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Ali Ganjaei

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CASE COMMENT

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.: The Death Knell for Predatory Price Fixing and the Avoidance of a Standard for the Foreign Sovereign Compulsion Defense

ALI GANJAEI*

I. INTRODUCTION

The case of *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*[1], recently decided by the United States Supreme Court, represents a significant step in antitrust law and a significant sidestep as to the international implications of U.S. antitrust law. On the one hand, the Court adopted a firm stance on policy towards predatory pricing, while on the other, a decision on the weight to be given to a foreign sovereign's control of defendant's actions was completely avoided. The two major issues before the court involved a charge by American manufacturers that their Japanese counterparts conspired to drive them out of the market through a predatory price fixing scheme.

Generally, predatory pricing occurs when a company in a strong financial position lowers its prices to drive out the competition even if it sustains substantial losses. The reward is a market virtually devoid of competition allowing unrestricted increases in the company's prices. The Japanese manufacturers, in part, defended their concerted actions as an involuntary compliance with their government's demands. The foreign sovereign compulsion defense essentially immunizes defendants from U.S. antitrust liability when their anti-competitive behavior is the result of a foreign government's exercise of sovereign power. Since an enterprise must comply with the domestic laws of its place of business, it would be unfair to punish that enterprise merely because it complied with its own government's demands.

The Supreme Court rendered an opinion that completely ignored the evidentiary issues that subsumed the lower courts' decisions. This is not to say, however, that the Court's decision is without merit. The opinion is

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* J.D. 1986, University of Denver; B.A., B.S., 1981, University of Colorado.

1. 106 S. Ct. 1348 (1986).

decisive on several matters in predatory pricing which were left speculative by prior case law. This comment shall endeavor to make a concise historical presentation of the case and will be followed by an analysis of the two issues mentioned above.

II. THE FACTS

In 1970, National Union Electric Corporation (NUE)[2] filed a suit against several Japanese manufacturers of consumer electrical products (CEP).[3] NUE alleged that the Japanese manufacturers of CEPs had conspired to reduce their prices in order to drive American competitors out of the U.S. market. This case was consolidated with an action filed by Zenith Radio Corporation.[4] Except for the fact that more defendants were named, the allegations by Zenith were similar.[5] The specific offenses complained of were: (1) a conspiracy to violate sections 1 and 2 of the Sherman Act; (2) attempted and actual monopolization in violation of section 2 of the Sherman Act;[6] (3) the violation of the Robinson Patman Act for discriminatory pricing among American purchasers;[7] (4) violations of section 7 of the Clayton Act[8] were alleged against defendants Sears, Motorola, Matsushita and Sanyo; and (5) the violation of the 1916 Antidumping Act[9] for the systematic sale of CEPs below the Japanese market price.[10] The evidence presented by Zenith approached mammoth proportions and consequently District Judge Becker, through a pre-trial order, required the plaintiffs to submit all of their evidence before trial in a final pre-trial statement (FPS) with preclusive effect.[11] The court's final decision dismissing the case occurred during the pre-trial stage and an evaluation of the antitrust legal issues never came to fruition.

In order to grasp the factual context of the allegations against the

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2. NUE is the successor to Emerson Radio Company, one of the pioneers of the radio and television industry. NUE terminated the production of television receivers in February 1970.

3. National Union Electric Corp. v. Matsushita Electric Industrial Co., No. 1706-70 (D.N.J. filed Dec. 21, 1970).

4. Zenith Radio Corp. v. Matsushita Electric Co., No. 74-2451 (E.D.Pa. filed Sept. 20, 1974). From this point on only Zenith will be named when referring to the plaintiffs.

5. The ten principal defendants were Mitsubishi Corporation, Matsushita Electric Industrial Co., Ltd., Toshiba Corp., Hitachi Ltd., Sharp Corp., Mitsubishi Electric Corp. (MELCO), Sanyo Electric Co., Ltd., Sony Corp., Motorola, Inc. and Sears, Roebuck & Co. The other companies are subsidiaries of the principal Japanese defendants. Zenith Radio Corp. v. Matsushita Electric Industrial Co., 494 F. Supp. 1190, 1194 (E.D. Pa. 1980).

6. 15 U.S.C. §§ 1, 2 (1970 & Supp. 1986).

7. 15 U.S.C. § 13(a) dismissed for failure to state a claim. *Zenith*, 402 F. Supp. 244 (E.D. Pa. 1975).

8. 15 U.S.C. § 18 (1970).

9. Revenue Act of 1916, § 801, 15 U.S.C § 72 (1970).

10. The case was dismissed on summary judgment and on appeal was affirmed only as to three defendants. *Zenith* 494 F. Supp. 1190 (E.D.Pa. 1980) *rev'd* 723 F.2d 319 (3d Cir. 1983).

11. *Zenith*, 478 F. Supp. 889, 946 (E.D.Pa. 1979).

Japanese manufacturers, it is best to summarize the alleged facts from Zenith's point of view, as they urged the Supreme Court to consider. According to Zenith, the conspiracy began in the late 1950s and expanded from radios to black and white television receivers and finally to color television receivers as those products were introduced into the marketplace. The fullest strength of the conspiracy was realized when the Japanese manufacturers sought and obtained permission to form a cartel from the Ministry of International Trade and Industry (MITI).[12] After obtaining such permission in 1963 by "acting secretly and with mutual knowledge and understanding" of their undisclosed common purposes, "petitioners (Japanese manufacturers) jointly and systematically transformed the character of the cartel."[13]

The cartel agreements and rules mandated minimum "check prices" on receivers imported into the United States.[14] Violations of the "check prices" were considered a violation of Japanese law.[15] Even though the "check prices" were found to be below U.S. market prices, Zenith did not rest on this point in their conspiracy charge. Rather, Zenith alleged that the manufacturers were involved in a scheme to sell to U.S. distributors at prices much lower than the "check prices" while hiding the matter from both the U.S. Customs Service and the Japanese authorities.[16]

In order to avert suspicion from the governmental authorities, the manufacturers had to report their transactions at the "check prices" designated by the cartel.[17] Form 5515 used by importers in reporting to the U.S. Customs Service indicates that the "check prices" were actually reported. The scheme was effectuated through a refunding process to the distributors. Zenith stressed the fact that the scheme could not work unless all of the manufacturers and all of the U.S. importers cooperated in the conspiracy.[18] The difference between the "voluntary camouflaged

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12. Respondent's Brief at 14, *Matsushita*, 106 S.Ct. 1348. The Japanese Export and Import Trading Act authorizes the MITI to exempt companies from the antitrust laws in order to form a cartel. The proposed cartel would be granted only if:

> (a) there is no fear of violating treaties and other arrangements concluded with foreign governments or the international agencies; (b) the interests of importers or enterprises concerned at the destination is not injured and there is no fear of gravely injuring international confidence in Japanese exporters: and (c) participation in or the withdrawal from the agreement is not unjustly restricted.

13. *Id.*

14. The formal agreement called the "rationales" stated that the reason for the cartel was to prevent Japanese CEP imports from "disrupting the United States market and injuring United States manufacturers." *Id.*

15. This allegation became the central argument as to the foreign sovereign compulsion issue avoided by the Supreme Court. *See* Petitioner's Brief at 36 *and* Respondent's Brief at 88. *Matsushita* 106 S. Ct. 1348.

16. Respondent's Brief at 15, *Matsushita*, 106 S. Ct. 1348.

17. *Id.* at 15-16.

18. The different prices reported to the United States Customs Service would have alerted the officials. *Id.* at 31.

price" and the "contract price" was termed the "check price balance" or the "difference money." The distributors would keep an accounting of the "difference money," and the Japanese manufacturers would refund the money principally through:

> (a) checks that petitioners secretly drew on their Hong Kong, Japanese and Swiss bank accounts and hand-delivered or mailed to the United States; (b) secret telegraphic fund transfers to the United States through petitioner's foreign bank accounts in Switzerland, Germany and other countries; (c) "credits" disguised as offset credits on tooling costs the buyer would ordinarily have paid, or credits for free spare parts or credits toward the purchase price of other products not subject to current dumping examination, including the "over-under" or "over-and-under" billing technique;[19] (d) "usuance" or "usuance interest";[20] (e) deposits in the United States customers' yen bank accounts in Japan; (f) travelers checks which petitioner's employees while visiting the United States would hand-deliver to United States buyers.[21]

Both sides of the lawsuit accounted for the transfers which were based upon the same fictitious nomenclature.[22] While the cartel agreement was not renewed in 1973, Zenith points to evidence that showed the continued use of rebating among suppliers until 1977.[23]

In order to sustain their enterprises in view of continued losses incurred by the rebate scheme, the Japanese manufacturers optimized their control of the closed Japanese domestic market.[24] By compiling a "war

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19. "[T]he difference between the higher 'invoice' price and the 'actual' price is credited toward and deducted from the actual agreed purchase price of another product which the same buyer desired to purchase, thus reducing the agreed price on other products to lower levels (and requiring further false declarations for those products and customs fraud on shipments of such other products, as well as on TV products)." *Id.* at 36.

20. "[P]etitioners allowed extended payment terms, permitted the buyer to retain accumulated interest on the letter of credit, and credited this sum against the 'difference money' owed the buyer." *Id.* at 37.

21. *Id.* at 36-7 (citations and footnotes omitted).

22. The payments were placed in the books under commissions, loyalty discounts, excessive inspections and compensation for market research. *Id.* at 37.

23. By this time the scheme had unraveled, when two of the importers acknowledged the practice to the Securities and Exchange Commission and the United States Customs Service. Another importer was indicted and pleaded guilty to customs fraud. *Id.* at 52.

24. As explained by Zenith,

> [the] petitioners eliminated competition among themselves by agreeing to stabilize and maintain high prices. These activities enhanced petitioner's conspiratorial control over their U.S.-Japan dumping margin, i.e. the difference between their Japanese market prices and their much lower U.S. prices. These concerted activities furthered the objects of the conspiracy by (a) giving them joint control over their prices in the closed Japanese market, (b) aggravating the dumping margin on sales in the U.S., (c) stabilizing the Japanese price component of the margin at artificially high prices, and (d) enhancing petitioner's ability to achieve the common objectives by improving return on sales in the Japanese market, and permitting them to deepen the dumping margin on the U.S. side and continue the conspiracy over a longer period of time.

chest" through domestic sales, the Japanese manufacturers subsidized sales at a loss to the United States.

The theory finally presented by Zenith to the trial court[25] was as follows. There existed a single (unitary) conspiracy with two facets, the domestic market and the export market. The aim of the conspiracy was to take over the U.S. CEP market at the expense of the U.S. CEP industry. The domestic market, closed to foreign firms through a combination of government control and economic tradition, provided the resources to subsidize the export facet by charging high prices to the Japanese consumer. The export market was attacked at two levels. First, low "check prices" were set by the cartel and second, the "check prices" were undercut with the cooperation of the American importers which compounded the destruction. In addition, for the duration of the conspiracy, the Japanese manufacturers never competed with each other. The ultimate goal and reward of the predatory pricing conspiracy was to create an entire market open for unchallenged high prices.[26] This theory was supported by numerous documents witnessing meetings, memoranda and diaries, all of which were carefully scrutinized by the district court.

III. THE CASE HISTORY

A. *The District Court*

The basic task before the district court was to determine the admissibility of the evidence compiled by Zenith within their final pre-trial statement (FPS). The defendant manufacturers moved for summary judgment based upon the FPS. The trial court considered the evidence in three opinions,[27] and in view of the scant evidence that was admissible, granted the motion.[28]

An examination of all the evidence would have been an impossible task. The pre-trial order designed to make the complex litigation manageable resulted in the submission of a 17,000 page FPS consisting of 250,000 documents, many of which were in Japanese.[29] With the concurrence of the plaintiffs, the court decided to rule on the admissibility of the documents essential to the plaintiffs' case. The documents fell into 13 categories, enumerated by the court as follows:

1. Documents, including certain findings, promulgated by the U.S.

Id. at 15.

25. Judge Becker showing some consternation as to the plaintiffs' conspiracy theory stated: "One would expect, after ten years of litigation, that there would be no difficulty in describing plaintiffs' conspiracy claims. Regrettably this is not true in this case, for plaintiffs' theory of defendants' alleged conspiracy has shifted on numerous occasions during the recent course of this litigation. Zenith v. Matsushita, 513 F. Supp. 1100, 1124 (E.D.Pa. 1981).

26. *Zenith*, 513 F. Supp. at 1124-25.

27. *Zenith* (I), 505 F. Supp. 1125; *Zenith* (II), 505 F. Supp. 1190; *Zenith* (III), 505 F.Supp. 1313 (E.D.Pa. 1980).

28. *Zenith*, 513 F. Supp. 1100 (E.D.Pa. 1981).

29. *Zenith* (I), 505 F. Supp. at 1137.

Treasury Department and the U.S. Tariff Commission in connection with proceedings under the 1921 Antidumping Act.

2. Documents, including certain findings, promulgated by the U.S. Tariff Commission and its successor, the U.S. International Trade Commission (ITC) as well as the Secretary of Labor under § 301(b)(1) and (c)(1) and (2) of the Trade Expansion Act of 1962 and §§ 201(b) and 221 of the Trade Act of 1974.

3. Certain purported findings and related documents of the Japanese Fair Trade Commission (JFTC) arising out of proceedings in two cases before the JFTC: one in 1957, brought against the Home Electric Market Stabilization Council, some of whose members are defendants in this action, alleging industry wide price fixing; and the second, brought in 1967, alleging retail price maintenance against defendant Matsushita Electric Industries Co., Ltd.

4. The findings of Judge Leon A. Higginbotham, Jr., a predecessor in this case, regarding personal jurisdiction and venue.[30]

5. Statistical data from the statistical office of the United Nations and a report of the Organization for Economic Cooperation and Development (OECD).

6. Diaries of officials of several of the Japanese defendants, alleged to contain evidence of the conspiracy referenced in plaintiffs' complaint. Also included in the category are a number of internal company memoranda seized by the JFTC.[31]

7. Transcripts of testimony and of protocols by witnesses in the Six Company Case.

8. Various agreements and rules of certain Japanese manufacturers' associations relating to export practices.

9. Various documents alleged to be minutes or memoranda of meetings of committees of certain manufacturers' associations.

10. A purported internal memorandum allegedly reflecting the decision made by the Electronic Industries Association of Japan (EIAJ) to conceal from the Japanese MITI the discrepancy between domestic and export prices and suggesting changes in accounting methods by which such concealment could be accomplished.

11. Various memoranda, letters, telexes and transactional documents produced by the defendants in discovery and involving the Japanese manufacturers, their trading companies, their American sales subsidiaries and various U.S. customers which, in plaintiffs' submission, show a pattern of "under the table" or concealed rebates that reduced the price of Japanese TV's to American customers below the so-called check prices that were reported to U.S. customs, and which also reveal a "cover up" of what plaintiffs describe as a predatory export scheme.

12. A potpourri of other documents, produced for the most part from

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30. *Zenith*, 402 F.Supp. 262 (E.D.Pa. 1975).

31. The documents were seized as part of a JFTC case in 1966 known as the "Six Company Case."

defendants' files during discovery.

13. Voluminous reports setting forth the opinions (with supporting data) of plaintiffs' experts.[32]

In the court's first evidentiary opinion, the first five categories were considered together, since they fall under the public records and reports exception to the hearsay rule.[33] Only the documents printed by the U.N. and the OECD were admissible, partly because the defendants did not object strenuously to this point.[34]

The district court's second opinion considered the evidence listed in categories six through twelve.[35] Those documents basically related to the manufacturers' activities in Japan. They were obtained mostly through discovery and some were seized through a "raid" on the corporate headquarters by the JFTC.[36] Zenith claimed that a collective consideration of that evidence would raise the inference that the manufacturers undertook concerted action to deploy a predatory scheme.[37] The trial court did not consider this evidence as an essential segment of the plaintiffs' case, however. Its importance lay with the admissibility of the expert opinions. Since the experts had relied on this evidence to form their opinion, a ruling of inadmissibility based on untrustworthiness, would render the expert opinion of the same character.[38] All of the diaries were ruled inadmissible.[39] The testimony of the employee-witnesses at the JFTC Six Company Case was admissible as former testimony.[40] The protocols were

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32. *Zenith* (I), 505 F. Supp. at 1138-39.

33. FED. R. EVID. 803(8).

34. Categories (1), (2) and (3) were excluded because (a) they were not findings as required by Rule 803(8), (b) they were untrustworthy and (c) they should be excluded under Rule 403 as unnecessarily cumulative anyway.

Category (4) was excluded because the statements by a judge could be given undue weight by the jury and could also cause a confusion of the issues. *Zenith* (I), F. Supp. at 1150-84.

35. *Zenith* (II), 505 F. Supp. at 1190.

36. *Id.* at 1209.

37. *Id.* at 1211.

38. *Zenith* (I), 505 F.Supp. at 1189.

39. Even though the plaintiffs never conducted a deposition in Japan in order to help lay a foundation to authenticate the diaries, the court found enough circumstantial evidence to meet the prima facie standard required by United States v. Goichmann, 547 F.2d 778 (3d Cir 1976). *Zenith* (II), 505 F. Supp. at 1216. The evidence was presented for admission under the hearsay exceptions of a business record, or as the admission of a party opponent. FED. R. EVID. 803(6), 801(d)(2). In this case the diaries did not qualify as a record of regularly conducted activity so as to be a business record. In order to be an admission, the statement must be an assertion that was made in the scope of employment. Though there exists a marginal validity as to the latter, no foundation was laid to show the statements were assertions, thus the diaries did not qualify on the second ground either. *Zenith* (II), 505 F.Supp. at 1267-86.

40. The court agreed with the plaintiff that the cases had a similarity of issues and purposes which would illicit a vigorous defense. The limitation, however, was that it applied to only six of the defendants present in that case. References in the testimony to exports were to be deleted since it was not the subject matter of the cases, as the proceedings were based on charges of price fixing in Japan only. *Id.* at 1286-94.

also admissible. The protocols were the statements of the defendants to investigators, which were transcribed and signed by the defendants.[41] A series of internal memoranda were excluded as not qualifying as business records.[42] The minutes and internal memoranda generated by the cartel group, EIAJ, were also held to be inadmissible.[43]

In the third and final evidentiary ruling, Judge Becker considered the admissibility of the expert opinions contained in several prepared reports.[44] According to the Federal Rules of Evidence, an expert can use information that is inadmissible at trial as the basis of his opinion.[45] That information, however, must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[46] Whether the information can be "reasonably relied" upon is to be decided by the trial court.[47] The court analyzed each report, section by section, and concluded in each case, that the sections dealing with an alleged conspiracy were inadmissible.[48]

The fourth opinion of the trial court was an in-depth analysis of the

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41. The protocols were admitted under Rule 801(d)(2) as admissions of a party opponent. *Id.* at 1294-97.

42. The memoranda did not possess the necessary regularity and did not identify the writer, therefore they did not qualify under Rule 803(6), as a business record. *Id.* at 1297-1301.

43. The document of the EIAJ did not even identify who made the statements, thus they could not be attributed to the assertions of the defendants. FED. R. EVID. 801(d)(2). *Id.* at 1301-03.

The memorandum, termed the Japan Victor Document, amounted to an agreement "to modify their (the manufacturers') accounting practices to cover up the disparity between home markets and export practices."*Id.* at 1303. Zenith placed substantial importance and reliance on this document. The company filed a forty-six page brief addressing the admissibility of this document. It did not, however, meet any of the exceptions to the hearsay rule, notably the business record exception, nor was it properly authenticated. FED R. EVID. 803 (6). *Id.* at 1303-10.

Another group, the TV Export Council, had also generated a substantial amount of documents produced by Matsushita. At this point, the court, frustrated by repetitious analysis, summarily excluded these documents on similar grounds as the memoranda of the EIAJ. *Id.* at 1310-13.

44. *Zenith* (III), 505 F. Supp. at 1313.

45. FED. R. EVID. 703.

46. *Zenith* (III), 505 F.Supp. at 1322.

47. *Id.* at 1324. The trial court struggled to find authority that would state a standard to assess "reasonable reliance." The obvious points were that the source of information must be "either intimately connected with his immediate sphere of expertise, . . . or upon unquestionably permissible documentary research." *Id.* at 1326-27. The court, relying on Pittsburgh Press Club v. United States, 579 F.2d 751 (3d Cir. 1978), decided that when information forming the foundation of the expert's opinion is excluded as untrustworthy and unreliable, the court would balance the expert evidence in favor of exclusion. *Id.* at 1327-30.

48. The court took issue with the fact that the plaintiffs recruited economists to find a conspiracy — a matter normally out of an economist's province. The conclusive findings of a conspiracy through documents submitted as evidence would take over the function of the fact finder. The experts had done no more than to read the evidentiary documents and interpret them to show a conspiracy. *Id.* at 1342.

evidence and the legal principles alleged to have been violated.[49] Considering the fact that almost all of the evidence presented by Zenith had been ruled inadmissible, the legal standards mandated by the statutes could not be met. The court concluded that based upon the admissible evidence, both direct and circumstantial, and viewing all reasonable inferences in favor of the plaintiff, no probative evidence was presented to make a permissible inference of the existence of a conspiracy.[50] The plaintiff had not raised a genuine issue of material fact of a conspiracy in order to defeat the Federal Rules of Civil Procedure Rule 56 summary judgment motion.

B. The Court of Appeals

The Court of Appeals for the Third Circuit reversed the trial court's decision, holding that the judge had incorrectly assessed the admissibility of the evidence.[51] The standard for summary judgment applied by the district court was upheld; therefore, the decision was based on the increased number of evidentiary documents admitted. Considering much of what was excluded by the district court, the court of appeals decided that, in fact, a genuine issue of material fact as to the existence of a conspiracy was presented by the record.[52]

Of the documents urged by Zenith for admission, the U.S. administrative cases, the findings of the JFTC, the expert opinion reports and some of the diaries were found to be admissible.[53] As to the antidumping administrative cases, the court concluded that the expectation of the trial court as to the complexity and thoroughness of administrative hearings was too high and that the opportunity for a defendant to challenge the findings were adequate.[54] Consequently, the trial court had abused its discretion in excluding the antidumping findings. The JFTC cases were admissible on the same grounds, even though the cases did not go beyond investigatory reports.[55]

The appellate court held that the standard for admitting expert opinions was also incorrect. What constitutes the type of data an expert can "reasonably rely" upon to form an opinion was for the experts to

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49. *Zenith*, 513 F. Supp. at 1100. The opinion spans over 300 pages and is integrated. The evidentiary evaluations are numerous and cannot be consolidated into a few statements.

50. "[A] jury is permitted to draw only those inferences of which the evidence is reasonably susceptible: it may not resort to speculation." *Id.* at 1171 (quoting from British Airways Board v. Boeing Co. 585 F.2d 946,-952 (9th Cir. 1978), *cert. denied.* 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979)).

51. *In re* Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983).

52. 723 F.2d at 316.

53. See *supra* notes 28-31 and accompanying text.

54. 723 F.2d at 268. Federal Rule of Evidence 803(8)(C) was misconstrued to require "an evidentiary hearing providing an opportunity for cross-examination."

55. *Id.* at 271-75.

decide and not the trial court.[56] The uncontradicted affidavits by the experts, stating that "the data they relied on in forming their opinions were of a type reasonably relied upon by experts in their respective fields," should not have been ignored; rather they should have been dispositive of the determination.[57]

Some of the diaries were found to be admissible by the court of appeals as records of regularly conducted business activity [58] since the standard used by the trial court was too stringent.[59] The record is trustworthy so long as it is regularly kept, and an ambiguity as to the meaning cannot be grounds for exclusion.[60]

The additional evidence made available would seem to make the task of overcoming a summary judgment easier. The court of appeals, however, still had to make the inferences of antitrust violations in a conclusory manner. The appellate court found that the admissible evidence would lead a fact-finder to infer an agreement among the Japanese manufacturers to stabilize home market prices, which in turn assured profits. The expert opinions also reinforced the finding of a domestic price fixing cartel.[61] Adding the excess capacity and the U.S. compatible CEPs of the Japanese manufacturers would lead the fact finder to the inference of a strong incentive to enter and compete in the U.S. market.[62] By combining the two, the court concluded that "it would permit a fact-finder to infer a motive to sell at prices low enough to eliminate competition in the United States market by American firms."[63] The leap from the possibility of an unfair trade practice to predatory pricing was substantial. Nevertheless, the inferences, made possible in the court's view by the direct and circumstantial evidence, were sufficient to overcome a summary judgment motion.

The Third Circuit Court of Appeals briefly considered the sovereign compulsion defense urged by the defendants. The court did not dismiss the claim as an issue not considered at trial. Rather, the court pointed to some of the factual issues surrounding the claim of the Japanese Government. The facts indicated that the compulsion may not have been genuine and that the governmental mandate may have been created under the manufacturers' direction. Because of the factual dispute arising from the Japanese Government's statement, a summary judgment without the factual resolution as to the true nature of the Japanese Government's state-

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56. *Id.* at 277.

57. *Id.* at 276.

58. FED. R. EVID. Rule 803(6).

59. Id. at 289. In order to decide on reliability, the court should not analyze the procedures or employees making the records, rather that "record keeping is essential to an ongoing business activity." 723 F.2d at 268.

60. *Id.* at 290.

61. *Id.* at 309.

62. *Id.* at 310.

63. *Id.* (emphasis added).

ment was improper. In essence, the court of appeals turned the defense against the defendants to rule against a summary judgment.[64] The fact that the court did not give conclusive effect to the statement became the greatest controversy in the case. This was evidenced by the numerous amicus briefs filed with the Supreme Court.[65]

C. *The Supreme Court*

The district court decision relied heavily on the exclusion of a substantial portion of the evidence presented by the plaintiff. Consequently, the remaining admissible evidence could not overcome the summary judgment motion. The court of appeals changed the standard of admissibility, and, based upon the admission of more evidence, found the presence of a genuine issue of material fact. The Supreme Court did not even consider the admissibility of evidence issue that subsumed the lower courts.[66] Instead, the Court went straight to the standard for evaluating a summary judgment motion. Therefore, the Court reversed even though additional evidence had been deemed admissible on appeal.

In addition to the showing of a genuine issue for trial under Federal Rules of Civil Procedure 56(e), the plaintiff must show an injury caused by the alleged illegal conduct.[67] The Court concluded summarily that since all of the alleged conspiracies except the predatory pricing would benefit the plaintiffs, they need not be considered.[68] In other words, the other conspiracies could not be used to make inferences about the predatory price fixing conspiracy.

The other prong of Rule 56(e) is to show a genuine issue of material fact. Direct evidence of a conspiracy is not necessary (and quite unlikely) and inferences can be made from the evidence. However, the Court concluded that "antitrust law limits the range of permissible inferences from ambiguous evidence in a [Sherman Act] section 1 case."[69] The inferences of conspiratorial activity must also overcome possible inferences of legal conduct. As the Court stated in *First National Bank of Arizona v. Cities*

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64. *Id.* at 315.

65. *See infra* notes 78 to 83 and accompanying text.

66. *Matsushita*, 106 S. Ct. at 1352. The Court had limited the grant of certiorari to exclude the evidentiary rulings. 471 U.S. ____, 106 S. Ct. 1863 (1985).

67. 106 S. Ct. at 1356. Fed. R. Civ. P. Rule 56(e) states that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but in his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

FED R. CIV. P. 56(e).

68. *Id.* An example of "other" conspiracies is the "Five Company Rule," whereby the Japanese manufacturers agreed not to deal with more than five companies in the United States.

69. 106 S. Ct. at 1357.

Services Co.,[70] when equally plausible explanations are legal conduct, then no inference of a conspiracy can be made. Thus with equally plausible motives, the motion for summary judgment must be granted.[71] The ambiguity presented by deciding on "equally plausible motives" was resolved in a later case in favor of a defendant, whereby a plaintiff must submit evidence "that tends to exclude" the possibility of independent action.[72]

The Supreme Court concluded that the court of appeals failed to consider whether any plausible motive existed to engage in predatory pricing, and instead focused on the "direct evidence of concert of action."[73] Most of the direct evidence relied upon focused on "other" conspiracies that had no relevance to the predatory pricing conspiracy. Without evidence relating to the predatory pricing and without a plausible motive to engage in a conspiracy, the appellate court committed a reversible error.

The dissent took issue with the majority's use of *Monsanto* to give the trial judge power to dismiss a case when the inferences are implausible.[74] The dissent would probably reverse the trend started in *Cities Services*. The role of the judge would only be to decide if one of the possibilities revealed by the evidence indicated the presence of a conspiracy; if so, the factual determination must be made by the fact finder at trial.[75]

The foreign sovereign compulsion defense presented by the Japanese manufacturers rested mainly on the official statement submitted by the Government of Japan to the trial court through the U.S. Department of State in 1974. The statement described the role of the MITI, among other instances, to monitor Japanese exports so that they did not disrupt the national economies of Japan's trading partners. In the case of the CEP manufacturers, the MITI "directed" the relevant industries and trade associations to enter into "arrangements" and thereafter "supervised" the operation of the exporters.[76] The defendant-petitioners argued that the court of appeals had relied upon the "check prices" and the "five-company rule" to find inferences of a predatory conspiracy. The failure in the appellate court's ruling was that these two features were part of the activities mandated by the MITI and should have been excluded from the consideration of the court.[77] The official representations of the Government of Japan as to these features should have been given conclusive ef-

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70. 391 U.S. 253, 280 (1968).

71. 106 S. Ct. at 1357.

72. *Id.* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) (supplier and several dealers conspired to exclude a single dealer).

73. 106 S. Ct. at 1361.

74. 106 S. Ct. at 1363 (White, J., dissenting).

75. *Id.* at 1366.

76. Brief for the Government of Japan at 8a-11a, *Matsushita*.

77. Petitioner's Brief at 38, *Matsushita*.

fect.[78] Since the contents of the statement indicated both compulsion and supervision, the petitioners concluded that it also applied to fulfill the elements of the foreign sovereign compulsion defense.[79]

The plaintiff-respondents did not rely on the compulsion of the Japanese Government as enumerated in the arrangements to point out predatory pricing. Rather the violation of the arrangements by the manufacturers was crucial to show a conspiracy not protected by the defense.[80] Zenith went further to argue that the sovereign compulsion defense should not be available for "commercial" activities compelled by the government.[81] The final argument made by Zenith related to the statement by the Government of Japan. The respondents would place two requirements on governmental communications. First, to have them be specific in order to assess the validity of the compulsion, and second, to have the government statement be presented in a timely fashion.[82] Zenith contended that the statement of the Japanese Government presented to the court did not meet either requirement.

The foreign sovereign compulsion issue brought forth a deluge of concern from various parties. Each amicus, except that of the Japanese Government, had a specific issue to address that basically related to the compulsion issue tangentially. The Japanese Government rightfully objected to the critical treatment by the appellate court of its statement submitted to the trial court and the Department of State. In describing its position, the Japanese Government stated that:

> the formal representations of foreign governments are to be given conclusive effect, and when the exercise of a state's sovereignty involves only control of the activity of its own nationals within its territory, with respect to its own export trade, foreign governments and foreign courts should not question or punish such activity.[83]

The United States Government agreed with this position. In a turnaround from earlier opposition to the compulsion defense, the U.S. Government asked the Court to give the Japanese statement "dispositive weight" and to hold that the court of appeals "erred in leaving open the possibility that on remand, liability might be predicated on that agree-

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78. *Id.* at 40-41. The petitioners based this argument on the act of state doctrine, where inquiry by the courts into the validity of a foreign sovereign's acts is prohibited.

79. *Id.* at 42.

80. Respondent's Brief at 89, 91-92, *Matsushita*.

81. *Id.* at 92-93. The mistake made by the respondents in carving out a commercial exception is similar to the petitioners. *See supra* note 74. By considering the compulsion defense as a corollary to the act of state doctrine the analysis of its application becomes incorrect. *See infra* notes 105 to 106 and accompanying text.

82. *Id.* at 94. The statement had to be specific because the court should not accept the government's statement at face value. For instance, the government had to define "under the direction" in order to allow the court to assess the compulsive nature of the word. *Id.* at 95-96. The requirement for a timely statement was to not disrupt the judicial process during the late stages of adjudication.

83. Brief for the Government of Japan, at 5-6.

ment."[84] The new position adopted by the United States was due to changes in foreign policy. In recent years, the Reagan administration has requested Japan to adopt voluntary controls on the export of automobiles to the United States, with the assurance that antitrust liability would not be imposed upon participating Japanese exporters. The Government had to give effect to the defense in order to preserve its own integrity.[85]

The governments of Australia, Canada, France and the United Kingdom used this opportunity to air their grievances. They pointed out that the U.S. Government had given assurances of immunity based upon the compulsion defense in order to accede to requests for government mandated export restraints.[86] Actually there was a related issue that prompted the response by these countries. They were dissatisfied with the procedure adopted in 1978 of filing their concerns directly with the court instead of the executive branch. They felt that such filings were ineffective, as depicted by the Seventh Circuit's treatment of the amicus curiae briefs in the *Uranium* case.[87] The court disregarded the contents of the briefs and continued to rule on the appeal. This action "prompted the Legal Advisor of the State Department to request the Justice Department to inform the court that the court's language has caused serious embarrassment to the United States in its relation with some of our closest allies."[88]

IV. THE END OF PREDATORY PRICING?

The issue of predatory pricing has been debated extensively in the past ten years. Though predatory behavior has been considered unlikely,[89] the introduction of a new economic analysis in 1975[90] sparked the interest of many commentators.[91] Up to this point, the analyses offered

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84. Brief for the United States at 17, *Matsushita*.

85. *Id.* at 18.

86. Brief for the Governments of Australia, Canada, France and the United Kingdom of Great Britain and Northern Ireland at 4, *Matsushita*. [hereinafter cited as Allies Brief]

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

88. Allies Brief at 6.

89. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & ECON. 137 (1958).

90. Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

91. *See* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 144-60 (1978); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 184-96 (1976); Scherer, *Predatory pricing and the Sherman Act: A Comment*, 89 HARV. L REV. 869 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979); Greer, *A Critique of Areeda and Turner's Standard for Predatory Pricing*, 24 ANTITRUST BULL. 233 (1979); Joskow & Klevorik, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979); Koller, *When is Pricing Predatory?*, 24 ANTITRUST BULL. 283 (1979); McGee, *supra* note 85; Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981); Ordover & Willig, *An Economic Definition of Predatory Product Innovation*, in STRATEGY, PREDATION, AND ANTITRUST ANALYSIS (S. Salop ed. 1981).

by the commentators had been ignored to a great extent by the courts.[92]

The courts had analyzed predatory pricing based upon the theories formulated in the initial Sherman Act cases at the turn of the century known as the "trust era."[93] This period in time was "characterized by the uninhibited commercial warfare in the attempt of industrial giants to monopolize various fields of business activity in their battle for supremacy."[94] The paradigm case decided by the Supreme Court was *Standard Oil Company v United States*.[95] Standard Oil methodically acquired control of the market by targeting one single wholesaler at a time. One form of control was to obtain all information about its competitor's customers and offer lower prices and rebates and even engage in deception to woo the dealer away from the competitor.[96] This action was coupled with disciplinary actions against a recalcitrant dealer-customer.[97] The theory of predation espoused by the Supreme Court was simple. Predatory pricing was limited to considering whether a dominant firm had sold their products at "below cost to eliminate rivals and subsequently earns monopoly profit."[98] Its holding was based on a series of presumptions raised by the behavior of the defendants. Under this theory, the courts would find a predatory scheme if the evidence revealed:

> (1) monopolistic power and large size advantage of the predator firm; (2) for a firm serving several geographic or related product markets, a pricing differential between a predator's 'monopoly' market and its competitive market; (3) sales below average total cost in the competitive market; (4) injury or exclusion of smaller competitors or new entrants as a result of such pricing ; and (5) intent of the predator firm to exclude or discipline rivals.[99]

After 1975, with the advent of new economic models, the lower courts have adopted various new legal standards that take into account economic analyses.[100] None of the legal standards has been reviewed by the

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92. Calvani & Lynch, *Predatory Pricing under the Robinson Patman and Sherman Acts: An Introduction*, 51 ANTITRUST L.J. 375, 378 (1981).

93. Cassady & Brown, *Exclusionary Tactics in American Business Competition: An Historical Analysis*, 8 U.C.L.A. L. REV. 88, 89 (1961).

94. *Id.*

95. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

96. State v. Standard Oil Co., 218 Mo. 1, 444, 116 S.W. 902 (1909).

97. Cassady & Brown, *supra* note 93, at 105.

98. Brodly & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738, 741 (1981).

99. *Id.* at 766. The relative importance of the criteria was dependent upon the claim. *See e.g.* United States v. Grinnell Corp., 384 U.S. 563 (1966)(Sherman Act); Utah Pie Co. V. Continental Baking Co. 386 U.S. 685 (1967)(Robinson-Patman Act).

100. *See* Brodly & Hay, *supra* note 98, at 767-772. The legal standards followed by the courts fall into three categories:

> 1. The marginal cost standard. Pricing below marginal cost or average variable cost is unlawful: pricing above marginal cost or average variable cost is lawful. This is the Areeda-Turner Rule [*See supra* note 90].
>
> 2. Augmented marginal cost standards. Although pricing below marginal cost

Supreme Court; therefore there presently exists a disharmony in the federal courts.[101] In view of the *Matsushita* opinion, the standards may become irrelevant in the future.

The Supreme Court has placed a barrier in cases alleging predatory pricing. If the dicta stated by the Court is adopted by the lower courts, then such cases may rarely go beyond the pretrial stage.[102] The Court cited commentators that stand for the nonexistence of predatory pricing.[103] Of the many rules invented in the past ten years, there is a group that espouses a "no rule" perspective. "The 'no rule' proponents argue that even given the illegality of merger and collusion today, predation will very unlikely be a profit-maximizing strategy."[104] Based upon "a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful," the Court set up a presumption that a single firm, not to mention several conspiring firms, will not engage in a predatory pricing scheme.[105]

When confronted with a summary judgment motion, courts must now decide the *reasonableness* of the alleged conspiracy in view of other possible inferences.[106] When the claim seems to be unreasonable or "if the claim is one that simply makes no economic sense — [plaintiffs] must come forward with more persuasive evidence to support their claim than would be otherwise necessary."[107] The Court considered whether the claim of predatory pricing by the Japanese manufacturers was reasonable by first looking at predatory pricing from a general viewpoint. Since the Court considered predatory pricing to be an unreasonable act by corporations, the conduct of a twenty year conspiracy by several firms in the

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remains unlawful, pricing *above* marginal cost may also be unlawful, under the following conditions:

a. The high entry barriers exception: Pricing above marginal cost is unlawful when entry barriers are "extremely high and the price is below the "short run profit maximizing price."

b. The marginal cost-plus-other-factors standard: Pricing above marginal cost is unlawful when other probative factors demonstrate that the price is predatory; these factors may include intent, limit pricing, nonpricing predation, and entry barriers.

3. The average total cost standard. Pricing below average total cost or "full cost" (average cost plus capital return) is unlawful when, in light of all the facts, the price is unreasonable or predatory.

Id. at 769.

101. *Id.* at 768-769. As the Court stated: "There is a good deal of debate, both in the cases and in the law reviews, about what 'cost' is relevant in such cases. We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act Section 1 case." *Matsushita*, 106 S. Ct. at 1355 n. 8.

102. 106 S.Ct. at 1357.

103. *Id.* at 1358.

104. Calvani & Lynch, *supra* note 92, at 389.

105. 106 S. Ct. at 1357-58.

106. *Id.* at 1357.

107. *Id.* at 1356.

hope of finally reaping monopoly profits was quite unreasonable.[108]

The standard set by *Matsushita*, indicates that a trial court has two roles in the case of a summary judgment motion. First the court will have to rule on the evidence. The evidence must raise an inference of illegal conduct that excludes possible explanations of legal conduct. Secondly, and as a subsidiary to the first, the court must engage in an economic analysis of the violation charged. If the antitrust violation, as theoretically presented, seems objectively unlikely in an economic or business sense, the evidence required must "be more persuasive . . . than would be otherwise necessary."[109] Based on the Court's analysis of predatory pricing,[110] a trial court can presume the theoretical presence of predatory pricing through a multi-corporate conspiracy to be highly unlikely, therefore, as to any such allegations in the future, the standard of proof placed upon plaintiffs shall be higher.

V. A STANDARD FOR THE FOREIGN SOVEREIGN COMPULSION DEFENSE

A. *Re-defining the Defense*

The sovereign compulsion defense applies when a foreign nation mandates a private entity or a group of entities to engage in activities that violate U.S. antitrust laws. Antitrust liability will not be imposed on corporate activity compelled by a foreign sovereign. The essential inquiry in all cases relates to the existence of a true "compulsion." The courts have considered the defense of sovereign compulsion as a corollary to the act of state doctrine.[111] This evaluation of the defense is erroneous. The two defenses do overlap in certain ways, but the application of each is quite distinct.

> The act of state doctrine based on the separation of powers principle, is a judicial formula reflecting deference to the executive branch, which the courts presume to be better qualified to handle the diplomatic and political consequences of an act of state. Sovereign compulsion, on the other hand, is a substantive defense to an antitrust complaint; it is based on the theory that defendants are engaged in illegal activity only because a foreign sovereign compelled them to do so. Despite these differences, the measures taken by foreign sovereigns to compel firms to engage in illegal business restraints remain in essence acts of state.[112]

Four rationales for the sovereign compulsion defense have been de-

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108. *Id.* at 1360-62.

109. *Id.* at 1356.

110. That analysis includes the adoption of Judge Bork's view on predatory pricing. *See* R. BORK, *supra* note 91, at 145.

111. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 606 (9th Cir. 1976).

112. Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 21-22 (1976).

veloped and they remain independent of the extension given to the act of state. First, it would be unfair to hold a defendant liable for acts compelled by a government authority.[113] Second, the foreign compulsion must be recognized in order to foster commerce. Non-recognition could work against an American company trying to do business within the laws of a foreign sovereign.[114] The third policy consideration parallels the act of state doctrine in that a tribunal cannot engage in the valuation of foreign laws and must exercise judicial restraint in such situations.[115] Finally, the defense has been analogized to the state action doctrine formulated in *Parker v. Brown* and its progeny.[116] The state action doctrine insulates private parties from antitrust liability when their anticompetitive conduct is a consequence of complying with domestic state regulation. The state action doctrine provides the strongest analogy to sovereign compulsion.[117]

The defense has only been established once in an independent form by the courts. The court in *Interamerican* concluded that "sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms have no choice but to obey. Acts of business become effectively acts of the sovereign."[118] The rationale for interpreting the Sherman Act to exclude compelled actions was that commerce is regulated by a sovereign and a refusal to comply with the regulation eliminates commerce against the purpose of the Act which is to encourage commerce.[119] The governmental mandate in *Interamerican* did compel the defendants to act in an anti-competitive manner even though the government may have acted improperly.[120] The court did not provide any guideline to finding genuine compulsion, but it did provide two instances of unfounded compulsion: (1) when the defendants procure the governmental action, and (2) when under an unspecified delegation of authority, the defendant voluntarily acts in an uncompetitive manner.[121]

The Justice department rejected the holding in *Interamerican.*[122] Through a hypothetical discussion of the same case, the Justice Depart-

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113. 1 B. HAWK, UNITED STATES, COMMON MARKET, AND INTERNATIONAL ANTITRUST 614 (1986).

114. This is the rationale adopted in the only case upholding the defense, Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

115. *Timberlane*, 549 F.2d at 606.

116. 317 U.S. 341 (1943).

117. Note, *Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW & POL'Y INT'L BUS. 747, 793 (1982).

118. *Interamerican*, 307 F. Supp. at 1298.

119. *Id.* The proposition was first set out by then Professor Brewster. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 94 (1958).

120. *Interamerican*, 307 F. Supp. at 1298-99. The court used the act of state to bar inquiry into the validity of the government order. In this manner, the court used the two doctrines in their proper form.

121. *Id.* at 1297.

122. ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, U.S. DEPT. OF JUSTICE ANTITRUST DIVISION (Jan. 26, 1977), *reprinted in* ANTITRUST & TRADE REG. REP.(BNA), No. 799, p. E-1 (1977).

ment declared the use of the act of state doctrine and the sovereign compulsion defense to be improper because the directed conduct is to be effectuated in U.S. territory.[123] The hypothetical case was analyzed under the legal principle of conflict of laws and the equitable application of comity. By balancing the stakes to each country, the Department concluded that the threat to U.S. interests would be greater; therefore, the court must not exercise comity to dismiss the case.[124]

The defense is on the books. Unfortunately, however, the policy or rationale that is to guide the courts in their decision making is nonexistent. The *Matsushita* case was ideal to discern the parameters of the sovereign compulsion defense. The most important factor presented by the case was the ability to decide on the weight to be given to an official governmental statement citing governmental compulsion as the cause of a defendant's actions. A Supreme Court decision could have followed either of two paths. One would be to give the governmental statement conclusive effect thereby invoking the defense without discussion. The other path would be to pierce the statement and to analyze the facts surrounding the allegations of anticompetitive conduct along with the relationship between the government and defendant business.[125] A conclusive statement would preclude a search into the factual setting of the case, but this is too harsh a result. If the sovereign compulsion defense is to become absolute in such situations, American based businesses could be subjected to repeated anti-competitive actions from countries that blend governmental policy and business expansion.[126] A solution to the potential inequities of such a defense is a set of criteria that looks beyond the final form of the compulsion presented at trial to the raison d'etre of the rule or

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123. *Id.* at E-15.

124. *Id.* The Department relied on the Restatement (Second) of Foreign Relations Law to determine the factors under the principles of comity.

125. The Court of Appeals for the Third Circuit revealed some of the ambiguous elements of the Japanese manufacturers defense in *Matsushita*:

> It is possible to conclude that the government merely provided an umbrella under which the defendants gained an exemption from Japanese antitrust law, and fixed their own export prices. Second, there is abundant evidence suggesting that many defendants parted from the agreed-upon minimums and took steps to conceal their departure from MITI. Thirdly, there is no record evidence suggesting that the five-company rule originated with the Japanese Government. Finally, the evidence about price stabilization in the Japanese home market suggests unequivocally that this activity violated the laws of Japan.

In re Japanese, 723 F.2d at 315.

126. An example of close government-business relations is the Swiss government participation in the Swiss watch manufacturers cartel's effort to curb the international watchmaking industry. United States v. Watchmakers of Switzerland Information Center, Inc., [1963] Trade Cas. (CCH) 77, 414, 77628-32 (S.D.N.Y. 1962) *modified* [1965] Trade Cas. 80, 490 (S.D.N.Y. 1965) (the case was dismissed through a consent decree). The Japanese government (MITI) participation in the cartelization of industries is pervasive, with the Japanese CEP exporters being one example of many. R. CAVES & M. VEKUSA, INDUSTRIAL ORGANIZATION IN JAPAN 6 (1976).

laws and to analyze the degree of governmental participation, direct or indirect, in forcing compliance by the business enterprise.

B. A Proposed Test to Analyze the Defense

Changes in the trade laws[127] and the ambiguity caused by the court of appeal's treatment of the defense made a decision by the Supreme Court necessary and timely. A standard is necessary to guide future litigation. For instance, the semiconductor industry took an interest in the *Matsushita* case fearing an opinion allowing the defense to be absolute in light of the statement by the Government of Japan. The commentators, possibly due to a lack of judicial guidance, are at odds on what the basis for the defense should be.

Hawk proposes a standard based upon fairness to the defendants.[128] The focus of his test is the actual compulsion on the defendants. The compulsion does not have to be through a particular form.[129] Upon a finding of true compulsion, the inquiry should shift to the location of the effect. Hawk opposes the absolute territorial limitation favored by the Justice Department.[130] He considers that certain circumstances do exist when the effect in the United States would still allow the sovereign compulsion defense, however, he does not provide much guidance as to its application.[131]

Another formula applies the domestic state action doctrine to the sovereign compulsion defense.[132] The test enunciated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[133] has two prongs: (1) an affirmative articulation of state policy; and (2) active supervision of the challenged restraint by the state. If both parts are met, the private entity under the direction of the state would be exempt from antitrust liability. Waller proposes to modify the first prong by changing the requirement of legislation as a statement of policy to accepting those forms of decision-making appropriate to a foreign sovereign. The second prong would be modified to "active enforcement" instead of supervision.[134] This test abandons the search for compulsion by "objectively address[ing] the level, rather than the form, of government involvement."[135] Like Hawk, Waller would not apply an absolute territorial limitation to the defense.

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127. Trade Act of 1974 § 203, 19 U.S.C. § 1401(a) (1982) (voluntary restraint agreements negotiated at the intergovernmental level).

128. 1 B. HAWK, *supra* note 113, at 614.

129. *Id.* at 626.

130. *See supra* notes 105-107 and accompanying text.

131. 1 B. HAWK, *supra* note 113, at 630.

132. Note, *supra* note 117, at 747.

133. 445 U.S. 97 (1980). Though other cases on the doctrine were decided subsequent to *Midcal*, the basic test remains the same. Kellman & Hiser, *The Antitrust State Action Exemption: An Essay on Doctrinal Organization from Parker to Hallie and Southern Motor Carriers*, 29 WASH. U.J. URB. & CONTEMP. L. 83 (1985).

134. Note, *supra* note 117, at 801.

135. *Id.* at 799.

The Department of Justice refuted a comparison of the compulsion defense to the state action doctrine in *Matsushita*.[136] First, the power of the courts to initially determine the validity of the state's program does not comport with the compulsion defense's need to avoid the comparison of national interests. Second, there are practical difficulties in assessing what comprises "state action" in a foreign legal system, including the difficulty in inquiring into the foreign state's conduct to find the presence of supervision.[137] The domestic courts just do not have the flexibility to make the same determinations when a foreign government, as opposed to a state, is involved.

All of the commentators, however, do agree with some basic factors. If a private party actively solicits the compulsion from the government, the sovereign compulsion defense will not apply.[138] If a government only encourages private parties to follow a general national policy, compulsion will never be found.[139]

The facts in *Matsushita* reveal some of the peculiar hardships that would confront a court deciding the validity of a foreign sovereign compulsion. There is some efficacy to using a simple test to analyze the problem, such as the two prong test of *Midcal*; however, the unique circumstances of each case warrants the adoption of a multi-factor test that would account for the multitude of possible variations. The proposed test seeks to balance three interests: the need to defer to foreign sovereigns; the fairness to the businesses under compulsion; and the need of U.S.-based businesses to compete freely.

A court confronted with the compulsion defense must begin with two premises before analyzing the facts. First, the court must not analyze the legitimacy of the government order or legislation. The court must accept it at face value for what it says. There must not be an inquiry as to authority, *i.e.* an ultra vires act, because the result will not change the requirement of compliance by a business. Second, the court must not consider the form of the government order. The fact that a defendant conducts his business in an anticompetitive manner, because of an oral agency order does not automatically change the strength of the compulsion. This fact is especially true in view of the variant legal systems and their true application by the officials. By disregarding these two matters, the court can focus on the conduct of all of the relevant parties from the time before the government mandate through the time the antitrust claim arises. The factors are enumerated below.

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136. Brief for the United States at 20, *Matsushita*.

137. *Id.* at 21.

138. United States v. Sisal Sales Corp. 274 U.S. 268 (1927).

139. United States v. Watchmakers of Switzerland Information Center, [1963] Trade Cas. (CCH) 77, 414 (S.D.N.Y.).

1. Who Initiated the Compulsion?

The focus here is on the government and the defendants. As stated before, the substantial efforts of the defendants in obtaining government action would negate the compulsion defense. The efforts must be beyond lobbying actions and would certainly include drafted proposals to be adopted by the government or its instrumentality.

In the *Matsushita* case, the issue rests with the allegation by Zenith that the Japanese manufacturers petitioned the government for permission to form the cartel.[140] If this is a prescribed form of addressing the government, then the effort is not as substantial as when the petition is a unique circumstance. An additional concern is the presence of a third party inducing the government to act. For instance, if the United States plays a part in negotiating trade restraints with another government, the pressure of such an initiating party would merit a finding in favor of the defense.

2. Who Sets the Standards of the Compulsion?

The focus here is on the contents and particularity of the government mandate. If the government legislates that no shoes will be exported to the United States for six months, the standard is clear and compulsion is present. However, if the government requires all manufacturers to come to an agreement to set the conditions for exporting and to make periodic revisions as they see fit, then the manufacturers anti-competitive behavior would be suspect.

The court of appeals considered this factor in *Matsushita*.[141] A summary judgment was held to be improper, in part, because the pre-trial evidence indicated that the Japanese Government did not participate in setting the standards for exporting CEP's to the United States. The Japanese manufacturers repeatedly pointed to their government's statement sent to the U.S. Department of State.[142] While conceding that the manufacturers conducted the negotiations, the defendants emphasized that "MITI supervised the preparation of such agreements and regulation so that the MITI's intention was correctly reflected."[143]

3. Is the Government's Role Administrative or Supervisory?

The role of the government after the passage of a mandate or regulation can help define the character of the compulsion. Like the state action doctrine, the participation of the government can be crucial to finding compulsion.[144] No matter what policy the government may have set to

140. Respondent's Brief at 14, *Matsushita*.
141. *In re Japanese*, 723 F.2d at 315.
142. Petitioner's Brief at 35, *Matsushita*.
143. *Id.* at 37.
144. In *Cantor v. Detroit Edison Co.*, though a state's regulation required a public util-

justify the defendants' actions, unless their role is to effectuate compliance with that policy, the compulsion may be illusory. An example of the difference could be a periodic reporting requirement, as opposed to preliminary approval of changes or modifications which the defendants desire. In order to help define the role of the government, a court should consider the sanctions for non-compliance. The presence of sanctions implies a supervisory role because the intention of the government to participate is manifested by the power to keep a party within the boundaries of a regulation. The degree of supervision, however, will depend upon the legal system under which the defendants function.

The 1975 Japanese Government Statement indicated that "[h]ad the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its power [under Japanese law] to unilaterally control television sales for export to the United States and carry out its established trade policy."[145] The court of appeals indicated that "[i]t is possible to conclude that the [Japanese] government merely provided an umbrella under which the defendants gained an exemption from Japanese antitrust law, and fixed their own prices."[146] Since the allegations of a conspiracy spans several decades, the role of the government in *Matsushita* was important in deciding on the continued compliance with a government compulsion.

4. Is the Involvement of the Defendants Voluntary or Mandatory?

When participation is mandatory, the defendant's involvement approaches a duress or necessity argument that would excuse their noncompetitive behavior.[147] It is important to see who falls within the purview of the decree at the outset. If only half of the targeted industries respond to the decree with no sanctions on the non-reacting half, then the compulsive nature of the decree is diminished. If the decree or any other final agreement specifies the right to exit from the grouping, then compliance becomes voluntary and there is no actual compulsion.In *Matsushita*, Zenith presented the "Rationales" agreement signed by the Japanese manufacturers, which had a non-restrictive clause to allow any signatory to leave the cartel.[148] This clause indicates that the MITI did not have the power to force the participation by all of the manufacturers in the cartel, thus diminishing the efficacy of "true" compulsion.

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ity to maintain a program that violated the Sherman Act, the public utility was liable because the program could be easily removed by filing for a tariff change. 428 U.S. 579, 593-94 (1976) Thus, state action without subsequent supervision would remove immunity from antitrust liability under the state action doctrine. California Retail Liquor Dealers Ass'n V. Midcal Aluminum, Inc., 445 U.S. 97 (1980). *See supra* note 125 and accompanying text.

145. Petitioner's Brief at 37.

146. *In re* Japanese Electronic Products, 723 F.2d at 315.

147. Note, *Foreign Sovereign Compulsion in American Antitrust Law*, 33 STAN. L. REV. 131, 144-45 (1980).

148. Respondents Brief at 14, *Matsushita*.

5. At What Time was The State Policy Specified or Clarified?

This factor cannot have a substantial effect upon the decision of a court, but it does help to analyze the compulsive nature, especially if the government decree was known and practiced by the parties before the presence of an impending litigation.

The emergence of this factor is due to the *Matsushita* case. The Japanese manufacturers wanted the Court to define the nature of the foreign sovereign compulsion through the contents of the 1975 Japanese Government Statement.[149] The amicus brief of the U.S. Solicitor General agreed with this point and urged the Court to give that statement conclusive effect.[150] Such a proposition would neutralize a court's fact-finding role.

This factor must be viewed in conjunction with the first three. Since the factual determinations made under the first three factors can contradict a statement presented by a government during litigation, a conclusory effect on that statement would be improper. This is not to say that a government is lying about the nature of its laws, but that under an objective assessment of the facts the defendants would not have deemed themselves to be under compulsion at the time they acted; thus, they are not entitled to the defense as a matter of fairness. A policy statement contemporaneous with the government mandate is probative of the fact that the defendants were made aware of the compulsion. The statement presented by the Japanese Government in the *Matsushita* case stated the law and also presented facts that would weigh the first three factors in their favor. On the basis of that letter alone, this test would satisfy the sovereign compulsion defense. However, the facts alleged by Zenith show otherwise. The resolution of the facts is not proper here, but a court should look beyond a later governmental statement for earlier policy statements that would support the defense. The only significant ramification presented by such a rule would be that countries, who want to legislate or administer rules upon private parties in their trade with the United States, would be on notice to clearly state why and how they want to affect U.S. trade.

6. What is the Nature of the Trade Position Before and After the Defendant's Anti-competitive Behavior?

A major concern in this factor is the territorial effect of the foreign sovereign's actions. The position of the Department of Justice under the International Antitrust Guide[151] does not carry over to the *Matsushita* case. The Department made no reference to the territorial effect of the defendants's action nor to the MITI mandate, and instead emphasized the harmful consequences to trade relations if a trial court were to rule on

149. Petitioner's Brief at 35, *Matsushita*.
150. Brief for the United States, *Matsushita*.
151. *See supra* note 122 and accompanying text.

the nature of the compulsion.[152] The effect on the U.S. trade position should be used as an auxiliary factor to support or contradict the policy stated by the foreign sovereign. If the policy is to limit adverse effects upon U.S. manufacturers and, in actuality, the U.S. production has fallen to nominal amounts, it would be probative of actions contradictory to the policy. A contradiction between what is said and what is done increases the importance of the factual findings under the first three factors. If the two elements support each other then a conclusive effect upon the governmental statement of compulsion would be proper.

The six factor test is designed to define a new role for a court confronted with the constraints of actions by foreign sovereigns. That role is to allow a U.S. court to look beyond government edicts when private parties are involved. The court must be able to look to the facts surrounding a case. The six factor test does not seek to eliminate the defense; rather it seeks to differentiate "true" compulsion in implementing trade policies from a sovereign's protection of domestic companies. The *Matsushita* case does not clearly show either finding based upon the facts considered by the district court, and on that basis would have made an ideal case to devise a standard for the foreign sovereign compulsion defense.

VI. CONCLUSION

The impact of *Matsushita* upon the field of antitrust law and specifically on cases alleging predatory pricing is yet to be seen. The adoption of a firm policy towards predation indicates the necessity of approaching any future litigation with a very strong case. The ability to succeed with only predatory pricing conspiracy will be rare; thus, a plaintiff will have to present the court with some form of direct evidence in order to succeed.

The issue of the foreign sovereign compulsion defense remains unanswered. The controversy surrounding this issue has not been preeminent, and this may account for the avoidance of the issue by the Supreme Court. However, there exists the possibility of a greater number of complaints leading to the assertion of this defense. The trend in the trade laws to resolve trade problems through inter-governmental negotiations will necessarily involve foreign governmental participation. If such cases do arise in conjunction with governmental statements indicating compulsion, the statements should not be given dispositive effect. The conclusory effect of such statements should only follow support in the facts corroborating them. Such a policy will not negate the defense, but rather, will only place the countries on notice to relate their trade policies toward the United States in a prescribed manner.

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152. Brief for the United States at 18-19, *Matsushita*.