FOREIGN AND INTERNATIONAL

CANADA-U.S. CRIME PACT WILL EXTEND MUTUAL ASSISTANCE IN COMPETITION LAW ENFORCEMENT

Prime Minister Mulroney and President Reagan signed a Treaty On Mutual Assistance in Criminal Matters on March 18, 1985. One effect of the Treaty after it has been ratified will be to strenghten Canada-U.S. cooperation in criminal investigations and prosecutions of restrictive business practices.

Implementing Canadian legislation is being drafted with a view to early tabling in Parliament. In the United States, ratification by a two-thirds majority of the Senate will give the Treaty force of law, and existing American laws are such that implementing legislation will probably not be required.

An official news release provided the following summary of the main provisions of the Treaty:

> "1. Scope: The treaty provides for a new simplified channel of cooperation directly between the Departments of Justice of both countries. It is designed to supplement and amplify cooperation which already exists under various arrangements between authorities responsible for the investigation and prosecution of criminal offences. It is intended that other means for providing assistance will continue, with the treaty mechanism being used where the other means are not effective or where a court order is needed.
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> 2. Offences: The treaty provides for cooperation in all criminal matters, broadly defined. For Canada, it covers all offences that can be prosecuted by indictment, plus serious Provincial offences. Minor offences are excluded. The treaty does not require that the conduct under investigation or prosecution be an offence in both countries. On the other hand, it allows the "Requested State" to refuse to execute the request if to do so would be against its public interest.
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> 3. Assistance: Assistance may range from providing publicly available information to locating people or to obtaining testimony and records under subpoena and search warrants. All assistance is intended to be available at both the investigatory and prosecution stages.
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> 4. Means: A request may originate from any police agency, wether federal, state, provincial or municipal, or from a prosecutor's office. The request must be forwarded through "Central Authorities", i.e., from one federal Department of Justice to the

other. Upon receipt of the request, the Department of Justice of the Requested State must decide whether providing assistance would be contrary to its public interest, in which case the request may be denied or delayed. If no "public interest" problems are identified, the Central Authority transmits the request to appropriate competent authorities (police agencies or prosecutors) for execution. The execution may require a court appearance to obtain a subpoena or search warrant. The evidence once obtained in the form stated in the request, is forwarded back to the Requesting State through the Central Authorities.

5. Extraterritoriality: The Treaty includes an article that, in principle, obliges the USA to use the treaty mechanism, rather than unilateral measures such as extraterritorial subpoenas, to obtain evidence from Canada. This obligation, of course, is a reciprocal one. Furthermore, the treaty allows the Requested State to deny assistance when execution of the request would be contrary to its public interest. Finally, in a separate echange of notes, Canada and the USA have stated their intention to continue consultations and cooperation regarding U.S. subpoenas for bank documents located in Canadian banks in third countries."

The treaty is separate from and does not substantially affect the Canada-U.S. Memorandum of Understanding on notification,consultation and cooperation in antitrust matters which was signed on March 9, 1984 (See Canadian Competition Policy Record, March, 1984). That Understanding replaced earlier Understandings and expanded upon them in a number of respects. Nor does the Treaty affect Canada's Foreign Extraterritorial Measures Act which was proclaimed into law on February 14, 1985 (See Canadian Competition Policy Record, March, 1985). In addition, Quebec and Ontario each has a business records protection act which its Attorney General can invoke to prevent an unwanted transfer of business records abroad.

At the present time, as far is known, neither country uses compulsory processes directly in the other country, although the office of a firm in one country may be ordered to produce documents which are located in the firm's office in the other country. A U.S. court has ruled that service of a subpoena by registered mail compelling a foreign company in a foreign country to produce witnesses and documents is improper, FTC v Compagnie de Saint-Gobain-Pont-A-Mousson, 1980-81 Trade Cas. 63, 632 (D.C. Cir. 1980). On the other hand, in Re Grand Jury Proceeding Bank of Nova Scotia 2 Case (not yet reported) the Eleventh Circuit Court of Appeals upheld the imposition of criminal contempt sanctions on a U.S. branch of a foreign company for failure to produce foreign-based documents pursuant to a subpoena served on the U.S. branch, despite foreign prohibitions against production. Both Canadian and U.S. antitrust authorities do on occasion carry out some aspects of antitrust investigations in the other's country, generally after notification under the antitrust Understanding. An agent of one country may, for example, visit the

other country to interview officials of firms under investigation. Requests for information may be made by mail or telephone.

The principal effects of the Treaty as it applies to criminal antitrust matters will probably be to facilitate the production of documents and the appearance of witnesses in cases with ramifications in both countries. The new producedures will also be useful in cases of misleading advertising, pyramid selling and other unethical business practices such as those which are prohibited by sections 36 and 37 of the Combines Investigation Act. Compulsory process could only be used, however, in accordance with the domestic legal requirements of each country, for example, on the basis of reasonable and probable grounds for search and seizure.

OECD ADOPTS CHECKLIST FOR EVALUATION OF COMPETITION-RELATED TRADE MEASURES

The governing Council of the Organization for Economic Co-Operation and Development, at a meeting in April, 1985, adopted a recommendation calling upon Member governments to undertake an evaluation of proposed trade and trade-related measures, as well as of existing measures when they come under review, on the basis of the following checklist:

(a) Is the measure in conformity with the country's international obligations and commitments?

(b) What is the expected effect of the measure on the domestic price of the goods or services concerned and on the general price level?

(c) What are the expected direct economic gains to the domestic sector, industry or firms in question?

(d) What type of jobs are expected to be affected by the measures? What are the net employment effects of the measure in the short and long term?

(e) What are the expected direct gains to government revenues and/or increased government costs?

(f) What are the direct costs of the measure to consumers due to the resulting higher prices they must pay for the product in question and the reduction in the level of consumption of the product? Are there specific groups of consumers which are particularly affected by the measure?

(g) What is the likely impact of the measure on the availability, choice, quality and safety of goods and services?

(h) What is the likely effect of the measure on the structure of the relevant markets and the competitive process within those markets?

(i) In the medium and longer term, will the measure, on balance, encourage or permit structural adaptation of domestic industry leading over time to increased productivity and international competitiveness or will it further weaken and delay pressures for such adaptation? Is the measure of a temporary nature? Is it contingent on or linked to another policy measures designed to bringabout the desired structural adjustment?

(j) What will be the expected effect of investment by domestic firms in the affected sector, by potential new entrants and by foreign investors?

(k) What could be the expected economic effects of the measure on other sectors of the economy, in particular, on firms purchasing from, and selling products to, the industry in question?

(l) What are the likely effects of the measure on other countries? How can prejudice to trading partners be minimized?

(m) How are other governments and foreign firms likely to react to the measure and what would be the expected effect on the economy of such actions? Is the measure a response to unfair practices in other countries?

The origin of the checklist was in the OECD's Committee of Experts on Restrictive Business Practices, a working party of which has been considering the interface between competition policy and trade policy under the chairmanship of Combines Director Lawson Hunter. An earlier version of the checklist appeared in a report emanating from the working party which was published this year by the OECD (Issues Arising at the Frontier of Competition and Trade Policies. See Canadian Competition Policy Record, September, 1984 for a description of the Report).

Mr. Hunter brought the checklist to the attention of the University of Ottawa Conference on Canada and International Trade on May 3, 1985. He stated in part:

> "In my opinion, the implementation of this Recommendation by Member countries would be a major step forward since it would provide a vehicle for fruitful dialogue between trade policy and competition policy officials in the systematic assessment of the costs and benefits of potential trade measures. In particular, it

would help governments to make rational choices in balancing conflicting interests so as to minimize losses and costs, maximize efficiency, and encourage needed adjustment where trade restrictions are deemed unavoidable given the balance of competing interests."

U.N. ANTITRUST GROUP HOLDS FOURTH MEETING

The United Nations Intergovernmental Group on Restrictive Business Practices held its third session in Geneva in April, 1985. The IGE was created within the framework of the United Nations Conference on Trade and Development (UNCTAD) as recommended in the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices which was adopted by the UN General Assembly in December, 1980 (the text of the Set is reported 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 Set of Principles and Rules and to make studies and recommendations.

The session was devoted to preparations for a UN conference which is scheduled for November, 1985 to review the Principles and Rules. A proposed provisional agenda for the Conference was approved. However, according to the concluding statement, "the Group considered, but could not agree upon, a number of proposals...by various Groups, for the improvement and further development of the Set of Principles and Rules." The developing contries (Group of 77) have sought to have the Principals and Rules made legally binding, more active implementation of the technical assistance provisions of the Principles and Rules, the establishment of a Special Committee to replace the IGE, and agreement on a further review conference in 1990. The OECD countries (Group B) would like more emphasis at the sessions on mutual problems which the various national and international jurisdictions have in enforcing their respective competition laws and policies.