that a market with five equally sized ventures -- representing a market HHI of 2,000 -- would be viewed as dangerously concentrated under standard merger analysis. Our more positive view of R&D markets reflects the fact that R&D joint ventures generally have far more limited anticompetitive effects than mergers, as well as a superior ability to realize scale economies and other efficiencies, and to spur technological development."

PRESIDENT REAGAN ORDERS JUSTICE TO DROP LAKER INVESTIGATION

A spokesman for the United States Department of Justice revealed on November 19 that President Reagan has ordered it to close its grand jury investigation of possible antitrust violations by British Airways and some other airlines on the transatlantic route. The move does not affect the civil antitrust suit by the liquidator of Laker Airways against British Airways and others. The President's decision was attributed to "foreign policy reasons", although the Wall Street Journal of November 21 stated:

> "A source close to current air-fare negotiations between the two countries said that the criminal investigation involving Laker was dropped for economic reasons as well as foreign policy considerations cited by Mr. Reagan. U.S. airlines now carry about two-thirds of all passengers on transatlantic flights between the U.S. and Britain. If the criminal investigation had resulted in indictments, that could have prompted Britain to try to cancel the existing agreement regulating air traffic between the two nations and insist on a 50-50 split in passenger traffic, which is common between many countries, the source explained."

In November, 1982 the liquidator of Laker filed a civil suit in the U.S. against a number of American, British and European airlines as well as McDonnell Douglas. Damages of $1.7 billions are sought for alleged Sherman Act violations on the basis that Laker was driven out of business by fare cutting and by the placing of pressure on McDonnell Douglas to stop supporting Laker financially. In March, 1983 it was revealed that the U.S. Justice Department had empanelled a grand jury in an investigation of airlines on the U.S.-U.K. route.

The British government objected strongly to both actions, contending that arrangements made under the Bermuda Two civil aviation agreement between the two countries are immune from antitrust attack. In June, 1983, the British invoked their Protection of Trading Interests Act to prevent their airlines from supply any information from Britain for either of the two legal actions in the U.S. The civil case precipitated a clash between U.S. and British courts when the defendants obtained a British court order barring Laker from continuing its suit against British airlines in U.S. court. That ruling was overturned by the British Law Lords on July 19, 1984. They found that only agreements approved by the U.S. Civil Aeronautics Board are exempt under Bermuda Two, and the agreement at issue did not have that approval. They also found that the airlines were operating in the U.S. and were subject to U.S. law.

On October 18, 1984 the U.K. government refused to approve plans by the major transatlantic airlines for sharply reduced winter fares although

some one hundred thousand tickets had already been sold. One reason was apparently that Virgin Airways, a cut-rate transatlantic carrier with only one aircraft, had objected that the proposed fares were "predatory" and the U.S. government was unable to offer a firm assurance to the U.K. that the lower fares would not be attacked under the antitrust laws. Subsequently, the U.K. approved only the low fares for which tickets had actually been sold prior to October 18.

Both London's Financial Times and The Economist, while not generally supportive of the extraterritorial reach claimed by the U.S. for its antitrust laws, have criticized the U.K. stand. The Financial Times editorialized on October 29:

> "The banning of the new fares looks like a bad mistake however it is viewed. It is an unaccpetable interference in the affairs of British and U.S. airlines which were willing to face the possibility of fresh anti-trust actions because they, and the industry's regulators, were confident the new fares were not predatory...If BA and B Cal were willing to risk prosecution, it seems unreasonable of the DoT to step in like a nanny and dash passengers' hopes of cheaper fares.
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> "...The complexities of the U.S. constitution leave it unclear whether any U.S. government department can give the U.K. explicit assurances of anti-trust immunity. And the DOT's attempt to exert pressure on the U.S. by denying Pan Am and TWA the lower fares they want may well backfire; already the U.S. Civil Aeronautics Board is talking about retaliatory action. The sensible course would have been for the U.K. to keep cool, continue negotiating but allow the regulators to get on with lowering air fares.
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> "...The long arm of the U.S. courts appears unacceptable in civil aviation mainly because other nations exempt airlines from normal competition laws. The fact that Laker's liquidator was able to seek damages in U.S. courts is less unacceptable than the fact that no such option exists in the U.K. If the British Government seriously wishes to encourage more international competition in civil aviation, it ought to feel uncomfortable championing IATA's demand that airlines should forever have a privileged status."

U.S. CONSENT DECREE PERMITS MODIFIED ALCAN-ARCO DEAL

The United States Justice Department announced the filing on October 5 of a consent decree to settle a civil antitrust suit filed simultaneously which challenged the proposed acquisition by Alcan Aluminium Ltd. of most of the aluminum-producing assets of Atlantic Richfield Co. (Arco). Under the decree, Alcan may acquire from Arco assets which include a primary aluminum smelter and two rolling mills in the United States, along with a 25 percent interest in an Irish alumina refinery. The decree stipulates, however, that Arco or its successors must retain a 60 percent interest for at least ten years in another rolling mill which it has just completed for the production of aluminum can stock; Alcan may acquire a 40 percent interest in a joint venture with Arco to own and operate the mill. Either company, individually or jointly with the other, may expand the mill. Alcan had sought to acquire sole ownership of the mill.

This marks the first time that a Clayton Act merger case has been settled by the device of a joint venture. J. Paul McGrath, Assistant Attorney General in charge of the Antitrust Division, commented upon the Department's concerns about the merger as originally proposed and the resolution of those concerns:

> "The production of can body stock, which is one of the largest and most important segments of the aluminum business, is highly concentrated. Last year the four largest producers of can body stock accounted for 87.9 percent of all sales in the United States, including sales by foreign producers. The Herfindahl-Hirschman Index (a measure of industry concentration obtained by adding the squares of the market shares of all firms in the market) was approximately 2300. The Antitrust Division's Merger Guidelines consider anything over 1800 to be 'highly concentrated' and subject to the most stringent antitrust scrutiny.
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> "Last year Alcan was the fourth largest producer of can body stock with 13.5 percent of total shipments. Arco has not previously made can stock, but it recently completed construction of a large, modern rolling mill in Logan County, Kentucky, designed to produce can stock. Based on the new plant's capabilities and Arco's plans for its utilization, it was clear that Arco would have become a significant new entrant into the can body stock market except for this acquisition.
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> "Under the proposed decree the companies would enter into a cost-sharing production joint venture. Arco would have a 60 percent undivided interest and Alcan a 40 percent undivided interest in the Logan County mill. A separate management company would be

created to operate the plant and would be owned 60 percent by Arco and 40 percent by Alcan, with Arco designating a majority of the board of directors. Use of the plant's production capacity would also be on a 60 percent/40 percent basis. Each company is guaranteed the right to initiate and participate in further expansions of the plant's capacity, including the right to expand the plant unilaterally if the other declines to participate.

"The decree and the accompanying joint venture agreements contain a variety of provisions designed to ensure that the joint venture partners remain independent competitors. Unlike many joint ventures, this one is strictly limited to operation of the plant as a cost center rather than as a profit center. Each company is solely responsible for determining its own product mix and level of output, and each must independently market its share of the plant's output. The companies are prohibited from exchanging information concerning competitively sensitive subjects such as prices, customers, and marketing plans, and from agreeing on price or output. The partners may not sell each other more than minimal amounts of the plant's production and are restricted in their ability to transfer production rights to each other. Two of the seven members of the board of directors must be otherwise unaffiliated with Alcan and Arco. Likewise, no employee of the management company may be contemporaneously employed by Alcan or Arco.

"The decree would be in effect for 10 years following its entry by the court. During that period Alcan and the other major aluminum producers would be barred from acquiring Arco's interest in the Logan County plant."

U.S. ANTITRUST SUITS AGAINST CANADIAN TRUCKERS DISMISSED

Private suits seeking treble damages against five Canadian member trucking firms of the Niagara Frontier Tariff Bureau were dismissed by a U.S. court in September (Square D Co. v. Niagara Frontier Tariff Bureau Inc., No. CIV-84-158C, WDNY, 9/25/84). See Canadian Competition Policy Record Sept./83 and March/84 for background.

The private suits followed the filing of a civil price fixing suit by the U.S. Department of Justice which was settled by a consent decree. The defendants were in a collective ratemaking agreement which had been approved by the Interstate Commerce Commission and which enjoyed antitrust immunity as long as its terms were strictly observed. According to the Justice Department complaint, the defendants held rate setting meetings outside the

framework of the approved agreement and interfered with the rights of other motor carriers to make rates independently.

The Court, in dismissing the private suites, cited a 1922 decision by the Supreme Court that a shipper could not obtain antitrust damage against the defendant carriers based upon a carrier conspiracy to fix tariff rates which were filed with the ICC and subject to its regulatory control. (Koegh v. Chicago & Northwestern Railway Co., 260 U.S. 156(1922)).

U.N. ANTITRUST GROUP HOLDS THIRD MEETING

The United Nations Intergovermental Group on Restrictive Business Practices (IGE) held its third annual session in Geneva on Nov. 7-16. The IGE was created within the framework of the United Nations Conference on Trade and Development (UNCTAD) as recommended in the Set of Multinationally Agreed Principles and Rules for the Control of Restrictive Business Practices which was adopted by the U.N. General Assembly in December, 1980 (the text of the Principles and Rules is reproduced in the June, 1980 issue of Canadian Competition Policy Record). The mandate of the IGE is basically to provide a forum for exchanges of views on matters related to the Principles and Rules and to make studies and recommendations.

The Group agreed to the following Resolution at the end of the Session:

> "Recalling the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices as adopted by the General Assembly in resolution 35/63 of 5 December 1980,
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> Recalling further resolution 1(I) adopted by the Group on 11 November 1981 and resolution 2 (II) adopted by the Group on 30 November 1983,
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> Affirming that the Set of Mulitlaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices can contribute to attaining the objective in the establishment of a new international economic order to eliminate restrictive business practices adversely affecting international trade and thereby contribute to the development and improvement of international economic relations on a just and equitable basis,
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> Recalling further the decision by the General Assembly to convene in 1985, under the auspices of UNCTAD, a United Nations Conference to review all aspects of the Set,

1. Expresses concern about the resort to restrictive business practices adversely affecting international trade, and particularly the trade and development of developing countries, and underlines the importance of the adequate implementation of the Set;

2. Having reviewed the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules, notes the views expressed that this implementation had been inadequate and calls on all States to implement the Set; and invites States to consider taking the issue up at the current session of the General Assembly, taking into account section F, paragraph 7 of the Set and the decision of the General Assembly in resolution 35/63.

4. Welcomes bilateral and regional technical assistance so far provided and urges international organizations and financing programmes, in particular the United Nations Development Programme, to provide resources through appropriate channels and modalities for financing the activities referred to above and invites all countries, in particular developed countries to make voluntary financial and other contributions for the above-mentioned activities;

5. Requests the UNCTAD secretariat to proceed as early as possible with the preparation of the handbook on restrictive business practices legislation which should contain descriptions supplied by States to the UNCTAD secretariat of the relevant legislation and of court and other decisions, on the basis of a format to be proposed by the secretariat;

6. Taking into account the revisions made to the study on collusive tendering, as contained in document TD/RBP/12/Rev.1, requests the Secretary-General of UNCTAD to arrange for the publication of the study together with the comments of the group Spokesmen as contained in the report on this session and calls upon States to take such effective action as they can, including the provision of information in accordance with section E, paragraph 9 of the Set, against collusive tendering adversely affecting international trade, in particular the trade and development of developing countries;

7. The Group of Experts reviewed the study on the use of restrictive business practices in the services sector by consulting firms (TD/B/RBP/19), notes the fact that no information was supplied by States for the study, reiterates its request to States to provide available information on this issue and requests the secretariat to develop the study in the light of the new information provided;

8. having reviewed the study prepared by the UNCTAD secretariat at its request on tied purchasing practices requests the UNCTAD secretariat to consider further developing the study on tied purchasing in the light, inter alia, of additional information to be supplied by governments, within a reasonable time period, after the third session of the Group and in the light of their comments as expressed at that session;

9. Notes the revised draft of the model law and the comments made thereon by the Group at its third session and requests the UNCTAD secretariat to continue work on the model law taking into account, inter alia, the comments made at the third session of the Group and taking into account the importance which the Group attaches to the preparation of the handbook;

10. Invites States to assist the UNCTAD secretariat in collecting material in accordance with paragraph 6 (d) of section F of the Set;

11. Requests the Secretary-General of UNCTAD: (a) to prepare necessary documents for the 1985 Review Conference and (b) to present outlines of possible future studies under section G, paragraph 3 of the Set."

Over 80 countries as well as a number of international governmental and non-governmental agencies were represented. As would be expected, there were sharp differences of view expressed on many of the subjects under discussion. The developing countries (Group of 77) and the socialist countries of eastern Europe (Group D) tend to stress the need for action-oriented recommendations directed against restrictive business practices emanating or thought to emanate from OECD countries (Group B). The latter tend of emphasize the importance of careful documentation of alleged practices and to favour recommendations which are in line with their national restrictive business practices laws. For example, Group B only agreed to publication of the study on collusive tendering on the condition that their spokesman's comments be published along with it.