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AN ANTITRUST REMEDY FOR INTERNATIONAL PRICE PREDATION: LESSONS FROM *ZENITH V. MATSUSHITA*

Harry First†

Abstract: The purpose of this article is to articulate a set of rules for an antitrust cause of action against international predatory pricing. The article develops these rules in the context of the antitrust and trade litigation brought in the United States and Japan against the Japanese televisions manufacturers between 1956 and 1986. The thesis of this article is that the litigation illustrates that antitrust enforcement should concentrate on exclusion from the home market rather than on low prices in the target market. The article also argues that antitrust should encompass a concern with the strategic use of market power to protect rents, to capture spillover benefits in complementary industries, or to capture the current oligopoly profits of the targets of predation. The proposed cause of action requires proof of exclusion from the blocked home market and pricing below cost in the target market. Market opening injunctions and damages for private litigants are suggested as remedies.

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† Professor of Law, New York University School of Law. For their very helpful comments on earlier drafts, I would like to thank John Flynn, Warren Grimes, Lewis Kornhauser, David Schwartzman, and the participants in the Comparative Competition and Trade Policy Project. I would also like to thank Craig Abruzzo for his invaluable research assistance.

> "But Japanese sets were better and cheaper," I said.
>
> "They may have been better," Ron said, "but they were only cheaper because they were sold below production cost, to wipe out American competitors. That's called dumping. . . . "
>
> "Then why didn't we stop it?"
>
> "Good question. . . . They also fixed prices: they had something called the Tenth-Day Group. Japanese managers met every ten days in a hotel room to set prices in America. . . . And of course all during this time, American companies could never fight back in Japan. They couldn't even get a foot in the door in Japan."
>
> "You're saying the Japanese took over the television industry illegally?"
>
> Ron shrugged. "They couldn't have done it without our help," he said . . . . "[T]he Japanese dumped steel, television, consumer electronics, computer chips, machine tools — and nobody stopped them. . . . Industry after industry, year after year. While we sit around and spout off about free trade."[1]

I. INTRODUCTION

The problem of international price predation, although an old one, has been of particular concern in the twentieth century. It has been dealt with mostly as a matter of trade policy, combining, in current practice, application of antidumping legislation and government negotiation.

Domestic predatory pricing has also been of economic concern, particularly predatory pricing done through geographic price discrimination. In the United States, it has been dealt with by antitrust law. In the early twentieth century, the ability to engage in such pricing was identified as a source of power for monopolists such as Standard Oil, and it led Congress in 1914 to enact the Clayton Act's provisions forbidding price discrimination and the Federal Trade Commission Act's provisions forbidding unfair methods of competition. More recently, predatory pricing has been the

1 MICHAEL CRICHTON, RISING SUN 201-03 (1992).

subject of private litigation brought under sections 1 and 2 of the Sherman Act.

Although the trade policy approach is still vigorously applied in the international area, its results are seen by many as economically inefficient, protecting high-cost producers from more efficient foreign competitors.[2] Might antitrust law offer a possible alternative to trade policy? The idea that antitrust could be a useful approach to this problem is hardly a new one; Viner's classic study on dumping discusses it.[3] Nevertheless, antitrust has rarely been used to attack international predatory pricing.

This article will explore the possibilities of using an antitrust approach to international predation. To illustrate some of the problems with such an approach, the article will use as an exemplar a case of alleged international predatory pricing in which both the trade and antitrust approaches were tried -- the Japanese television manufacturers' cartel. Many view this case as a paradigmatic example of predation by foreign competitors. At the very least, the case shows the problems of the two legal approaches, but it also provides some suggestions for modifications to current antitrust approaches in this area.

The first part of this article reviews the case against the Japanese television manufacturers and how it was pursued under trade law and antitrust law. The second part of the article concentrates on the antitrust theories for predatory pricing. The basic thesis of this article is that antitrust law should concentrate on exclusion from the home market, rather than on low prices in the target market. Ending this exclusion not only offers the possibility of discouraging strategic predation, but directly fosters open markets, a primary goal of antitrust. A secondary point is that U.S. antitrust need not be concerned only with injury to U.S. consumers through the extraction of monopoly profits in the goods subject to predation (indeed, historically antitrust has not been so limited). Rather, antitrust should be concerned with the strategic use of market power to protect rents, to achieve strategic goals in complementary industries, or to capture the current profits of the targets of predation, when those targets operate in oligopolistic international markets where the capture of profits by domestic industries is important for national economic welfare.

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2 *See generally* COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT TO CONGRESS (1994) (criticizing dumping).

3 *See* JACOB VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 239-40 (1966 ed.) (1923).

II. THE LITIGATION

A. *The Chronology*

Television, although invented in the United States before World War II, did not become commercially viable until after the war. In Japan, the seven major companies that would make up Japan's television industry (Matsushita, Mitsubishi, Hitachi, Sony, Toshiba, Sanyo, and Sharp) were all in existence by 1947. In 1949, Matsushita began to organize its distribution system into exclusive territories and near-exclusive retail outlets.[4] In 1953, RCA licensed its technology for black-and-white televisions to Japanese firms.[5]

Formal collusion in Japan began shortly thereafter. In 1956, a group of sixteen major appliance manufacturers (including the television manufacturers) and an association of appliance dealers formed the Household Electrical Appliance Market Stabilization Council. The purpose of this group was to control wholesale and retail prices of home electric appliances and to prevent shipment of products to discounters. An attempt to restrict output was also necessary to the effort. One year after its formation, in 1957, Japan's Fair Trade Commission (although at a low ebb in its enforcement efforts) issued a Recommendation Decision ordering the Council to end its price-fixing agreement as well as the agreement to boycott discounters. The Recommendation was accepted by the parties.[6]

Whether the industry completely abandoned its efforts to prevent price-cutting cannot be stated with certainty. Nevertheless, it appears that

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[4] Kozo Yamamura & Jan Vandenberg, *Japan's Rapid-Growth Policy on Trial: The Television Case, in* LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES 238, 252-53 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986) [hereinafter Yamamura & Vandenberg]. Matsushita's initiative to gain control over its distribution system so as to prevent price cutting is described in M. YOSHINO, THE JAPANESE MARKETING SYSTEM: ADOPTIONS AND INNOVATIONS 111-16 (1971).

[5] James Millstein, *Decline in an Expanding Industry: Japanese Competition in Color Television, in* AMERICAN INDUSTRY IN INTERNATIONAL COMPETITION 106, 124 (John Zysman & Laura Tyson eds., 1983) [hereinafter Millstein].

[6] For a description of the Council's efforts and the FTC's decision see, e.g., DAVID SCHWARTZMAN, THE JAPANESE TELEVISION CARTEL: A STUDY BASED ON MATSUSHITA V. ZENITH 77-80 (1993) [hereinafter SCHWARTZMAN]; Kenji Kawagoe, *Ryutsu keiretsuka no jittai* [*The Actual Situation of the Process of Creating Distribution Keiretsu*] (1977), *translated in* JOHN HALEY & MITSUO MATSUSHITA, JAPANESE ANTITRUST LAW: COMMENTARY AND CASES 288, 289-91 (1987) (mimeo).

the industry spent several years without any formally organized effort to control price or output.

It was during this time that exports of television sets began. As of 1960, just slightly more than one percent of Japan's black-and-white television production was being exported (and only about a quarter of that to the United States).[7] As of 1963, exports to the United States had risen only to 2.6 percent of the U.S. market.[8] Despite this low level of exports, in 1963 the major television manufacturers entered into an export cartel agreement. Pursuant to this agreement the manufacturers set minimum export prices for sales of black-and-white television sets in the United States (referred to as "check prices"). The publicly stated rationale of the agreement was both to expand exports and to prevent "disturbance" to the U.S. market which might lead to the filing of dumping complaints.[9] The agreement was entered into pursuant to the Export and Import Trading Act of 1952, and it was approved by the Ministry of International Trade and Industry ("MITI") pursuant to that Act, thereby conferring a statutory antitrust exemption on the agreement with regard to prosecution under the Antimonopoly Law.[10]

In 1964, the Japanese manufacturers formally organized an elaborate hierarchy of groups to discuss the price and output of television sets for the domestic market. Issues went from mid-level managers (the Tenth Day Group), to the senior managing directors of the companies (the Palace Group), to the presidents of the companies (the Okura Group). Discussions included minimum prices, margins for wholesalers and retailers, and the level of rebates. Color televisions were added to the discussions in 1965. The more senior groups were not limited to televisions, but discussed other products in the home appliance field as well.[11]

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7 *See* SCHWARTZMAN, *supra* note 6, at 113 tbl. 6.6.

8 Yamamura & Vandenberg, *supra* note 4, at 261 tbl. 4.

9 *See id.* at 261. In light of the fact that the check prices were lower than domestic prices, it is unclear how the agreement would successfully have prevented a dumping complaint. *See id.*

10 *See* Yushutsunyū torihiki hō (Export-Import Transaction Law) § 33, Law No. 299 of 1952. MITI subsequently stated that it "directed" the manufacturers to enter into the agreement (presumably not under the 1952 Act, which does not give any such authority to MITI) and that it "supervised the preparation" of the agreement "so that MITI's intention was correctly reflected." Statement of the Ministry of International Trade and Industry transmitted by letter from Embassy of Japan to United States Department of State (Apr. 25, 1975) *in* Petition for Writ of Certiorari for Defendant-Appellant, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 83-2004), *microformed on* U.S. Supreme Court Records and Briefs app. at 7a-12a (Microform, Inc.) [hereinafter MITI Statement].

11 *See* SCHWARTZMAN, *supra* note 6, at 81-89; Yamamura & Vandenberg, *supra* note 4, at 255-56. The Tenth Day Group was so named because its first meeting was on the tenth of the month; the other two Groups were named for the Tokyo hotels where they met.

Two years after the formation of these groups in 1966, Japan's Fair Trade Commission ("JFTC") began a new investigation of the industry. The JFTC issued a recommendation charging six of the major television manufacturers with a violation of section 3 of the Antimonopoly Law (a horizontal restraint of trade) arising out of their activities in the domestic market.[12] This action was followed by a recommendation in 1967 charging Matsushita with fixing resale prices and with refusals to deal with discounters.[13]

Exports to the United States continued to grow. By 1966, Japanese firms had 14 percent of the U.S. black-and-white television market (accounting for 26 percent of Japan's output).[14] The Japanese industry also began to export color televisions; in 1966, Japanese firms had 4 percent of the U.S. market (but that accounted for 47 percent of its output of color televisions that year).[15] In this same year MITI became involved in coordinating and providing financial assistance for a research and development program to develop solid-state technology for black-and-white and color televisions.[16]

With imports increasing, the television manufacturers in 1967 adopted a second agreement governing their exports to the United States, the "five-company rule." Under this agreement, each manufacturer was limited to five customers with whom it could make an export contract or engage in a "long-term, continuous trading relationship."[17] One of these customers would be the manufacturer's own U.S. sales subsidiary, which made sales to smaller customers that did not come to Japan for buying, and the other four customers were direct purchasing mass merchandisers or original equipment manufacturers.[18] A significant aspect of the five-

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[12] Sanyo Elec. Co., Ltd., Tokyo Shibaura Elec. Co., Ltd. (Toshiba), Hayakawa Elec. Co., Ltd. (Sharp), Hitachi, Ltd., Matsushita Elec. Industrial Co., Ltd., and Mitsubishi Elec. Corp., Case No. 6, 1966, *discussed in* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1209 n.2 (E.D. Pa. 1980).

[13] *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1177 n.53 (E.D. Pa. 1980). Sony received a warning for similar practices; FTC, ANNUAL REPORT FOR 1968 218 (1969); *see also* Hideto Ishida, *Anticompetitive Practices in the Distribution of Goods and Services in Japan: The Problem of Distribution Keiretsu*, 9 J. JAPANESE STUDIES 319, 329 (John Haley trans. 1983).

[14] Yamamura & Vandenberg, *supra* note 4, at 262 (tbl. 5); SCHWARTZMAN, *supra* note 6, at 113 (tbl. 6.6).

[15] SCHWARTZMAN, *supra* note 6, at 110-11 (tbls. 6.4, 6.5).

[16] *See* Millstein, *supra* note 5, at 107.

[17] Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1189 (E.D. Pa. 1981).

[18] *See* SCHWARTZMAN, *supra* note 6, at 97.

company rule was a prohibition on one manufacturer listing the same customer as another manufacturer.[19]

The five-company rule was adopted as part of the rules of the Japan Machinery Exporters Association ("JMEA"), whose Television Export Council was the vehicle for managing the export cartel. Pursuant to the Export and Import Trading Company Act, the agreement was filed with MITI.[20]

Japanese manufacturers' market share in the United States continued to climb between 1968 and 1970 for both black-and-white and color televisions.[21] It also appears that during this period the Japanese manufacturers were selling television sets in the United States to mass merchandisers and original equipment manufacturers at prices that were below the check prices.[22] This "double invoicing" (the public check prices and the secret lower prices) led to the filing of the first trade complaint involving televisions, filed in 1968 by the U.S. Electronic Industries Association. This complaint alleged that the Japanese manufacturers were violating the Antidumping Act of 1921 by selling black-and-white and color televisions in the United States for "less than fair value."[23]

Three legal strands converged in 1970. First, the Department of the Treasury determined that the Japanese manufacturers were selling televisions at less than fair value.[24] Second, seventeen days after that finding, the

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[19] It is unclear for how long this customer allocation rule was part of the written agreement. It was included in "Guidelines for Registration" attached to the 1973 version of the Rules. *See* 513 F. Supp. at 1189 n.118. The export cartel agreement was not renewed after 1973. Brief for Respondents Zenith Radio Corp. at 48, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 83-2004) [hereinafter Brief for Respondents].

[20] Act of 1952, § 11. MITI's 1975 statement, provided for purposes of the antitrust litigation, did not refer specifically to the five-company rule. *See* MITI Statement, *supra* note 10. Instead, the letter refers to directing the parties "with respect to filing of export prices and other related matters." *Id.*

[21] *See* SCHWARTZMAN, *supra* note 6, at 111 (tbl. 6.5, color), 114 (tbl. 6.7, monochrome).

[22] *See* Brief for Respondents, *supra* note 19, at 33-48; Yamamura & Vandenberg, *supra* note 4, at 261-62.

[23] *See* 19 U.S.C. § 160(a). The Electronic Industries Association was formed in the 1960s to lobby for U.S. manufacturing interests. *See The Implications of Our International Trade Policy for American Business and Consumers: Hearing Before the Subcomm. on International Trade, Investment and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 10 (1978) (statement of Dr. Thomas C. MacAvoy, President, Corning Glass Works), *microformed on* CIS No. 78-H241-18 (Congressional Info. Serv.).

[24] 35 Fed. Reg. 18,549 (1970). At this time the Treasury Department was responsible for determining if merchandise was being sold in the U.S. for less than fair value, and the Tariff Commission was responsible for determining if there was a related injury to domestic manufacturers. The duties of the Treasury Department were transferred to the Department of Commerce in 1979. *See* 44 Féd. Reg. 70,703

National Union Electric Company ("NUE"), a television manufacturer that had discontinued manufacturing six months before, filed suit seeking damages under the antitrust laws and the Antidumping Act of 1916. Third, a hearing decision was finally drafted by Japan's Fair Trade Commission relating to its 1966 charges against the domestic cartel activities of the six major Japanese manufacturers. This draft decision found that there had been a cartel that had agreed to fix minimum prices, resale margins, and resale prices of black-and-white televisions, in violation of section 3 of the Antimonopoly Law. The draft decision also found that the violations had stopped in 1967.[25]

In 1971, the Tariff Commission decided that the U.S. industry was being injured as a result of television imports from Japan being sold at less than fair value.[26] The Bureau of Customs consequently added black-and-white and color Japanese television sets to the list of imports on which dumping duties should be assessed (although no dumping duties were then assessed).[27]

Three months later, three unions representing workers in the U.S. television manufacturing industry filed a petition under section 301 of the Trade Expansion Act of 1962 alleging that Japanese televisions were being imported in such quantities as to seriously injure the domestic industry.[28] The Tariff Commission rejected the petition for failing to meet the statutory criterion (trade concessions must be a major cause of industry harm).[29]

In the same year, Matsushita accepted a consent decision in the domestic vertical distribution case begun by the JFTC in 1967, which Matsushita had contested. In a consent decision under the Antimonopoly Law, the respondent admits the facts and the legal charge, and sets out a plan for

(1979). The Tariff Commission was renamed the International Trade Commission pursuant to the Trade Reform Act of 1974. *See* 40 Fed. Reg. 2,627 (1975).

[25] *See* Yamamura & Vandenberg, *supra* note 4, at 254; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1209 n.2 (E.D. Pa. 1980).

[26] 36 Fed. Reg. 4,576 (1971).

[27] T.D. 71-76, 36 Fed. Reg. 4,597 (1971). Dumping duties are not automatically assessed. They are levied on an entry-by-entry basis if dumping margins are found to exist. *See generally* RUTH F. STURM, A MANUAL OF CUSTOMS LAW 362 (1976).

[28] 36 Fed. Reg. 11,491 (1971). The purpose of section 301 of the Trade Expansion Act is to provide the criteria for determining whether a domestic industry qualifies for tariff or other assistance. *See* 36 Fed. Reg. 22,654 (1971). The unions were the International Association of Machinists and Aerospace Workers, AFL-CIO; the International Brotherhood of Elec.al Workers, AFL-CIO; and the International Union of Elec.al, Radio & Machine Workers, AFL-CIO-CLC. *Id.*

[29] 36 Fed. Reg. 22,653 (1971). The decision is further described in Millstein, *supra* note 5, at 123.

remedying the violation. Matsushita agreed that it had attempted to keep television sets from discounters, and it agreed to end the practice.[30]

Exports of televisions from Japan continued rising through the early 1970s. Japan's share of the black-and-white market reached its peak in 1971, both in terms of market share and quantity.[31] Color television exports were similarly high in 1971, although the peak in volume and market share for the 1970s was not reached until 1976-1977.[32]

In 1974, Matsushita acquired Motorola's Quasar television division, an acquisition not challenged by the U.S. government on antitrust grounds, although Zenith vigorously protested.[33] Three months later Zenith filed a private antitrust suit against the major Japanese television producers. The suit alleged violations of sections 1 and 2 of the Sherman Act, along with claims under the Wilson Tariff Act and the Antidumping Act of 1916 (the latter two being infrequently used statutes prohibiting importing or predatory dumping done with intent to restrain trade or to monopolize).[34] Four months later Zenith's suit was consolidated with NUE's.

No other U.S. manufacturers joined the antitrust litigation. Some may have chosen to stay out because of on-going business relations with the Japanese defendants. (General Electric, for example, owned 10 percent of Toshiba, and RCA was a substantial licensor of technology to the Japanese producers.)[35] Others subsequently chose the trade law route. In 1976, GTE Sylvania and Philco Consumer Electronics Corporation filed a complaint with the International Trade Commission (ITC) alleging unfair methods of

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[30] *See* Yamamura & Vandenberg, *supra* note 4, at 254. Matsushita contended that it agreed to the consent decision to appease the public which had begun to boycott the company's products in response to the JFTC's charges. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1182 n.66 (E.D. Pa. 1980).

[31] *See* SCHWARTZMAN, *supra* note 6, at 114 (tbl. 6.7) (36% for imports from Japan); Yamamura & Vandenberg, *supra* note 4, at 260 (tbl. 4) (26.9%).

[32] *See* SCHWARTZMAN, *supra* note 6, at 111 (tbl. 6.5) (29% in 1976, 22% in 1977); Yamamura & Vandenberg, *supra* note 4, at 262 (tbl. 5) (18.9% in 1976, 14% in 1977). Part of the U.S. response to Japanese competition was to move production offshore. This effort, which began in 1967, resulted in an import market share in 1972 for U.S. subsidiaries and affiliates of 52 percent of the black-and-white market (the peak year for total U.S. consumption of black-and-white sets). *See* Millstein, *supra* note 5, at 114, 116.

[33] *See Antitrust Procedural Act of 1979: Hearings on S. 390 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 85 (1979) (statement of John J. Nevin, Chairman, Zenith Radio Corp.), *microformed on* CIS No. 78-S521-52 (Congressional Info. Serv.) (discussing this merger as further evidence of a Japanese raid on the United States industry).

[34] *See* 15 U.S.C. §§ 8 (Wilson Tariff Act), 72 (Antidumping Act).

[35] *See* Brief for Respondents, *supra* note 19, at 55 (alleging that GE had considered filing suit, but did not do so because of its ownership interests).

competition by Japanese television manufacturers in violation of section 337(b) of the Tariff Act of 1930.[36] The acts challenged were the same as those that formed the basis of the antitrust complaint.[37]

Nine months later COMPACT (the Committee to Preserve American Color Television[38]) filed another trade act petition. This case was filed under the "escape clause" (section 201 of the Trade Reform Act of 1974), charging that Japanese television sets were being exported to the U.S. in such increased quantities as to be a substantial cause of injury to the domestic industry.[39]

The ITC resolved both cases relatively quickly. In March of 1977, it found a violation under section 201, recommending that additional duties of 20 percent be levied on the television sets.[40] In June of 1977, the ITC entered a consent order in the section 337 proceeding, in which the Japanese manufacturers agreed not to engage in any of the conduct with which they had been charged.[41]

President Carter rejected the ITC's proposed remedies under section 201. Instead, he announced an Orderly Marketing Agreement (pursuant to his authority under the 1974 Act) which limited the export of color televisions from Japan into the United States to 1.75 million sets per year for the following three years.[42]

Meanwhile, the 1966 JFTC charges against the six television manufacturers for their domestic cartel activities still remained unresolved. In 1978, the Fair Trade Commission finally ended its work by dropping the case. Despite the findings of the previously drafted hearing decision, the JFTC decided that it was unable to resolve the "'factual and legal problems

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[36] 41 Fed. Reg. 14,014 (1976). Section 1337 of Title 19 of the U.S. Code authorizes the ITC to investigate importing practices for unfair methods of competition which destroy or substantially injure a U.S. industry. If a violation is found, the statute authorizes the ITC to exclude such imports, issue cease and desist orders, and levy civil penalties for continued violations.

[37] *See* 41 Fed. Reg. 14,949 (1976).

[38] COMPACT was a coalition of unions and domestic manufacturers who still did substantial manufacturing in the United States. *See* Millstein, *supra* note 5, at 128.

[39] 41 Fed. Reg. 50,076 (1976). This section provides remedies for aggrieved industries without the section 337's requirements of unfair practices and actual injury. The imports need only be a substantial cause of a threat of serious injury to trigger protection under Section 201. *See generally* DAVID SERKO, IMPORT PRACTICE: CUSTOMS AND INTERNATIONAL TRADE LAW 275-79 (1985).

[40] 42 Fed. Reg. 16,489 (1977). Only three of the six commissioners determined that serious injury existed for both the black-and-white and color television industries.

[41] 42 Fed. Reg. 30,262-65 (1977). Inspection and reporting requirements were imposed under the agreement.

[42] Proclamation No. 4511 of the President of the United States, 1 PUB. PAPERS 1157-61 (1977).

involved in this case. . . . [A]ny further prolonging . . . is considered to be undesirable from the point of view of legal stability.'"[43]

In 1980, the U.S. government announced a $77 million settlement of the dumping duties assessed under the order originally entered in 1971 (pursuant to the antidumping petition filed by the U.S. industry in 1968).[44] Subsequent litigation brought by both Zenith and COMPACT, however, sought (with some eventual success) to enjoin the collection of the settlement on the grounds that U.S. negotiators had acted improperly in reaching the settlement.[45] It is unclear whether any dumping duties have ever been collected, either under the agreement or under assessments of dumping duties for subsequent years.

In the same year, the antitrust litigation moved toward a disposition when the district court issued a series of evidentiary rulings adverse to Zenith. These rulings held inadmissible: 1) the documents and studies produced by the Fair Trade Commission in the course of its antitrust proceedings and by the U.S. government in the course of the trade investigations; 2) the documents seized from the defendants by the Fair Trade Commission in the course of its investigations; and 3) the reports of Zenith's five experts relating to the economic theory of its case and to Japan's industrial and legal system as it affected this industry.[46] In 1981, the district court granted the defendants' motion for summary judgment.[47] Although subsequently reversed by the court of appeals,[48] in 1986 the Supreme Court agreed with the district court and held that the defendants were entitled to summary judgment.[49] This ended the antitrust litigation.

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43 *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1209 n.2 (E.D. Pa. 1980).

44 45 Fed. Reg. 37,782, n.7 (1980).

45 The substance of Zenith's claim was that the decision to settle was based on "improper motivations of persons in the Executive Branch . . . [b]ased primarily on political and other irrelevant considerations." Zenith Radio Corp. v. United States, 505 F. Supp. 216, 218 (Ct. Int'l Trade 1980). *See also* COMPACT v. United States, 4 I.T.R.D. (BNA) 1155, 1157 (Ct. Int'l Trade 1982).

46 *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125 (Public Records Opinion), 1190 (Japanese Evidentiary Materials Opinion), 1313 (Expert Testimony Opinion) (E.D. Pa. 1980).

47 Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100 (E.D. Pa. 1980).

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

49 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). Technically, the Court remanded the case to the Court of Appeals for a further search for "unambiguous" evidence of the conspiracy alleged by the plaintiffs; such evidence was not found on remand, leading the Court of Appeals to affirm the grant of summary judgment entered by the District Court. *See In re* Japanese Electronic Products Antitrust Litigation, 807 F.2d 44 (3d Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987).

The antidumping order remains in effect. In 1991, the Department of Commerce found dumping margins for eleven Japanese manufacturers for the period 1983-1990, ranging from 0.16 percent to 35.4 percent.[50]

B. The Antitrust Case

Zenith's antitrust theory was that the Japanese manufacturers had engaged in "an integrated course of conspiratorial conduct to restrain and monopolize" the market for television sets in the United States "through collusive dumping and other anticompetitive activities."[51] The cartel coordinated home (Japan) and export (U.S.) pricing so as to create "sharp price differentials between the two markets." The prices charged in the U.S. "were generally at a loss," these losses being subsidized by the profits from price-fixing in the "closed Japanese home market."[52]

As proof of the existence of the cartel, Zenith pointed to the evidence of domestic collusion uncovered in the Fair Trade Commission's 1956 and 1966 investigations, and to the formal arrangements surrounding the export cartel formed in 1963. Evidence of systematic dumping was supplied by the Treasury Department's dumping findings plus the willingness of the defendants to sell below-the-check prices. The five-company rule, it was argued, enabled the Japanese firms to allocate U.S. customers and "concentrate the effects" of dumping on the U.S. competitors while eliminating competition among the Japanese firms.[53] The creation of excess plant capacity in the Japanese market gave the Japanese firms a strong motive to export rather than to engage in unlimited price competition at home.[54]

The Supreme Court did not believe it. The Court approached predatory pricing with the following theory: predatory pricing is pricing at some loss of profit; these losses are an investment; firms are rational economic actors that must recoup their investments, plus some return on the amount invested, at some later point; this would have to be done through monopoly pricing.

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[50] *See* 56 Fed. Reg. 5392 (1991).
[51] Brief for Respondents, *supra* note 19, at 60.
[52] *Id.* at 12, 60-61.
[53] *Id.* at 81.
[54] *Id.* at 76-77.

The Court then applied the theory to the case. The Court saw the cartel idea as problematic, thinking it unlikely that a group of firms would stick to an agreement to sustain such long-term losses (firms would likely cheat). Even more unlikely was the opportunity to recoup the losses, given both the duration of the alleged cartel (two decades already, according to the Court) and the difficulties of collusively raising prices once the cartel was successful (particularly with the low entry barriers in this industry). Neither the check price agreement and its violation nor the five-company rule helped Zenith. They either restrained competition among the Japanese firms (thereby helping the U.S. firms) or showed competitive behavior. The cross-subsidization argument was not persuasive either. Even if the Japanese manufacturers were earning supra-competitive profits in the domestic market, that did not give them any motive to sustain losses in the export market, unless those losses could be recouped (which they could not be).

In the end, the allegation that the Japanese firms engaged in a predatory cartel made "no practical sense" to the Court: "[I]t calls for [the Japanese firms] to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth."[55]

Critical to the Court's view of the case was the identity of the plaintiffs. Zenith and NUE were competitors seeking damages for injury to their business caused by price-cutting rivals. The Court was plainly worried that this was just a complaint about aggressive competition. Liability, the Court felt, might "chill the very conduct the antitrust laws are designed to protect."[56]

The Court thus accepted economic theories that would defeat Zenith's arguments, even though the theories might actually have supported antitrust liability had the case been brought by the Government. Taking the Court's responses to some of Zenith's arguments at face value, the Court's prediction of the competitive effects of the Japanese firms' behavior should have led to a government antitrust suit against two clearly admitted agreements, the five-company rule and the check price agreement. The five-company rule, as a market sharing rule that restricted competition among the Japanese firms and kept prices up, would have been a per se antitrust

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[55] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986).
[56] *Id.* at 594.

violation.[57] The export cartel agreement on check prices, being an effort to raise or stabilize prices, would also have been a per se violation, subject to the availability of the foreign government compulsion defense.[58]

It is hard to imagine, of course, that the U.S. Government would have brought suit against the Japanese industry for agreements to raise the prices of televisions in the U.S. market. In the context of what was happening in the U.S. industry between 1965 and 1977, such an allegation would have "made no economic sense." At least at first glance, the idea that the Japanese firms were engaged in a price-raising effort appears to be as implausible a description of the Japanese firms' behavior as the Court thought Zenith's description was.

The Government's failure to file an antitrust suit did not, however, stem from a divergence between economic theory and fact. It is traceable more to an antitrust skepticism about the U.S. industry's arguments. This skepticism came out clearly in a letter submitted to the International Trade Commission by the Justice Department in 1976 in the course of the ITC's section 337 proceeding:

> The acknowledged inventiveness and technical expertise of [the Japanese manufacturers] . . . has made the television industry very competitive and brought substantial benefits to the American consumer. We become concerned when businessmen complain that competition is so tough in an industry that "you can't make a decent profit."[59]

Thus, the Government's inaction stemmed from the belief that the Japanese television industry's success was the result of a competitive advantage rather than unfair competition, and that the U.S. industry was motivated by the fear of falling profits due to increased competition.

This view of the dispute between the U.S. and Japanese producers ultimately informed the views of antitrust enforcers in three Administrations,

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57 *See* Palmer v. BRG of Georgia, 498 U.S. 46 (1991) (division of customers by formerly competing bar review companies); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (division of territories by potentially competing grocery chains).

58 The question whether of MITI's involvement in the export cartel provided an antitrust defense to Zenith's charges was argued in the Supreme Court, but the Court did not need to reach it.

59 Letter from Jonathan C. Rose, Deputy Assistant Attorney General, Department of Justice, Antitrust Division, to Will E. Leonard, Chairman, U.S. International Trade Commission (Sept. 24, 1976), *microformed on* CIS No. 76-H781-27.1, 93-105 (Congressional Info. Serv.).

views which moved from disengagement to active support of the Japanese manufacturers. Zenith's suit was filed during the Ford Administration, but the Justice Department did not become involved in part because of limited enforcement resources and its view that the case was being pursued by competent private counsel.[60] The Antitrust Division in the Carter Administration, under prodding by the Senate Judiciary Committee, took a "fresh look" into the case. Working under limits placed by the Japanese manufacturers on the Government's ability to gain access to the documents produced during discovery, the Antitrust Division investigated for six months and concluded that there was "no evidence of concerted predatory conduct intended to destroy or supplant the U.S. color television industry either at an earlier period or at the present time."[61] The Reagan Administration filed an amicus brief in the Supreme Court supporting the Japanese manufacturers.[62]

C. *Economic Effects*

The Supreme Court's skepticism about Zenith's theory was bolstered by the market shares in the record as of 1977 when pre-trial discovery was closed. Although the market share of all the Japanese defendants was close to 50 percent, Zenith and RCA were actually the market leaders with a combined share of approximately 40 percent.[63] Market shares for 1974 (the

[60] Letter from Donald I. Baker, Assistant Attorney General, Department of Justice, Antitrust Division, to Senator Edward M. Kennedy (Feb. 16, 1977), *in* Petition for Writ of Certiorari for Defendant-Appellant, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 83-2004), *microformed on* U.S. Supreme Court Records and Briefs app. at 15a-18a (Microform, Inc.).

[61] *Department of Justice Budget Authorization (Antitrust Division), Hearings Before the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 360 (1978) (statement of John H. Shenefield, Assistant Attorney General, Antitrust Division), *microformed on* CIS No. 78-S521-45.3 (Congressional Info. Serv.). Shenefield testified that the review and decision were carried out without interference from other branches of the Administration. *Id.* at 362. It has been alleged that President Carter, in return for Japan's agreement to the Orderly Marketing Agreement in 1977, made a side letter agreement which the Japanese interpreted as terminating any antitrust investigations by the Justice Department into predatory pricing. *See* SCHWARTZMAN, *supra* note 6, at 127; *Antitrust Procedural Act of 1979: Hearings on S. 390 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 87 (1979) (statement of John J. Nevin, Chairman, Zenith Radio Corp.), *microformed on* CIS No. 78-S521-52 (Congressional Info. Serv.). If there were such an agreement, the Japanese did not get much.

[62] One of the reasons for supporting the Japanese manufacturers was a concern that a rejection of the sovereign compulsion defense might adversely affect the Reagan Administration's Voluntary Restraint Agreements in other industries, particularly automobiles. *See* Brief For the United States as Amicus Curiae, on Petition for Writ of Certiorari, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 83-2004).

[63] Matsushita, 475 U.S at 591; *In re* Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 316 (3d Cir. 1983).

year Zenith filed its suit) through 1978 show Zenith as the top firm, with 21 to 24 percent of the market. RCA was second (overtaking Zenith in 1979) with shares ranging from 19 to 21 percent of the market.[64]

These shares have changed somewhat over time, but not toward the monopoly position that Zenith alleged was the goal of the Japanese manufacturers. As of 1986, Zenith had 16 percent of the market and it and RCA were still the market leaders. By 1990, Zenith's share dropped to 12 percent (third in the market), but still comfortably ahead of both Sony and Matsushita (the leading Japanese firms in the U.S.) which had 7 and 5 percent respectively. The levels of concentration in the U.S. market were also relatively low, with a 1986 (Herfindahl-Herschman Index) HHI of 834 and a 1990 HHI of 941. Both were lower than the HHI in 1982. The four-firm concentration ratio in 1990 was 52.8 percent.[65]

Given the relatively low levels of concentration, one would predict that prices and profits would tend toward competitive levels. Data for 1986 through 1990 indicate that prices for television sets dropped as against the consumer price index for all goods (which rose). Retail prices of television sets declined by about 10 percent over that period while producers' costs declined by just over 5 percent. Profit margins were reportedly low.[66]

Although the industry has not shown a dramatic shift toward greater concentration, there has been a marked change in the nationality of the ownership of the firms in the industry. Of the fifteen U.S.-owned firms manufacturing television sets in the United States in 1971, by 1983 only five remained under U.S. ownership (one being a very small regional manufacturer and one a private label manufacturer). Five had gone out of business, three had been bought by Dutch interests, and two had been acquired by Japanese firms.[67] As of 1990, the two leading firms in the U.S. market were Thomson, a French firm that acquired RCA and GE (following GE's

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[64] *See* International Trade Commission, Economic Effects of Export Restraints, Investigation No. 332-117 Under Section 332 of the Tariff Act of 1930, ITC Pub. No. 1256 (1982), *available in* LEXIS, ITRADE Library, ITC File.

[65] International Trade Commission, Industry & Trade Summary, Television Receivers and Video Monitors, ITC Pub. No. 2445 (ET-1) (1992), *available in* LEXIS, ITRADE Library, ITC File [hereinafter 1992 ITC Study]. The Herfindahl-Herschman Index measures the level of market concentration in an industry. The higher the index, the more concentrated the industry.

[66] *See id.*.

[67] *See* International Trade Commission, Foreign Industrial Targeting and its Effects on U.S. Industries, Phase I: Japan (Part 2 of 2), Report to the Subcomm. on Trade, House Comm. on Ways and Means, on Investigation No. 332-162 Under Section 332(b) of the Tariff Act of 1930, ITC Pub. No. 1437 (1982), *available in* LEXIS, ITRADE Library, ITC File [hereinafter 1983 ITC Study].

acquisition of RCA in 1986), and Philips, a Dutch firm that had acquired Sylvania and Magnavox. The only major U.S.-controlled producer was Zenith, which in 1991 sold a 5 percent share of itself to Goldstar, a Korean television manufacturer.[68]

Along with the shift in the nationality of ownership of firms has come an increase in the number of foreign firms assembling television sets in the United States, a process set in motion with the 1977 Orderly Marketing Agreement. By 1983, six Japanese firms, two Taiwanese firms, and one Korean firm had established TV final assembly operations in the United States.[69] By 1990, almost 90 percent of U.S. production of television sets was by foreign-controlled companies (including Japanese, Korean, and Taiwanese).[70]

Although there are more firms producing television sets in the United States than ever before, the level of imports has remained at around 50 percent of total consumption. The major country of production for imports into the United States has shifted from Japan to Mexico, as producers have shifted production to that country to take advantage of low labor costs, but substantial numbers of televisions for the U.S. market are also produced in Taiwan, Singapore, Malaysia, Korea, Thailand, China, and Canada.[71]

The economic record thus does not confirm Zenith's antitrust fears that the members of the Japanese cartel would monopolize the U.S. television market. The record also supports the argument that foreign production from other countries would be available to discipline the Japanese cartel had it achieved monopoly status in the United States (although it is not clear from these data how much of that production is actually controlled by the Japanese firms). On the other hand, the economic record lends support to the trade concern over the shifting of ownership from U.S. firms to foreign firms. The United States dominated the television industry from its inception until the early 1970s. It no longer does so.

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68 1992 ITC Study, *supra* note 65.
69 1983 ITC Study, *supra* note 67.
70 1992 ITC Study, *supra* note 65.
71 *See id.* tbl. 2 (1986-1990), tbl. 3 (1986-1990).

III. AN ANTITRUST APPROACH

A. *Dealing with the Television Story*

How can we understand the activities of the Japanese television manufacturers between 1963 and 1974? It is undisputed that they were selling television sets in the United States at prices significantly below the prices at which they were being sold in Japan. Should their pricing have been considered predatory?

1. *The Investment/Recoupment Theory*

To answer the predatory pricing question requires exploring the investment/recoupment theory which the Supreme Court used in *Matsushita.* This theory served several functions in the decision. First, it enabled the Court to avoid the difficult question of how low prices must be before they could be considered predatory.[72] Although Zenith had argued that export prices were below home market prices and that these low prices produced losses in the United States, Zenith did not indicate what measure of costs it was using (for example, average total cost, average variable cost, or marginal cost). Finding no ability to recoup losses anyway, the Court was able to avoid resolving the debate going on in the courts and in the academic literature on this issue.

The second legal function served by the theory was its use in determining whether there was a conspiracy, a prerequisite for section 1 liability. Given the lack of direct evidence of a predatory pricing conspiracy, the Court could use the logic of the investment/recoupment scenario to rebut inferences from otherwise ambiguous evidence (at least ambiguous as to whether the parties conspired to price predatorily). The investment/recoupment theory, however, assumes economic rationality. The Court avoided the argument that the parties might still have agreed (albeit "irrationally") by indicating that economically irrational collusive behavior might be shown with "sufficiently unambiguous" proof.[73] The case was accordingly remanded to give the parties an opportunity to present such evidence to the lower court (which they were unable to do).

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[72] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584 n.8 (1986).

[73] *See id.* at 597.

Subsequent court decisions have shown the investment/recoupment theory to be more powerful than indicated in *Matsushita.* In the Supreme Court's next decision on predatory pricing, it made clear that recoupment is a prerequisite to a successful claim for predatory pricing. Even where the plaintiff shows that prices have been below average variable cost, the failure to prove the likelihood of recoupment will defeat the claim.[74]

The theory is powerful for two reasons. First, its economic logic is unassailable, because it is founded on the understanding that business firms will not likely continue a money-losing strategy for a significant period of time. There must be some gain. If there is no likelihood of gain, the parties either will not embark on the plan or will abandon it soon enough. That being the case, if we see an extended period of alleged predatory pricing with no hope for recoupment, it may be that the low prices are not money-losing low prices, but the kind of competitive pricing that we want to encourage.

Second, the investment/recoupment scenario focuses inquiry on the harm from predatory pricing, which is not low prices but recoupment in the form of monopoly pricing. Competition is supposed to produce low prices. Antitrust intervention should not occur unless the low prices yield some harm, beyond the harm to the firm that prefers not to meet the low prices.

The difficulty is not with the logic of the investment/recoupment theory. It is with its application. As with other antitrust areas where the Court has resorted to economic analysis, accepting the basic theory only provides the first level of analysis. Second-level theory, as well as facts, are then needed to work through to a correct result.[75]

To understand the conduct of the Japanese television manufacturers between 1963 and 1977 through the use of the investment/recoupment theory requires several steps: 1) a reexamination of the basic view of what the firms might have been doing; 2) a better understanding of what constitutes the costs of predation and how the Japanese firms might have minimized those costs; 3) an idea of the gains from predation that the Japanese firms

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[74] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993).

[75] This is what happened in Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072 (1992), where the Court countered the defendant's theory for why it lacked market power by using other economic theories (information failures and consumer lock-ins) and by noting that the defendant's actual pricing was inconsistent with its own economic theory and with the theory as proposed by the Department of Justice. For a deft criticism of the "logic is all" approach taken by the Supreme Court in Matsushita, see John J. Flynn, *An Antitrust Allegory*, 38 HASTINGS L.J. 517 (1987).

might have sought; and 4) an assessment of the harm that flowed from the alleged predatory pricing.

2. *Rewriting the Story*

An alternative explanation for the behavior of the Japanese firms that could fit the investment/recoupment theory would go like this. As part of a consistent national approach toward manufacturing (import raw materials, export value-added finished products), Japanese television manufacturers saw export markets as economically necessary. The industry also wanted high prices in the domestic market. Capacity built for export, however, could serve either market (Japan and the United States use the same television signal standard), so the industry needed to be certain that export production would not be diverted to domestic markets.

The industry faced several problems in implementing this strategy. For one, to be successful in the U.S. market and convince U.S. consumers to desert trusted brand names, the Japanese manufacturers needed to be better than price competitive with already established major U.S. firms. Selling at a low price, however, would increase the differential between the price in the U.S. and the home price, increasing the incentive to divert production to the home market. For another, it was not so easy to control competition at home. The oligopoly was not tight and the product market was technologically dynamic. The dynamic aspects of the domestic market were sharpened by the fact that the set of competitors against whom the Japanese firms were competing in terms of technology effectively included the U.S. manufacturers who had developed television in the first place.

The strategies for reducing competition were as follows. The manufacturers started by getting control of their distribution networks. Exclusive outlets, resale price maintenance, and restrictions on sales to discounters were adopted. This tactic reduced the possibility of intrabrand discounting, which might put pressure on all pricing, made entry by potential competitors more difficult, and made manufacturer price collusion easier. The manufacturers also formed overt cartels to agree on pricing and output. Both tactics served to keep prices above competitive levels in the domestic market.

On the export side, the industry began (even before starting the export drive) by agreeing on minimum prices. In the face of pressure from large

U.S. mass merchandising buyers, combined with capacity that exceeded domestic needs, the check prices did not stick. The five-company rule was then adopted to reduce competitive pressures in the U.S. market and prevent a pricing free-fall that would hurt everyone. This process was always tenuous, but the pressure finally ended in 1977 when the U.S. "forced" the Orderly Marketing Agreement ("OMA") on the Japanese industry, limiting output and making direct investment a more profitable strategy.

3. *The Costs of Predation*

The idea that losses from low prices need to be recouped (with interest) through gains by high prices sounds plausible enough, but almost proves too much. For example, we readily accept the idea that firms will price below the market price to "get a foothold" in the market. Even though the firm has no expectation of "recouping" by charging monopoly prices later, such promotional pricing is not thought of as economically irrational because the promotional price does not entail forgoing a sale at a higher price. The seller's next best sale is presumably at an even lower price. In this sense, the price exceeds its opportunity cost. With price above cost, its loss (and consequently its "investment" to be recouped) is zero.

Suppose that the promotional price is below cost. Would the seller sell for such a low price? Again, the question would be opportunity cost. Unless the seller would be better off simply not making the product (that is, if the price does not cover its variable costs), it would sell at the below (average total) cost price. That is, the price received would still be above its opportunity cost and its loss would be zero. There is still nothing to recoup.

When the Japanese firms were deciding on pricing in the export market they would presumably seek the best price they could get, even if it were below cost. Unless they could get a higher price, they would not be forgoing any opportunity for more profit and would have no loss to recoup. This "price equal to opportunity cost" need not bear any relation to manufacturing cost. Anything below that opportunity cost, however, would mean a loss which, in the investment/recoupment scenario, would be an investment to be recouped.

Viewing the loss in terms of opportunity cost indicates that an actual measurement of the investment cost of the Japanese firms' export drive is harder than it might initially appear. One might assume that low promotional prices, at least in the early years of both monochrome and color sets, might very well have been above opportunity cost. In those years reliability would have been a particular issue, given the generally low reputation of Japanese consumer goods manufacturing and the fact that sales through mass merchandisers meant that after-market service would be weaker than if the sales were through the normal distribution channels of the day. This scenario would mean that even prices below average total cost might not have entailed the kind of investment loss which would have to be recouped in subsequent years. On the other hand, sales at low prices in subsequent years may very well have had a higher opportunity cost, with losses to be subsequently recouped.

If this view is correct, it would appear that the Supreme Court likely overestimated the magnitude of the investment the Japanese firms would have made in "below market price" sales. This error was then compounded by exaggerating the number of years during which this behavior allegedly occurred. Put at "two decades" by the Court,[76] the outside figure would actually be fourteen years (1963, when exporting began, to 1977 when the OMA was agreed to). This assessment would then have to be decreased, at least on the front end, to account for low opportunity costs compounded by the early agreement on check prices.

4. *Minimizing the Costs of Predation*

The Supreme Court suggested that a predatory cartel was unlikely in part because "each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds."[77] This "cheating" is different than the cheating in a price-raising cartel where firms cheat by taking a lower price. In a price-lowering conspiracy, firms cheat by *not* taking a lower

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[76] *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 591 (1986). In this case the Court was relying on hyperbolic advocacy by Zenith's counsel who sought to tie the defendants' behavior to their earlier behavior with respect to radios. *See* Brief for Respondents, *supra* note 19, at 13. ("Petitioners' conspiracy began in the late 1950s with radios, and then continued successively with black-and-white television receivers and with color television receivers."). Frank Easterbrook, in a law review article which the Court quotes, talks about "[f]ifteen years of losses." *Id.*, n.15.

[77] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 590 (1986).

price. This willingness to "let Jack do it" should therefore be fairly strong.[78]

This is the reason for the five-company rule. By dividing up customers the Japanese firms would insure that the costs of predation would be allocated around the group, rather than being borne disproportionately by a few. No one would have too many large customers. The rule would also insure that price competition did not break out among the Japanese firms. Unrestrained competition offered the possibility of further increasing the costs of predation, perhaps destroying the cartel.[79]

5. *The Gains From Predation*

On the other side of the equation are the gains from predation. The Supreme Court thought about the gains in terms of monopoly profits. The alleged predatory cartel was unlikely to be able to destroy the entire U.S. industry and then engage in monopoly pricing for a sufficiently long time to recoup the losses (over a period of twenty years) with interest. Added to the unlikelihood was the fact that subsequent monopoly pricing would have required a conspiracy, subject to U.S. antitrust enforcement, and was prone to defeat by new entrants.

Subsequent events have borne out the Court's views on the likelihood of monopoly in this industry. Monopoly power in the U.S. market has not come to the Japanese firms which, even today, have market shares below RCA and Zenith. Given the position of RCA and Zenith when the Japanese firms embarked on their effort, it does seem doubtful that the Japanese firms would have ever expected to be able to monopolize the U.S. television market (of course, they might have expected to, but misjudged).

There are other possible gains, however, that the Japanese manufacturers could have had in mind. The first would be spillover benefits in other consumer electronic products (although this is somewhat speculative, based on the state of the current record). The Japanese firms could have believed that a dominant presence in television production would enable them to continue to develop related technology, whether in the form of complementary products, such as VCRs, or in the form of inputs that could be used

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[78] *See* Kenneth G. Elzinga, *The New International Economics Applied: Japanese Televisions and U.S. Consumers*, 64 CHI.-KENT L. REV. 941, 955-56 (1988).

[79] David Schwartzman so argues. *See* SCHWARTZMAN, *supra* note 6, at 97.

elsewhere, such as display screens. The Japanese television manufacturers have continued to dominate in both of these areas.

A second possible gain is less speculative. The Japanese might well have believed that profits in the oligopolized U.S. industry were above competitive rates. Given the necessary scale of entry, and the costs of acquiring technology, this would not be an industry likely to attract so many competitors as to reduce the industry to a purely competitive situation. That being the case, the Japanese may have felt that these above-competitive profits could be redistributed from the U.S firms to them.

The third potential gain, which is the most likely, is a variant of the familiar idea of rent-seeking. It is well accepted that firms will invest to gain future monopoly profits (for example, by seeking legislation restricting entry). This type of rent-seeking is often mentioned as a social cost of monopoly.[80] Similarly, monopoly firms will invest to maintain future monopoly profits. For example, a monopolist might engage in predatory pricing to discipline an upstart competitor. The monopolist would presumably spend in predation (invest) up to the amount of the stream of future monopoly profits it is trying to protect.[81]

The Japanese firms were in the position of the hypothetical monopolist seeking to protect its future profits, but the profits the Japanese firms wanted to protect were the supra-competitive profits in the home market. Their output, if sold in the domestic market, could have undermined the cartel and produced competitive prices (particularly given the fact that industry capacity exceeded likely demand in Japan). To protect those profits, the Japanese firms had an incentive to spend on predation up to an amount equal to future supra-competitive profits. This means that the Japanese firms might have rationally priced even below variable costs so long as those losses were less than the value of the future protected profits in the domestic market.

If this analysis is correct, the emphasis in the case on profits in the United States was misplaced. The key was profits in the home market. It is in this sense that the existence of supra-competitive profits in Japan is relevant. It is not that these profits somehow subsidize losses in the United

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[80] *See* RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 11-15 (1976) [hereinafter POSNER].

[81] Note that this type of behavior would be economically rational within the context of the investment/recoupment theory, even though it would not result in the monopolist being able to charge a higher price in the end than it was charging before it engaged in its predatory campaign.

States. It is that the Japanese firms must protect these profits from dissipation. Why else would the Japanese firms have been selling into the United States at prices below those which they could have obtained in Japan, at least in the short run? It is this differential that constitutes the true opportunity cost of the Japanese firms' conduct, and it is this differential which must be recouped in the form of protected future monopoly rents.[82]

6. *The Harm*

The investment/recoupment theory also forces a focus on the competitive harm from the alleged predation. Three types of gains to the Japanese firms are suggested above: 1) spillovers that lead to control of complementary and input industries; 2) eventual redistribution of supra-competitive profits from U.S. firms to Japanese firms; and 3) protection of supra-competitive profits in the home market.

To view these gains as antitrust harms (as we would monopoly pricing) requires a somewhat broader approach to the goals of antitrust than some might favor. Welfare economics has guided current thinking about the goals of antitrust, emphasizing allocative efficiency and focusing on the deadweight loss caused by monopoly pricing. In this view, not even the redistribution to producers of the consumer surplus is considered antitrust injury.

In the context of international price predation this approach is excessively narrow. The indifference as to who gets the consumer surplus is tolerable (if at all) only in the context of "an economy," that is, a closed domestic economy. In such an economy, one might argue that it does not matter who gets the consumer surplus because the resources, whether in the hands of consumers or producers, will still be available for savings or consumption within that economy. With national economic wealth unaffected, there is no reason to favor one party over the other.

[82] This is not to say that every sale made into the United States incurred a loss in the sense that the Japanese firms could have sold at a higher price in the domestic market. Assuming that the Japanese firms had market power in the domestic market, maximization of joint profits in the domestic and foreign markets would lead the Japanese firms to engage in some amount of output restriction in Japan and some sales into the United States. This output restriction in the domestic market would actually be greater than if the Japanese firms were selling only in the domestic market (that is, the joint maximizing price would lead them to sell less in Japan than they otherwise would). It would only be sales beyond this point that might bring a higher short-term profit if sold in Japan, but at a long term cost of unraveling the domestic cartel.

One cannot be as sanguine about the result when the surplus is redistributed out of the economy and national economic wealth is decreased. Nor can one even be as focused on the deadweight loss and on maximizing allocative efficiency when the distortions of a second, different economy enter the picture. Thus, the guide that welfare economics offers for antitrust policy becomes dimmer when international price predation is at issue.

It might therefore be permissible to widen the concept of harm to go beyond harm to the consumer and to encompass harm to national economic welfare. In this setting, the competitive opportunities of U.S. producers would be as worthy of protection as the interests of U.S. consumers. Wealth reducing anticompetitive behavior, whether in the form of capturing spillover benefits or the oligopoly profits of U.S. firms, should not escape antitrust just because the price to the U.S. consumer is unaffected.

The third type of gain suggested for the Japanese manufacturers was the protection of supra-competitive prices and profits in the domestic market. This is closer to the traditional harm recognized by antitrust, except that the parties harmed are not citizens of the United States. Nevertheless, it hardly seems unwarranted for antitrust to show some concern for competition and its traditional beneficiaries even when those beneficiaries are found beyond the boundaries of the United States. The issue here is not a jurisdictional one, nor is it one of standing.[83] Rather, the issue is simply identifying why antitrust should be concerned if the Japanese television firms did engage in a predatory price cartel in the United States.

The focus on the home market is also consistent with extending the values of free markets into the international economy. Had the markets in the television industry been operating without competitive restraint, the results of international trade might have looked quite different. The ability to restrict output sold in Japan would have decreased, as would the Japanese firms' willingness to price predatorily in the United States to protect rents in Japan. Japanese firms would have sold fewer televisions in the United States and more televisions in Japan. Japanese consumers would have paid less for their televisions. U.S. producers would have continued as viable

[83] There is precedent for allowing foreign citizens to use U.S. courts to pursue antitrust violations committed by U.S. firms in foreign markets. *See* Pfizer, Inc. v. Government of India, 434 U.S. 308 (1977) (foreign government can sue for damages caused by price-fixing conspiracy that operated internationally). With regard to standing by U.S. firms, if the effort by the Japanese cartel to avoid undermining its profits at home leads to predatory pricing in the United States, U.S. firms should have standing for having been directly injured by the behavior.

competitors, unless the Japanese firms came to the United States with a properly priced product that consumers preferred on the merits. What could be wrong with that? And we would have saved money on all that litigation to boot.

B. Elements of a Cause of Action for International Predation

The television story offers some suggestions for a cause of action for international price predation. Such a case would require proof of 1) a blocked home market in which the sellers were earning above competitive profits and 2) below cost pricing by the sellers in the target market. Proof of each of these elements, however, presents some serious problems. There are also the difficult problems of measuring damages and taking account of foreign government policies and enforcement.

1. Blocked Home Market

The types of gains suggested above that might flow from international predation depend on a blocked home market. If markets are not blocked, then the cartel should be reluctant to price low in foreign markets because its behavior is subject to strategic retaliation. With an unblocked home market, foreign competitors could let the predators take losses in the foreign market while they divert production to the high-priced domestic market. In the case of the television cartel, whatever the motives of the Japanese firms in terms of their pricing strategy in the U.S., they could have been defeated by Zenith and RCA selling into Japan and taking sales away from them there.

One could not infer that domestic markets were blocked simply from observing that there were no foreign sales made in that market. That would be as consistent with a lack of supra-competitive profits in the home market. Thus, a cause of action for international price predation would have to examine more closely the reasons for the lack of foreign firm sales to determine whether the reasons were consistent both with high profits and blocked entry.

In some cases it will be possible to prove that the domestic industry has engaged in concerted behavior to exclude foreign competition. Such proof may take the form of efforts by the domestic industry to use their economic power to force customers to not buy from foreign firms. In Japan, for example, this was the pattern in the soda ash industry and has been alleged to be the case in others (such as flat glass).[84]

There are other cases in which the mechanism for exclusion is more complex and perhaps difficult to prove. In the case of Japan, the inability of foreign firms to sell into Japan has been attributed to a large number of factors, such as unusual product specifications or certification procedures, the high cost of creating distribution channels in Japan, a professed belief among Japanese buyers that foreign suppliers are unreliable, supposed preferences of domestic purchasers for Japanese products, or keiretsu arrangements that make buyers reluctant to alter purchasing patterns and seek sources of supply outside their keiretsu.

There are two steps that could be taken to disentangle the reasons for a lack of foreign firm sales. The first would be to require the plaintiff to show that it had made some efforts to enter the allegedly blocked market. Such a requirement would serve several functions. It would show that there were mechanisms operative to exclude foreign firm competition and provide the opportunity for rents to the predatory cartel. It would place a pro-competitive burden on foreign firms to defeat predation through competitive means before they sought the help of the courts. Finally, it would give assurance to the court that the complaining firms were not weak competitors seeking protection. In this sense, the requirement of a good faith entry attempt would serve the same filtering function that the Court saw the investment/recoupment scenario serving, that is, making certain that the law is not being used to protect firms from hard competition.[85]

The second step for disentangling the reasons for low foreign sales would be to allow the plaintiff to carry its initial burden of proof of exclusion through an outlier argument. That is, a plaintiff could argue that exclusion can be inferred by proof of low foreign-firm market shares in relation to what these foreign firms obtain in other national markets. This inference would be particularly strong when augmented by proof of the efforts that

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[84] *See* Harry First, *Japan's Antitrust Policy: Impact on Import Competition*, *in* FRAGILE INTERDEPENDENCE: ECONOMIC ISSUES IN THE JAPAN-U.S. RELATIONSHIP 63 (Thomas Pugel and Robert Hawkins eds., 1986). The allegation in the case of flat glass is that the maker of polished wire glass, used only in Japan, has threatened to withhold supplies if customers buy other types of glass from foreign firms.

[85] A weaker version of this requirement would be to allow a plaintiff to satisfy the entry requirement by showing that other foreign firms had made an entry effort, even though the plaintiff had not done so (perhaps because it had been dissuaded by the difficulties faced by other entrants).

the plaintiff made to enter the market. The burden could then shift to the defendants to explain outlier status by showing legitimate justifications for low market share.[86]

2. Below Cost Pricing

Because of the way that the *Matsushita* litigation developed, there was little testing of the measure of cost being proposed by Zenith, below which the Japanese firms were allegedly selling. To some extent, Zenith's argument appears to have rested on the pricing differential between the domestic and U.S. prices, although there are also allegations that sales were at a loss.[87]

A price differential claim is a price discrimination measure, one which underlies the trade approach to dumping. It is not one which has found favor among most U.S. courts or commentators. If anything, the current view is that price discrimination often serves pro-competitive ends. Lower prices to one set of consumers reflects competitive demand conditions (why else would a seller lower price?) and can be the way that rigid price structures start to break down (as the lower prices start to generalize). The social inequities ("fairness") are not relevant.

As a result of this pro-competitive view of price discrimination, courts and commentators dealing with predatory pricing have tended to focus not on differentials, but on the extent to which the predator's price falls below cost. Where a low-cost seller is outselling the complaining firm, but is still pricing above cost, there appears to be little reason for condemnation. Such behavior captures the essence of efficiency.[88]

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[86] It is uncertain how Zenith would have fared under this requirement. Imports into Japan were certainly low during this period. *See* Yamamura & Vandenberg, *supra* note 4, at 253 (imports accounted for .1% of color televisions as late as 1980). Among the reasons suggested by Zenith were high import tariffs and restricted distribution channels. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1183-85 (E.D. Pa. 1980); 1992 ITC Study, *supra* note 65 (tariffs on color televisions were 30% in Japan until 1968, compared to 7.5 to 10% in the U.S. over the same period). The efforts Zenith made to penetrate this market are unclear. Clyde Prestowitz states that Zenith and Motorola tried "for years" to obtain distribution in Japan, but without success. CLYDE V. PRESTOWITZ, TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD 202 (1988).

[87] On remand from the Supreme Court, Zenith argued that prices had been set "below the competitive market price, but above marginal cost." *In re* Japanese Electronic Products Antitrust Litigation, 807 F.2d 44, 47 (3d Cir. 1986).

[88] One might argue that with the current emphasis on recoupment, we should pay no attention to how low the alleged predator is pricing. If the investment in low prices (however small or large the investment) will be recouped by subsequent above competitive pricing, competitive harm will have been

If we are to require pricing below cost, the question then becomes what should be the appropriate level of cost. Areeda and Turner's view that average variable cost is the appropriate measure has carried great weight, although courts and enforcement agencies have provided at least theoretical room for a plaintiff to show predatory pricing where price is between average variable cost and average total cost.[89]

Whatever the appropriate test, however, plaintiffs have had difficulty meeting it. First of all, there are likely to be difficult conceptual issues in terms of separating costs between variable and fixed. Perhaps more important are the practical difficulties of reconstructing the seller's pricing practices. There may be voluminous sales, over several years, with company pricing information being kept on an accounting basis rather than as "average variable costs."

There is an additional problem when encountering a case of international price predation. The theoretical base for all the cost-based tests has been the view that the optimal price is one equal to marginal cost. This is the price that sets the value of the extra resources expended for producing a particular product equal to what consumers are willing to pay for that product. At this point, resources are being efficiently allocated in a society.

Different economies, however, may have different views of what constitutes the extra cost (variable cost) for producing a product. For example, many large firms in Japan use some form of lifetime employment. This means that a large component of labor cost is considered fixed rather than variable. It also means that a larger component of cost may be considered to be fixed for a Japanese firm than for a firm operating in the United States. Were a court to insist on the Areeda-Turner test, which permits pricing above average variable cost, this would mean that Japanese firms would be lawfully allowed to price at a lower level than the competing U.S. firms. From the point of view of efficiency, it would be efficient within Japan's economy to have the Japanese firms price down to average variable cost without considering the price of labor, but it would not be efficient in terms of the U.S. economy because labor costs are variable. But from the point of view of legal rules that permit markets to work fairly, the

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shown. If we are guided by economic rationality, by definition, the benefit to the predator (and harm to the consumer) in such a case will be larger than the cost to the predator (in the form of low prices).

[89] *See, e.g.*, *In re* International Tel. & Tel., 104 F.T.C. 280 (1984) (although average variable cost is the usual line of presumptive illegality, there may be circumstances where prices will be predatory if between average variable cost and average total cost).

Japanese firms would be given a lawful competitive advantage over their U.S. competitors.

These differences indicate that courts should be wary of readily transposing the cost tests developed for domestic economies into the international context. It is still important to have some reference to below cost pricing, so as to be certain that we do not discourage competitive pricing by foreign firms selling into the United States. On the other hand, a strict adherence to an Areeda-Turner type of test will give foreign firms an unjustified economic advantage without producing any clear benefits in terms of optimal resource allocation.

Perhaps the most that can be said at this point is that a court would have to examine alleged predatory pricing with a less rigid test when the alleged predator is a foreign firm. Pricing below average total cost should be a requirement of the plaintiff's proof; we certainly would not want to prohibit prices by foreign firms which are in excess of their total costs, even if the prices are below the market price or below the costs of their U.S. competitors. The ultimate question might then be whether the low prices are "calculated to exclude from the market an equally or more efficient competitor."[90]

3. *Remedy*

International predatory pricing cases could be brought either by the federal government or by private parties. Government enforcement action would look toward injunctive relief. Such relief, however, is particularly problematic in predatory pricing cases where it is often difficult to frame an injunctive order against low pricing that will make clear to the defendant what kinds of pricing might violate it.[91]

Perhaps more useful, and more appropriate, would be a market-opening injunction. Taking the view that the existence of a closed home market explains the willingness to sell at predatory prices and insures against retaliation, a remedy might be to order the foreign defendants to end their exclusionary efforts in their domestic markets.[92] This should no more

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90 POSNER, *supra* note 80, at 188.

91 *See In re* Borden, Inc., 102 F.T.C. 1147 (1983) (relief order in predatory pricing case).

92 I am assuming here that there is no personal jurisdiction problem; if there were, there would be no underlying predatory pricing litigation in the first place.

raise issues of extraterritoriality than would the predatory pricing case itself. This would be an instance of the familiar problem of defendants engaging in anticompetitive behavior abroad whose effects are felt in the domestic U.S. economy.

There is also the private remedy. However important government antitrust enforcement action has been, it is the private action which has been the critical component of antitrust enforcement in the United States. One of the benefits of providing an antitrust cause of action for international predatory pricing lies precisely in the private enforcement mechanism that has been an integral part of the Sherman Act since its passage.

The problem here is how to measure damages. Assuming the case was brought by the competing U.S. firms (as the *Matsushita* case was), the measure of damages should focus on the harm caused to their business. This might involve some effort to put the plaintiffs in the position they would have been had the predation not occurred. This suggests several possible measures: 1) the difference in profits earned at the predatory price and the profits that the plaintiffs would have earned had the predator sold at a lawful price (that is, at average total cost); 2) the difference between the profits earned by the plaintiffs at the predatory price and the profits that would have been earned at the price that would have prevailed had the defendants increased output in the home market to the point where competitive prices prevailed there; or 3) the difference between the home market and foreign market price.

The first measure looks only at the predatory price and tries to measure damages in a violation free market. The second measure takes more account of the impact of the home market and what would have happened if prices were equalized across markets. This measure takes closer account of the theory for liability. It assumes that a foreign firm might sell at a price below average total cost, but still not violate the antitrust laws if there were no blockaded home market or if prices were already competitive there; in a sense, this would also be a lawful price. The third measure is closer to a traditional dumping measure of damages, but differs from dumping duties in that the damages are paid to the plaintiff competitors (and trebled), rather than being paid to the U.S. Treasury. This measure is not keyed to lost profits, but assumes that the injury from this type of pricing lies in not selling at a uniform price in all markets.

Despite the somewhat poor theoretical fit, it may be that the third measure is preferable. It is the easiest measure to administer, itself a benefit. This measure would also provide a readily observable pricing line for foreign firms to use in pricing into the United States. So long as prices are equalized between markets, there would be no damages. Although we might prefer that prices be equalized at competitive levels, this approach at least gives sellers who are concerned that they might be pricing below cost in export markets some further incentive to eliminate pricing differentials.

4. Accounting for Foreign Government Policies and Enforcement

Antitrust enforcement that deals with conduct occurring abroad always carries with it the possibility of undue interference in the affairs of a foreign country. A foreign government might have its own system of antitrust enforcement which it would prefer to invoke to deal with the conduct of firms clearly subject to its jurisdiction. A foreign government might also decide that open markets and competition are not what it wants for its economy, and it might adopt measures that are designed to enable its companies to cooperate to seek advantage abroad.

The television case exhibits both aspects. The Fair Trade Commission brought a number of antitrust enforcement actions against the Japanese industry in the 1960s. On the other hand, MITI had some degree of involvement in the efforts of the industry to form an export cartel that enabled the industry to engage in some degree of cooperative behavior with regard to the U.S. market.

U.S. antitrust law is not without doctrines that can accommodate these efforts by a foreign government to control and police its economy. If a foreign antitrust authority were involved in remedying a blocked market, for example, a U.S. court might be convinced to stay its own proceedings pending the outcome. This remedy is used in litigation in the United States where the defendants are engaged in defending parallel private and government proceedings. On the other hand, if a foreign government was compelling its firms to engage in predatory pricing in the United States, that would be recognized as a defense to an antitrust suit in the United States.[93]

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[93] *See* Hartford Fire Insurance Co. v. California, 113 U.S. 2891 (1993).

5. *Replacing Trade Law*

The antitrust cause of action sketched above cannot be taken as a replacement for a trade law approach to international pricing problems. One reason is that the case explored covers only a small portion of the kinds of pricing issues that can be the subject of a trade law proceeding complaining of low prices. Besides escape clause proceedings, which look only at harm to the domestic industry, trade law permits action in cases where domestic market and target market prices are the same, that is, where the sellers are allegedly selling below cost in all markets. This was the case, for example, in semiconductors. The trade law approach was to construct a fair market value for semiconductor prices in Japan, which was above the price at which the Japanese manufacturers were actually selling semiconductors. The predatory pricing analysis above would not take such an approach. It would be hard to say that the Japanese semiconductor firms were selling below cost in the U.S. so as to avoid dissipating monopoly rents in Japan if they were, in fact, busy dissipating those rents in Japan by dropping their prices there as well.

There is a second reason why the cause of action cannot replace trade law. At this time it is quite unclear that the proposed view of recoupment would be accepted by U.S. courts. The Supreme Court's most recent decision in this area, *Brown & Williamson*, focuses on recoupment as "caus[ing] a rise in price above a competitive level that would be sufficient to compensate for the amounts expended on the predation."[94] It is unclear whether the Court would recognize the rent-preservation theory of recoupment, which, if successful, only brings prices back to where they were before the competitor emerged. It is also unclear whether U.S. courts are prepared to broaden the view of the goals of antitrust law to encompass the harms suggested above: a concern with a redistribution of profits that reduces national economic wealth or with seller behavior that harms foreign consumers by preserving a foreign cartel (in addition to harming U.S. busi-

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94 Brooke Group, Ltd. v. Brown & Williamson Tobacco Co., 113 S. Ct. 2578, 2589 (1993). The Court in *Brown & Williamson* also held that a plaintiff alleging predatory pricing must prove that prices were "below an appropriate measure of cost." *Id.* at 2587. The Court did not decide, however, whether average variable cost is the appropriate level. *See id.* at n.1.

ness firms).[95] In fact, if there is anything clear about the current state of predatory pricing law in the United States it is that plaintiffs never win.

On the other hand, antitrust law has one particular attraction to litigants that trade law does not possess: injured competitors collect the damages. A more flexible antitrust cause of action might entice litigants into the antitrust system. This, in turn, might take some pressure off the trade law system which seems, inevitably, to move toward quotas and protectionism, with little ultimate benefit to the very U.S. firms who invoke it.

IV. CONCLUSION

This article has used the television cartel case as a way to review current approaches to international predatory pricing and to suggest how an antitrust cause of action might be fashioned that would focus attention on exclusion from the home market.

The first part of the article reviewed the litigation itself, both on the antitrust and trade sides, and both on the Japanese and U.S. sides. That review showed that there was considerable evidence of cartel agreements in the industry, agreements which were prosecuted to a very limited extent in Japan but which, on the export side, were to some extent openly adopted and approved by MITI. The export drive of the Japanese industry led the U.S. competitors to seek relief both under trade law and antitrust law.

Legally, the U.S. industry had more success under trade law than under antitrust law. Antidumping margins were found and antidumping penalties set. The antidumping order remains in effect today for many of the original Japanese firms and antidumping margins continue to be found. On the antitrust side, after an extensive pretrial discovery and litigation effort, the Supreme Court held that the U.S. plaintiffs were not even entitled to take their case to a jury.

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95 For example, in *Pfizer, Inc. v. Government of India,* in the course of permitting a foreign government to sue under U.S. antitrust law for damages caused by an international cartel, the Court wrote:

> The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations. Treble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.

Pfizer, Inc. v. Government of India, 434 U.S. 308, 314 (1977).

As a practical matter, it is less clear whether the trade route was any more successful than the antitrust route. It is not clear whether the United States ever collected any of the dumping duties. An Orderly Marketing Agreement was imposed, but that only moved the Japanese to import more expensive television sets and to acquire and build plants in the United States. In the end, the only U.S.-owned manufacturer is Zenith, and it is partly owned by a Korean company. The U.S. industry produces no VCRs and lags in flat screen technology. It is also the case that the market remains roughly at the same level of concentration as it was when the plaintiffs began their antitrust litigation. The Japanese firms have not monopolized it.

The second part of the article explored the question of whether the factual scenario supported the U.S. industry's claim of predatory pricing. To make a plausible case for the claim of predatory pricing required a closer understanding both of what the costs of predation might have been for the Japanese firms and the reasons why these investments might have been economically sensible, that is, recoupable.

The costs of predation should properly be seen as the opportunity costs faced by the Japanese firms. That is, if they could only make sales in the United States at a low price, they would not have any loss to recoup in the sense that they had given nothing up by selling at the low price. Viewed in this way, the amount invested was not necessarily related to the amount below cost at which the Japanese sold television sets; it was more connected to their competitive opportunities. In addition, the check price agreement and the five-company rule appeared to be an effort by the Japanese firms to reduce the potential costs of predation. Thus, it may be that the Supreme Court overestimated the amount the Japanese firms might have invested in predation. Similarly, the Court likely overestimated the time during which these investments were made.

Three benefits to this scheme were suggested: 1) spillovers in other consumer electronics industries; 2) eventually obtaining the supra-competitive profits then being earned by the U.S. industry; and 3) protecting the rents in the Japanese market which would have been dissipated if too much of the industry's output ended up being sold in Japan. Although each of these benefits may have occurred, the prevention of rent dissipation seemed the most plausible given the kinds of cartel agreements that were operating in the Japanese market, the extreme price differentials between the two markets, and the lack of competitive imports into Japan.

This theory for why a predatory pricing campaign could have been economically rational was then used to generate some requirements for an antitrust cause of action for international predatory pricing. The recoupment part of that analysis would focus on the blocked home market within which the alleged predatory cartel was likely earning supra-competitive profits. A plaintiff would be required to show that the market was blocked. Such proof could come either from direct evidence of exclusionary practices or from an inference that could be drawn from outlier status, that is, if imports into the market in a relevant country were below levels in other similar foreign markets. Outlier status would shift the burden of coming forward to the defendants to show that the lack of imports was due to some sound business reason, such as an inferior foreign product. The second requirement on this prong of the analysis would be that the firms complaining of the predation would have to show an effort to enter the foreign market (or, at least, that other foreign firms had made such an effort and that their failure had dissuaded the plaintiffs). Such proof would help demonstrate that the plaintiffs were aggressive competitors with a serious complaint about competitive disadvantage for which they needed court intervention.

The second requirement for a cause of action would be proof of price below average total cost. This requirement was left less specific than is currently acceptable to many U.S. courts following the Areeda-Turner approach. The need for more vagueness relates directly to the international aspect of this type of behavior. Trying to guide by variable costs when firms in different countries treat similar costs (particularly labor) in different ways creates an improper legal advantage unrelated to efficiency. Further, constructing rules to maximize the allocation of resources across national economies is an extremely uncertain effort.

Two remedies were suggested. For a government suit, relief could include an injunction against exclusionary practices in the foreign market. For the private suit, the article suggests that damages be assessed as the difference between domestic and foreign price. Although this is not clearly related to the profits lost because of the predation, it would be an easier standard to administer and would give foreign companies clearer guidance on what type of pricing would avoid a damage award (even if it would not necessarily avoid injunctive relief).

It is not certain whether this type of antitrust remedy would bring much relief to the pressures on the trading system arising out of a belief that low prices by foreign firms are "predatory." The state of the law in the United States regarding predatory pricing is very unfavorable to plaintiffs and the kinds of cases which would be covered by this cause of action do not exhaust all cases which are today covered by dumping laws.

It may very well be, however, that there is more room for antitrust enforcement in this area than is commonly thought. Based only on the historical record, it would seem that if there is going to be predatory pricing, it is more likely to be done by foreign cartels rather than monopolies, and by cartels trying to avoid spoiling supra-competitive pricing in the home market.[96] Antitrust is an important legal tool that moves the trading system in the right direction, away from protection and toward the open markets that give consumers the opportunity to choose the best products on their merits and give producers the opportunity to compete free from the strategic uses of market power.

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[96] For examples, see VINER, *supra* note 3, at 36 (quoting Adam Smith), 51-66 (export bounties paid to German producers by German cartels as incentive to sell output abroad). Interestingly, Viner found systematic dumping to be less prevalent by U.S. companies because of legal prohibitions on cartel formation; he found only one example of systematic grants of export bounties. *Id.* at 84-85.