Consumers Union of U. S., Inc. v. Kissinger

506 F.2d 136 (D.C. Cir. 1974)

OPINION BY: McGOWAN

… In the form eventually taken by the litigation in the District Court, we consider that the only question before us is whether the actions of the Executive were a regulation of foreign commerce foreclosed to it generally by Article I, Section 8, Clause 3 of the Constitution, and in particular by the Trade Expansion Act of 1962. To the extent that the District Court declared no such conflict to exist, we affirm its decision.

I

… After an initial showing of interest by the foreign producer associations, State Department officials entered into discussions that lasted from June to December, 1968, and resulted in letters being sent to the Secretary in which the Japanese and European producer associations stated their intentions to limit steel shipments to the United States to specified maximum tonnages for each of the years 1969, 1970, and 1971. During 1970, domestic industry and union representatives urged the State Department to seek renewal of the restraints beyond 1971 to provide greater time within which to achieve needed changes, and the House Ways and Means Committee issued a report to like effect. When various executive organs, such as the President's Council of Economic Advisors, had made the same recommendation, the President directed the Secretary to seek extensions of the limitation representations. Such extensions, covering 1972 through 1974, were forthcoming in letters dated early in May, 1972, and announced by the President on May 6. The two 1972 letters are substantially alike. Each states the signatories' intention to limit exports of steel products to the United States both in aggregate tonnage and, within such limits, in terms of product mix. Each represents that the signatories "hold themselves [itself] ready to consult with representatives of the United States Government on any problem or question that may arise with respect to this voluntary restraint undertaking" and expect the United States Government so to hold itself ready. In addition, each states that its undertaking is based on the assumptions that (1) the effect will not be to place the signatories at a disadvantage relative to each other, (2) the United States will take no unilateral actions to restrict exports by the signatories to the United States, and (3) the representations do not violate United States or international laws.

IV

We turn, then, to the District Court's declaration that, in respect of the actions of the Executive culminating in the undertakings stated in the letters of intent, "the Executive is *not preempted* . . . and that there is no requirement that all such undertakings be first processed under the Trade Expansion Act of 1962." That statute, as its name suggests, had as its principal purpose the stimulation of the economic growth of the United States and the maintenance and enlargement of foreign markets for its products. This was to be achieved through trade agreements reached by the President with foreign countries. Title II of the Act provided that, for a period of five years (1962-67), the President was authorized to enter into such agreements whenever he determined that any existing tariff duties or other import restrictions of either the United States or any foreign country were unduly burdening and restricting the foreign trade of the United States. Upon reaching any such trade agreement, the President was delegated the unmistakably legislative power to modify or continue existing tariffs or other import restrictions, to continue existing duty-free or excise treatment, or to impose additional import restrictions, as he determined to be necessary or appropriate to the carrying out of the agreement. In connection with the first two of these powers, the Tariff Commission was given an advisory function,

which included public hearings; and public hearings were also directed to be held, by an agency designated by the President, in connection with any proposed trade agreement.

Title III of the Trade Expansion Act of 1962, recognizing that domestic interests of various kinds may be adversely affected by concessions granted under trade agreements, authorizes the making of compensating adjustments of various kinds. Section 301 provides that the Tariff Commission shall undertake investigations of injuries allegedly being done to domestic businesses or workers by such things as increased imports flowing from a trade agreement. After holding public hearings, the Tariff Commission shall make a report to the President. If it affirmatively finds injury to domestic industry, the President may under Section 351 increase or impose tariff duties or other import restrictions, or alternatively he may under Section 352 negotiate agreements with foreign governments limiting the export from such countries to the United States of the article causing the injury. If this latter option is taken, the Act provides that the President is authorized to issue regulations governing the entry or withdrawal from warehouse of the article covered by the agreement.

The foregoing description of the Trade Expansion Act of 1962 covers, among others, Sections 301 and 352. They are the only provisions expressly identified in the amended complaint as constituting the allegedly preemptive exercise by Congress of its constitutional power to regulate foreign commerce that, so it is said, forecloses the actions of the Executive challenged in this case. The description extends also to Sections 302 and 351, which are referred to in plaintiff-appellant Consumers Union's brief, as is also Section 232, This last is the so-called national security clause which provides that the President shall not decrease or eliminate tariffs or other import restrictions if to do so would impair the national security. The Director of the Office of Emergency Planning is directed to investigate any situation where imports threaten to impair the national security; and if he finds such threat, and the President concurs, action shall be taken "to adjust the imports" of the article in question, which means that the article may by regulation be excluded from entry or withdrawal from warehouse.

What is clear from the foregoing is a purpose on the part of Congress to delegate legislative power to the President for use by him in certain defined circumstances and in furtherance of certain stated purposes. Without such a delegation, the President could not increase or decrease tariffs, issue commands to the customs service to refuse or delay entry of goods into the country, or impose mandatory import quotas. To make use of such delegated power, the President would of course be required to proceed strictly in accordance with the procedures specified in the statutes conferring the delegation. Where, as here, he does not pretend to the possession of such power, no such conformity is required.

The steel import restraints do *not* purport to be enforceable, either as contracts or as governmental actions with the force of law; and the Executive has no sanctions to invoke in order to compel observance by the foreign producers of their self-denying representations. They are a statement of intent on the part of the foreign producer associations. The signatories' expectations, not unreasonably in light of the reception given their undertakings by the Executive, are that the Executive will consult with them over mutual concerns about the steel import situation, and that it will not have sudden recourse to the unilateral steps available to it under the Trade Expansion Act to impose legal restrictions on importation. The President is not bound in any way to refrain from taking such steps if he later deems them to be in the national interest, or if consultation proves unavailing to meet unforeseen difficulties; and certainly the Congress is not inhibited from enacting any legislation it desires to regulate by law the importation of steel.

The formality and specificity with which the undertakings are expressed does not alter their essentially precatory nature insofar as the Executive Branch is concerned. In effect the President has said that he will not initiate steps to limit steel imports by law if the volume of such imports remains within tolerable bounds. Communicating, through the Secretary of State, what levels he considers tolerable merely enables the foreign producers to conform their actions accordingly, and to avoid the risk of guessing at what is acceptable. Regardless of whether the producers run afoul of the antitrust

laws in the manner of their response, nothing in the process leading up to *the voluntary undertakings* or the process of consultation under them differentiates what the Executive has done here from what all Presidents, and to a lesser extent all high executive officers, do when they admonish an industry with the express or implicit warning that action, within either their existing powers or enlarged powers to be sought, will be taken if a desired course is not followed voluntarily.

The question of congressional preemption is simply *not* pertinent to executive action of this sort. Congress acts by making laws binding, if valid, on their objects and the President, whose duty it is faithfully to execute the laws. From the comprehensive pattern of its legislation regulating trade and governing the circumstances under and procedures by which the President is authorized to act to limit imports, it appears quite likely that Congress has by statute occupied the field of *enforceable* import restrictions, if it did not, indeed, have exclusive possession thereof by the terms of Article I of the Constitution. There is no potential for conflict, however, between exclusive congressional regulation of foreign commerce -- regulation enforced ultimately by halting violative importations at the border -- and assurances of voluntary restraint given to the Executive. Nor is there any warrant for creating such a conflict by straining to endow the voluntary undertakings with legally binding effect, contrary to the manifest understanding of all concerned and, indeed, to the manner in which departures from them have been treated. n12

In holding, as we do, that the District Court did not err in declining to characterize the conduct of the Executive here under attack as in conflict with the Trade Expansion Act of 1962, we are not to be understood as intimating any views as to the relationship of the Sherman Act to the events in issue here. The Sherman Act is not, as noted above, one of the regulatory statutes charged as preempting the field, and the question of its possible substantive applicability vanished from this case with the original complaint.
The declaration in the District Court's order with respect to antitrust exemption is vacated, and the declaratory aspect of that order is confined to the proposition that the State Department defendants were not precluded from following the course they did by anything in the Constitution or Title 19 of the U.S. Code. As so confined, the order appealed from is affirmed.

It is so ordered.