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Compelling Dumping in the United States: Can Foreign Governments Shield Unfair Trade Practices?

Michael P. Waxman
Marquette University Law School, michael.waxman@marquette.edu

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by Michael P. Waxman

Matsushita Electric Industrial Co., Ltd.
v.
Zenith Radio Corporation
(Docket No. 83-2004)

Argued November 12, 1985

Over the past fifteen years, while the United States balance of trade deficits burgeoned and the American consumer expressed a significant preference for "cheaper" Japanese goods, courts of the United States have had an uncomfortable task. They have had to decide whether the fact that the Japanese government "compelled" Japanese electronic manufacturers to sell in the United States at prices significantly below those in Japan precludes U.S. courts from reviewing the legality of those acts. As the Court analyzes this issue, it must try to avoid being forced to choose between a political Scylla and an international Charybdis: American public opinion voicing concern about the effect of foreign source sales on United States industry and the international pressure from foreign governments (such as Australia, Canada, France and the United Kingdom).

However the Court decides the foreign sovereign compulsion issue, the effects of this decision will be substantial and long lasting. Either international politics and law will become embroiled in a struggle to ascertain the extent of domestic court power to review a foreign sovereign's laws and actions or Congress and United States agencies which regulate international trade must immediately revamp the process to avoid a blanket immunity by a foreign government placing a "compulsion" seal on their foreign trade planning.

ISSUES

There are two significant issues in this case. One requires the Court to resolve the conflict between enforcing United States trade laws and respecting the rights of a foreign sovereign. The other addresses evidentiary standards for anticompetitive conduct. The Court must determine:

1. Whether the court of appeals properly interpreted the legal standards for sufficiency of evidence of an antitrust conspiracy by concluding that the questioned actions were more representative of concerted action than independent action, and 2) whether the court of appeals erred in finding liability for a violation of the Sherman Act if the predicate conduct was compelled by a foreign government.

Michael P. Waxman is an Associate Professor of Law at Marquette University Law School, 1103 W. Wisconsin Avenue, Milwaukee, WI 53233; telephone (414) 224-3799.

FACTS

Fourteen years ago, in December 1970, the National Union Electric Corporation (NUE) filed a complaint alleging that Japanese television manufacturers, their subsidiaries, and a Japanese trading company and its United States subsidiary were violating United States antitrust, tariff and anti-dumping laws. In September of 1974, Zenith Radio Corporation (Zenith) filed a similar complaint claiming that all of those named in the NUE complaint as well as some other subsidiaries, Motorola, Inc. and Sears Roebuck Co. had violated sections 1 and 2 of the Sherman Act (conspiracy in restraint of trade and attempted monopolization). In November, 1974, the NUE action was cnsolidated for trial with the Zenith suit. The Supreme Court will now determine whether a summary judgment dismissal by the district court was correct or that the parties may begin the long march to determination of the substantive issues.

This case developed in the golden days of yesteryear when trade deficits were a foreign problem, not ours. In 1968, Japanese manufacturers supplied 28% of U.S. television sets; three years earlier, their market share had been only 10%. The United States Tariff Commission (now the U.S. International Trade Commission) reported in 1971 that the decline in TV set prices in the American market was significantly influenced by the Japanese TV manufacturers' ability to undersell the American manufacturers. This resulted in lost profits and lost jobs for many American TV companies. NUE claims that it was forced from the market by the defendants' conspiracy to keep television sets in Japan priced artificially high, thereby enabling the defendants to sell televisions at artificially low prices in America. Zenith complains that it incurred operating losses and a loss of profits by the defendants' sales of television sets, radios and other electronic equipment at depressed prices.

NUE & Zenith stress two key activities of the Japanese defendants as being highly indicative of a conspiracy. First, NUE and Zenith claim that there was a check-price agreement among seven of the principal Japanese

manufacturers of televisions which established minimum prices (it is a violation of U.S. antitrust law to set either a maximum or minimum resale price) for televisions sold in America. Second, NUE and Zenith claim that those seven manufacturers were also members of the Japan Machinery Exporters Association, an export trade association which instituted a requirement in 1967 that each member limit to five the number of its customers in the United States. Both of these activities would normally constitute a *per se* violation under section 1 of the Sherman Act. However, in 1975, the Japanese Ministry of International Trade and Industry (MITI) (on behalf of the Japanese government) informed the district court that they compelled the defendants to abide by the check-price agreement and also directed certain regulations of the Japan Machinery Exporters Association. Accordingly, the defendants claimed that since the agreements were compelled by the Japanese government, they could not serve as a basis for imposing antitrust liability.

The district court granted summary judgment dismissing the action for all twenty-four defendants. The court's determination to dispose of NUE and Zenith's claims under the Wilson Tariff Act and sections 1 and 2 of the Sherman Act sprung from its conclusion that there was no admissible evidence from which concerted action, a necessary element of these claims, could be found. Finally, NUE and Zenith's claims under the Anti-Dumping Act of 1916 were dismissed. Not only was the absence of a conspiracy considered in dismissing the anti-dumping claims, but the noncomparability of the products was of primary importance. Because the district court found that NUE and Zenith failed to present any admissible evidence that would support the necessary element of a conspiracy, it did not need to consider the defendants' claim that their conduct was compelled by the Japanese government and therefore precluded from review under the "foreign sovereign compulsion" defense.

After reviewing the district court's evidentiary rulings, the Court of Appeals for the Third Circuit reversed the district court's grant of summary judgment on all of the antitrust counts except as to defendants Motorola, Sears and Sony. Also, in a separate opinion the court of appeals reversed the district court's summary judgment awards as they pertained to the Anti-Dumping Act of 1916 (723 F.2d 238 and 319 (1983)). The court of appeals concluded there was both direct and circumstantial evidence of certain kinds of concerted action among the defendants and that some direct evidence might be circumstantial evidence of a broader conspiracy.

To establish that the artificially low prices in the U.S. were the result of a conspiracy among the defendants, NUE and Zenith introduced various documents (diaries and memoranda), Japanese administrative proceedings against some of the defendants and expert testimony relating to the records and documents. While the district court refused to admit this material, the court of appeals found this material admissible. The court of appeals concluded that a factfinder could reasonably infer that conditions in the Japanese market (high fixed costs, high debt-equity ratios and a more stable workforce) created an incentive for the defendants to find a market able to take on some of their excess production.

Having established a motive, the court of appeals next concentrated on the legal standards for sufficiency of evidence of a conspiracy. The court concluded that both direct evidence and circumstantial evidence may be considered in testing for a conspiracy. It found that not only was there parallel conduct among the defendants but that there was also "direct" evidence that the Japanese defendants colluded (*i.e.*, that check-price agreement and the five company rule in the U.S. and the price maintenance agreement in Japan). According to the court of appeals, this was enough evidence to defeat summary judgment.

The court of appeals addressed the defendants' defenses to NUE and Zenith's charge of a violation of section 1 of the Sherman Act and the Wilson Tariff Act and found that a summary judgment in the defendants' favor would be improper. Of particular significance is the fact that the court of appeals rejected the defendants' defense of sovereign compulsion. The court of appeals opinion refers to MITI's participation as "apparent encouragement" of the defendants in one instance, and as a possible mere umbrella under which defendants gained an exemption from Japanese antitrust law in another. However, in its separate opinion reversing the district court's dismissal of the dumping charges (except as to Sony, Sears and Motorola) the same panel "assumed that the minimum price agreement of which all the Japanese defendants were members, was mandated by the Ministry of International Trade and Industry." Thus, there is a discrepancy in the court of appeals' categorization of the Japanese government's involvement.

The court of appeals also found that there were material issues of fact as to whether the Japanese companies, together, attempted to acquire or maintain monopoly power to exclude competition from the market and therefore reversed the district court's summary judgment in favor of the defendants on the Sherman Act section 2 charge.

Likewise, the trial court's summary judgment dismissing Zenith's claim under the Robinson-Patman Act with regard to price discrimination among American customers was reversed because it was predicated on the contention that no conspiracy finding was possible. The trial court's dismissal of Zenith's section 7 claim was also reversed (except as to Sears, Motorola and Sony).

In the separate opinion reversing the district court's dismissal of the dumping charges, four issues were considered. The first issue the court of appeals addressed was whether the 1953 Treaty of Friendship, Commerce and Navigation with Japan bars NUE and Zenith's claims under the 1916 Act. The court of appeals held that the Treaty does not bar the dumping claims. The second issue was whether there was a price differential between two comparable products—one which is sold in the exporting country and one which is sold in the U.S., so as to constitute the first element under the 1916 Act (comparability between products). The court of appeals concluded that the two products were comparable under the 1916 Act. Next, the court looked at whether the defendants sold consumer electronic products in the U.S. at substantially lower prices than they were sold in Japan. Its conclusion was that there was a material issue of fact on this point. Finally, the court concluded that in considering the evidence of intent, there were genuine issues of fact which precluded a summary judgment award in the defendants' favor. It should be noted that NUE and Zenith charged each individual with violations of the Act, thus making them subject to liability under the Anti-Dumping Act regardless of whether a conspiracy claim is upheld.

BACKGROUND AND SIGNIFICANCE

Zenith and NUE in this case have alleged significant antitrust violations. The district court's summary judgment dismissal for Zenith and NUE's failure to allege and provide sufficient evidence to warrant judgment if they went to trial followed the traditional analysis of evidentiary issues in antitrust cases. Normally, evidence of parallel conduct will be sufficient evidence of an anti-competitive agreement only if the conduct is shown to be inconsistent with the independent competitive interests of the defendant and therefore more likely to be the result of collusion. (See *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).) If Zenith and NUE can prove an anti-competitive conspiracy only through circumstantial evidence in the form of parallel conduct, the district court would be correct in dismissing the action unless the activity can be shown to be inconsistent with the normal independent competitive interest of each defendant. (*First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968)) Arguably, the conduct of the Japanese defendants could have been in their own self-interest because even though they were selling products below the costs of the plaintiffs, it is possible they were still turning a profit.

However, the court of appeals concluded that this test was not applicable here because there was "direct" evidence of collusion among the defendants. Specifically, the court of appeals found the resale price agreement in Japan, the use of check-prices and the five-company rule for exports to the United States to be examples of "direct" evidence that the defendants had colluded in some way, and interpreted this as possible circumstantial evidence of a broader conspiracy to maintain artificially low prices for their products sold in the United States. Therefore, according to the court of appeals, the cases dealing merely with the legal conclusions which may be drawn from circumstantial evidence did not shed light on his case because of its unique combination of "direct" and circumstantial evidence.

The Court, in reviewing the parallel conduct, must determine whether or not there was sufficient evidence to warrant a conclusion that defendants' sales at the prices complained of were actually in their self-interest. As the Court assesses the relationship between the circumstantial and direct evidence, it must examine the legal significance, in Japan, of the resale price agreement, the check-price agreement and the five-company rule. This will require the Court to consider whether the defendants were "compelled" by the Japanese government to act in concert to enforce these agreements and the rule in the United States.

The foreign sovereign compulsion doctrine is a common law creation of the courts of the United States. The doctrine is founded on the act of state doctrine principle that United States courts should preclude themselves from considering claims which would require them to review the legality of the acts of a foreign sovereign. Although the act of state doctrine had its origins in international comity and respect for the independence of foreign sovereigns its rationale has evolved to gain significant support from considerations of the independent role of the executive branch to foster and maintain foreign relations. The foreign sovereign compulsion doctrine directs courts to preclude themselves from reviewing the legality of the acts of a defendant where that defendant has been "compelled" by a foreign sovereign to perform or omit a certain act even when such performance or omission may have had an illegal effect in America.

The Court in *Zenith* must boldly state whether a defendant's activity, "compelled" by a foreign government, constitutes a defense to antitrust suits. If the Court supports such a defense, it must then define the parameters of what will suffice as a "compelled" activity.

In prior cases, courts have rarely found the action by the defendants to be compelled by the foreign sovereign. The compulsion analysis has generally broken into four categories based on the involvement of the foreign government: 1) conduct "compelled" (mandated, required) by the foreign government with surveillance to insure compliance; 2) conduct approved by the foreign government; 3) conduct encouraged by the foreign government, and 4) conduct made possible by a delegation of power by the foreign government.

United States' courts have held that mere permission or even approval of a defendant's actions by a foreign

sovereign have been insufficient to establish compulsion. Rather, the foreign law must have coerced the defendant into violating American antitrust law. This coercion has been further categorized by courts to demand that the foreign government required the action or inaction and that such requirement did not arise due to lobbying by the defendant.

The only case clearly applying the foreign sovereign compulsion defense is *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.* (307 F. Supp. 1291 (D.C. Del. 1970)). In *InterAmerican*, Venezuela prohibited exportation of crude oil intended for Interamerican (a New Jersey corporation whose officers were political enemies of the Venezuelan government leaders). InterAmerican sued the suppliers of crude oil operating in Venezuela and a middleman, alleging a refusal to deal in violation of the antitrust laws. The district court held that sovereign compulsion made the defendants' restrictive trade practices into "acts of the sovereign" that United States courts could not review. It was the Venezuelan government's order, which essentially offered the defendants the choice of complying with the Venezuelan decree or terminating their business, which served to compel the action of the defendants.

The Court may need to fashion a standard of review to guide lower courts in weighing the effect of the defense. It may decide either that "compelled" activity may serve as a blanket defense to what would normally be a *per se* violation of antitrust law or it may merely decide to apply a rule of reason test to such circumstances and thereby embrace a balancing of the needs of the two governmental policies.

Whatever the holding in *Zenith*, the Supreme Court will be making a major statement as to the role of American courts in international trade. In light of their activity and participation as amicus curiae some of our major foreign trading partners have indicated a significant interest in the outcome of this case. The United States Department of Justice has strongly supported the interests of these governments in their ability to have unfettered participation in the foreign trading practices of their constituent businesses. By contrast, certain U.S. industries and their supporters are seriously concerned about the shield that the foreign sovereign compulsion defense will provide to foreign manufacturers who blatantly violate U.S. unfair trade regulations. If foreign competitors may be "compelled" by their governments to undercut their U.S. competitors while supporting their activities with profits from protected markets to home, U.S. manufacturers may be whipsawed.

ARGUMENTS

For Matsushita Electric Industrial Co., Ltd. *(Counsel of Record, Donald J. Zoeller, 180 Maiden Lane, New York, NY 10038; telephone (212) 510-7000)*

1. The court of appeals erred by failing to apply the *Cities Service* conspiracy inference standard. This standard requires that an antitrust conspiracy cannot be inferred in the absence of a rational motive to conspire and conduct against independent economic self-interest.
2. Participation in export controls which the government of Japan has attested that it compelled cannot constitute a feature of an antitrust violation. This action is protected by the "foreign sovereign compulsion" and "act of state" doctrines.

For Zenith Radio Corporaton *(Counsel of Record, Edwin P. Rome, 120 Four Penn Center, Philadelphia, PA 19103; telephone (215) 569-5500)*

1. The Court of Appeals correctly held that the direct and circumstantial evidence of a conspiracy is sufficient to create a genuine issue of fact. Proof of action contrary to economic self-interest although probative and often sufficient proof of conspiracy is not a *sine qua non* of conspiracy evidence in all cases.
2. Matsushita's involvement was simply a constituent element in a broader unlawful arrangement. Commercial acts implemented by acts within the territorial boundaries of the United States and have intended effects on United States Trade and Commerce are not immune from United States law even if "compelled" by a foreign government.

AMICUS BRIEFS

In Support of Matsushita

The United States of America; and, a brief on behalf of the governments of Australia, Canada, France, and the United Kingdom of Great Britain and Northern Ireland.

In Support of Zenith

The Semiconductor Industry Association