

- Indications that some of the major oil companies are contemplating a change in their pricing procedures in selling to retailers by the introduction of so-called "rack" pricing as distinct from present price contracts and consignment selling methods. Under rack pricing, the retailer would buy at a variable posted price and then seek to resell at a profit.

## FOREIGN AND INTERNATIONAL

### CANADA JOINS OTHER TRADING NATIONS IN AMICI BRIEF TO U.S. SUPREME COURT ON EXTRATERRITORIALITY ISSUE

Canada, Australia, France and the U.K. applied on June 15 for leave to file a joint amici curiae brief with the U.S. Supreme Court in support of the Japanese Government in an antitrust case (Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., No. 83-2004, U.S. Sup. Ct., cert. granted 4/1/85).

At issue is a private suit which was launched in the 1970's alleging a conspiracy among Japanese television manufacturers to fix high prices for sales in Japan and low prices for sales in the U.S. The trial court granted summary judgment for the defendants. A higher court reopened the case despite a Japanese Government statement to the trial court that some of the alleged conduct had been directed by MITI. The following are among the issues to be reviewed:

"May a U.S. court (a) disregard the duly issued statement of a friendly foreign government attesting that certain export controls observed by its nationals were compelled by that government, (b) permit the trier of fact to adjudicate the veracity of such an official government statement, or (c) hold such government-mandated conduct to constitute or be a feature of a conspiracy in violation of the U.S. antitrust laws."

The brief takes the negative stand. In 1978, the Department of State, at the suggestion of the Clerk of the Supreme Court, encouraged foreign governments to present their views directly to U.S. courts. According to the joint brief, the procedure "has failed to prove satisfactory", and it cites the unfriendly reception by the appeal court of foreign government amicus briefs in the uranium litigation, as well as in the present case.

The U.S. courts have generally been reluctant to exempt otherwise illegal conduct unless it has been mandated by law. However, the Supreme Court adopted a more lenient stand in a recent case which is cited in the amici brief (Southern Motor Carriers Rate Conference Inc. v. United States, 105 S. Ct. 1721, 1730 (1985)). In that case, the Supreme Court considered the question whether, in the absence of a Mississippi statute expressly permitting the

challenged conduct, the State had clearly articulated a policy to displace competition with a regulatory structure. The Court relied on the State's amicus brief in the lower court to hold that the state commission had actively encouraged collective ratemaking; the commission had been delegated the power to prescribe "just and reasonable rates".

#### **U.K. PROBES BRITISH TELECOM'S PROPOSAL TO PURCHASE MITEL**

British Telecom's agreement with Mitel to buy a controlling interest in the latter for some \$320 millions was referred in June to the British Monopolies and Mergers Commission on the recommendation of the Director General of Fair Trading and with the support of the Director General of the Office of Telecommunications. The move will mean a delay of at least six months before the deal can be completed. Moreover, the issues for the U.K. are complex, and the outcome of the investigation is unpredictable.

British Telecom, which has a monopoly on local telephone service and a near-monopoly on long distance service, was privatized by the sale to the public of 51 percent of its stock in 1984. A new regulatory body, the Office of Telecommunications, was established at about the same time, but with limited powers. For example, it does not have the power to license competing telephone services. Press reports suggest that while the government seeks to protect the public and to promote competition at least among suppliers to British Telecom, it also hopes that British Telecom will become Britain's world leader in the supply of information technology. British Telecom's purchase of Mitel would take it one step in that latter direction, but would undoubtedly be a cause of concern for present British suppliers to British Telecom.

#### **U.S. SUPREME COURT DECISION OPENS POSSIBILITY OF SETTLING SOME PRIVATE INTERNATIONAL ANTITRUST CLAIMS BY ARBITRATION**

The U.S. Supreme Court ruled in a majority decision on July 2 that antitrust claims may be subject to foreign arbitration where the contract in an international commercial transaction contains an arbitration clause (Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc., Nos. 83-1569, 83-1733, U.S. Sup. Ct., 7/2/85). The decision offers the possibility of foreign suppliers protecting themselves against treble damages antitrust claims by their distributors through arbitration clauses in their contracts. Resultant arbitration awards, as long as they respect American antitrust laws, may be enforced by U.S. courts. The decision casts doubt upon the applicability of an earlier lower court decision which disallowed arbitration of antitrust claims in a domestic transaction (American Safety Equipment Corp. v. J.P. McGuire & Co., 391 F.2d 821 (CA2 1968)).

Soler, a Chrysler dealer in Puerto Rico, had a contract with Mitsubishi to distribute a certain number of the latter's cars. The local market declined, and Soler sought permission to transship the cars to another market, but was refused. Soler then disclaimed responsibility for some cars not yet shipped from Japan. Mitsubishi applied to a U.S. court to compel Soler to submit to arbitration. Its contract with Soler provided that "all disputes, controversies or differences" would be settled by arbitration in Japan in accordance with the rules of the Japan Commercial Arbitration Association. Soler countered by claiming that Mitsubishi had violated s.1 of the Sherman Act by preventing transshipment of the cars and argued that arbitration of the antitrust claim could not be compelled.

Arbitration is governed by the U.S. Arbitration Act and the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Supreme Court held that there is "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims". Moreover, the Court took account of the principle of comity, stating:

"...concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predicatability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."

Arbitration awards are enforceable by American courts, and the Court stated:

"Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed...While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them."



# CANADIAN COMPETITION POLICY RECORD

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