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# Matsushita Electric Industrial Co. v. Zenith Radio Corp.: Supreme Court Leaves Extraterritorial Antitrust Questions Unanswered

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# *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*: Supreme Court Leaves Extraterritorial Antitrust Questions Unanswered

## I. INTRODUCTION

Since the end of World War II, the importance of international trade in the United States marketplace has grown dramatically. The transformation of the United States economy, however, has been far from painless. The popularity of foreign products has produced a record balance of trade deficits[1] as imported goods began to dominate certain markets.[2] In 1986, the United States became the world's largest *debtor* nation, owing foreign interests nearly $200 billion more than that owed to United States creditors.[3] Only three years earlier the United States had been the largest *creditor* nation.[4]

This tremendous growth of foreign trade has brought with it a commensurate increase in antitrust litigation involving both foreign companies and transactions. The extraterritorial application of United States antitrust law, however, has evolved very slowly during this period despite the increasing interdependence of the United States and the world economy. Moreover, the federal circuit courts have followed different approaches. Since the original codification of United States antitrust law in 1890, Congress amended the statute very slightly.[5] Consequently, United States courts have, without guidance from Congress, struggled to apply United States antitrust laws to foreign corporations and agreements.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[6] the

1. The United States balance of trade deficit was estimated to reach a record $160 billion to $170 billion in 1986. The Wall St. J., Oct. 31, 1987, at 1, col. 1.

2. For example, in 1985 imported products comprised: 63% of radio and television sets, 58% of shoes, 45% of machine tools, 40% of semiconductors, 18% of computers, and 20% of motor vehicles sold in the United States. The Wall St. J., Oct. 27, 1986, at 16, cols. 2-3.

3. *Id.* at 16, col. 1.

4. *Id.*

5. The original targets of United States antitrust laws were domestic companies and trusts. Consequently, the antitrust laws vaguely addressed the issue of extraterritorial jurisdiction. While Congress has codified some extraterritorial provisions, it has generally deferred most antitrust issues, both substantive and jurisdictional, to the courts.

6. 475 U.S. 574 (1986).

United States Supreme Court affirmed the district court's grant of summary judgment to twenty-one Japanese consumer electronics manufacturers alleged to have illegally conspired over a twenty year period to eliminate competitors from the United States by an agreement to maintain artificially low prices in the United States market.[7] The plaintiffs contended that the losses incurred in the United States were offset by an agreement to charge higher than normally competitive prices in Japan.[8]

The Supreme Court's opinion, however, failed to address two important issues. First, although the Court granted a writ of certiorari on the issue, the Court did not address the parameters of the sovereign compulsion defense.[9] Additionally, the Court, in its brief discussion of the extraterritorial application of United States antitrust laws, raised doubt over the jurisdictional "rule of reason"[10] approach developed by the federal courts over the past decade.

This Note primarily focuses on the Supreme Court's discussion of the "rule of reason" approach, the vitality of the sovereign compulsion defense and the potential impact of this defense on foreign antitrust policy. Additionally, this Note briefly discusses the Court's raising of the "threshold" requirement to obtain antitrust summary judgment.[11]

Establishing the scope of United States antitrust jurisdiction may ultimately require Congressional legislation. However, until Congress acts, it is important to the actors in the global economy, domestic and foreign corporations, and governments that the courts enunciate a clear standard. This Note concludes that the Supreme Court incorrectly ignored the extraterritorial issue. Moreover, by not fully addressing this issue, the Supreme Court added to the confusion surrounding the application of United States antitrust law.

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7. *Id.* at 577-78.

8. *Id.*

9. Briefly, the sovereign compulsion defense provides a defendant relief from conduct required by another foreign government. *See infra* text accompanying notes 284-321.

10. This approach was first developed in Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).

11. The Court required that the plaintiffs, suing under sections 1-2 of the Sherman Antitrust Act, must provide sufficient evidence which tends to exclude the possibility that the alleged conspirators acted independently. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-90 (1986). Additionally the plaintiffs must present a claim that is factually "plausible" (i.e., must make economic sense). *Id.* at 593.

## II. FACTS OF THE CASE

### *A. Background*

In the United States, Japanese companies dominate the consumer electronics products (CEP)[12] marketplace. Fierce competition among companies in Japan created an innovative environment for product development. For example, a Japanese consumer entering a department store is overwhelmed by the products of more than 580 manufacturers producing over 200 types of stereo headphones, 100 different models of color television sets and 75 types of record turntables.[13] This wealth of diverse products, combined with intense domestic competition, greatly contributed to the success of the Japanese in the United States CEP marketplace. However, this success has caused tremendous economic dislocation among United States competitors.[14] Over the past two decades, from 1952 to the late 1970's, the collective Japanese share of United States CEP market rose from twenty percent to almost fifty percent.[15] By 1986, United States manufacturers sold only thirty-seven percent of the televisions and radios sold in the United States.[16]

During this period, United States government agency reports,[17] academic reports,[18] internal company memorandum,[19] minutes of

12. Consumer electronics products (CEP) generally refers to monochrome (black and white) and color television receivers in co-plaintiff National Union Electric's (NUE) antitrust suit. For the purposes of this Note, CEP encompasses the broader definition used by co-plaintiff Zenith Radio Corporation, which also includes radios, phonographs, tape and audio equipment, and electronic components. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1119 n.7 (E.D. Pa. 1981).

13. TIME, Aug. 1, 1983, at 38, col. 1.

14. National Union Electric Company, one of the primary plaintiffs in *Zenith*, is a prime example. NUE initially stopped production and resold television sets under their brand name, but later completely abandoned the television market after sustaining heavy losses. *Zenith*, 513 F. Supp. at 1119.

15. *See supra* note 2.

16. The Wall St. J., *supra* note 2, at 16.

17. A 1968 report by the United States Commissioner of Customs stated that "[t]he information received tends to indicate that the prices of the television sets for exportation to the United States are less than the prices for such or similar merchandise for home consumption in Japan." *In re* Japanese Elec. Prods., 723 F.2d 238, 266 (3d Cir. 1983).

In 1970, the Assistant Secretary of the Treasury concluded that television sets from Japan were sold at less than "fair value." *Id.* at 267.

A United States Tariff Commission report concluded that "imports of television receivers from Japan, sold at LTFV [less than fair value] . . . have caused substantial loss of sales by United States producers." *Id.* at 270.

18. Included were studies by Professors Kozo Yamamura (Univ. of Washington), Gary R. Saxonhouse (Univ. of Michigan), and John O. Haley (Univ. of Washington School of Law). Also relied on by the courts were studies by Dr. Horace J. DePodwin (Horace J. DePodwin

trade group meetings,[20] and employee diaries of Japanese manufacturers[21] indicated improprieties in the export of CEPs from Japan. The various reports documented agreements in Japan to allocate exports, markets and technology among the subscribing companies.

### *B. Procedural History of the Case*

In *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*[22] the competition between Japanese and United States CEP companies left the marketplace and entered the courtroom. In 1974,[23] in the United States District Court for Pennsylvania, Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE)[24] filed suit

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Associates) and Stanley Nehmer (Economic Consulting Services, Inc.), both economic consulting firms. *Id.* at 276.

Briefly, the reports found, inter alia, that Japanese manufacturers (including the defendants here): engaged in price discrimination to sell televisions in the United States below cost while earning substantial profits in Japan; had a total production capacity far exceeding the needs of the Japanese market; had higher fixed costs than similar United States firms, which created an environment in which vigorous price competition was unlikely and made collusion desirable; and further found that Japanese government imposed trade barriers allowed manufacturer-controlled distribution and retail price controls in Japan. *Id.* at 281-84.

19. For example, a Toshiba memorandum summarized the meetings of the inter-manufacturer "Palace Group," and discussed issues concerning electrical appliance producers. The memo described a proposal by Matsushita to raise the color television profit margin in Japan from 18% to 20% which was agreed to by all in attendance. *Id.* at 294.

20. For example, see the minutes of the Electronic Industries Association of Japan, TV Export Council Meetings and notice of the meeting of the Market Stabilization Council. *Id.* at 296, 298. Portions of the documents were authored by employees of defendant Matsushita. *Id.* at 297.

The Market Stabilization Council was created pursuant to an order by the Japanese Ministry of International Trade and Industry (MITI) to implement government foreign trade policies. The meeting established " 'MITI-mandated minimum prices below which television receivers could not be sold in the Japanese domestic market for export to the United States.' " *Id.* at 298 (quoting interrogatory given by an employee of Mitsubishi Electric Co.) The court of appeals found that the meeting was held for the purpose of acting in concert. *Id.* at 299.

21. Included were the diaries and memorandum of Mssrs. Yajima, Yamada, Yamamoto, Okuma and Tokizane. *Id.* at 285. The diaries and memorandum discuss meetings of the "Tenth Day" and "TS" groups, regularly attended by employees of the defendant companies, which the plaintiffs alleged were used to engage in price fixing. *Id.* at 289. The evidentiary value of the diaries and memorandum was contested by the defendants, because many entries contained hearsay. *See* FED. R. EVID. 803(6).

22. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100 (E.D. Pa. 1981), *rev'd*, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 475 U.S. 574 (1986).

23. NUE first filed suit against the Japanese defendants in December, 1970. Zenith filed a similar suit in 1974. The Pennsylvania district court consolidated the pretrial proceedings. "The transfer was made unconditional and the actions were consolidated for trial." *Zenith*, 513 F. Supp. at 1119.

24. Formerly the Emerson Radio Company. Emerson Radio manufactured and sold television receivers until 1970. After sustaining substantial losses, NUE sold television sets man-

against twenty-four companies and alleged that "the Japanese defendants and others had conspired to take over the American (CEP) industry and thereby drive NUE [and Zenith] out of business."[25] Of the principal defendants,[26] seven were manufacturers of CEPs,[27] one was a Japanese trading company,[28] and two were United States companies.[29] Fourteen defendants were subsidiaries of the principal Japanese defendants.[30] Additionally, the plaintiffs' complaint named numerous other co-conspirators whose business operations ranged from small Japanese companies to large multi-national corporations.[31]

Plaintiffs Zenith and NUE alleged, inter alia,[32] that the defendants violated sections one and two of the Sherman Antitrust Act[33] by attempting and conspiring to monopolize the United States CEP market by " 'commonly and systematically,' with predatory intent, selling their products in this country for substantially less than their actual market value in Japan"[34] and "by discriminating in price among American purchasers."[35]

Zenith and NUE claimed that the defendants agreed to artificially raise their prices in Japan which resulted in lower sales in

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ufactured by other companies under the "Emerson" name until completely abandoning the market in 1972. *Id.*

25. *Id.*

26. The defendants which manufactured and sold CEPs, both United States and Japanese, were controlled by Japanese parent corporations, or sold Japanese manufactured products. *Id.* at 1119-20.

27. The seven manufacturers were: Matsushita Elec. Indus. Co.; Toshiba Corp.; Hitachi, Ltd.; Sharp Corp.; Sanyo Elec. Co., Ltd.; Sony Corp.; and Mitsubishi Elec. Corp. *Id.* at 1119.

28. Mitsubishi Corporation. *Id.*

29. Sears, Roebuck & Co. and Motorola, Inc. *Id.*

30. *Id.*

31. For example, named as defendants were industrial giants N.V. Philips Gloeilampenfabrieken (German) and General Electric Company. *Id.* at 1120.

32. Zenith and NUE also alleged that the Japanese manufacturers violated the Antidumping Act of 1916, 15 U.S.C. § 72 (1982), section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982), and section 7 of the Clayton Act, 15 U.S.C. § 18 (1982). Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1120 (E.D. Pa. 1981).

33. 15 U.S.C. §§ 1-2 (1982). Section 1 states: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal . . . ." *Id.* § 1.

Section 2 states: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several States, or with foreign nations, shall be deemed guilty of felony . . . ." *Id.* § 2.

34. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1120 (E.D. Pa. 1981).

35. *Id.*

defendents' country.[36] Consequently, according to the plaintiffs, the Japanese CEP manufacturers were forced to export more goods to the United States than they would have if their products were fairly priced.[37] Zenith and NUE also alleged that the Japanese manufacturers' "five-company rule" required each manufacturer to sell their products to only five specified wholesale distributors.[38] The plaintiffs claimed that the five-company rule restricted competition among the defendants and caused the plaintiffs to lose more business than usual.[39]

The litigation consumed an extraordinary amount of resources of the parties and the trial court. Discovery alone lasted several years and produced a tremendous volume of evidence.[40] For example, the plaintiffs' Final Pre-trial Statement was 17,000 pages long and raised hundreds of issues.[41] One-hundred-and-fourteen briefs or memoranda were filed during the first nine months of 1980 alone.[42]

## III. REASONING OF THE COURT

### *A. The United States District Court Decision*

The Pennsylvania district court, in an opinion over two-hundred pages long, initially focused on the admissibility of the plaintiffs' evidence.[43] The court held that the vast majority of the evidence submit-

36. *In re* Japanese Elec. Prods., 723 F.2d 238, 307 (3d Cir. 1983).

37. *Id.* at 305.

38. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 581, 602-03 nn.2 & 3 (1986).

39. *Id.*

40. *In re Japanese Elec. Prods.*, 723 F.2d at 255.

41. In order to limit the issues and the evidence presented, the district court's pre-trial order mandated that "[e]xcept for good cause shown, the parties are precluded from offering at trial any facts or evidence supporting such facts which have not been disclosed in the [Final Pre-trial Statement]." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 949-50 (E.D. Pa. 1979). The court's pre-trial order also "require[d] that each party make, before trial, with preclusive effect, a complete offer of proof on each issue it intended to prove." Pre-Trial Order No. 154, *Zenith*, 478 F. Supp. at 950.

42. *Zenith*, 513 F. Supp. at 1118 n.2. The unusually large number of documents filed required the court to order the creation of a document depository in the courthouse. The Final Pretrial Statement before the district court included an evidentiary record of 250,000 documents submitted by the parties. Pretrial Order No. 219, *In re* Japanese Elec. Prods., 723 F.2d 238, 255 (3d Cir. 1983).

43. *See generally Zenith*, 513 F. Supp. at 1135-38, 1265-1317. Basically, five categories of evidence were presented by the plaintiffs. Briefly, the five categories of evidence presented were:

(1) Reports prepared by the United States Treasury Department under the 1921 Antidumping Act, 19 U.S.C. §§ 160-71;

(2) Findings of fact by the United States International Trade Commission under

ted and relied upon by Zenith and NUE was hearsay and inadmissible under any of the exceptions to the hearsay rule.[44] The trial court determined that the inadmissible evidence lacked the inherent trustworthiness required for admission to the court record.[45]

The inadmissible evidence was "not considered in opposition to the defendants' summary judgment[46] motion."[47] The court, after evaluating the remaining evidence, sustained the motion for summary judgment by the Japanese manufacturing companies.[48] The court held that the admissible evidence raised no triable issue of fact regarding the alleged conspiracy to raise and maintain artificially high prices in Japan while keeping prices low for products exported to the United States.[49] According to the trial court, the plaintiffs failed to prove that the defendants had acted in concert, a requirement for all conspiracy claims.[50] Thus, the district court granted summary judgment.[51] The court also granted summary judgment against Zenith and NUE's claim that the defendants violated section 2 of the Sher-

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the Trade Expansion Act of 1962, Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended in scattered sections of 5 & 19 U.S.C.), and its successor statute, the Trade Act of 1974, Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (codified as amended in scattered sections of 19 U.S.C.);

(3) Records and findings of fact by the Japanese Fair Trade Commission;

(4) Conclusions expressed by experts in five academic studies;

(5) Diaries and reports of employees who attended intercompany meetings between competitors in the Japanese marketplace.

*In re Japanese Elec. Prods.*, 723 F.2d at 263-97.

44. *Zenith*, 513 F. Supp. at 1331. Because most of the evidence relied upon by Zenith and NUE was hearsay, the court was forced to examine the Federal Rules of Evidence hearsay exceptions for (1) public records and reports [Rule 803(8)(c)]; (2) testimony by experts [Rule 702]; (3) records of regularly conducted activity [Rule 803(6)]; (4) former testimony [Rule 804(b)(1)]; (5) statement against interest [Rule 804(b)(3)]; (6) admission by party opponent [Rule 801(d)(2)]; (7) residual exception for material fact [Rule 803(24) and 804(5); and (8) present sense impression [Rule 803(1)]. *In re Japanese Elec. Prods.*, 723 F.2d at 259-303.

45. *Id.* at 264.

46. The defendants moved for summary judgment pursuant to Federal Rule of Civil Procedure Rule 56(c): "[t]he judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

47. *In re* Japanese Elec. Prods., 723 F.2d 238, 255-56 (3d Cir. 1983).

48. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1180-1318 (E.D. Pa. 1981).

49. *Id.* at 1318-21.

50. *Id.* at 1321.

51. *Id.* The district court also granted summary judgment to Zenith's claim of price discrimination between Japan and the United States, and between U.S. customers, violating the Robinson-Patman Act. *Id.* at 1323-29. The court held that the plaintiffs produced insufficient evidence to demonstrate that the defendants' alleged conspiracy to charge different prices in Japan and United States injured their companies or competition. *Id.* Finally, the court granted summary judgment against Zenith's alleged violation of section 7 of the Clayton Act

man Act because the aggregate-share theory required proof of concerted action.[52] Zenith and NUE alleged that the defendants conspired to use their aggregate or combined market share to monopolize the United States market.[53] The court concluded that the plaintiffs did not produce sufficient evidence to preclude the possibility that the defendants merely acted independently according to their economic interests.[54]

Zenith and NUE subsequently appealed the district court's grant of summary judgment and its evidentiary rulings.

### *B. The Third Circuit Court of Appeals Decision*

The Third Circuit Court of Appeals reversed most of the district court's evidentiary rulings after determining that the trial court erred in excluding much of the plaintiffs' evidence.[55] Judge Gibbons held that the evidence possessed sufficient trustworthiness and should have been considered by the trial court prior to granting the motion for summary judgment.[56]

Consequently, the appellate court, after evaluating the newly enlarged evidentiary record, reversed the lower court's grant of the defendants' motion for summary judgment. The court held that "there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred."[57] The court concluded that a reasonable fact finder could find a conspiracy to decrease prices in the United States market to eliminate United States competitors, which was funded by excess profits obtained from sales in Japan.[58]

The court of appeals found:

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because the plaintiff failed to demonstrate any injury traceable to the transaction. *Id.* at 1329-31.

The court also denied Zenith's objection to the sale of Quasar by Motorola to Mitsubishi Electric, Inc., and Sanyo's purchase of a seventy-five percent interest. *Id.*

52. *Id.* at 1175-76.

53. *Id.* at 1124-25.

54. *Id.* at 1318-23.

55. *In re* Japanese Elec. Prods., 723 F.2d 238, 260-303 (3d Cir. 1983).

56. The appellate court's contrary finding resulted from its application of a less stringent standard of hearsay evidence. Generally, the admissibility of hearsay evidence is subject to the judge's discretion pursuant to the Federal Rules of Evidence. *See* MCCORMICK ON EVIDENCE § 60 (E. Cleary 3d ed. 1984).

57. *In re Japanese Elec. Prods.*, 723 F.2d at 304-05.

58. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 581 (1986).

(1) Oligopolistic behavior characterized the Japanese market for consumer electronics. A small number of manufacturers met regularly to exchange information, including pricing. This environment created the opportunity to raise both prices and profits in Japan.[59]

Additionally, significant trade barriers erected by the Japanese government effectively barred foreign consumer electronics companies from the Japanese domestic market.[60]

(2) The Japanese manufacturers had relatively higher fixed costs compared to United States producers. Consequently, the Japanese companies, in order to make a profit, needed to operate at nearly production capacity.[61]

(3) The collective manufacturing capability of the Japanese CEP companies exceeded the consumption requirements of the domestic market.[62]

(4) The Japanese CEP manufacturers formally agreed to minimum prices for products exported to the United States. The "check price agreements" were arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI).[63]

(5) Manufacturers in Japan also agreed to distribute their products in the United States to only five distributors. This agreement became known as the "five-company rule."[64]

(6) Despite the check price agreements, the Japanese manufacturers bypassed the agreement by using variety of rebate schemes. The companies attempted to conceal their rebate schemes from both the United States Customs Service and MITI to avoid customs regulations, punitive action under anti-dumping laws and action by the Japanese government.[65]

Consequently, based upon these findings, the court of appeals concluded that "a fact-finder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competitors among the Japanese manufacturers in either market."[66]

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59. *In re Japanese Elec. Prods.*, 723 F.2d at 307-11.
60. *Id.* at 307.
61. *Id.*
62. *Id.*
63. *Id.* at 310.
64. *Id.* at 311.
65. *Id.*
66. *Id.* Judge Gibbons also concluded that "[t]he collusive establishment of dumping

### *C. Supreme Court Grant of Writ of Certiorari*

The United States Supreme Court granted the defendants' writ of certiorari,[67] but limited its review of the Third Circuit's judgment to (1) whether the standard the district court applied in granting the defendants' motion for summary judgment was correct and (2) whether the defendants are liable under United States antitrust laws for a conspiracy partly compelled by a foreign sovereign.[68] The Supreme Court did not review the court of appeal's reversal of the district court's evidentiary rulings.[69]

### *D. The United States Supreme Court Decision*

#### 1. The Majority

A divided Supreme Court[70] reversed the Third Circuit's judgment, holding that "[t]he Court of Appeals did not apply proper standards in evaluating the District Court's decision to grant petitioners motion for summary judgment."[71] The majority believed that no genuine issue of fact[72] existed because (1) the plaintiffs suffered no cognizable injury;[73] (2) the plaintiffs' direct evidence had little if any, relevance to the alleged predatory pricing conspiracy; and (3) no plausible explanation existed for the defendant manufacturers to engage in predatory pricing.[74]

Associate Justice Powell,[75] writing for the majority, initially distinguished plaintiffs Zenith and NUE's case from prior antitrust litigation before the Court. The Court refused to recognize Zenith and NUE's claim "based solely on alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competi-

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prices could support an inference of collective predatory intention to harm American competitors." *Id.*

67. 471 U.S. 1002 (1985).

68. *In re* Japanese Elec. Prods., 723 F.2d 238, 311 (3d Cir. 1983).

69. The Court gave no explanation why the evidentiary rulings were not examined. Traditionally, evidentiary rulings are within the discretion of the trial court and thus are not reviewed absent abuse of discretion. *See* MCCORMICK, *supra* note 56, § 60.

70. The Court voted five to four to reverse and the case was remanded.

71. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

72. FED. R. CIV. P. 56(c), (e); *see* DeLuca v. Atlantic Refining Co., 176 F.2d 421, 423 (1949), *cert. denied*, 338 U.S. 943 (1950); and First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968).

73. *Matsushita*, 475 U.S. at 596-97.

74. *Id.* at 593.

75. Justice Powell was joined in his opinion by Chief Justice Burger, Justices Marshall, Rehnquist, and O'Connor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 576 (1986).

tive conditions of other nations' economies[ ]" unless the conduct has an effect on United States commerce.[76] The Court then addressed the summary judgment standard applied by the lower courts.

a. the plaintiffs Zenith and NUE suffered no cognizable injury

The Supreme Court found that Zenith and NUE suffered no cognizable antitrust injury.[77] According to the majority, the non-price distribution restraints[78] alleged by the plaintiffs neither caused prices to rise nor limited production.[79] The Court acknowledged that such agreements may harm competition, but in the instant case, the outcome actually benefited competitors by allowing supra-competitive[80] pricing.[81] Thus, the majority believed that Zenith and NUE actually profited from any agreement to raise market prices or limit product distribution because of the reduced marketplace competition. Consequently, because the plaintiffs failed to demonstrate cognizable injury, Zenith and NUE must prove injury resulting from a predatory pricing conspiracy in the United States consumer electronics marketplace.[82]

b. the plaintiffs Zenith and NUE failed to prove a predatory pricing conspiracy existed

The Third Circuit held that respondents Zenith and NUE's allegation of a horizontal conspiracy to predatorily price CEPs would be a per se[83] violation of the Sherman Antitrust Act.[84] The Supreme Court majority, however, believed that the plaintiffs failed to present sufficient evidence to exclude the possibility that the alleged conspirators acted independently.[85] Consequently, the majority found no rele-

76. *Id.* at 582.

77. *Id.* at 586.

78. For example, the alleged "five-company rule."

79. *Matsushita*, 475 U.S. at 583.

80. A supra-competitive price is a price higher than what the marketplace would bear. Supra-competitive pricing becomes viable if the supply fails to meet demand for a product; here this allegedly occurred because of the defendants' agreement to limit distribution.

81. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596-97 (1986).

82. *Id.* at 584-86 & n.7.

83. Under a per se analysis, the court may invalidate agreements which clearly result in restraining competition, regardless of any benefits which may arise from the activity.

84. *Matsushita*, 475 U.S. at 584-85.

The defendants did not appeal this conclusion of the court of appeals and thus, "[t]he issue . . . becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment." *Id.*

85. *Id.* at 592-93.

vant direct evidence that raised a genuine issue of fact for trial.[86]

Justice Powell, strictly limited the scope of permissible inferences, and thus found no evidence that the conspiracy was reasonable considering "competing inferences of independent action or collusive action . . . ."[87] The majority believed that economic factors strongly suggested that the defendants had no motive to form the antitrust conspiracy. Additionally, because the conduct of the Japanese manufacturers may equally be explained as competition as well as an illegal conspiracy, the conduct standing alone does not support an inference of antitrust conspiracy.[88] Consequently, because the plaintiffs' claim was inconsistent with "economic sense," Zenith and NUE must provide more persuasive evidence than would otherwise be necessary to support their claim.[89] The Court, therefore, found the plaintiffs' evidence to be insufficient.

c. the defendants lacked plausible motive to engage in conspiracy to predatorily price

The Supreme Court applied its "economic sense"[90] standard against plaintiffs Zenith and NUE's claims of a predatory pricing conspiracy. Predatory pricing allegations are inherently speculative because the conspirators must voluntarily forego profits offered by unrestrained competition.[91] The conspirators must sustain short-run losses in expectation of later realizing uncertain monopoly profits.[92] After completing the conspiracy's objectives, the company must have obtained sufficient market power to recover its lost earnings by monopoly pricing.[93]

Additionally, plaintiffs Zenith and NUE alleged a conspiracy involving twenty-one corporate defendants.[94] However, a conspiracy

86. *Id.* at 598. Under Federal Rule of Civil Procedure 56(e), evaluating a summary judgment motion requires the judge to "pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial." FED. R. CIV. P. 56(e) (advisory comm.'s note to 1963 amendment).

87. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

88. *Id.*

89. *Id.* at 587.

90. Conduct of the defendants must be supported by a logical business motive: for example, sustaining short-term to later reap long-term increased profitability. Conversely, incurring unrecoverable losses to obtain a monopoly fails to meet the Court's economic sense requirement.

91. *Id.* at 588-89.

92. *Id.*

93. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

94. *See supra* text accompanying notes 26-31.

involving numerous firms, over a long period,[95] is "incalculably more difficult to execute than an analogous plan undertaken by a single predator."[96] The increased difficulty arises because the losses sustained and any gains realized must be allocated among the participants in the conspiracy.[97]

Consequently, the Supreme Court required direct evidence of predatory pricing by the defendants because "only direct evidence of below cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies."[98] Neither the district court nor the court of appeals, however, found that the defendants' market share conveyed sufficient economic power to charge monopoly prices.[99] The Court concluded that the absence of a plausible motive to engage in a pricing conspiracy is "highly relevant" to determine the existence of a genuine issue of fact for trial.[100] Consequently, if the defendants lacked a "rational economic motive to conspire [and their conduct is consistent] with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."[101]

The Court, however, found little evidence to prove a plausible motive. Plaintiffs Zenith and NUE failed to provide sufficient admissible, direct evidence of a conspiracy to monopolize the United States consumer electronics market. Thus, the majority sustained that district court's grant of the defendants' motion for summary judgment.

Justice Powell expressed a strong concern to protect corporations from damage arising from allegations which require an inference of a conspiracy. By requiring direct evidence of a conspiracy, the court sought to minimize the potential of an erroneous conclusion inferred from competitive conduct. For example, a price reduction in order to increase business, is a fundamental characteristic of the free market system. The majority cautioned that "mistaken inferences [of a conspiracy] . . . are costly, because they chill the very conduct the antitrust laws are designed to protect."[102]

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95. Plaintiff Zenith alleged that the conspiracy began in 1953, while NUE contended the defendants' illegal conduct began in 1960. *Matsushita*, 475 U.S. at 591 n.13.

96. *Id.* at 590.

97. *Id.*

98. *Id.* at 595-96.

99. *Id.* at 593.

100. *Id.* at 596-97.

101. *Id.*

102. *Id.* at 594.

d. remand by the Supreme Court

The Supreme Court remanded the case back to the Third Circuit Court of Appeals[103] to consider if other evidence existed which permitted a trier of fact to find that the defendants conspired to price predatorily despite no apparent motive to do so.[104] The majority also required that the evidence must tend to exclude the possibility that the defendants reduced prices to legally compete for business. Justice Powell ordered that, absent such a showing, the defendants are entitled to the reinstatement of summary judgment.[105]

e. extraterritorial application of the Sherman Act

The Supreme Court briefly addressed the extraterritorial application of the Sherman Antitrust Act. The majority limited its discussions of the issue to a single footnote.[106] The Court relied on *United States v. Aluminum Company of America (Alcoa)*[107] and held that the Sherman Act's jurisdiction was limited to activity which had an effect on United States commerce.[108] The Court did not fully address this issue despite plaintiffs Zenith and NUE allegation that the "effect" here was artificially depressed CEP prices in the United States.[109]

The many countries[110] which submitted amici curiae briefs on the sovereign defense issue reflected the importance of the sovereign defense issue to international trade. The defendants claimed their agreements were immune from antitrust laws because these agree-

103. The Third Circuit Court of Appeals, upon remand by the Supreme Court, reconsidered the entire case. *In re* Japanese Elec. Prods. Antitrust Litig., 807 F.2d 44, 46 (3d Cir. 1986). In a narrowly written opinion, the court concluded that the plaintiffs were foreclosed from arguing both the existence of a motive to enter into the alleged conspiracy and "that the direct and circumstantial evidence to which this court referred in its prior opinion is sufficient to overcome a motion for summary judgment." *Id.* at 47. Additionally, no other evidence raised material issues of fact to regarding alleged predatory pricing conspiracy by the defendants. *Id.* at 48. Thus, the appellate court affirmed the district court's grant of summary judgment on behalf of each defendant. *Id.* at 49.

Plaintiffs Zenith and NUE subsequently petitioned the Supreme Court for a writ of certiorari. The Court, however, denied the plaintiffs request, thus ending over a decade of litigation. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 107 S. Ct. 1955 (1987).

104. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597-98 (1986).

105. *Id.* at 598.

106. *See id.* at 582 n.6.

107. 148 F.2d 416 (2d Cir. 1945).

108. *Matsushita*, 475 U.S. at 582 & n.6.

109. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.6 (1986).

110. Australia, Canada, France, and the United Kingdom submitted a joint brief as amicus curiae; the United States also submitted a brief as amicus curiae.

ments were compelled by the Japanese government.[111] The Supreme Court,[112] however, did not reach the issue. The majority found that if a conspiracy to charge higher than competitive prices existed, Zenith and NUE could not have suffered a cognizable injury because the plaintiffs would actually benefit from such an agreement.[113]

### 2. The Dissent

Associate Justice White,[114] writing for the dissent, stated it was "remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does."[115] The dissent found no reversible error and argued that the plaintiffs' evidence raised genuine issues of material fact.[116] According to Justice White, the majority "only muddies the waters [by] mak[ing] confusing and inconsistent statements about the appropriate standard for granting summary judgment."[117]

Although the Court "faithfully followed the relevant precedents . . . ,"[118] the dissent believed that the majority opinion departed from the traditional standard for summary judgment.[119] The dissent asserted that the language of the majority suggests that the judge should go beyond the traditional summary judgment inquiry and decide for herself whether the weight of the evidence favors the plaintiff.[120] Justice White stated that if the Court majority is overturning "settled" law, this pronouncement should have been clearly stated to avoid

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111. *In re* Japanese Elec. Prods., 723 F.2d 238, 315 (3d Cir. 1983).

The defendants contended the "check price" agreements were compelled by MITI. MITI informed the district court that it had required the check price agreements. *Id.*

112. The dissent also did not reach the sovereign compulsion issue: "[s]ince the Court does not reach this issue, I see no need of my addressing it." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 605 n.5 (1986) (White, J., dissenting).

113. *Id.* at 596. Reduced competition in the CEP market would also allow the plaintiffs to profit from supra-competitive pricing.

114. Justices Brennan, Blackmun and Stevens joined Justice White in his dissent. *Id.* at 598.

115. *Id.* Justice White believed that "the evidence taken as a whole creates a genuine issue of fact . . ." and that "the Court of Appeals' opinion more than adequately supports this judgment." *Id.* at 599.

116. *Id.* at 603.

117. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 599 (1986).

118. The dissent cited as examples: First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253 (1968); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). *Id.* at 598.

119. *Id.* at 599.

120. *Id.* at 600-01. Traditional summary judgment doctrine requires that "all evidence be construed in the light most favorable to the party opposing summary judgment." *Id.* at 601.

"unnecessarily broad and confusing language."[121]

The majority opinion followed economic-analysis theory in discounting the plaintiffs' evidence, especially the DePodwin Report.[122] Justice White believed that the report alone created a genuine issue of fact that Zenith and NUE were harmed by actions of the defendants.[123] Consequently, the dissent would have held that the plaintiffs suffered a cognizable injury from the artificially depressed prices caused by products sold in the United States.[124]

Justice White agreed with the Third Circuit's opinion which found "that this case is distinguishable from traditional 'conscious parallelism'[125] cases, in that there is direct evidence of concert of action among petitioners."[126] The dissent noted that, although illegal

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121. *Id.* at 601. The dissent believed the majority raised the standard for summary judgment under the Sherman Act without expressly stating so. Justice White wanted the majority, if indeed changing the standard for summary judgment, to clearly enunciate the new standard. *Id.*

122. The report analyzed television manufacturing in Japan and the United States, including statistics on: Japanese television industry concentration, construction and export data, facilities expansion, and production investment and capacity. *In re* Japanese Elec. Prods., 723 F.2d 238, 279 (3d Cir. 1983). The experts concluded that conditions and opportunities were conducive to collusion. Most importantly, the report concluded that the Japanese companies acted in concert consistent with the plaintiffs' conspiracy theory. *Id.* at 280.

The trial court described the DePodwin Report as "by far the most careful, scholarly, and disinterested of the reports submitted by the plaintiffs' expert witnesses." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. at 1100, 1334 (E.D. Pa. 1981).

123. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 603 (1986) (White, J., dissenting); *see id.* at 601-03.

124. *Id.* at 601-03.

> [T]he price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increasing exports to this country resulted in depressed prices here, which harmed respondents.

*Id.* at 601-02. The plaintiffs were also injured by the Japanese manufacturers' five company-rule, under which each company agreed to sell their products to only five specified wholesale distributors. As a result, Zenith and NUE lost business (other than that lost through the normal course of business) because of the restricted intragroup competition. *Id.* at 602-03 nn.2 & 3 (citing the DePodwin Report submitted in the Brief for Appellants at 1629a-30a, 1628a-29a).

125. Although parties acting with "conscious parallelism" pattern their actions after each other, they do not act in concert with the intent to restrain commerce. *See, e.g.*, Tose v. First Pennsylvania Bank, 648 F.2d 879, 890-91 (3d Cir. 1981); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 207-09 (3d Cir. 1980).

Conscious parallel conduct by itself, although possessing some evidentiary value, is legally insufficient to prove conspiratorial conduct or concert of action. *In re Japanese Elec. Prods.*, 723 F.2d at 304.

126. *Matsushita*, 475 U.S. at 605 (citing *In re* Japanese Elec. Prods., 723 F.2d 238, 304-05 (3d Cir. 1983)).

horizontal agreements to allocate customers normally do not injure competitors of the agreeing parties, a factfinder could reasonably infer that the defendants intended to eliminate competition among themselves in Japan and the United States and collusively establish below-cost dumping prices in the United States market.[127]

The majority found that the Third Circuit erred because it "failed to consider the absence of a plausible motive to engage in predatory pricing."[128] However, the dissent, concluded that the issue is not whether a court believes the expert opinions, such as the De-Podwin Report. The courts, according to the dissent, are not to conduct "academic discussions" but instead the courts are to decide whether the plaintiffs' evidence raises a genuine issue of material fact after viewing the evidence in the light most favorable to the party opposing the motion for summary judgment.[129] Consequently, the dissent believes that Zenith and NUE's evidence established genuine issues of material fact and would have affirmed the Third Circuit's judgment.[130]

## IV. ANALYSIS OF THE CASE

### *A. The Sherman Antitrust Act*

Section 1 of the Sherman Antitrust Act[131] declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations . . . ."[132] First substantively enforced during the Progressive Era,[133] the Sherman Act "rests on the premise

127. *Matsushita*, 475 U.S. at 605. The dissent found no fault with the reasoning of the Third Circuit Court of Appeals which held that "a factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market." *In re Japanese Elec. Prods.*, 723 F.2d at 311.

128. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 595 (1986). Justice White wrote that the majority faulted the court of appeals for not being "sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy." *Id.* at 605.

129. *Matsushita*, 475 U.S. at 606.

130. *Id.* at 607.

131. 15 U.S.C. § 1 (1982).

132. *Id.*

133. The Progressive Era represented a period of United States history characterized by a "crusading spirit" against unethical practices by domestic corporations. During this period, the Clayton Act, 15 U.S.C. §§ 12, 15, 16, 18, 21, 26, 27, 18 U.S.C. §§ 401, 402, 660, 29 U.S.C. § 52 (1982) (prohibiting mergers, tying agreements, inter-locking corporate directorates and

that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress while . . . providing an environment conducive to the preservation of our democratic political and social institutions."[134]

The courts, however, have not always applied the literal language of the statute. Instead, the courts began to analyze the effects of the alleged illegal conduct. Consequently, in addition to the approach, the courts developed the rule of reason approach to evaluate alleged violations of the Sherman Antitrust Act.

### 1. The Per Se Rule Approach

Two methods of analysis are used by the courts to evaluate conduct alleged to unreasonably restrain trade. Early Supreme Court antitrust cases applied the literal language of the Sherman Act. Per se[135] violations of section one, were presumed to inhibit competition regardless of the degree of unreasonableness. Consequently, such violations did not require an evaluation of their actual anti-competitive effect and were considered per se illegal. For example, in *United States v. Trans-Missouri Freight Association*,[136] the Supreme Court concluded that all restraints of trade were illegal, regardless of whether they were reasonable or not.[137]

This approach was reemphasized in *United States v. Trenton Potteries Co.*[138] In *Trenton Potteries*, the Court stated that cartel agree-

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exclusive dealings), the Elkins Act, 49 U.S.C. §§ 41-43, 11703, 11902, 11903, 11915, 11916 (1982) (further regulating the railroads), the Pure Food and Drug Act, 21 U.S.C. §§ 301-92 (1982) (creating the Food and Drug Administration), the Underwood Tariff Act, 18 U.S.C. § 1905, 19 U.S.C. §§ 124, 128, 130, 131, 46 U.S.C. § 146 (1982) (reducing import tariffs), and the Federal Reserve Act, 38 Stat. 251 (codified as amended in scattered sections of 12 U.S.C.) (1982) (establishing the Federal Reserve banking system) were signed into law.

134. Northern Pac. R.R. v. United States, 356 U.S. 1, 4 (1958). One commentator writes:

> [a]ntitrust in the United States rests on two premises. The first is the English common law as it evolved through court decisions over a long period of time. In general these decisions held that restraint on trade or commerce are not in the public interest . . . . The second premise is the belief that competition is an effective regulator of most markets and, with a few exceptions, that monopolistic practices can be stopped by competition.

M. SCHNITZER, CONTEMPORARY GOVERNMENT AND BUSINESS RELATIONS 133 (2d ed. 1983).

135. The term "per se" was first applied in 1940, in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

136. 166 U.S. 290 (1897). *Trans-Missouri* was the first section 1 case to reach the Supreme Court.

137. *Id.* at 312, 341.

138. 273 U.S. 392 (1927).

ment which fixed prices and limited sales, was per se invalid, and did not require a detailed inquiry as to whether a particular price is reasonable or unreasonable.[139] This approach was narrowed in other cases which applied the Sherman Act only to direct agreements restraining trade.[140] The clear definition of the per se approach not only provides companies with predictable consequences for conduct restraining trade, but may also invalidate activity resulting in no harm or actually benefitting competition.[141] Consequently, the Supreme Court began to evaluate alleged anti-competitive conduct by examining its impact.

### 2. The Rule of Reason Approach

Economic efficiency was first considered to determine an alleged antitrust violation and restraint of trade in *United States v. Joint Traffic Association*.[142] The Court, however, did not adopt the standard in its analysis. The rule of reason approach was first applied by Chief Justice White in *Standard Oil Co. v. United States*.[143] Standard Oil, by purchasing competitors through stock acquisitions, had acquired control almost ninety percent of the production and transportation of petroleum in the United States.[144] Standard Oil's market control, based on stock ownership, however, did not rely on agreements which directly inhibited competition. This forced the Supreme Court to reexamine the per se analysis. The Court applied a test of reasonableness, based upon the purpose of the arrangement, the monopoly power of the defendant, and the impact on the marketplace.[145] Thus, the Court accepted the lower court's holding that Standard Oil's purpose was to obtain monopoly power and therefore was an unreasonable restraint of trade.[146]

In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[147] the Supreme Court adopted a case-by-case balancing test. *Continental T.V.* man-

139. *Id.* at 397.

140. *See, e.g.*, Hopkins v. United States, 171 U.S. 578 (1898).

141. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (Supreme Court found that a geographically restrictive franchise agreement actually benefited competition).

142. 171 U.S. 505 (1898).

143. 221 U.S. 1 (1911).

144. Standard Oil v. United States, 221 U.S. 1, 31-43 (1911). This indirect method of gaining market share control, here through stock acquisitions became known as a "trust."

145. *Id.* at 66.

146. *Id.* at 74.

147. 433 U.S. 36 (1977).

dated that the courts must balance, in each case, the agreement's competitive benefits against the burdens placed on competition.[148] Therefore, the modern rule of reason approach primarily analyzes the conduct to determine its effect on economic efficiency and competition in the marketplace.[149] Consequently, an agreement to restrain trade does not violate the Sherman Antitrust Act if the overall result consists of increased economic efficiency and competition.[150]

As the rule of reason standard developed, section 2 of the Sherman Antitrust Act prohibited a party from possessing monopoly power in the relevant market, and having no other "legitimate" business objective to support the allegedly illegal pricing policy.[151] For example, producing a superior product, normal business growth, or historical accident may constitute legitimate business objectives. Thus, while section 1 of the Sherman Act focuses on anti-competitive business transactions and agreements, section 2 focuses on misuse of monopoly power. Consequently, the court logically focuses on whether the defendant possessed the requisite monopoly power, since a company lacking sufficient monopoly power cannot impose its will upon the marketplace.

### 3. Monopolistic Market Share Power

Although traditional economic analysis defines market power as the ability to conduct business without regard to competitive conditions, antitrust laws apply a much narrower standard.[152] The "structural approach" is the most widely accepted method used by the courts to determine whether a defendant possesses sufficient market

148. P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1503a (1986).

149. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979). In *Broadcast Music* the Court, quoted: " '[t]he Sherman Act has always been discriminately applied in light of economic realities' " and upheld the defendants' licensing arrangement designed to lower costs and increase efficiency. *Id.* at 14 (quoting Memorandum for United States as Amicus Curiae on Pet. for Cert. in K-19, Inc. v. Gershwin Publishing Corp., 389 U.S. 805, *cert. denied*, 389 U.S. 1045 (1967)).

150. For example, a territorial restriction in a franchise agreement may increase economic efficiency and competition by minimizing injurious "excess" competition. Without such restrictions, after fierce competition in the marketplace subsides, fewer retailers may survive, thereby reducing competition. Consequently, a reasonable territorial restriction may preserve competition by promoting economic efficiency by ensuring a number of retailers in a geographical area.

151. *See* American Tobacco Co. v. United States, 328 U.S. 781 (1946). The Court in *American Tobacco* upheld the judgment against separate tobacco companies which conspired to acquire and maintain collective monopoly power. *Id.* at 809.

152. *See* P. AREEDA & D. TURNER, *supra* note 148, ¶ 507.

power to be considered monopolistic.[153] Monopoly power exists if a defendant, or combination of defendants, possesses "the power to control prices or exclude competition."[154] "The material consideration in determining whether a monopoly exists is not that prices have been raised or that competition actually is excluded, but that power exists to raise prices or exclude competition when it is desired to do so."[155]

Consequently, to obtain monopoly power the defendant or defendants usually control a very high proportionate share of the relevant market. "The existence of such power ordinarily may be inferred from [possessing] the predominant share of the market."[156] However, courts are reluctant to arbitrarily declare that a certain percentage of market share constitutes monopoly power.[157] Thus, the courts rarely find monopoly power absent control by the defendants of a dramatically high proportionate market share.

### 4. Allegations of Conspiracy

Plaintiffs alleging a conspiracy to restrain trade between multiple defendants face difficult evidentiary problems because co-conspirators rarely provide direct evidence of an agreement to restrain trade.[158] For example, business records of a single entity seldomly provide direct evidence of a conspiracy. Consequently, most evidence provided to prove a conspiracy is circumstantial. This circumstantial evidence, although marginally relevant, "may nevertheless be taken into account along with such direct evidence . . ."[159] to prove that concerted action between the defendants occurred.[160]

The plaintiffs' evidence must also exclude the possibility that the defendants acted with "conscious parallelism."[161] For example, many

153. *See id.* Market shares are initially calculated by comparing the number of companies within the relevant market against their respective sales. Monopoly power is inferred by possessing a threshold of market power. *Id.* ¶¶ 529-35.

154. United States v. Du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

155. *American Tobacco*, 328 U.S. at 811.

156. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

157. For example, possessing " 'over two-thirds of the entire domestic field of cigarettes, and . . . over 80% of the field of comparable cigarettes' constituted a 'substantial monopoly.' " *Id.* at 571 (citing American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946)).

In *Grinnell*, the companies held eighty-seven percent of the accredited central stations service business, and the Supreme Court found "no doubt . . . these defendants have monopoly power . . . ." *Id.*

158. *In re* Japanese Elec. Prods., 723 F.2d 238, 304 (3d Cir. 1983).

159. *Id.* at 305.

160. *Id.*

161. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

corporations in the same industry follow similar marketing, production, and distribution methods which are not themselves illegal. Thus, the plaintiffs must prove that the defendants acted in concert, and not independently.

Moreover, the evidence must present an economically plausible theory. The plaintiffs allegations of a conspiracy must be consistent with conveying some economic benefit, even in the future, upon the defendant-conspirators. For example, a plaintiff, in alleging that an agreement which would produce only losses for the conspirators violates United States antitrust laws, must explain the ultimate advantage that the defendants would obtain after completing their objective. Thus, if the plaintiffs' claim lacks economic sense, the evidence must provide more persuasive evidence than usually necessary to prove that a conspiracy existed.[162]

### 5. Application to the *Matsushita* Decision

The Supreme Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* did not apply the per se rule. If the Court had applied the per se rule, the majority would certainly have upheld the judgment of the court of appeals, based upon the lower court's finding of agreements which attempted to restrain trade.[163] Agreements, such as those entered into by the defendants here, have been invalidated by the Court without examining their actual economic and competitive effects. The Supreme Court, however, did examine the effects of the alleged anti-competitive agreements and thus followed the rule of reason approach.[164]

By analyzing the effect of the defendants' conduct, the Court avoided invalidating agreements commissioned, in part, by the government of Japan. The flexibility of this approach allows agreements benefiting competition to be upheld, without impairing United States foreign relations.

The majority emphasized that the plaintiffs did not suffer any cognizable antitrust harm. Justice Powell explained that, although the check price agreements and the five-company rule may have harmed competition, Zenith and NUE actually benefited from the re-

162. *See* First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 277-80 (1968).

163. Examples are: the five-company rule which limited wholesale distribution in the United States and the check price agreements which placed a bottom on prices in the United States.

164. *See supra* notes 77-82 and accompanying text.

sulting higher prices.[165] Therefore, the Court correctly concluded that the plaintiffs were not injured by the alleged illegal conduct.

The majority, however, dismisses too quickly the possibility that the overall effect of higher prices in Japan and lower prices in the United States harmed competition.[166] The Court refused to draw inferences from the empirical studies and agreements placed in evidence.[167] The majority believed that the agreements which raised prices in Japan were outside the reach of United States antitrust laws.[168] Thus, any harm resulting to Zenith and NUE originated, in Japan.

The Sherman Antitrust Act has long been applied to conduct occurring in foreign countries having a foreseeable effect on United States commerce. The Supreme Court, however, did not fully address the extraterritorial application of the Sherman Act. If the agreements in Japan fell under the extraterritorial application of United States antitrust laws, Zenith's and NUE's claims would have been much more substantial.

The majority believed that plaintiffs Zenith and NUE failed to provide a plausible explanation for the defendants' conduct. Thus, the Court found that the defendants could not have engaged in a predatory pricing conspiracy. Moreover, without a compelling motive to conspire, no genuine issue of fact existed for trial, entitling the defendants to summary judgment.

Raising prices and limiting distribution, obviously, is not a logical method to obtain customers. Predatory pricing does not result in higher prices.[169] Instead, such conduct usually results in lowered

165. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596 (1986). The Supreme Court held that the plaintiffs could not "recover damages for any conspiracy by [the defendants] to charge higher than competitive prices in the American market." *Id.* at 582-83.

166. It must be remembered that the appeal is reviewing a summary judgment ruling. In a motion for summary judgment, "evidence must be construed in the light most favorable to the party opposing [here the plaintiffs] summary judgment." *Id.* at 601. *See also* First Nat'l Bank of Ariz. v. Cities Serv., 391 U.S. 253 (1968); and Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

167. The Supreme Court did not review the evidentiary rulings of the court of appeals, which admitted much of the evidence ruled inadmissible by the district court. The Court, however, does not mention which evidentiary record it reviews: the greatly enlarged court of appeals record or the much smaller district court record.

168. The application of United States antitrust laws is discussed later in this Note; *see infra* text accompanying notes 185-283.

169. "Unless acting irrationally or out of ignorance, the firm is likely to be charging the lower price in order to preserve or enhance its market share by deterring rivals." Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88

prices. Conspiratory pricing, however, may be undertaken to obtain a future gain. For example, if used with predatory pricing, parties to such agreements may limit competition among themselves. The defendants may have intended to minimize predatory pricing among Japanese CEP manufacturers by limiting the distribution of these company's products. Although a motive may be ascertained, proof, of course, is an entirely different issue. Consequently, the Court, considering the possible harm on positive business practices, required that plaintiffs Zenith and NUE provide direct evidence of the conspiracy. Absent such evidence from the plaintiffs, the Supreme Court expressed reluctance to infer an illegal motive and conduct from the circumstantial evidence presented.

It is unclear how persuasive the majority considered the plaintiffs' empirical evidence provided by both academic institutions[170] and economic consulting firms.[171] Dr. DePodwin, in his report, concluded that "the Japanese television manufacturers' export agreement was part of a generally collusive scheme embracing the Japanese domestic market as well."[172] The report also summarized the harm to United States television manufacturers, such as Zenith and NUE, resulting from the collusive behavior, as "very severe."[173]

Academic and consultants' reports cannot create evidence of illegal conduct. However, the reports tend to corroborate the plaintiffs' evidence of the agreements to restrain trade and predatorily price, and the defendants' motive to engage in such conduct. Justice White, writing for the dissent, found Zenith and NUE's evidence important in formulating his opinion. The dissent found that "[t]he DePodwin Report alone create[d] a genuine issue regarding the harm caused to [Zenith and NUE] by Japanese cartelization and by agreements restricting competition among [defendants] in this country."[174]

Although non-price restraints,[175] such as the five-company rule,

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HARV. L. REV. 697, 704 (1975); *see also* McGee, *Predatory Pricing Revisited*, 23 J. LAW. & ECON. 289, 295-97 (1980).

170. *See In re* Japanese Elec. Prods., 723 F.2d 238, 279-84 (3d Cir. 1983); *see also infra* text accompanying notes 174-75.

171. *In re Japanese Elec. Prods.*, 723 F.2d at 279-84.

172. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 602 n.2 (1986) (quoting 5 App. to Brief for Appellants at 1629a-30a).

173. *Id.*

174. *Matsushita*, 475 U.S. at 603 (White, J., dissenting).

175. Dr. DePodwin notes that such restraints are diametrically opposed to a basic understanding of competition, that companies act independently. *Id.* at 602-03 n.3 (quoting Brief for Appellants at 1628a-29a).

may have restricted competition, the Court did not examine their total effect on competition. The five-company rule assured that each manufacturer had reasonably fixed customers despite the pricing structure.[176] Predatory pricing becomes less risky if a manufacturer possesses a stable distribution base and also does not fear erosion of the distribution base from competitors agreeing to restrict their own distribution. The tremendous growth allowed the Japanese consumer electronics producers to invest in new plants and equipment and expand their production capacity.[177] The additional capacity enabled the Japanese television industry to lower production costs and provide more products thus enabling them to capture more of the United States market "than they would have had they competed lawfully."[178]

The collective market share of the CEP producers may have been insufficient to constitute monopoly power,[179] even assuming the conspiracy existed and was effective. Although the courts refuse to arbitrarily declare that control of a certain percentage of market share is monopolistic, the defendants probably did not control a sufficient market share.[180] Standard Oil, for example, controlled ninety percent of the United States petroleum market.[181] In the instant case, however, the defendants' collective market share had risen to about fifty percent. Thus, although the defendants possessed a substantial market share, at the time of trial the remaining competitors still controlled the remaining half of the CEP market. The defendants probably lacked "the power to control prices or exclude competition."[182] Thus, the collective Japanese manufactures market share was insufficient to be monopolistic.[183]

In summary, the majority's approach, although not clear in its analysis, was correct in its decision. Zenith and NUE presented insuf-

176. *Id.*

177. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 602-03 n.3.

178. *Id.*

179. Even in 1985, *total* CEP imports comprised sixty-three percent of the United States market. *See supra* note 2. *Cf.* Standard Oil v. United States, 221 U.S. 1, 33 (1927). In *Standard Oil*, the combination had "obtained a complete mastery over the oil industry, controlling 90 percent of the business . . . and thus was able to . . . restrain and monopolize all interstate commerce in those products." *Id.*

180. *See supra* note 179.

181. *See supra* notes 144-47 and accompanying text.

182. United States v. Du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). *See generally* Areeda & Turner, *supra* note 169.

183. The Japanese defendants' share of the CEP market was at its high during the complained of period, from the late 1950's to the late 1970's. The collective market share was almost fifty percent. The Wall St. J., *supra* note 2, at 16, cols. 2-3.

ficient direct evidence to negate the possibility that the defendants acted with conscious parallelism. Additionally, the defendants controlled insufficient collective market share to be considered monopoly power.

The Supreme Court's opinion, however, failed to address numerous important issues under the Sherman Antitrust Act. The Court did not fully discuss the proper standard for asserting extraterritorial[184] subject matter jurisdiction and the breadth of the sovereign compulsion defense.

### *B. Establishing Jurisdiction: Extraterritorial Application of United States Antitrust Laws*

#### 1. Background

The United States Supreme Court described the Sherman Antitrust Act "as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[185] However, the United States' "economic bill of rights," at times, is diametrically opposed to our country's interests in foreign policy and relations. Problems arise, for example, when United States laws attempt to reach economic activities and conduct occurring in another country.[186] Additionally, because no accepted standard exists for evaluating whether foreign conduct is subject to the Sherman Antitrust Act, foreign nations and corporations are unable to adequately predict future legal consequences of their activities in United States courts. Consequently, foreign sovereigns have "resented and protested, as excessive intrusions into their own sphere, broad assertions of authority by American courts."[187]

#### 2. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*

Federal antitrust laws are limited by Congressional power to regulate interstate commerce. The Constitution provides that "Congress

184. Extraterritoriality, as used in this Note, is a nation's right to control and regulate activities within its border and conduct occurring outside the country that cause harm within its borders.

185. United States v. Topco Assoc., 405 U.S. 596, 610 (1972). The economic objective of the Sherman Act is to "maximize consumer economic welfare through efficiency in the use and allocation of scarce resources . . . ." P. AREEDA & D. TURNER, *supra* note 148, ¶ 103.

186. Dam, *Economic and Political Aspects of Extraterritoriality*, 19 INT'L LAW. 887, 889 (1985).

187. Timberlane Lumber Co. v. Bank of Amer., 549 F.2d 597, 609 (9th Cir. 1976).

shall have the power "[t]o regulate Commerce with foreign Nations . . . ."[188] The Sherman Antitrust Act, however, does not fully exercise this seemingly broad power over foreign trade granted pursuant to the commerce clause.[189] "[T]he tenets of international law which limit legislative jurisdiction, the inability of courts to obtain personal jurisdiction, and the doctrine of comity have tempered the expansive reach of the Sherman Act over foreign commerce."[190] Consequently, the courts have extended jurisdiction in antitrust matters if the questioned conduct had an impact upon United States commerce.[191]

"Few aspects of the Sherman Act have generated as much controversy over such an extended period as its application to 'trade commerce . . . with foreign nations.' "[192] The judicial power asserted by United States courts over activity in other nations, however, may intrude upon the sovereignty of the affected country. Private litigants, as in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* "may implicate foreign policy concerns without evaluating considerations of comity that are necessarily undertaken prior to the initiation of legal proceedings by the government."[193]

The *Matsushita* Court briefly addressed the jurisdiction of United States antitrust laws. Justice Powell began by stating that absent the requisite "effect" in the United States marketplace, the plaintiffs' allegations were not cognizable "because American antitrust laws do not regulate the competitive conditions of other nations' economies."[194]

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188. U.S. CONST. art. I, § 8, cl. 3.

189. *See* E. KINTNER, FEDERAL ANTITRUST LAW § 5.4 (1980).

190. *Id.*

191. *Id.* For example, the Sherman Act applies to anticompetitive agreements between domestic and foreign firms, foreign companies selling in the United States market, joint corporations between foreign and domestics companies, or foreign subsidiaries of United States companies. Under section seven of the Sherman Act, the antitrust laws apply to foreign commerce if:

> (1) such conduct has a direct, substantial, and reasonably foreseeable effect
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, or a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of this Act . . . .

Export Trading Company Act, Pub. L. No. 97-2920, 96 Stat. 1246 (1982) (current version at 15 U.S.C. § 7 (Supp. I 1986)).

192. E. KINTNER, *supra* note 189, § 7.1. The application of the Sherman Act to foreign commerce has "been the catalyst for diplomatic protests, international disputes, and retaliatory legislation by foreign governments." *Id.*

193. Dunfee & Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for An Interim Solution*, 45 OHIO ST. L.J. 883, 893 (1984).

194. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986).

The Court clarifies this seemingly contradictory statement by stating that "the Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."[195] Thus, "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."[196]

### 3. The *Alcoa* "Effects" Test

The Supreme Court in *Matsushita* relied upon the much criticized[197] rationale of *United States v. Aluminum Co. of America* (*Alcoa*).[198] In *Alcoa*, the United States filed suit under the Sherman Act for judicial dissolution of a corporate monopoly, and alleged illegal restraints of trade in both interstate and foreign commerce.[199] The Canadian subsidiary of Alcoa, Limited, allegedly participated in a cartel (Alliance) with aluminum producers from Great Britain, France and Switzerland.[200] The Alliance cartel allegedly conspired to allocate production and restrict importation into the United States.[201]

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195. *Id.* at 582 & n.6.

196. *Id.* (quoting Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)).

197. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976). In *Timberlane*, Judge Choy asserted that the "effects test by itself is incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country." *Id.* at 611-12. The *Timberlane* court cited numerous commentators who concluded that the courts have not sufficiently considered the interests of other nations: Katzenbach, *Conflicts on an Unruly Horse*, 65 YALE L.J. 1087, 1150 (1956); A. NEALE, THE ANTITRUST LAWS OF THE USA 362-72 (2d ed. 1970); Fortenberry, *Jurisdiction over Extraterritorial Antitrust Violations*, 32 OHIO ST. L.J. 519, 521, 534-36 (1971). *Timberlane*, 549 F.2d at 611,612 n.3. *See also* Industrial Inv. Dev. Corp. v. Mitsui & Co., 704 F.2d 788 (5th Cir. 1983), *cert. denied*, 464 U.S. 961 (1983); Laker Airways Ltd. v. Sabena, 731 F.2d 909 (D.C. Cir. 1984).

Other nations, the United Kingdom in particular, "have questioned various applications of U.S. law as 'exorbitant.' . . . In particular, some states have questioned the lawfulness of applying the 'effects doctrine,' . . . to economics effects." RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403, Reporters' Note 1 (Tent. Draft No. 7, 1986).

198. 148 F.2d 416 (2d Cir. 1945).

The Court of Appeals for the Second Circuit acted under certification from the Supreme Court because the Court was unable to formulate a quorum of six qualified justices to hear the case. Consequently, the case was referred back to the Second Circuit Court of Appeals for rehearing. *See* 28 U.S.C. § 2109 (1982). Thus, the appellate court's decision here in *Alcoa* was final.

199. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 420-21 (2d Cir. 1945).

200. *Id.* at 442-44.

201. *Id.*

Judge Learned Hand concluded that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[202] The appellate court construed the Sherman Act to apply to extraterritorial acts which were both intended[203] *and* had an effect in United States territory.[204] "The prevailing interpretation of this 'effects test' is that the impact of foreign conduct on U.S. commerce must be direct, substantial, and reasonably foreseeable."[205]

The territorial approach under *Alcoa* is criticized as inflexible and unduly broad. Consequently, problems arose under the "intended effects" test, because it failed to consider external political and economic factors of asserting jurisdiction of United States antitrust law upon foreign nations. Moreover, the objective territorial principle of *Alcoa*, "especially in cases involving conduct which is not considered criminal in many nations, are too remote and too difficult to establish to provide an appropriate basis for jurisdiction."[206] Subsequent changes in *Alcoa*'s approach by later courts were confined to the standard's overall framework.[207]

The inflexibility of this approach, however, has "resulted in an escalation of legal confrontations between the U.S. and foreign nations."[208] International conflicts have usually occurred in three scenarios:

> (1) [a]pplying U.S. antitrust laws to competition from a foreign state controlled or subsidized companies;

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202. *Id.* at 443 (citing Strassheim v. Daily, 221 U.S. 280, 284-85 (1910)).

203. Intent to affect United States commerce may be inferred from surrounding circumstances. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 243 (1899); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1189 n.65 (E.D. Pa. 1980) ("It is plain that the intent required is general, not specific.").

204. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 444 (2d Cir. 1945). Judge Hand found that "[i]t is settled law . . . that any state may impose liabilities . . . for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *Id.* at 443.

205. Dunfee & Friedman, *supra* note 193, at 886.

206. E. KINTNER, *supra* note 189, § 7.9. Supporters of the *Alcoa* decision point out that no mechanism exists for international enforcement against anti-competitive behavior occurring in more than one country. Additionally, they contend that, subsequent to *Alcoa*, "foreign firms have been on notice that anti-competitive conduct which intentionally affects United States commerce is subject to United States assertions of jurisdiction." *Id.*

207. Comment, *The Expanding Extraterritorial Jurisdiction of the Sherman Antitrust Act: Intent and Effects in the Balance?*, 6 LOY. L.A. INT'L & COMP. L.J. 463, 470 (1983).

208. Dunfee & Friedman, *supra* note 193, at 883.

(2) [a]pplying U.S. antitrust laws to apparently private cartel arrangements for natural resources or other economic policies fundamental to American trading partners; and
(3) [i]ntrusive discovery orders to produce foreign confidential data by U.S. courts.[209]

These conflicts arose in *In re Uranium Litigation*.[210] Plaintiff Westinghouse filed suit against twenty-nine foreign and domestic companies which formed a cartel in response to United States legislation which prevented the importation of uranium.[211] In response, Australia, England, South Africa, and Canada passed legislation which prohibited compliance with the plaintiff's discovery requests, which they believed infringed upon their national sovereignty.[212] The four nations filed amicus briefs which claimed the United States lacked subject matter jurisdiction.[213] Default judgment, then, was entered against the foreign defendants who refused to appear.[214] Although the parties ultimately settled their dispute, the four nations maintained their respective protective legislation.[215]

The Supreme Court, thus, left subsequent refinement of Judge Hand's extraterritorial approach to the lower federal courts.[216] Subsequent case law did not challenge *Alcoa*'s basic approach.[217] Thirty-five years after *Alcoa*, the perceived deficiencies in the intended effects standard produced a more complex approach to asserting antitrust jurisdiction.

### 4. The *Timberlane* Jurisdictional Rule of Reason Standard

During the past decade, the federal circuit courts began to adopt the test enunciated by the Ninth Circuit Court of Appeals in

209. *Commission on the International Application of the U.S. Antitrust Laws Act: Hearings on S. 432 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 271 (1981).

210. 480 F. Supp. 1138 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980); *see also* Note, *The Effects Test vs. Act of State Considerations: A Comparison of the OPEC and Westinghouse Decisions*, 53 COLO. L. REV. 677 (1982).

211. *In re* Uranium Litigation, 617 F.2d 1248, 1254 (7th Cir. 1980).

212. *Id.*

213. *Id.* at 1253.

214. *Id.* at 1250.

215. Dunfee & Friedman, *supra* note 193, at 889.

216. Comment, *The Expanding Extraterritorial Jurisdiction*, *supra* note 207, at 470 (citing 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 151 (2d ed. 1981)).

217. *Id.*

*Timberlane Lumber Co. v. Bank of America.*[218] In *Timberlane*, the plaintiffs alleged that bank officials residing in both the United States and Honduras conspired to prevent Timberlane from milling lumber and exporting it to the United States.[219] A Honduran judicial lien was placed upon the property of a Honduran lumber company by a local subsidiary of the United States bank.[220] The debtor violated the court order by selling some of its assets to Timberlane.[221] Timberlane alleged a conspiracy to prevent the company from entering the Honduran lumber market to compete with other companies—also customers of the bank.[222] The plaintiffs claimed the aggrieved conduct affected United States' imports and consequently foreign commerce of the United States.[223]

The Ninth Circuit adopted a "jurisdictional rule of reason,"[224] believing that "[t]he effects test by itself is incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country."[225] Consequently, Judge Choy sought to interject comity into the extraterritoriality analysis.

The court of appeals asserted jurisdiction after applying a tripartite standard:

> [First,] [d]oes the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? [Second,] [i]s it of such type and magnitude so as to be cognizable as a violation of the Sherman Act? [Third,] [a]s a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?[226]

Consequently, jurisdiction under the Sherman Antitrust Act is established if some effect, actual or intended, occurred in the United States market.[227] Jurisdiction, however, under *Timberlane* did not re-

218. 549 F.2d 597 (9th Cir. 1976), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984).

219. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 601 (9th Cir. 1976).

220. *Id.* The plaintiffs alleged, inter alia, that the Honduran judge issued the lien after accepting a bribe. *Id.*

221. *Id.*

222. *Id.*

223. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 601 (9th Cir. 1976).

224. The jurisdictional rule of reason approach is also known as "discretionary jurisdiction." P. AREEDA & H. HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 237 (Supp. 1986).

225. *Timberlane*, 549 F.2d at 611-12.

226. *Id.* at 615.

227. P. AREEDA & H. HOVENKAMP, *supra* note 224, ¶ 237.

quire an allegation or appearance of "direct or substantial effects."[228] Additionally, the Sherman Act must address and provide a cognizable remedy against the allegedly illegal restraint of trade.[229] This section of the analysis is a corollary to the normal proof required to prove an antitrust violation under the per se approach or the rule of reason.[230] Third, and most importantly, whether "international comity and fairness counseled against exerting jurisdiction over extra-territorial conduct."[231] Here, the court will balance any potential foreign policy or law conflict against the interests of the United States in asserting extraterritorial jurisdiction, after evaluating:

> (1) the degree of conflict with foreign law of policy, (2) the nationality or allegiance of the parties and their principal places of business, (3) the extent to which either state can expect compliance, (4) the relative effects upon the several countries involved, (5) an explicit purpose to harm or affect United States commerce and the foreseeability of such an effect, and (6) the relative importance of the conduct inside the United States.[232]

The *Timberlane* approach grants a trial court much more discretion compared to the intended effects standard of *Alcoa*. As a result, the court may refuse to assert jurisdiction after balancing the effect on United States foreign commerce against considerations of policy and comity, despite the apparent existence of anti-competitive restraints. Additionally, this flexibility helps to preserve the integrity of United States antitrust laws. For example, the court may decline to assert jurisdiction over a defendant sued by a private litigant because the plaintiff's suit implicates United States foreign relations, or the court lacks the ability to enforce its judgment against the defendant. Additionally, conduct which violates United States antitrust laws may not violate the domestic laws of the foreign corporation.

a. comity

The *Timberlane* jurisdictional rule of reason seeks to protect comity in the international marketplace. Comity requires that the United States courts give equal weight to sovereign authority which is given to similar domestic authority.[233] Moreover, comity must pro-

228. In other words, the *Alcoa* test.
229. Timberlane Lumber Co. v. Bank of Am., 749 F.2d 1378, 1383 (9th Cir. 1984).
230. *Id.*
231. *Id.*
232. *Id.* at 1384-85.
233. *See* Laker Airways, Ltd. v. Sabena, 731 F.2d 909, 937 (D.C. Cir. 1984). Many West-

tect the national interest, because unlike products which freely move between international boundaries, sovereignty ends at a country's borders.[234]

Under the Restatement approach, comity does not require reciprocity from the affected foreign nation.[235] The jurisdiction to prescribe laws "does not depend on any finding that another state would exercise its jurisdiction to the same extent, though some elements of reciprocity may be relevant . . . ."[236] Additionally, "[t]he doctrine of comity provides that on the basis of politeness, convenience, and goodwill, states will refrain from fully exercising their power in order to reach an internationally acceptable accommodation."[237] Thus, countries must rely on each other to assist enforcement of its policies and laws outside its own territory. "Although comity is not a legal defense, it may be employed as a basis for a request that enforcement officials refrain from exercising their power to it fullest extent in order to preserve friendly diplomatic relations."[238]

### b. acceptance in the legal community

#### i. the federal circuits

The *Timberlane* decision inspired an attempt to create a uniform standard which required courts to evaluate and balance numerous factors before asserting jurisdiction. In addition to the Ninth Circuit, four other federal circuits have adopted similar approaches, including the Second,[239] Third,[240] Fifth,[241] and Tenth[242] Circuits. The ap-

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ern nations have antitrust laws based on similar principles as the United States. *See infra* note 281 and accompanying text.

234. For example, the United States Department of Justice consults with other agencies prior to prosecuting antitrust cases affecting foreign relations. *See infra* text accompanying note 252; *see also infra* note 266.

235. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW, supra note 197, comment a.

236. *Id.*

237. E. KINTNER, *supra* note 189, § 7.9 n.153. *See generally* Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 1 (1966).

238. E. KINTNER, *supra* note 189, § 7.9.

239. *See, e.g.*, Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680 (S.D.N.Y. 1979); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100 (E.D. Pa. 1981).

240. *See, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

241. *See, e.g.*, Industrial Inv. Dev. Corp. v. Mitsui & Co., 704 F.2d 785 (5th Cir. 1982), *cert. denied*, 464 U.S. 961 (1983).

242. *See, e.g.*, Montreal Trading v. Amax, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).

proaches of the five federal circuits similarly require a complex and multilevel comity analysis prior to asserting extraterritorial jurisdiction.

For example, the Third Circuit adopted this approach in *Mannington Mills, Inc. v. Congoleum Corp.*[243] In *Mannington*, the court of appeals indicated "a preference for retaining [the] *Alcoa* standards for the threshold effects determination."[244] Consequently, the court applied an expanded set of factors in its jurisdictional analysis, evaluating the availability of a remedy in another country, the possibility a defendant may be subject to conflicting legal obligations and whether a treaty with the affected country addresses the issue.[245]

### ii. the United States Department of Justice

The jurisdictional rule of reason analysis has also been substantially adopted by the United States Department of Justice.[246] In *Matsushita*, the Reagan Administration submitted an amicus curiae brief.[247] The Justice Department, relying on *Alcoa* and *Timberlane*, asserted that "the Sherman Act can reach . . . anti-competitive re-

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243. 595 F.2d 1287 (3d Cir. 1979).

244. Comment, *Expanding Extraterritorial Jurisdiction*, *supra* note 207, at 474 (citing Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979)).

245. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979). The set of factors balanced by the Third Circuit in *Mannington* were the:

(1) Degree of conflict with foreign law or policy;
(2) Nationality of the parties;
(3) Relative importance of the alleged violation of conduct here compared to abroad;
(4) Availability of a remedy abroad and pendency of litigation there;
(5) Existence of intent to harm or to affect American commerce and its foreseeability;
(6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
(7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
(8) Whether the court can make its order effective;
(9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; [and]
(10) Whether a treaty with the affected nations has addressed the issue.

*Id.* at 1297-98.

246. *See, e.g.*, DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6-7 (rev. 1977) (cited in Dunfee & Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883, 886 n.21 (1984)).

247. It should be noted that most of the Department of Justice's brief addressed the issues of the sovereign compulsion defense and the standard for summary judgment for conspiracies alleged under the Sherman Act.

straints that occur wholly overseas but have a direct, substantial and reasonably foreseeable effect on American commerce."[248] Throughout the brief, the Solicitor General asserted the potential foreign policy implications[249] of inflexibly applying the Sherman Act.[250]

Additionally, the Justice Department adopts a *Timberlane*-like approach prior to filing suit against foreign defendants. "In recent years the Department of Justice has shown a keen awareness of the reactions of other governments to U.S. antitrust enforcement . . . and has stressed the factors of comity and foreign relations."[251] Prior to filing and prosecuting antitrust cases which may potentially affect relations with foreign governments, the Justice Department also consults with the Departments of State and Defense, and other agencies.[252]

### iii. the restatement of foreign relations law of the United States

The American Law Institute's Restatement (Revised) of the Foreign Relations Law of the United States also substantially adopts the *Timberlane* approach. The Restatement requires a court to initially consider relevant factors to determine if the exercise of jurisdiction is unreasonable.[253] The enumerated list of factors, however, is not

248. Brief for the United States as Amicus Curiae Supporting Petitioners at 18, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 83-2004) [hereinafter Brief for the United States].

249. *See, e.g., supra* text accompanying notes 233-38.

250. For example, the Justice Department contends that "an unlimited application of the antitrust laws in the international context would have far-reaching and potentially destructive results." *Id.* at 19.

251. II W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 15.1 (1982).

252. *Id.* § 15.7 (citing Vol. I, Commission's Rep. to the President; Vol. II Special Studies (1979)).

253. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW, *supra* note 197, § 403. The Restatement draft provides:

> (1) a state may not exercise jurisdiction to prescribe law with respect to the activities, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.
>
> (2) Whether the exercise of jurisdiction is reasonable or unreasonable is judged by evaluating all the relevant factors, including, where appropriate,
>
> (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
>
> (b) the connections . . . between the regulating state and the persons principally responsible . . . or between that state and those whom the law or regulation is designed to protect;
>
> (c) the character of the activity . . . the importance of regulation to the regulat-

exhaustive.[254]

The Restatement proposal recognizes the need for comity in applying United States laws to conduct occurring abroad. Comity, under the Restatement, however, "does not depend on any finding that another state would exercise its jurisdiction to the same extent. . . ."[255] A court following Section 403 should decline to assert jurisdiction if after evaluating the "activities, relations, status, or interests . . ." of the United States and other affected nations, the court believes that exercising jurisdiction is unreasonable.[256] "[T]he principle of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states."[257]

### 5. Structural Problems in Exercising Antitrust Jurisdiction

Inherent structural limitations in the ability of the federal judiciary to adequately address the issues which arise when a private plaintiff seeks to invoke the extraterritorial jurisdiction of United States antitrust laws. The complexity of the rule of reason standard may strain judicial resources, which are very limited compared to the other branches of government. For example, as in *Matsushita*,[258] comity considerations require the court to evaluate a tremendous amount of evidence in addition to the already burdensome tasks of evaluating complex antitrust issues. Additionally, the trial court must ascertain the veracity of volumes of foreign-originated evidence and legal arguments presented by both counsel and foreign sovereigns.[259] Consequently, the courts are not well-positioned to properly evaluate all

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ing state, . . . and the degree to which the desirability of such regulation is generally accepted;

(d) . . . justified expectations . . . ;

(e) the importance of the regulation in question to the international political, legal or economic system;

(f) the extent . . . consistent with the traditions of the international system;

(g) the extent . . . another state may have an interest in regulating . . . ; and

(h) the likelihood of conflict with regulation by other states.

*Id.*

254. *Id.* § 403 comment b. Additionally, the factors are not listed according to priority nor are all the factors equally important in each situation. *Id.*

255. *Id.* § 403 comment a.

256. *Id.* § 403(1).

257. *Id.* § 403 Reporters' Note 3. If more than one country has a "reasonable basis" for exercising jurisdiction, a state "should defer to the other state if that state's interest is clearly greater." *Id.* § 403(3).

258. *See supra* text accompanying notes 40-42.

259. *See supra* notes 40-42.

relevant legal,[260] economic,[261] and political[262] criteria and determine their impact upon the affected nations and international trade.

Legal issues are, of course, within the expertise of the courts. Economic and political questions, however, provide courts with little or no reference points to begin their analysis, and thus must be analyzed on an a case-by-case basis.[263] Foreign relations require a court to balance the interests of the United States against the affected nation. Trial courts will, in effect, create an ever-changing and inconsistent "foreign policy" based on its interpretation of policy and relations between countries.

Moreover, no structural mechanisms are in place to ensure that judicial and executive foreign policy pronouncements are consistent.[264] Private antitrust litigants, seeking to redress alleged harm, generally do not evaluate economic and foreign policy considerations prior to requesting the court to assert jurisdiction over extraterritorial activities. However, "an unlimited application of the antitrust laws in the international context would have far-reaching and potentially destructive results."[265] Consequently, the United States Department of Justice evaluates such considerations prior to filing suit to avoid political and diplomatic protests by foreign governments.[266]

United States antitrust laws must be asserted extraterritorially under a less complex method of analysis. The standards developed by Restatement and the federal circuits require additional clarification and uniformity. Thus, the executive and legislative branches must address the problem of the extraterritorial application of United States antitrust laws.

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260. The legal factors include: conflict with foreign law, nationality of parties, availability of an alternative procedure abroad, enforceability of remedy, coverage by treaty, conduct within the United States, and purpose to harm United States trade. Dunfee & Friedman, *supra* note 193, at 906.

261. The economic factors include: the effect in the United States and the foreseeability of the effect. *Id.*

262. The political factors include: conflict with foreign policy, the effect of asserting jurisdiction, importance of effect in involved countries, and relative importance of conduct in both nations. *Id.*

263. Economics and political science may present divergent viewpoints which a court must reconcile against the facts of each case. For example, despite similar facts, each court may place different values upon the differing political and economic theories and thus arrive at opposite conclusions.

264. Dunfee & Friedman, *supra* note 193, at 901.

265. Brief for the United States, *supra* note 248, at 19.

266. "A decision to bring suit thus amounts to a determination by the executive branch that the challenged conduct is more harmful to the United States than is any potential injury to our foreign relationships that will follow from the antitrust action." *Id.* at 23.

### 6. Solutions to Exercising Jurisdiction

Every extraterritorial application of laws infringes on the sovereignty of another nation. Antitrust laws review economic, political, and legal policies of the affected country. Consequently, the courts must assert jurisdiction by applying a judicially manageable analysis which also considers foreign policy implications.

#### a. the Foreign Trade Improvement Act

In 1982, Congress attempted to clarify the extraterritorial jurisdiction of the Sherman Antitrust Act. The Foreign Trade Improvements Act of 1982,[267] however, is expressly limited to exports.[268] The Act "indicates that the *direct and substantial effects test*, with the Restatement's *foreseeable* concept added, will continue to be the test for foreign trade activities."[269] Therefore, "restraints on export trade only violate the Sherman Act if they have a direct and substantial effect on commerce within the United States or on a domestic firm competing for foreign trade."[270]

Congress thus set forth a standard to be applied to exports in the Foreign Trade Improvements Act. The direct, substantial and foreseeable effects approach may also establish a standard to be applied to the extraterritorial jurisdiction of United States antitrust laws. Although the test maintains the expectations of litigants, the Act also retains the implementation problems encountered in the direct effects and jurisdictional rule of reason standards. The Act's approach is similarly judicially unmanageable and lacks sufficient precision and

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267. Pub. L. No. 97-290, 97th Cong., 2d Sess., § 402 (codified as amended at 15 U.S.C. § 7 (Supp. I 1986)). The amended Sherman Antitrust Act applies to foreign commerce (excluding import trade or import commerce) if:

> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on trade or import commerce with foreign nations . . . .

*Id.*

The bill "establish[es] that restraints on export trade only violate the Sherman Act if they have a direct and substantial effect on commerce within the United States or on a domestic firm competing for foreign trade." H.R. REP. No. 97-686, 97th Cong., 2d Sess. 7-8 (1982) (comments of Rep. Rodino), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 1076, at 306 (Aug. 5, 1982).

268. The amendment limits its application to "conduct involving trade or commerce *other than* import trade or import commerce with foreign nations . . . ." 5 U.S.C. § 7 (Supp. I 1986) (emphasis added).

269. W. FUGATE, *supra* note 251, § 2.15a (Supp. 1986).

270. H.R. REP. No. 686, 97th Cong., 2d Sess. 7-8 (1982) (statement of Rep. Rodino).

clarity to ensure that invocation of United States antitrust jurisdiction is foreseeable to potential defendants.

b. an interim proposal: principle of prudence

Professors Dunfee and Friedman of the University of Pennsylvania's Wharton School propose an interim solution to the extraterritorial problem.[271] They believe that the legal objectives of any extraterritorial solution should: (1) prevent gaps in regulation to avoid "havens" from regulation; (2) provide a positive climate for international business transactions; (3) balance the political and economic interests of both forum and affected country; and (4) balance or integrate procedural and substantive[272] law differences among both forum and affected nation.[273]

Dunfee and Friedman propose a bipartite "principle of prudence" analysis. The prudence approach is a hybrid of the intended effects test of *Alcoa* and the jurisdictional rule of reason of *Timberlane*. First, the trial court applies the intended effects test, with narrowly construed sovereignty-related defenses.[274] The narrowed defenses further United States' advocated free-trade policy, follow international law, and provide incentives for international resolution.[275]

The *Timberlane* jurisdictional rule of reason analysis would be applied only in rare circumstances identified by the President of the United States.[276] Once invoked, the rule of reason analysis must be applied by the court.[277] The authority to invoke the rule grants President additional leverage in foreign negotiations and may avoid undesired diplomatic confrontations caused by private antitrust lawsuits.

The principle of prudence provides a workable interim approach to extraterritorial antitrust problems because it relies on the less complex *Alcoa* standard. Dunfee and Friedman's approach, however, may raise constitutional separation of powers difficulties. The judiciary traditionally operates free from direct interference from the executive and legislative branches. Discretionary presidential authority to

271. Dunfee & Friedman, *supra* note 193.
272. *Id.* at 924.
273. *Id.* at 889.
274. *Id.* at 923. The authors favor the *Alcoa* intended effects test's simplicity. *Id. See* text accompanying notes 197-217.
275. Dunfee & Friedman, *supra* note 193, at 925.
276. *Id.* at 923. This power would be granted to the president by statute. *Id.*
277. *Id.* at 924.

mandate judicial approaches steps beyond the usual method followed by the executive branch to address legal issues before the court—the amicus curiae brief. Thus, the principle of prudence may violate the separation of powers[278] by intruding upon the independence of the judicial system.

c. international agreement

An international agreement provides an opportunity to meet the economic, political, and legal needs of the United States and other affected nations. A multi-nation convention could establish a consensus about the parameters of antitrust law, establish legislation in the form of a treaty, and a mechanism for enforcement.[279] A working framework for such a meeting should: (1) resolve underlying policy differences; (2) develop guidelines for asserting authority over conduct abroad; (3) increase notice, consultation, and cooperation to avoid potential conflicts; (4) expand international cooperation arrangements; and (5) allow the United States Department of State increased opportunity to provide advance consultation regarding enforcement action involving other nation's interests.[280]

Although many countries share antitrust laws similar to the United States,[281] reaching agreement may be difficult because of the vast differences in the substantive law among various Western nations.[282] International negotiations, however, provide the best long-term solution because the input of all affected nations is considered. Such an agreement also provides both subscribing governments and their constituents foreseeable consequences of anti-competitive activity. Moreover, a much more workable solution may be produced by diplomatic negotiations, which operate in an environment much freer from the restraints of judicial precedent. Additionally, the executive and legislative branches may establish parameters for its negotiators

278. A constitutional separation of powers analysis is beyond the scope of this Note. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *But cf.* Dames & Moore v. Regan, 453 U.S. 654 (1981).

279. Dunfee & Friedman, *supra* note 193, at 921.

280. Dam, *supra* note 186, at 891.

281. A majority of the twenty-four members of the Organization for Economic Cooperation and Development (OCED) have antitrust laws based upon similar principles as that of the United States. II W. FUGATE, *supra* note 251, § 16.1. The OCED includes: Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Id.* n.1.

282. Dunfee & Friedman, *supra* note 193, at 917.

to formulate an agreement acceptable to United States economic and political objectives.[283]

### *C. Sovereign Compulsion Defense*

The sovereign compulsion defense[284] is an implied defense available to an antitrust defendant for conduct compelled by a foreign government and occurring within the territory of the foreign sovereign.[285] The defense, based in comity,[286] prevents United States courts from reviewing the validity of the policies of foreign states and protects the defendants from being penalized for conduct over which they have no choice.[287] The compelled conduct becomes similar to an act of the state itself.[288] This "market participant"[289] antitrust exemption requires that the foreign government must be fundamental to the alleged illegal conduct; mere approval or acquiescence is generally insufficient.[290]

The sovereign compulsion defense is very important to foreign governments. In *Matsushita*, the Japanese consumer electronic com-

283. *See* K. BREWSTER & J. ATWOOD, ANTITRUST AND AMERICAN BUSINESS ABROAD (2d ed. 1981) §§ 19.05-.07.

284. The corollary of the sovereign compulsion defense is the "act of state" doctrine. The doctrine is asserted by a foreign *government* while the sovereign compulsion defense is asserted by *private* litigants. It precludes judicial inquiry into the validity of acts by foreign sovereigns. Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The act of state doctrine recognizes that sovereign states must respect each other's independence and thus their courts will not hear judgments on the acts of another state which occur within its own territory. *Id.*

The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1 note, 1330, 1332, 1392, 1442, 1602-11 (1982)), "provides that sovereign immunity shall not apply to an action based upon a commercial activity in the United States by a foreign state . . . ." II W. FUGATE, *supra* note 251, § 3.10.

285. *See* Comment, *Foreign Sovereign Compulsion in American Antitrust Law*, 33 STAN. L. REV. 131 (1980).

286. *See supra* text accompanying notes 233-38.

287. *See* Mannington Mill, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

288. *See, e.g.*, Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

> When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns.

*Id.* at 1298; *see also* J. TOWNSEND, EXTRATERRITORIAL ANTITRUST: THE SHERMAN ACT AND U.S. BUSINESS ABROAD 82-83 (1980). "Generally, what a foreign sovereign requires cannot be held illegal, and judicial cognizance is taken of foreign law and policy." *Id.* at 82.

289. For example, states are exempted from scrutiny under the commerce clause if, in pursuing a legitimate state goal, they operate as an actor in the free market. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 809-10 (1976); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 336 (1978).

290. *Interamerican Refining*, 307 F. Supp. at 1293.

panies asserted that their five-company rule agreement was compelled by the Ministry of International Trade and Industry. The defendants argued that the sovereign compulsion defense immunized their activities which were compelled by the Japanese government. The validity of the defense was assumed by the court of appeals in *Matsushita*,[291] despite its very limited application.[292]

The *Matsushita* litigation concerned many foreign governments, because the court of appeals was not persuaded by the Japanese government's assertions that MITI compelled the agreement.[293] Consequently, the governments of the United States,[294] Australia, Canada, France, and the United Kingdom[295] filed an amicus curiae brief. The four foreign governments asserted that:

> [i]n an international context the equality of nations demands that at least the same weight should be given to the statement of a co-equal, friendly foreign sovereign describing its regulatory actions and their significance within its own cultural and legal environment, which often will be unfamiliar to U.S. courts.[296]

The countries that submitted amicus curiae briefs supported the defense of sovereign compulsion. The implied defense was generally supported because it recognized the sovereignty of foreign governments. The countries, however, disagreed on the extensiveness of the defense.

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291. The Third Circuit "assume[d], without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of Sec. 1 of the Sherman Act." *In re* Japanese Elec. Prods., 723 F.2d 238, 315 (3d Cir. 1983); *see, e.g.*, Inter. Assoc. of Mach. & Aerospace Workers Org. of Petroleum Exporting Countries, 649 F. Supp. 1354, 1358-59 (9th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982).

292. The sovereign compulsion defense is limited in application because implied defenses to the antitrust laws are strongly disfavored. *See* National Gerimedicial Hosp. v. Blue Cross, 452 U.S. 378 (1981). The defense arose from judicial concerns for comity and deference to the other branches of government in foreign policy matters. *See* Hilton v. Guyot, 159 U.S. 113, 164 (1895).

As of 1986, only one defendant, in Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 439 F. Supp. 1291, 1297-98 (D.Del. 1970), has successfully asserted the implied defense of sovereign compulsion. Brief for the United States, *supra* note 248, at 16 n.16.

293. The foreign governments believed that "[t]he most reliable evidence of a foreign sovereign's policy, law, method of operation and intention *vis-a-vis* particular challenged conduct is a statement by that sovereign." Brief of the Governments of Australia, Canada, France, and the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners at 7, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 83-2004) [hereinafter Joint Brief].

294. *See* Brief for the United States, *supra* note 248.

295. *See* Joint Brief, *supra* note 293.

296. *Id.* at 7.

### 1. United States' Proposal

The Department of Justice filed an amicus curiae brief on behalf of the United States government. The Justice Department supported a limited implied defense of sovereign compulsion derived from two general considerations: comity and separation of powers.[297] The United States, however, argued that the defense should be narrowly construed and applied. The Justice Department proposal requires that the anti-competitive "conduct at issue was in fact compelled by a foreign sovereign[ ]" because these cases are "likely to touch most sharply on foreign concerns and pose the greatest difficulties for the conduct of [United States] foreign relations."[298]

The Department of Justice proposed that an antitrust defendant be required to provide a statement from the foreign government demonstrating that the activity was compelled.[299] A "clear and intelligible" statement from a foreign government "generally should be deemed 'conclusive.' "[300] The brief required that statements not meeting this evidentiary requirement should be evaluated by the court to determine their reliability after considering the credibility of the statement and circumstances of the case.[301]

The Justice Department argued that the sovereign compulsion defense should not apply in antitrust suits initiated by the United States government because "[a] decision to bring suit thus amounts to a determination by the executive branch that the challenged conduct is more harmful to the United States than is any potential injury to our foreign relationships that will follow from the antitrust action."[302] Concerns of comity and foreign relations are already considered by the executive branch before suit is brought by the United States government, and therefore should be deferred to by the judiciary.[303]

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297. Brief for the United States, *supra* note 248, at 7. The Justice Department argued that " 'comity among nations and among the respective branches of the Federal Government'. . . has led to the creation of the act of state doctrine as a principle of judicial abstention in resolving disputes concerning the validity of foreign sovereign acts." *Id.* at 17 (citations omitted).

298. *Id.* at 20.

299. *Id.* at 22-23.

300. *Id.* at 23. "[I]n extraordinary circumstances, concern for the integrity of the judicial process may obligate a court to inquire into the underlying circumstances if it believes that it has been presented with a state that is incredible on its face." *Id.*

301. *Id.*

302. *Id.*

303. For example, prior to filing suit the executive branch may "deem it more appropriate to engage in diplomatic efforts to persuade the foreign sovereign to cease compelling the conduct (or to take no action at all) rather than to bring suit." *Id.* at n. 23.

Consequently, the sovereign compulsion defense would be available only in antitrust litigation brought by private parties.

### 2. Joint Proposal of Australia, Canada, France, and the United Kingdom

The governments of Australia, Canada, France, and the United Kingdom filed a joint amicus curiae brief.[304] The refusal of the court of appeals to give dispositive weight to or even acknowledge the Japanese government's statement greatly concerned the foreign sovereigns.[305] The brief expressed "a compelling interest in the treatment that is accorded their official statements made to U.S. courts."[306]

The four governments proposed a broad defense which they believed fully recognized their right to exercise territorial sovereignty without being reviewed by foreign courts.[307]

The foreign governments also asserted that their statements submitted to United States courts should be accepted as the most reliable evidence available on their laws, policy, and intent.[308] They also argued that comity required United States courts to grant such statements "at least the same weight" given in foreign courts.[309] The amici maintained that United States courts cannot adjudicate the ve-

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304. *See* Joint Brief, *supra* note 293. The joint brief only discussed the foreign compulsion defense and expressed no opinion regarding the alleged antitrust violations. *Id.*

305. The four governments believed that the court of appeals disregard of the statement from the government of Japan threatened:

> [t]rade and investment between the United States and the amici [which] are traditionally and necessar[il]y conducted on the basis of mutual respect for each nation's sovereignty . . . . One of the fundamental attributes of each nation's sovereignty is the right to control conduct within its borders in the manner it deems appropriate, subject only to such limitations as may be agreed between governments or otherwise required by international law.

*Id.* at 2.

306. *Id.* at 5. The foreign governments cited Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), *In re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980), and other cases where a United States court found a foreign sovereign's statement unsatisfactory. *Id.* at 5 & n.8.

307. *Id.* at 6. The governments asserted that the sovereign compulsion defense is based on:

> international comity, judicial noninterference in the Executive Branch's conduct of international relations, fairness to private parties caught between conflicting sovereign commands, the construction of the Sherman Act, and the concept that conduct compelled by a foreign sovereign should be deemed an act of the sovereign itself.

*Id.* at 6-7 (citations omitted). The countries also urged the Supreme Court to "reaffirm the foreign sovereign compulsion doctrine's vitality . . ." as early as possible to avoid possibly disrupting the international economic relations. *Id.* at 7, 18.

308. *Id.* at 7.

309. *Id.*

racity of foreign government statements without questioning the government's sovereignty.[310]

The joint brief did not mandate express compulsion on the part of their governments. Requiring express compulsion would entail United States courts mandating administrative procedures to foreign governments.[311] Additionally, requiring proof of explicit government compulsion disregards the economies of countries which lack centrally planned and highly regulated economies.[312] Therefore, the governments argued that "the express determinative inquiry for a U.S. court is whether the foreign sovereign exercised its authority to mandate the relevant conduct."[313] The form of the government order, expressed or implied, may reflect not the importance of the issue domestically, but the style of governing.[314] Thus, the amici concluded, "[f]riendly foreign governments should not have their national policies questioned or thwarted by American courts because they do not adopt compulsory foreign orders."[315]

The Supreme Court in *Matsushita* failed to address the sovereign compulsion defense issue. Justice White in his dissent, stated that the Court's "decision makes it unnecessary to reach the sovereign compulsion issue."[316] The reluctance of the Court to discuss the issue is unclear. After *Matsushita*, "[t]he vitality and intricacies of the foreign compulsion defense remain disputed uncharted territory . . . [because] the [C]ourt has carefully avoided giving any hint of its position."[317]

The availability of the sovereign compulsion defense to the defendants in *Matsushita* is dependent on the application of either the

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310. *Id.* at 9-10. The governments analogized the sovereign compulsion defense with the act of state doctrine, based upon the principle that:

> [e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

*Id.* at 8.

311. Joint Brief, *supra* note 293, at 10.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 10.

316. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 598 (1986). "We reverse on the first issue [antitrust liability], but do not reach the second [sovereign compulsion defense]." *Id.* at 582.

317. Griffin, *Court Ducks Foreign Antitrust Questions*, NAT'L L. J., Vol. 8 No. 48, at S-11, col. 2.

United States or the foreign nations proposal. Under the Justice Department's narrower implementation, the defendants could not assert the defense. MITI's statement did not clearly indicate that it compelled the price and distribution agreements. The court of appeals found that the Japanese government may have impliedly authorized the agreements, but did not compel them.[318] The evidence also indicated that the defendants actually tried to conceal their agreements from the Japanese government.[319] Consequently, the sovereign compulsion defense would be unavailable to the defendants because MITI's statement did not expressly claim, nor did the circumstances indicate, that the agreements were compelled by the government.[320]

Although it is not clear from the Court's decision, the defendants may not have been able to assert the defense under the joint country proposal. MITI's statement did not clearly indicate it mandated the agreements. Additionally, the circumstances indicated that the defendants acted under an "umbrella" of the Japanese government, but were not acting in response to any government compulsion.[321]

The amicus curiae briefs reflect the concerns and policy decisions of both the United States and several important trading partners. These factors will necessarily be weighted by courts in any future consideration of the sovereign compulsion defense.

## V. CONCLUSION

The Sherman Antitrust Act was enacted during a period of vigorous domestic reform. It reflected the growing concerns in the United States about the abusive power exercised by *domestic* corporations and trusts. Issues of foreign relations, trade, or comity were not considered important factors during this period.

Although the express language of the Sherman Act has changed very little since originally enacted, the United States economy has transformed dramatically into an interdependent trading nation. The growing importance of foreign trade to the economic welfare of the United States requires that a clear antitrust standard be enunciated. The days of isolationism, which allowed United States courts to avoid applying antitrust law to conduct occurring abroad, are now gone.

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318. *In re* Japanese Elec. Prods., 723 F.2d 238, 315 (3d Cir. 1983).

319. *Id.*

320. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 598 (1986) ("The sovereign compulsion question that both petitioners and the Solicitor General urge us to decide thus is not present here.").

321. *In re Japanese Elec. Prods.*, 723 F.2d at 315.

Unfortunately, it is unclear whether future courts must limit their analysis to foreseeable and intended effects of extraterritorial conduct or whether they must consider the competing social, political, economic, and legal consequences of the affected nations. Additionally, the court may have to determine foreign policy objectives of the executive branch to ensure that its decision is consistent.

The Supreme Court in *Matsushita* raised many doubts as to the future of the widely used jurisdictional rule of reason by relying on the simpler intended effects test. The discussion of the test was not crucial to the outcome of the case, and thus may not indicate the true position of the Court. Additionally, the Supreme Court did not consider the scope of the sovereign compulsion decisions despite its importance to many foreign governments. International trade and diplomatic harmony require that limits be placed on the ability of private litigants to invoke the jurisdiction of United States courts to adjudicate the veracity and wisdom of the economic policy of a foreign government.

The solution for extraterritorial problems may require an international convention to fully address international norms of economic regulation. The principle of prudence standard provides the government an alternative to the regular effects or reason tests. Political and diplomatic solutions may provide an interim method to allow courts to function with manageable standards and still consider possible implications for United States foreign relations.

The competing proposals, for extraterritorial application of the Sherman Antitrust Act and the availability of the sovereign compulsion defense, provide an interim solution in an area crucial to United States interests. Thus, many still await an answer—from either the Supreme Court or Congress—about the future jurisdictional application of United States antitrust laws and defenses.

*Geoffrey T. Tong**

* This Note is dedicated to my parents Tom and Mae Tong; their love, support and guidance have made so many dreams a reality.