

SYMPOSIUM ON CURRENT ISSUES IN THE WORLD TRADE ORGANIZATION

INTERNATIONALIZING OUR VIEWS TOWARD RECOUPMENT AND MARKET POWER: ATTACKING THE ANTIDUMPING/ANTITRUST DICHOTOMY THROUGH WTO-CONSISTENT GLOBAL WELFARE THEORY

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1. INTRODUCTION

As nations become more economically interdependent, the conflict between individual nationalism and global welfare intensifies. The linked concepts of market efficiency and global welfare dictate that every nation should have the ability to engage in free trade and to fully exploit its natural comparative advantage.¹ It is through such exploitation that all nations benefit from

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¹ Natural comparative advantages result from an abundance of natural resources, efficient production, advanced technology, skilled workers, lower labor costs, and a favorable climate. These advantages may be compared to artificial comparative advantages which result when the government protects or subsidizes labor, capital, and research and development. It can be argued that the use of natural advantages is merely a fair trading practice, while the use

an increasing pool of global wealth, the division of which determines the social, economic, and political well-being of each nation. To achieve these benefits, individual governments must no longer rely on policies that focus only on their domestic producer or consumer welfare. Instead, a new approach must be developed acknowledging the importance of global welfare and recognizing that growing economic interdependence mandates a fusion of foreign and domestic policies.

Unfortunately, current antidumping² and antitrust³ policies do not reflect this global interdependence. These policies continue to be mired in theoretical and nationalistic vacuums which inhibit the growth of global wealth and distort its efficient distribution. Conflicts between consumer and producer interests, as well as between the pursuit of efficiency and the demand for protection, have led to a constrictive process through which

² For the purposes of this Article, "antidumping law" refers to 19 U.S.C. §§ 1673-1677n (1994), unless otherwise noted. Generally, antidumping law provides that an antidumping duty may be imposed on imports when those imports are sold in the United States at less than their fair value and a U.S. industry is materially injured, threatened with material injury, or prevented from entering the market as a result of these imports. See *id.* § 1673.

³ U.S. antitrust laws are designed to protect "competition, not competitors," *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), and thus do not have the domestic producer orientation of U.S. antidumping laws. Since "[U.S.] antitrust laws do not regulate the competitive conditions of other nations' economies," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986), and because the Sherman Act reaches conduct outside our borders "only when the conduct has an effect on [U.S.] commerce," *id.* at 582 n.6, the interpretation of our antitrust laws, including the theories upon which such interpretations are based, often takes on a decidedly nationalistic flavor. The antitrust laws of primary concern in this Article are sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1994) and the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21(a) (1994). Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1994). The relevant part of section 2 of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." *Id.* § 2. The Robinson-Patman Act prohibits a person from price discriminating between "purchasers of commodities of like grade and quality," where such commodities are sold within the United States and where the discrimination tends to lessen competition, to create a monopoly, or "to injure, destroy, or prevent competition." *Id.* § 13(a). The Robinson-Patman Act provides, however, for price reductions in "good faith to meet an equally low price of a competitor . . ." *Id.* § 13(b).

parochial answers are given in response to international questions. As a result, U.S. competition and trade regimes have barely acknowledged the inevitable link between foreign and domestic welfare.

Antidumping laws are protectionist measures applied regardless of market structure, consumer welfare, or the relative efficiencies of foreign and domestic industries.⁴ They effectively outlaw international price discrimination, while ignoring its domestic equivalent, by treating predatory and nonpredatory price levels similarly, providing relief pursuant to a very broad causation

⁴ See generally Wood, *supra* note 1 (discussing market structure and relative efficiencies). For a general survey of the antitrust/trade remedy debate, see generally S. REP. NO. 403, 102d Cong., 2d Sess. (1992); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT TRADE COMMITTEE, TRADE AND COMPETITION POLICIES: COMPARING OBJECTIVES AND METHODS (1994); Bernard M. Hoekman & Petros C. Mavroidis, *Competition, Competition Policy, and the GATT*, (The World Bank Policy Research Working Paper No. 1228 Dec. 1993); Harvey M. Applebaum, *The Coexistence of Antitrust Law and Trade Law with Antitrust Policy*, 9 CARDOZO L. REV. 1169 (1988); Harvey M. Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, 56 ANTITRUST L.J. 409 (1987); Harvey M. Applebaum & David R. Grace, *U.S. Antitrust Law and Antidumping Actions Under Title VII of the Trade Agreements Act of 1979*, 56 ANTITRUST L.J. 497 (1987); Donald I. Baker, *The Proper Role for Antitrust in a Not-Yet-Global Economy*, 9 CARDOZO L. REV. 1135 (1988); John J. Barceló III, *A History of GATT Unfair Trade Remedy Law-Confusion of Purposes*, 14 WORLD ECON. 311 (1991); Ronald A. Cass, *Price Discrimination and Predation Analysis in Antitrust and International Trade: A Comment*, 61 U. CIN. L. REV. 877 (1993); Joel Davidow, *The Relationship Between Anti-Trust Laws and Trade Laws in the United States*, 14 WORLD ECON. 37 (1991); Alfred E. Eckes, *The Interface of Antitrust and Trade Laws-Conflict or Harmony? An ITC Commissioner's Perspective*, 56 ANTITRUST L.J. 417 (1987); Kenneth G. Elzinga, *Antitrust Policy and Trade Policy: An Economist's Perspective*, 56 ANTITRUST L.J. 439 (1987); Alan F. Holmer, *The Interface of Trade/Competition Law and Policy: Trade Negotiation and Policy Considerations*, 56 ANTITRUST L.J. 433 (1987); Gilbert B. Kaplan & Susan H. Kuhbach, *The Causes of Unfair Trade: Trade Law Enforcers' Perspective*, 56 ANTITRUST L.J. 445 (1987); Jeffrey L. Kessler, *The Antidumping Act of 1916: Antitrust Analogue or Anathema?*, 56 ANTITRUST L.J. 485 (1987); John R. Morris, *International Trade and Antitrust: Comments*, 61 U. CIN. L. REV. 945 (1993); John D. Ong, *The Interface of Trade/Competition Law and Policy: A Businessman's Perspective*, 56 ANTITRUST L.J. 425 (1987); A. Paul Victor, *The Interface of Trade/Competition Law and Policy: An Overview*, 56 ANTITRUST L.J. 399 (1987); A. Paul Victor, *Task Force Report on the Interface Between International Trade Law and Policy and Competition Law and Policy: Introduction*, 56 ANTITRUST L.J. 463 (1987); Presley L. Warner, Comment, *Canada-United States Free Trade: The Case for Replacing Antidumping With Antitrust*, 23 LAW & POL'Y INT'L BUS. 791 (1992).

analysis,⁵ and barring the meeting competition defense available to domestic producers.⁶ As a result, pricing strategies lawfully undertaken by a U.S. enterprise may be unlawful when used by foreign competitors.

In contrast, U.S. antitrust laws are designed to encourage competition and promote both lower consumer prices and greater allocative and productive efficiency.⁷ As a means of stimulating

⁵ See *USX Corp. v. United States*, 12 Ct. Int'l Trade 205, 206-16 (1988); *British Steel Corp. v. United States*, 8 Ct. Int'l Trade 86, 90-91 (1984).

⁶ The Robinson-Patman Act provides that

nothing herein contained shall prevent a seller [from] rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

15 U.S.C. § 13(b) (1994). For a comparison of the antidumping laws with the Robinson-Patman Act, see Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, *supra* note 4, at 410-11; Applebaum & Grace, *supra* note 4, at 507-12; Davidow, *supra* note 4, at 43-44; Kaplan & Kuhbach, *supra* note 4, at 447-50. For discussions noting that predatory pricing is not a prerequisite for an antidumping finding, see Applebaum & Grace, *supra* note 4, at 512-14; Kaplan & Kuhbach, *supra* note 4, at 450-52.

⁷ "Allocative efficiency . . . refers to the placement of resources in the economy, the question of whether resources are employed in tasks where consumers value their output most. Productive efficiency refers to the effective use of resources by particular firms." ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 91 n.* (1978). Bork notes that the sole goal of antitrust is "to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare." *Id.* at 91. For a description of other characterizations of allocative and productive efficiencies, see Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1159-61 (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 72-74, 77-80 (1982). According to Judge Frank H. Easterbrook, "antitrust laws should be treated as if their sole objective were increasing allocative efficiency." Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 715 (1982). One commentator has indicated that "the maximization of the value of total output" can be achieved only when sellers "are supplying goods and services in accord with consumer preferences." Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1192 (1977). For the author's opinion about the inadequacy of an antitrust approach based solely on efficiency concerns, see Wesley A. Cann, Jr., *Section 7 of the Clayton Act and the Pursuit of Economic "Objectivity": Is there Any Role for Social and Political Values in Merger Policy?*, 60 NOTRE DAME L. REV. 273 (1985); Wesley A. Cann, Jr., *Toward the Depoliticization of Takeover Theory: Creation of an Innovation Factor*, 40 SYRACUSE L. REV. 1167

both global trade and product innovations, this approach is substantially preferable to that reflected in the antidumping laws. Although the antidumping laws are ill-equipped to promote international competition—and actually have the effect of retarding such competition—the antitrust laws are similarly ill-equipped to influence the structure of, or the access to, foreign markets. The Sherman Act⁸ cannot “regulate the competitive conditions of other nations’ economies,”⁹ and the Robinson-Patman Act¹⁰ does not apply to international price discrimination.¹¹ Since these laws cannot be used to alter the market structure of another country, and since the ability to dump depends on a protected home market and the inability to engage in international arbitrage, a dichotomy between antidumping and antitrust remedies has naturally developed.¹² Moreover, because antitrust models do not recognize the social, political, and economic differences among nations, antidumping remedies have become the mechanism for harmonizing and equalizing international economic systems.¹³

This dichotomy, however, increasingly has been aggravated by the development of an antitrust regime that relies extensively on Chicago School economic theory.¹⁴ Although aspects of this

(1989); Wesley A. Cann, Jr., *Vertical Restraints and the “Efficiency” Influence - Does Any Room Remain for More Traditional Antitrust Values and More Innovative Antitrust Policies?*, 24 AM. BUS. L.J. 483 (1986).

⁸ See 15 U.S.C. §§ 1, 2 (1994); see also *supra* note 3.

⁹ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986); see also *supra* note 3.

¹⁰ See 15 U.S.C. §§ 13-13b, 21(a); see also *supra* note 3.

¹¹ See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 244, 248 (E.D. Pa. 1975), *petition denied*, 521 F.2d 1399 (3d Cir. 1975) (“[B]oth commodities involved in the alleged price discrimination must be sold for use, consumption or resale within the United States.”).

¹² The Antidumping Act of 1916, 15 U.S.C. § 72 (1994), was designed to serve as “an international analogue to domestic price discrimination law.” Kessler, *supra* note 4, at 485. This Act is rarely applied, however, due to its predatory intent requirement and imposition of criminal sanctions. See *id.* at 485-91. Kessler notes that “[t]here have been fewer than a dozen reported cases construing the 1916 Act . . .” *Id.* at 491 (citation omitted); see also S. REP. NO. 403, *supra* note 4, at 3 (“As early as 1919, it became clear to the act’s sponsors that the intent requirement made the new law unworkable. . .”).

¹³ See Kaplan & Kuhbach, *supra* note 4, at 445, 456.

¹⁴ Scholars of the Chicago School of Economics advocate the usage of the Efficiency Model, which “posits that consumers benefit from a free, competitive market that forces producers to make the most, at the least cost, sold at the

theory are being challenged by Post-Chicago¹⁵ and Industrial Organization economics,¹⁶ antitrust enforcement continues to rely heavily on questionable assumptions arising out of a distinctly U.S.-oriented view of 'rational' business behavior. These assumptions, although perhaps appropriate for the development of domestic antitrust policy and enhancement of competition within the United States, become problematic when applied to the international setting. Moreover, a policy based on a passionate belief in the self-correcting abilities of a free market,¹⁷ and applied chiefly when market power is exercised within the United States, barely considers the political, economic, and cultural forces shaping the global market.

This policy leads to ironic results. By ignoring the realities of international diversity and by limiting antitrust remedies to only the most egregious conduct, the free market approach has encouraged private parties to seek antidumping remedies that are inherently anticompetitive in nature.

1.1. *The Need for a New Design*

Nowhere is this irony more apparent than in the area of predatory pricing. In *Matsushita Electric Industrial Co. v. Zenith*

lowest prices." Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1545 (1984); see also Jonathan B. Baker, *Predatory Pricing After Brooke Group: An Economic Perspective*, 62 ANTITRUST L.J. 585, 586-89 (1994); Peter M. Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319; Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

¹⁵ Post-Chicago economists provide "a new theory of recoupment based on the insight that if predation occurs in one market, recoupment can occur rapidly and profitably in many other markets. Post-Chicago economics also challenges the Chicago view that recoupment is never possible in the traditional single-market predation story." Baker, *supra* note 14, at 589-90.

¹⁶ See INDUSTRIAL STRUCTURE IN THE NEW INDUSTRIAL ECONOMICS (Giacomo Bonanno & Dario Brandolini eds., 1990); 1 HANDBOOK OF INDUSTRIAL ORGANIZATION (Richard Schmalensee & Robert D. Willig eds., 1989).

¹⁷ Chicago School theorists believe that the market possesses remarkable self-correcting capacities. See Rowe, *supra* note 14, at 1547-53 (discussing such features of the market). Chicago School theorists often view governmental intervention with a deep distrust concerning both its appropriateness and effectiveness. See Posner, *supra* note 14, at 948 n.67 (discussing the "deep distrust of government intervention that is associated with the Chicago School of Economics").

*Radio Corp.*¹⁸ and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,¹⁹ the Court refused to provide an antitrust remedy for predatory pricing. In *Matsushita*, the Court in effect examined the theoretical probability that the defendants engaged in predatory activity and held that the purported predatory behavior would have been implausible, nonsensical, and economically irrational.²⁰ In doing so, however, the Court assumed that all foreign and domestic businesses: (1) are rational profit-maximizers; (2) have the same level of intensity regarding the incentive to cheat; and (3) would refrain from predatory behavior unless they could recoup their losses in the same market in which those losses were incurred.²¹ By applying a U.S. perspective of rationality, the Court refused to recognize that rational conduct can be a function of both culture and managerial philosophy. Similarly, the Court ignored factors such as: (1) the relative importance of market share and return on investment; (2) the emphasis on consensus and group decisionmaking; (3) the desire for full or lifetime employment; (4) the existence of cultural norms concerning cheating; and (5) the development of managerial attitudes concerning recoupment within a particular market, within a particular period of time, and in traditional monetary terms.²²

In *Brooke Group*, a case involving domestic defendants, the Court imposed an arguably impossible burden of proof for predatory pricing allegations.²³ Despite the existence of both a

¹⁸ 475 U.S. 574.

¹⁹ 113 S. Ct. 2578.

²⁰ See *Matsushita*, 475 U.S. at 588-98.

²¹ See *id.* at 585-98.

²² See *USX Corp. v. United States*, 12 Ct. Int'l Trade 205, 211-12 (1988) (noting that foreign exporters do not always act as rational profit maximizers); JACOB VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 23-32 (1923) (commenting on motives for dumping); Steven F. Benz, Note, *Below-Cost Sales and the Buying of Market Share*, 42 STAN. L. REV. 695 (1990) (discussing the motives and practices of foreign producers seeking to gain market share); Steven Semeraro, Note, *Distinguishing International from Domestic Predation: A New Approach to Predatory Dumping*, 23 STAN. J. INT'L L. 621 (1987) (discussing motives for dumping).

²³ For a general discussion of the *Brooke Group* case and its implications, see Baker, *supra* note 14; Michael L. Denger & John A. Herfort, *Predatory Pricing Claims After Brooke Group*, 62 ANTITRUST L.J. 541 (1994); Kenneth G. Elzinga & David E. Mills, *Trumping the Areeda-Turner Test: The Recoupment Standard in Brooke Group*, 62 ANTITRUST L.J. 559 (1994); Kenneth L. Glazer,

concentrated industry with declining demand and historically supracompetitive prices, and sufficient evidence of both predatory intent and below-cost sales,²⁴ the Court denied antitrust relief. In so holding, the Court indicated that because “unsuccessful predation is in general a boon to consumers,” predatory activity is only unlawful under the Robinson-Patman Act and section 2 of the Sherman Act when the predator has the ability to later recoup its losses by exercising market power.²⁵

This reluctance to provide relief in predatory pricing cases exists because the lowering of prices to increase market share “is the very essence of competition.”²⁶ A strategy involving a decrease in prices, the elimination of competitors, and then a subsequent increase in prices may represent either predatory conduct or fair and vigorous competition on the part of a highly efficient firm. Apparently, because lower prices enhance consumer welfare and because “predatory pricing schemes are rarely tried, and even more rarely successful,”²⁷ courts have decided to err on the side of leniency. In the courts’ view, to do otherwise would discourage legitimate price competition.²⁸

Predatory Pricing and Beyond: Life After Brooke Group, 62 ANTITRUST L.J. 605 (1994).

²⁴ See *Brooke Group*, 113 S. Ct. at 2582-92.

²⁵ *Id.* at 2588. More particularly, section 2 of the Sherman Act condemns predatory pricing only when there is a “dangerous probability of actual monopolization” and the Robinson-Patman Act will condemn such conduct when there is “a reasonable possibility” of substantial injury to competition. *Id.* at 2587 (quoting *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434 (1983)).

²⁶ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

²⁷ *Id.* at 589 (citations omitted). The *Brooke Group* Court noted that “[low prices benefit consumers regardless of how those prices are set.” *Brooke Group*, 113 S. Ct. at 2588 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). Furthermore, without recoupment, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.” *Id.* See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PREDATORY PRICING 17-32 (1989) (discussing the frequency of predatory pricing and comparing the various academic theories thereof) [hereinafter PREDATORY PRICING].

²⁸ See *Matsushita*, 475 U.S. at 594 (discussing the chilling effect of mistaken inferences of predation); see also *Brooke Group*, 113 S. Ct. at 2589 (“[T]he costs of an erroneous finding of liability are high.”); *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 892 (1993) (“[T]his Court . . . [has] been careful to avoid constructions of [the Sherman Act] which might chill competition. . . .”); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-64 (1984)

Although this approach has provided an administratively convenient set of policies with which to dispose of predatory pricing allegations, the validity of these policies must now be questioned in light of the changes occurring in the global market. Current predatory pricing policy is no longer adequate in its scope and a broader, more innovative design for policy development must be established. This design must reflect: (1) the rise of developing and transition economies; (2) the increase in economic integration; (3) the global proliferation of antidumping legislation; and (4) the spirit of the new World Trade Organization ("WTO") Agreement.²⁹

Global trends toward deregulation, privatization, and a firm's ability to protect unfairly its dominant position must also be considered.³⁰ Predatory pricing is more likely to occur in an international setting where: (1) industrial policy blurs the distinction between public and private conduct; (2) subsidies and transfer pricing obscure the level of costs; (3) markets are more easily segregated; and (4) differing social and political agendas are established.³¹ New economic thinking, which challenges old

(discussing the dangers of overzealous enforcement of the Sherman Act); *Morgan v. Ponder*, 892 F.2d 1355, 1358-59 (8th Cir. 1989) ("There is a real danger in mislabeling such practices as predatory, because consumers generally benefit. . . ."); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235-36 (1st Cir. 1983) (rejecting plaintiff's complaint for fear of chilling desirable price cutting).

²⁹ See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, reprinted in FINAL TEXTS OF THE GATT URUGUAY ROUND AGREEMENTS INCLUDING THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AS SIGNED ON APRIL 15, 1994 5 (Office of the United States Trade Representative ed., 1994) [hereinafter FINAL TEXTS].

³⁰ See PREDATORY PRICING, *supra* note 27, at 7 (discussing such trends); see also ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTERIM REPORT ON CONVERGENCE OF COMPETITION POLICIES 11 (1994) [hereinafter INTERIM REPORT]; ORGANISATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT, COMMITTEE ON COMPETITION LAW AND POLICY, REGULATORY REFORM, PRIVATIZATION AND COMPETITION POLICY 36-38 (1992) [hereinafter COMMITTEE REPORT] (discussing the monopolistic nature of former state-run businesses and the steps that need to be taken to ensure competitive markets).

³¹ For a general discussion of predatory pricing, see Barbara Epstein, *Foreign Predation Against U.S. Firms: Reconciling International and Domestic Policies*, in ANTITRUST AND TRADE POLICY IN INTERNATIONAL TRADE (Barry E. Hawk ed., 1985); Benz, *supra* note 22; Semeraro, *supra* note 22.

conceptions regarding the difficulty of predatory pricing³² must also be employed. Recent insights into the effects of capital imperfections, as well as the ability to recoup in different markets by means of selective predation and intimidation³³ appear to be equally applicable to the international marketplace.

That predatory pricing may be more common than suggested by the Chicago School, however, is an argument that addresses only part of the issue. The question remains whether an attempt to discover and punish firms that engage in price predation would be beneficial.³⁴

A policy providing more realistic remedies against predatory conduct also may encourage nonprice predation in the form of sham litigation.³⁵ The costs involved in defending a meritless lawsuit are substantial. Difficulties experienced in the discovery process and the tacit collusion that can result from the exchange of information also are matters for concern.³⁶ The harm to consumer welfare resulting from either delays in instituting price reductions or from an overly cautious reluctance to engage in lawful price competition raises concerns that the chilling of legitimate business conduct may become a reality.³⁷

In weighing these concerns, however, it is important to recognize the consequences of retaining the current predatory pricing policy. Since no adequate antitrust remedy is available against international predation, businesses increasingly have turned to antidumping laws to obtain relief. Between 1980 and 1990, there were 1,383 antidumping actions instituted worldwide, nearly half of which were instituted on behalf of Canadian or U.S.

³² See Baker, *supra* note 14, at 589-92; Paul Milgrom & John Roberts, *New Theories of Predatory Pricing*, in *INDUSTRIAL STRUCTURE IN THE NEW INDUSTRIAL ECONOMICS*, *supra* note 16, at 112; Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust*, in *HANDBOOK OF INDUSTRIAL ORGANIZATION*, *supra* note 16, at 537-96.

³³ See Baker, *supra* note 14, at 589-92; Milgrom & Roberts, *supra* note 32, at 112; Ordover & Saloner, *supra* note 32, at 537-96.

³⁴ See Milgrom & Roberts, *supra* note 32, at 133-34.

³⁵ See Denger & Herfort, *supra* note 23, at 557; *PREDATORY PRICING*, *supra* note 27, at 83; Baker, *supra* note 14, at 1149.

³⁶ See *INTERIM REPORT*, *supra* note 30, at 21 (discussing problems with discovery); *PREDATORY PRICING*, *supra* note 27, at 23; Kaplan & Kuhbach, *supra* note 4, at 450.

³⁷ See *supra* notes 26-28 and accompanying text; see also Warner, *supra* note 4, at 886.

industries.³⁸ In 1993 alone, U.S. steel producers filed seventy-two actions against flat-rolled steel products imported from various nations.³⁹ These statistics are not surprising considering that the antitrust and antidumping laws, while divergent in theory have a common purpose. Both potentially provide relief when the price of a foreign competitor's product is considered to be at too low of a level, either by being priced below an appropriate measure of cost,⁴⁰ or by being priced at less than its fair value.⁴¹

The already substantial number of antidumping actions will increase exponentially in the future. "By the end of 1989, twenty-eight countries had adopted antidumping laws,"⁴² and by the spring of 1994 that number had increased to approximately forty.⁴³ Furthermore, all nations signing the WTO Agreement will automatically adopt its antidumping code.⁴⁴ The GATT Tokyo Round codes will no longer be optional in nature. As a result of the single undertaking approach adopted by the WTO, nations that previously lacked antidumping legislation will adopt these protectionist trade measures.⁴⁵

Proponents of current predatory pricing policy should consider that the increasing availability and use of antidumping remedies also will have a substantial effect on competition. In this regard, the threat of antidumping remedies will chill price competition, discourage producers from entering foreign markets, encourage the use of sham proceedings, and enhance the ability of businesses to collude through both public and private settlements.⁴⁶ While these proponents may argue that the

³⁸ See THOMAS M. BODDEZ & MICHAEL J. TREBILCOCK, UNFINISHED BUSINESS: REFORMING TRADE REMEDY LAWS IN NORTH AMERICA 16 (1993); see also Warner, *supra* note 4, at 794 ("Producer interests initiated nearly 1,200 antidumping actions in Australia, Canada, the European Community and the United States between July 1980 and June 1988.")

³⁹ See F. Amanda DeBusk, *Dumping Laws Still Endanger the Deal*, N.Y. TIMES, April 17, 1994, at F13.

⁴⁰ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2587 (1993).

⁴¹ See 19 U.S.C. § 1673 (1994).

⁴² Warner, *supra* note 4, at 794 (citation omitted).

⁴³ See DeBusk, *supra* note 39, at F13.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS at 239 (1994) (describing the chilling of price competition); PREDATORY

antidumping laws should be repealed, such an action would be impossible until the law of predatory pricing becomes capable of filling the economic and political vacuum that would result.

1.2. *The WTO, Global Interdependence, and the Need for a New Antitrust Remedy*

The goals of the new WTO Agreement must be considered in creating a new foundation on which to base predatory pricing policy. This Agreement, which binds over 100 nations, established the WTO,⁴⁷ and was designed to enhance international trade in goods and services by reducing tariff and nontariff barriers and by providing improved dispute settlement procedures.⁴⁸

Encouraging free trade, however, merely is the means by which to accomplish a more comprehensive result. The true spirit of the WTO Agreement lies in its attempt to: (1) create additional global wealth; (2) raise global standards of living; (3) encourage the optimal use of resources; and (4) "ensure that developing countries, and especially the least developed among them" share in the benefits resulting from the WTO Agreement.⁴⁹ GATT Secretariat preliminary estimates indicate that the Uruguay Round Agreement will result in a level of world merchandise trade that will be approximately twelve percent higher by the year 2005 than it would be in the absence of the Agreement.⁵⁰ In monetary terms,

PRICING, *supra* note 27, at 13 (citation omitted) (describing sham proceedings); Hoekman & Marvoidis, *supra* note 4, at 6-7 (describing private collusion); Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, *supra* note 4, at 414-16 (describing public collusion).

⁴⁷ See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on 15 April 1994, *reprinted in* FINAL TEXTS, *supra* note 29, at 5.

⁴⁸ See *id.*

⁴⁹ Agreement Establishing the World Trade Organization, Pmb., *reprinted in* FINAL TEXTS, *supra* note 29, at 9.

⁵⁰ See TRADE NEGOTIATIONS COMMITTEE, GROUP OF NEGOTIATIONS ON GOODS (GATT), GATT SECRETARIAT, AN ANALYSIS OF THE PROPOSED URUGUAY ROUND AGREEMENT, WITH PARTICULAR EMPHASIS ON ASPECTS OF INTEREST TO DEVELOPING ECONOMIES 45 (Nov. 29, 1993). These estimates are based upon the implementation of "the Uruguay Round market access offers on the table as of" Nov. 19, 1993. *Id.* at 41. Changes in such offers "could substantially affect estimates." *Id.* at 46.

this represents an increase of approximately \$745 billion.⁵¹ With respect to global income, the implementation of market access provisions would add approximately \$230 billion annually,⁵² and the GDP of developing nations could be increased by \$80 billion.⁵³ These estimates tend to underestimate substantially the impact of the WTO Agreement because they do not consider the resulting stimulus to world trade in the services sector,⁵⁴ or reflect the more dynamic gains that will result from the dissemination of knowledge, the increase in innovation and productive efficiency, and the reallocation of resources.⁵⁵

By establishing these goals, the WTO Agreement emphasizes the connection between increasing global economic efficiency and enhancing the social well-being of nations. Thus, the Organisation for Economic Co-operation and Development ("OECD") has indicated that the eradication of poverty, hunger, disease, migration, and uncontrolled population growth is intimately linked to the pursuit of sustainable economic development.⁵⁶ As a result, the OECD nations have agreed to "bear a special responsibility for ensuring that sustainable economic development and social progress are consolidated and extended" and that "universally shared benefits" are pursued.⁵⁷

This approach, however, depends upon the willingness of governments to recognize the benefits of global specialization. When nations are permitted to exploit their comparative advantage in a free and open market, the levels of global productivity and output are increased, investment and innovation are encouraged, and consumer prices are reduced.⁵⁸ This exploitation allows individual nations to reap the rewards of their comparative

⁵¹ See *id.* at 45. All monetary figures in this Article will be in U.S. dollars unless otherwise stated.

⁵² See *id.* at 45 (citation omitted).

⁵³ See *id.* at 46.

⁵⁴ See *id.* at 46-47.

⁵⁵ See *id.*

⁵⁶ See ORGANISATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT, MEETING OF THE OECD COUNCIL AT MINISTERIAL LEVEL, COMMUNIQUE 9 (June 8, 1994) [hereinafter OECD COUNCIL MEETING].

⁵⁷ *Id.*

⁵⁸ See THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, *supra* note 46, at 205, 234; Sylvia Nasar, *GATT's Big Payoff for the U.S.*, N.Y. TIMES, Dec. 19, 1993, at F7.

advantage and thereby raise their standard of living.

A political problem arises, however, because comparative advantage often is based on the availability of substantially lower labor costs, and specialization may result in the migration of domestic employment opportunities. Although the loss of unskilled, low-paying jobs will be more than offset by new and better paying opportunities,⁵⁹ these new opportunities will not necessarily accrue to the displaced individuals. Thus, the benefits of such a macroeconomic approach are often undervalued by many political constituencies.

Despite this effect, the movement toward global interdependence cannot be reversed. Attempts to artificially preserve "yesterday's jobs"⁶⁰ are doomed as international trade barriers are eliminated. A policy allowing inefficient producers to survive will only dampen future international competitiveness,⁶¹ and decrease employment opportunities.

If the benefits of specialization are to be achieved, nations cannot continue to rely on policies designed to protect domestic producer or consumer welfare. Policies must focus instead on the goal of increasing global consumer welfare, or, more accurately, global total welfare.⁶² This focus would not only be more consistent with the philosophy of the WTO Agreement, but also would recognize that the health of a domestic economy depends on the strength of the international economy.

Examining this approach through a more nationalistic perspective emphasizes that the benefits of specialization will accrue to efficient domestic producers, to their employees, and to domestic consumers. The creation of an open international marketplace will permit producers to increase exports and hire additional workers to meet increased demand. Furthermore, it will allow producers who rely on foreign components to engage in "global sourcing" and acquire needed components at lower

⁵⁹ See THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, *supra* note 46, at 45-46, 234.

⁶⁰ OECD COUNCIL MEETING, *supra* note 56, at 2.

⁶¹ See Victor, *The Interface of Trade/Competition Law and Policy: An Overview*, *supra* note 4, at 399-400 (proposing that "[U.S.] international competitiveness may be adversely affected" by trade restraints and other protective measures).

⁶² Total welfare is defined as the sum of consumer and producer welfare. See Morris, *supra* note 4, at 945-46 n.4.

costs,⁶³ thereby increasing the international competitiveness of the finished products. The open international marketplace will offer domestic consumers a greater choice of products and will ensure that those products are provided at lower prices. Additionally, as developing countries increase their level of exports, resulting in improved standards of living and increased access to hard currency, they will become larger consumers of imported goods and services.

Antidumping remedies, in conjunction with an inadequate antitrust policy that encourages their use, substantially impede global specialization and threaten to undermine the results of the Uruguay Round. As GATT negotiations have lowered both tariff and nontariff barriers, many developing nations claim that producers are increasingly turning to antidumping legislation.⁶⁴ This legislation has been described as a form of “creeping protectionism,”⁶⁵ inappropriately invoked as a “safeguard,”⁶⁶ and functioning as “an oft invoked escape clause.”⁶⁷ Antidumping laws, when used as weapons to counteract the success of GATT negotiations, serve as “a powerful brake on international trade.”⁶⁸ The imposition of an antidumping duty often represents nothing more than an administratively sanctioned subsidy for inefficient enterprises.

Some argue that unfair trade laws are justified on “the grounds that they act to harmonize differing economic systems.”⁶⁹ Because of differing social and legal arrangements, such as those dealing with employment and debt-equity structures, an industry in one country may be more willing to engage in dumping than

⁶³ See S. REP. NO. 403, *supra* note 4, at 19-20, 24-25.

⁶⁴ See *GATT Participants Criticize New U.S. Antidumping Proposal*, 10 Int'l Trade Rep. (BNA) No. 47, at 2004 (Dec. 1, 1993); see also Barceló, *supra* note 4, at 332-33 (discussing short-run reliance on, and long-run resistance to, antidumping measures); Barry E. Hawk, *Antitrust In Today's World Economy*, 9 CARDOZO L. REV. 1161 (1988) (describing the U.S. antidumping response to GATT).

⁶⁵ *GATT Participants Criticize New U.S. Antidumping Proposal*, *supra* note 64, at 2004.

⁶⁶ Barceló, *supra* note 4, at 332 (discussing the “safeguard-like” concept).

⁶⁷ Hoekman & Mavroidis, *supra* note 4, at 6 (describing “an oft invoked escape clause”).

⁶⁸ DeBusk, *supra* note 39, at F13.

⁶⁹ Kaplan & Kuhbach, *supra* note 4, at 445.

an industry located elsewhere.⁷⁰ Additionally, "differences in national business practices and laws" become more determinative of trade outcomes as barriers to trade are reduced.⁷¹ In providing sanctions against goods imported at less than their fair value, the antidumping law "acts as an interface between the two economies, equalizing or offsetting the differences between the two."⁷² The antidumping laws thus attempt to weigh short-term gains to domestic consumers against the long-term harm to potentially efficient domestic producers. They also attempt to inhibit the ability of foreign firms to use their protected market power at home to increase their presence abroad.⁷³

As the international economy becomes more integrated, however, nations become less tolerant of antidumping remedies.⁷⁴ When countries agree to open their borders to international competitors, they expect that their trading partners will reciprocate. As nations attempt to increase free trade, they resort to antitrust law, rather than antidumping law, to deal with issues such as predatory pricing.⁷⁵

The problem, however, is that no adequate antitrust remedy exists. Current antitrust policy does not address the argument that antidumping laws are justified as a means to "harmonize differing economic systems,"⁷⁶ and antitrust models do not account for differing social, political, and economic systems. Thus, until the antitrust laws address these issues, antidumping remedies will continue to act as the political justification for the reduction of other trade barriers.⁷⁷

Although current antitrust enforcement is inadequate, the world is not ready for a universal antitrust code. Assistant Attorney General Anne K. Bingaman recently noted that the

⁷⁰ See *id.* at 456.

⁷¹ THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, *supra* note 46, at 239.

⁷² Kaplan & Kuhbach, *supra* note 4, at 456.

⁷³ See Eckes, *supra* note 4, at 423; Ong, *supra* note 4, at 429-30.

⁷⁴ See Barceló, *supra* note 4, at 332.

⁷⁵ See *id.*

⁷⁶ Kaplan & Kuhbach, *supra* note 4, at 445.

⁷⁷ One commentator has noted that the presence of trade remedies act as "safety valves" which make it "possible for [the U.S.] government to reduce tariff barriers to present low levels, and thus to open our economy to global competitive forces." Eckes, *supra* note 4, at 424.

problems of achieving any worldwide agreement are "so overwhelming that it is hard to imagine this occurring in the near term."⁷⁸ There are substantial differences between the needs and values of industrialized and developing nations,⁷⁹ and there is no consensus concerning the basic purposes of antitrust law.

It is unlikely that any nation would unilaterally repeal its antidumping legislation. National governments, confronted by a variety of social, political, and foreign relations issues, often promote public policy interests by imposing trade restrictions.⁸⁰ As a result, the pursuit of free competition sometimes can be set aside "in the messy, pragmatic, contentious world of international trade."⁸¹ Moreover, because producers seeking protection from foreign competition are part of a stronger lobbying contingency than that representing consumers,⁸² the political pressure to refrain from unilateral action is substantial.

Since a comprehensive international antitrust regime is not currently possible, this Article proposes an antitrust-based predatory pricing remedy to be considered during future WTO negotiations. This remedy would act as a substitute for the interfacing function of the antidumping laws and would provide for the recovery of actual damages for international predatory pricing. Pursuant to such a proposal, recoupment would be approached with an appreciation for strategic behavior, oligopolistic and multimarket relationships,⁸³ and the economic, political, and cultural differences among nations. The concept of market power would be redefined, concentrating less on potential

⁷⁸ Interview: Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, ANTITRUST, Fall 1993, at 8, 9.

⁷⁹ See *Witnesses Discuss Differing Paths of Antitrust and Antidumping Schemes*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1571, at 852 (June 25, 1992) (citing testimony of Professor Pitofsky before the Senate Judiciary Committee discussing the differences between U.S. and foreign nations' competition policies).

⁸⁰ See Hoekman & Mavroidis, *supra* note 4, at 8-9 (discussing public policy reasons for restraints); Holmer, *supra* note 4, at 433 (noting the complex set of agendas facing nations as they develop competition policy).

⁸¹ Holmer, *supra* note 4, at 433.

⁸² "[T]he only politically effective resistance to antidumping comes from domestic industries that are negatively affected by the resulting impacts on input prices and uncertainty." Hoekman & Mavroidis, *supra* note 4, at 28 (citation omitted).

⁸³ See Baker, *supra* note 14, at 594-98.

market share and more on the ability of a firm, using segregated markets and nontraditional forms of recoupment, to discipline or destroy a more efficient competitor.⁸⁴ In the spirit of the WTO Agreement, this remedy would also be designed to recognize preferences for developing nations and to adjust cost and pricing criteria to meet those needs. Additionally, by providing relief through a predation test rather than through the application of an overly zealous antidumping standard, this approach would encourage legitimate global specialization and a more equitable division of wealth.

This antitrust remedy is politically defensible on several grounds. First, it would provide domestic businesses with an expanded, more realistic basis on which to recover for predatory activities undertaken by foreign competitors. However, it would link such an expanded basis of recovery to the abolition of the antidumping laws or the imposition of substantial restrictions on their use.⁸⁵ Concerning this tradeoff, it may be emphasized that a successful private cause of action for predatory conduct would result in a compensatory award that accrues directly to the individual business that has been harmed. Antidumping duties, in contrast, are simply collected by the U.S. government, and no direct compensation is awarded to the injured party.⁸⁶ In

⁸⁴ For a proposal creating a new definition of trade injury that protects only efficient U.S. producers from foreign dumpers, and that balances consumer and producer interests in light of probable efficiencies, see Wood, *supra* note 1.

[T]he injury that should be legally recognized is the injury suffered because the practice in question causes lost market share or sales to a competitively structured industry. If the competing foreign firm is more efficient, adjusting for any advantage conferred by the unfair trade practice, or if the U.S. industry does not conform roughly to the model of a competitive (and hence efficient) market, a closer look at the injury suffered is required. Only the injury that corresponds to the loss that a competitive industry would suffer should be recognized

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Id. at 1173. For a discussion concerning the ability of a firm to harm an equally or more efficient rival, see generally Epstein, *supra* note 31; Benz, *supra* note 22.

⁸⁵ Competition policy "should not rank very highly. . . unless an explicit link is made with the abolition of antidumping provisions." Hoekman & Mavroidis, *supra* note 4, at 7. "If a credible argument could be made that the abolition of antidumping would follow the adoption of common competition policies, this would greatly strengthen the case of those calling for international competition rules." *Id.* at 28.

⁸⁶ See Applebaum & Grace, *supra* note 4, at 498.

addition, a foreign competitor subject to an antidumping charge also may choose to eliminate the duty by lowering the price that is being charged in its home market.⁸⁷ In this case, the competitive position of the domestic firm would not be enhanced by the use of the antidumping remedy. Businesses, therefore, may actually have more to gain by supporting a broader and more realistic predatory pricing remedy capable of reflecting cultural, political, and economic differences, than by supporting the use of the antidumping laws.

Any political or economic justification for antidumping legislation must be questioned in light of changes in international trading patterns. The United States, for example, increased its merchandise exports by 95% between 1985 and 1993, and over 16% of all U.S. manufacturing jobs are now directly or indirectly related to exports.⁸⁸ Furthermore, over 47% of U.S. exports are now destined for nations other than Canada, Japan, and the member states of the European Union, and almost 46% of U.S. imports come from nations other than these traditional trading partners.⁸⁹ Moreover, approximately 41% of U.S. exports are bound for developing countries and more than 41% of U.S. imports originate in these countries.⁹⁰ Mexico, for example, has become the third largest U.S. trading partner.⁹¹ U.S. trans-Pacific trade, already 50% higher than U.S. trans-Atlantic trade, is expected to expand as China continues to increase its role in the international market.⁹²

As a result of these changes in trading patterns, antidumping remedies should continue to decline as a source of political capital in industrialized countries. As developing nations gain in economic power, the ability to intimidate these countries through the use of trade remedies will decrease.⁹³ The Council of Economic Advisors recently acknowledged such a fact when it

⁸⁷ See *id.* at 515.

⁸⁸ See THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, *supra* note 46, at 206-07.

⁸⁹ See Nasar, *supra* note 58, at F7.

⁹⁰ See *id.*

⁹¹ See Peter Passell, *Regional Trade Makes Global Deals Go Round*, N.Y. TIMES, Dec. 19, 1993, at E4 (citation omitted).

⁹² See THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, *supra* note 46, at 211.

⁹³ See *id.* at 231.

noted that "as long as the Asian countries grow faster than the United States, they will become more important in our trade while we will become less important in theirs. Therefore past trade strategies based on threats of market closure are liable to become less and less effective."⁹⁴

Moreover, because antidumping legislation has proliferated throughout the world, industrial nations are as likely to be the subjects of antidumping duties as the enforcers of those duties. The political expediency that may have existed when relatively few nations possessed antidumping remedies no longer exists. Thus, when the political viability of antidumping legislation is examined, the potential benefits to domestic producers competing with foreign imports must be weighed against the potential harm to domestic producers exporting to foreign markets. This trade-off particularly affects the technology industry in the United States because it is both the most import and export-intensive industry.⁹⁵

Finally, as antidumping remedies become available globally, a corresponding increase in the potential for abuse occurs. These remedies can be used not only as disguised barriers to entry and as mechanisms for retaliation, but also as tools for implementing social agendas. For example, by imposing prohibitive duties on imported products, a nation may coerce foreign producers to establish production facilities within its boundaries in order to avoid such duties.⁹⁶ Rather than acting as a mechanism for creating level playing fields, antidumping laws could transfer jobs from one nation to another, regardless of efficiency rationales or natural comparative advantage.

These considerations suggest that an expanded but economically justified antitrust remedy is preferable to current antidumping remedies. This Article first examines the law surrounding predatory pricing, antidumping, and the WTO Antidumping Code. Next, the Article addresses whether the current foundation of predatory pricing law is theoretically consistent with either the existence of strategic behavior or the general dynamics of the international marketplace. Finally, this Article proposes an internationalization of the concept of recoupment, the redefinition

⁹⁴ *Id.*

⁹⁵ *See id.* at 210.

⁹⁶ *See DeBusk, supra* note 39, at F13.

of the market power prerequisite, and the creation of a new antitrust remedy.

2. THE PREDATORY PRICING/LESS THAN FAIR VALUE DICHOTOMY

2.1. *Predatory Pricing: An Overview*

Traditionally, predatory pricing occurs when a firm with a dominant position in a relevant market lowers its price below some appropriate level of cost in order to force an equally efficient competitor out of the market.⁹⁷ This strategy also may be used to discipline a nonconforming rival or to deter potential competitors from entering the market.⁹⁸ In either event, predatory pricing involves a conscious decision to sacrifice present revenues with the expectation that any current losses will be recouped in the future through the exercise of market power.⁹⁹ In order for this recoupment expectation to be reasonable, the predator must remain in business and possess the ability to absorb increasing demand as its victims are driven from the market.¹⁰⁰ Furthermore, barriers to entry that are sufficiently high to permit the subsequent imposition and maintenance of monopoly prices also must exist.¹⁰¹

Some commentators argue that businesses, because they are rational profit-maximizers, would rarely engage in predatory behavior.¹⁰² Predatory pricing is self-detering because short-run

⁹⁷ See PREDATORY PRICING, *supra* note 27, at 9.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.* For similar definitions of predatory pricing, see *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2587 (1993); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117, 119 n.15 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8, 589 (1986); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 86, 86 n.11 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975); John S. McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289, 293, 306 (1980).

¹⁰² See *Brooke Group*, 113 S. Ct. at 2589-90; *Cargill*, 479 U.S. at 121-22, 121 n.17; *Matsushita*, 475 U.S. at 588-89, 594-95; Areeda & Turner, *supra* note 101, at 699, 718-19; McGee, *supra* note 101, at 294-300.

losses are inevitable while long term gains are speculative at best.¹⁰³ Expected gains must be substantially higher than incurred losses because of the risk that they will not be recovered, the time value of money, and the uncertainty over whether the predator's product will remain popular with consumers.¹⁰⁴ Predation is often more costly to the predator than to the victim.¹⁰⁵ Not only may some victims choose to remain in business or to shut down only temporarily, the predator's losses will magnify as it absorbs increased demand and is forced to sell additional units below cost.¹⁰⁶ Moreover, future monopoly pricing may simply encourage new entry.¹⁰⁷ If the expulsion of the predator's rivals was relatively easy and inexpensive, then entry into the market also will be relatively easy.¹⁰⁸ These self-detering characteristics and the notion that lowering prices to increase market share is the very essence of competition, have made the courts reluctant to find the existence of predatory pricing.¹⁰⁹

Several approaches were suggested to develop a rule that can both punish a predator and encourage legitimate price competition. Some of these proposals concentrate on either short-run or long-run cost criteria, while others attempt to place limitations on alleged post-predatory price or output activity. Still others are based on a rule of reason analysis or on the determination of relevant market structure characteristics.¹¹⁰

In their seminal article, Areeda and Turner argue that prices at or above reasonably anticipated average variable cost—a substitute for marginal cost—should be presumed lawful, and that prices below reasonably anticipated average variable cost should be presumed unlawful.¹¹¹ Although the original Areeda/Turner test has been modified or qualified in subsequent commentary, including a recognition that a price above average total cost

¹⁰³ See *Matsushita*, 475 U.S. at 588-89, 594-95.

¹⁰⁴ See *Baker*, *supra* note 14, at 586-87.

¹⁰⁵ See *McGee*, *supra* note 101, at 295.

¹⁰⁶ See *id.* at 295-96.

¹⁰⁷ See *id.* at 296-97.

¹⁰⁸ See *id.* at 298-99.

¹⁰⁹ See *supra* notes 18-28 and accompanying text.

¹¹⁰ For a discussion of these approaches, see PREDATORY PRICING, *supra* note 27, at 23-32. See also *McGee*, *supra* note 101, at 304-20.

¹¹¹ See *Areeda & Turner*, *supra* note 101, at 732-33.

conceivably could be predatory if substantially below marginal cost,¹¹² the basis for the test continues to be the relationship between price and cost, with average variable cost or marginal cost as the benchmark. Areeda and Turner also propose that any firm selling at a short-run profit-maximizing or loss-minimizing price is not a predator.¹¹³

In establishing a line between lawful and unlawful pricing, Areeda and Turner assert that a monopolist producing at a point where price equals marginal cost would only be able to harm less efficient and, theoretically, equally efficient rivals.¹¹⁴ As a result, the creation of a price floor anywhere above marginal cost would only protect inefficient producers.¹¹⁵ Judge Posner, however, contends that a less efficient producer can eliminate a more efficient rival if that rival has lower long-term marginal costs, but higher short-run marginal costs, than the predator.¹¹⁶ Areeda and Turner's cost-based approach finds intent completely irrelevant in determining whether a price is predatory.

The courts, in attempting to determine the appropriate measure of cost for distinguishing predatory from nonpredatory pricing, have had a mixed reaction to the Areeda/ Turner test. In *Northeastern Tel. Co. v. American Tel. & Tel. Co.*,¹¹⁷ the Second Circuit adopted average variable cost as the proper predatory pricing test, and held that prices below average variable cost are presumed predatory, while those above average variable cost are presumed lawful.¹¹⁸ The court, therefore, accepted the Areeda and Turner premise that creating a floor above average variable cost would only harm efficiency and consumer welfare.¹¹⁹ The court also recognized that loss-minimizing would constitute a

¹¹² For a discussion of the subsequent modifications and qualifications to the Areeda/Turner test, see PREDATORY PRICING, *supra* note 27, at 25 (citations omitted); Terry Calvani & James M. Lynch, *Predatory Pricing Under the Robinson-Patman and Sherman Acts: An Introduction*, 51 ANTITRUST L.J. 375, 380-98 (1982); McGee, *supra* note 101, at 304-05.

¹¹³ See Areeda & Turner, *supra* note 101, at 703.

¹¹⁴ See *id.* at 711.

¹¹⁵ See *id.* (Areeda & Turner recognized that this rule also could harm an equally efficient producer); see also *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 87 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

¹¹⁶ See McGee, *supra* note 101, at 300-02, 306 n.41.

¹¹⁷ 651 F.2d 76.

¹¹⁸ See *id.* at 88.

¹¹⁹ See *id.* at 87.

defense for pricing below marginal cost.¹²⁰ Similarly, while recognizing that even harming less efficient firms can damage competition because their presence helps to limit price increases, the First Circuit has reasoned that any attempt to protect less efficient competitors or to apply any form of intent-based standard would be too speculative.¹²¹ As a result, the First Circuit stated that any workable test must be based on the price/cost relationship, and that because the defendant's prices were above both average cost and marginal cost they could not be anticompetitive.¹²²

Numerous courts have created standards that deviate in varying degrees from the Areeda and Turner proposal. The Eighth Circuit, for example, employs average variable cost as the predatory benchmark, but then applies rebuttable presumptions to prices falling above or below that benchmark.¹²³ The Fifth Circuit has held that prices above average variable cost can be predatory where barriers to entry are high, and that the higher the barriers to entry, the more prices can exceed average variable cost and still be deemed predatory.¹²⁴ The Eleventh Circuit has held that although prices above average total cost are lawful, prices between average variable and average total cost can be predatory if accompanied by predatory intent.¹²⁵ In weighing the element of intent, the court applies a sliding scale by which the plaintiff's burden of proof increases as prices approach average total cost.¹²⁶ Similarly, the Ninth Circuit has ruled that tests based solely on costs not only fail to consider intent, but also fail to consider factors such as market power, market share, and long-term behavior.¹²⁷ As a result, the Ninth Circuit held that cost should be used to allocate the burden of proof and that even

¹²⁰ See *id.* at 91 n.24.

¹²¹ See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-34 (1st Cir. 1983).

¹²² See *id.* at 234, 236.

¹²³ See *Morgan v. Ponder*, 892 F.2d 1355, 1360 (8th Cir. 1989).

¹²⁴ See *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 889-90 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

¹²⁵ See *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1503-04 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

¹²⁶ See *id.* at 1503.

¹²⁷ See *Transamerica Computer Co. v. International Business Mach. Corp.*, 698 F.2d 1377, 1387 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983).

prices above average total cost could be predatory if clear and convincing evidence indicated that they were below short-term profit-maximizing levels.¹²⁸

Finally, the Seventh Circuit, in a clear reflection of the Chicago School approach, held that the cost issue need not be examined unless the relevant market structure would allow for the recoupment of predatory losses.¹²⁹ Even prices that are below cost and admittedly predatory can benefit consumers, and thus should be lawful, unless the predator will have the opportunity to reap monopoly profits at a later date.¹³⁰ As a result, an examination of market structure and the future ability to recoup losses incurred should serve as a preliminary filter or screening device in all predatory pricing cases.¹³¹

Although the approaches taken by the various circuits differ,¹³² there is general agreement that cost determinations are difficult. In order to decide whether a price is at or above average variable cost, for example, there must be a relatively clear distinction between fixed and variable costs. This distinction is not always apparent, however, because all costs become variable over time, and the manner in which costs are defined may depend on the duration of the activity under review.¹³³ The existence of multiproduct firms, the use of common facilities to produce joint products, and the potential for cross-subsidization, transfer

¹²⁸ See *id.* at 1388. This decision has apparently lost much of its validity in light of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993).

¹²⁹ See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990).

¹³⁰ See *id.*

¹³¹ See *id.*; Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 243-45 (1979) (proposing such a screening device). The Seventh Circuit, however, reluctantly recognizes that intent might be relevant in Robinson-Patman Act cases, although it is not required for Sherman Act cases. See *A.A. Poultry Farms*, 881 F.2d at 1406.

¹³² For a further discussion concerning the approaches taken by the various courts, see *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1495 n.14, 1503 n.34, nn.36-37, 1504 n.39 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

¹³³ See *A.A. Poultry Farms*, 881 F.2d at 1400; see also *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 891 n.6 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 86 n.12 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Areeda & Turner*, *supra* note 101, at 701.

pricing, and creative accounting, particularly in the international setting, make it difficult to measure accurately the level of costs.¹³⁴ Even when costs can be established adequately, the courts must consider variables such as: (1) promotional pricing of new products and new market entrants; (2) product obsolescence; (3) declining industrial strength; and (4) expectations that costs will fall as sales increase.¹³⁵

The U.S. Supreme Court has provided little guidance concerning costs. On three separate occasions, the Court has specifically declined to define the appropriate measure of cost for determining predatory pricing.¹³⁶ The Court has indicated that predatory pricing involves sales below *some* level of costs, but it has not spoken on whether recovery could “*ever* be available . . . when the pricing in question is above some measure of incremental cost,” . . . or whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation.¹³⁷

In *Brooke Group*, the Court stated that “only below-cost prices should suffice”¹³⁸ to establish predation and that prices, “so long as they are above predatory levels . . . do not threaten competition.”¹³⁹ The *Brooke Group* Court favored this below-cost standard for determining predation over, for example, the standards employed by the Ninth Circuit.¹⁴⁰ Nevertheless, the Court failed to define below-cost beyond noting that prices are legal provided they are above predatory levels. This reasoning is circular because predatory levels have never been defined.

The Court’s avoidance of cost issues results from a shift in the analytical focus in predatory pricing cases. Although the

¹³⁴ See *A.A. Poultry Farms*, 881 F.2d at 1400; *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d. 227, 232 (1st Cir. 1983); *Areeda & Turner*, *supra* note 101, at 704; *McGee*, *supra* note 101, at 326.

¹³⁵ See *A.A. Poultry Farms*, 881 F.2d at 1400; *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d. 227, 232 (1st Cir. 1983); *Areeda & Turner*, *supra* note 101, at 704; *McGee*, *supra* note 101, at 326.

¹³⁶ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2587 n.1 (1993); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 n.12 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986).

¹³⁷ *Cargill*, 479 U.S. at 117 n.12 (alteration in original) (citation omitted).

¹³⁸ *Brooke Group*, 113 S. Ct. at 2588.

¹³⁹ *Id.* (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)).

¹⁴⁰ See *supra* notes 127-28 and accompanying text.

price/cost relationship ultimately may prove relevant in a particular case, all predatory pricing claims are now screened based on their plausibility, their economic rationality, their potential for harming consumers, and their arguable motive. If an allegation does not meet these initial prerequisites, summary judgment will be entered and the issue of costs will not be reached.

In *Matsushita*, the Court examined the theoretical probability that the defendants had engaged in a predatory pricing scheme. *Matsushita* involved a Sherman Act section 1 claim alleging that the defendants conspired to fix artificially high prices in Japan and used those monopoly profits to fund a predatory pricing conspiracy in the United States.¹⁴¹ In stating that the plaintiff's claim was implausible and that the defendants had no rational motive for engaging in such conduct,¹⁴² the Court held that rational predatory pricing schemes require a reasonable expectation for recouping losses.¹⁴³ Because over two decades had elapsed since the alleged predation commenced and the scheme still had not become successful, recoupment of the incurred losses would require many years of monopoly pricing.¹⁴⁴ Since the ability to engage in such pricing was unlikely, and since businesses are presumed to be rational profit-maximizers, such a fact represented strong evidence that a conspiracy did not exist.¹⁴⁵ Moreover, because the activity was allegedly carried out by a conspiracy rather than by a single firm, the conduct was even more speculative in nature because the conspirators had to agree on an allocation of losses and later profits, and because the incentives to cheat would be substantial.¹⁴⁶ The available evidence failed to exclude the possibility that the conduct merely represented competitive pricing.¹⁴⁷

The Court indicated that despite the supracompetitive profits in Japan, which possibly represented a means to sustain losses in the United States, the petitioners had no motive to sustain such

¹⁴¹ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577-78 (1986).

¹⁴² See *id.* at 596-97.

¹⁴³ See *id.* at 590-93.

¹⁴⁴ See *id.* at 592.

¹⁴⁵ See *id.* at 594-95.

¹⁴⁶ See *id.* at 590.

¹⁴⁷ See *id.* at 597.

losses absent a strong likelihood of recoupment.¹⁴⁸ Similarly, the existence of any excess production capacity in the Japanese facilities merely indicated that the petitioners had the ability to export their products abroad and not that they had a motive for selling those products at a loss.¹⁴⁹ Excess production capacity could not explain why the petitioners would be willing to forfeit revenue without some reasonable expectation for recouping that investment.¹⁵⁰ Considering the substantial impediments to success, neither the ability to reap supracompetitive profits at home nor the existence of excess capacity increased the likelihood that the petitioners would have engaged in a predatory scheme. Because U.S. antitrust laws cannot regulate the competitive conditions of another nation,¹⁵¹ and “a conspiracy to increase profits in one market does not [demonstrate] a conspiracy to sustain losses in another,”¹⁵² the respondent’s evidence was not adequate to survive summary judgment.

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,¹⁵³ the Supreme Court placed additional restrictions, far surpassing those contemplated in *Matsushita*, on the ability to recover for predatory pricing. In this case, Brooke Group, a cigarette manufacturer (formerly named Liggett), charged Brown & Williamson with anticompetitive conduct. After Brown & Williamson introduced a line of generic cigarettes into the market, the respondent alleged that Brown & Williamson engaged in price-cutting practices that would force Liggett to raise its own prices to remain profitable and would encourage oligopolistic pricing in the cigarette market.¹⁵⁴ The Court held that regardless of whether an injury results from primary-line discrimination under the Robinson-Patman Act or from predatory pricing under section 2 of the Sherman Act, the two basic prerequisites for recovery are: (1) pricing below an appropriate measure of cost; and (2) a “reasonable prospect” or a “dangerous probability” that the losses

¹⁴⁸ See *id.* at 593.

¹⁴⁹ See *id.* at 593 n.18.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* at 582 (citations omitted).

¹⁵² *Id.* at 596.

¹⁵³ 113 S. Ct. 2578.

¹⁵⁴ See *id.* at 2582.

would be recouped by the predator.¹⁵⁵ Although the Court in *Matsushita* used the recoupment criteria to judge the probability of whether the petitioners engaged in an unlawful act, the Court in *Brooke Group* held that the act of predatory pricing itself is lawful, unless the predator is likely to recoup its investment. The Court stated that a victim's "painful losses" are of no consequence to the antitrust laws if competition is not injured because an unsuccessful predatory pricing scheme produces lower prices in the marketplace and generally is "a boon to consumers."¹⁵⁶

The Court relied on *Atlantic Richfield Co. v. USA Petroleum Co.*,¹⁵⁷ which held that "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."¹⁵⁸ The Court's reliance on this language to support its position is problematic. The pricing policy in *Brooke Group* was admittedly below the predatory level and therefore beyond the scope of the *Atlantic Richfield* holding. Moreover, although the antitrust laws are designed to protect "competition, not competitors,"¹⁵⁹ predatory pricing is aimed specifically at eliminating competition and thus "harms both competitors and competition."¹⁶⁰ As a result, predatory pricing has been described as "inimical to the purposes of [the antitrust] laws"¹⁶¹ and thus "capable of inflicting antitrust injury."¹⁶²

The Court described the relevant factors in determining the likelihood of recoupment. In order for recoupment to occur, the predatory scheme must be capable of producing its intended results, either by actually driving a rival from the market or by causing a rival to increase prices to a supracompetitive level.¹⁶³ The Court will examine "the extent and duration of the alleged

¹⁵⁵ *Id.* at 2587-88. In an attempted monopolization case under § 2 of the Sherman Act, a plaintiff must also prove "a specific intent to monopolize." *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 892 (1993).

¹⁵⁶ *Brooke Group*, 113 S. Ct. at 2588.

¹⁵⁷ *Atlantic Richfield*, 495 U.S. at 328.

¹⁵⁸ *Id.* at 340.

¹⁵⁹ *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

¹⁶⁰ *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 118 (1986).

¹⁶¹ *Id.* (citation omitted).

¹⁶² *Id.*

¹⁶³ *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2589 (1993).

predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will."¹⁶⁴ If the predatory behavior is capable of producing its intended effect, the ability to recoup then will be analyzed in terms of the defendant's market power and capacity to set and maintain monopoly prices, as evidenced by the market structure, the existence of barriers to entry, and the presence of excess capacity to absorb rivals' market shares.¹⁶⁵

The *Brooke Group* Court recognized that cigarette manufacturing was a concentrated industry, and that the lack of competition enabled the oligopolists to reap supracompetitive profits.¹⁶⁶ The industry was experiencing an overall decline in demand and a resulting rise in excess capacity. Brown & Williamson was the oligopoly member who suffered most from the competitive presence of generic cigarettes,¹⁶⁷ and there was sufficient evidence from which a jury could conclude that Brown & Williamson had intended to carry out the predatory scheme.¹⁶⁸ Finally, the Court acknowledged that Brown & Williamson had actually lowered its prices below its production cost for an eighteen month period and that their scheme was successful.¹⁶⁹ Liggett had succumbed, the prices on generic cigarettes had been raised, and the percentage gap between the prices of generics and branded cigarettes had narrowed.¹⁷⁰

Despite these findings, the Court held that the plaintiffs were not entitled to submit their case to the jury because Brown & Williamson did not possess a reasonable prospect of recouping its losses by either slowing the growth of generic cigarettes or by charging supracompetitive prices in the generic market.¹⁷¹ The plaintiff's argument was based, in part, on the belief that Brown & Williamson, in tacit collusion with the other oligopolists, could exert market power over generics.¹⁷² The Court held that any

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See id.* at 2595.

¹⁶⁷ *See id.* at 2583.

¹⁶⁸ *See id.* at 2592.

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* at 2585.

¹⁷¹ *See id.* at 2592-93.

¹⁷² *See id.* at 2593.

plan based on tacit collusion would be extremely difficult to implement, and that there was insufficient evidence to support the claim of collusion in this case.¹⁷³ The Court demonstrated that while supracompetitive pricing requires a restriction on output, generic market production had actually increased.¹⁷⁴ Price increases, therefore, simply may reflect growing consumer demand, and a jury should not infer competitive injury under such circumstances. Thus, because oligopolistic price coordination was extremely unlikely, supracompetitive prices could not result, thereby precluding recoupment or competitive injury.¹⁷⁵

Perhaps the most disturbing aspect of both the *Matsushita* and *Brooke Group* decisions was the Court's willingness to usurp the function of the jury and to disregard fact, or reasonable inferences of fact, in favor of economic theory. In *Matsushita*, for example, the Court remarked that "the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational."¹⁷⁶ As the dissenting opinion indicated, however, the issue was not whether the Court found the plaintiff's experts persuasive, but whether a jury reasonably could have found them persuasive.¹⁷⁷

Although the *Matsushita* Court used economic theory to determine the rationality of the defendant's behavior and the likelihood that the defendants engaged in such behavior, the Court in *Brooke Group* employed economic theory to legitimize predatory pricing, absent the ability to recoup. The *Brooke Group* Court noted that the plaintiff's expert believed that the predatory pricing plan created a reasonable possibility that Brown & Williamson could recoup its losses and injure competition.¹⁷⁸ The expert based his opinion on the relevant pricing structure, a variety of corporate documents indicating intent, and evidence of below-cost pricing.¹⁷⁹ Nevertheless, the Court, in substituting its own judgment, held that a reasonable jury could not have

¹⁷³ See *id.* at 2596.

¹⁷⁴ See *id.* at 2593.

¹⁷⁵ See *id.* at 2598.

¹⁷⁶ *Matsushita*, 475 U.S. at 594 n.19.

¹⁷⁷ See *id.* at 606 (White, J., dissenting).

¹⁷⁸ See *Brooke Group*, 113 S. Ct. at 2597-98.

¹⁷⁹ See *id.* at 2598.

concluded that the pricing structure would eliminate the risks involved in tacit collusion.¹⁸⁰ It also determined that there was no real prospect of slowing the growth of generics.¹⁸¹ Thus when an expert opinion is not validated "in the eyes of the law . . . it cannot support a jury's verdict."¹⁸²

In applying economic theory, the Court not only substituted its view of the facts for those of the expert witnesses and the jury, it also substituted its judgment about recoupment for that of Brown & Williamson's corporate executives. A rational, profit-maximizing business normally would not sell below cost unless it believed that it had the ability to recoup at a later date. A conscious business decision to sell below cost and incur monetary losses with no hope of recovery makes no economic sense. Where, as in *Brooke Group*, below-cost pricing is established, and the defendant does not invoke defenses such as promotion or obsolescence, the Court should be more reluctant to replace the experienced judgment of business decisionmakers with the Court's questionable economic expertise. As Justice Stevens indicated in his dissent, the willingness of Brown & Williamson's executives to accept losses of such a substantial magnitude was "powerful evidence of their belief" that the predatory scheme would succeed.¹⁸³ If this plan was as unfeasible as the Court seemed to believe, these executives would not have been willing "to invest millions of company dollars in its outcome."¹⁸⁴

Finally, it should be noted that the requirement of proving a reasonable prospect or a dangerous probability of recoupment arguably does not apply to section 1 of the Sherman Act. Allegations brought pursuant to section 1 of the Sherman Act should not be affected because section 1 is directed towards contracts or conspiracies in restraint of trade.¹⁸⁵ A plaintiff need not prove an injury to competition or consumer welfare in order to prevail because concerted activity is itself "fraught with

¹⁸⁰ See *id.* at 2597.

¹⁸¹ See *id.*

¹⁸² *Id.* at 2598.

¹⁸³ *Id.* at 2601 (Stevens, J., dissenting).

¹⁸⁴ See *id.* at 2603 (Stevens, J., dissenting); see also Glazer, *supra* note 23, at 625-28.

¹⁸⁵ Sherman Act, 15 U.S.C. § 1 (1994).

anticompetitive risk.”¹⁸⁶ Instead, in order to recover for injuries caused by a predatory pricing conspiracy, a plaintiff must only prove the existence of the conspiracy and a resulting antitrust injury to that particular plaintiff.¹⁸⁷ Since predatory pricing constitutes an antitrust injury,¹⁸⁸ the ability to recoup, or to adversely affect consumer welfare, would not be a prerequisite for recovery. The issue of recoupment would only be considered in determining the rationality of the plaintiff’s argument and the likelihood that the defendants engaged in the alleged conduct. Furthermore, in the event that the defendants admit to below-cost pricing, recoupment should not be an issue at all. Irrational conduct by an individual firm does not threaten competitive injury, but “an irrational conspiracy is still a conspiracy” under section 1.¹⁸⁹

The price level leading to a right of recovery arguably may vary depending on whether the case involves a section 1 or section 2 allegation. In *Matsushita*, the Court indicated that predatory pricing usually involves conduct by a single firm, and that “in such cases” predation clearly involves “pricing below some appropriate measure of cost.”¹⁹⁰ The Court did not need to determine the appropriate cost level because *Matsushita* involved a section 1 allegation. Instead, an antitrust injury would exist if there was a conspiracy to drive the plaintiffs from the market either by “pricing below some appropriate measure of cost” or by “pricing below the level necessary to sell . . . [a firm’s] products.”¹⁹¹ This distinction arguably is consistent with the fact that section 1 does not require proof of an injury to competition when *per se* violations are involved, but rather requires only proof of a conspiracy and an antitrust injury to the complainant.

¹⁸⁶ *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 892 (1993) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69 (1984)).

¹⁸⁷ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); see also *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (stating that a private plaintiff may not recover damages under § 4 of the Clayton Act unless the existence of an antitrust injury has been proved).

¹⁸⁸ See *Matsushita*, 475 U.S. at 586 (“Except for the alleged conspiracy to monopolize the [U.S.] market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an ‘antitrust injury.’”).

¹⁸⁹ Glazer, *supra* note 23, at 628.

¹⁹⁰ *Matsushita*, 475 U.S. at 584-85 n.8.

¹⁹¹ *Id.*

Despite these section 1 reservations, the *Matsushita* and *Brooke Group* decisions have placed severe restrictions on the ability to recover for injuries resulting from predatory pricing. Considering that the Robinson-Patman Act cannot be used to inhibit international price discrimination, and that the Sherman Act cannot be used to alter the economic conditions of sovereign nations,¹⁹² the severity of these restrictions may not only serve to extinguish predatory pricing as a legitimate cause of action, but also may eliminate the role of antitrust law in providing relief to injured domestic producers. The Assistant Attorney General appropriately has warned that “there is a danger that theoretical constructs will be used to deny the existence of real world phenomena” at the expense of factual analysis.¹⁹³

In order to establish a better balance between theory and fact, the courts must consider the effects of strategic behavior. This was demonstrated in the *Eastman Kodak Co. v. Image Technical Serv., Inc.* decision,¹⁹⁴ and by the results of the *Brooke Group* decision, which although based on more traditional economics than *Kodak*, did not derail the *Kodak* approach.¹⁹⁵ In *Brooke Group*, for example, the Court specifically recognized that tacit coordination or interdependent pricing among oligopolists could conceivably provide the means for achieving recoupment.¹⁹⁶ Additionally, whether purposefully or not, the Court indicated that recoupment must be examined in light of the respective “incentives and will” of the predator and the victim.¹⁹⁷ Both the incentives and wills of foreign producers may be substantially different from those of the typical U.S. firm, whose characteristics form the basis of current economic assumptions. It remains to be seen whether the Court will explore these incentives in light of a more thorough examination of strategic behavior and a more thoughtful analysis of the predatory motives that eluded the Court

¹⁹² See *supra* notes 8-11 and accompanying text.

¹⁹³ Assistant Attorney General Anne K. Bingaman, Address to ABA's Antitrust Section, [July-Jan.] 65 Antitrust Trade Reg. Rep. (BNA) No. 1627, at 250 (Aug. 12, 1993) (regarding the withdrawal of the Department of Justice Vertical Restraints Guidelines).

¹⁹⁴ See *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451 (1992).

¹⁹⁵ See *Baker*, *supra* note 14, at 586.

¹⁹⁶ See *Brooke Group*, 113 S. Ct. at 2590-91.

¹⁹⁷ *Id.* at 2589.

in *Matsushita*.

Similarly, the courts must resist the temptation to rely on westernized economic theory to systematically deny the existence of predation in the international setting. Because obvious predation presents less of a threat to intended victims, successful predatory pricing is inherently difficult to identify or to distinguish from simple competitive pricing.¹⁹⁸ Difficulties in detection, however, should not be equated with a lack of occurrence. Moreover, even if predatory pricing is rare within the United States, the likelihood of predation may be a function of social, political, and economic conditions. "The frequency with which predation occurs in one country may be a poor indicator of its frequency elsewhere."¹⁹⁹

Finally, other nations may not be so reluctant to identify predatory pricing activity. Most nations regulate this behavior through abuse of a dominant position, monopolization, or price discrimination statutes.²⁰⁰ Market structure and the ability to exercise market power play substantial roles in the judicial decisionmaking process. The OECD has recently endorsed a two-tier approach that would initially screen predatory pricing allegations in light of the market's susceptibility to successful predation.²⁰¹ Nevertheless, nations may differ substantially in their interpretation and enforcement of these statutes. A foreign firm may be viewed as possessing market power or market dominance with a considerably smaller market share than would be required in the United States. Some nations, therefore, choose to supplement their antitrust statutes with unfair competition laws that prohibit sales below some level of cost without regard to market power, efficiencies, or competitive injury.²⁰² Nations also may adopt different positions concerning the relevance of intent, the effects of a shared monopoly, the existence of multimarkets, and the ability to engage in selective pricing and cross-subsidization. Moreover, in their examination of the competitive effects of alleged predation, national tribunals will often differ over the appropriate time references to be applied.

¹⁹⁸ See PREDATORY PRICING, *supra* note 27, at 17, 20-21.

¹⁹⁹ *Id.* at 17.

²⁰⁰ See *id.* at 7-8, 33-48.

²⁰¹ See *id.* at 82.

²⁰² See *id.* at 7-8, 47-48.

These variations will alter judicial views regarding the appropriate measure of costs.²⁰³

3. ANTIDUMPING LAW: AN OVERVIEW

3.1. *The Statutory Provisions*²⁰⁴

While the antitrust laws are designed to protect competition and promote consumer welfare, the antidumping laws primarily are aimed at protecting domestic industries from unfairly priced imports resulting from international price discrimination.²⁰⁵ As a result, antidumping enforcement is based on economic assumptions that differ substantially from the assumptions of current competitive models. These assumptions reflect a belief that "Congress has made a judgment" that injuries to domestic producers may justify relief despite the fact that the economy might be better served in the absence of protection.²⁰⁶ Thus, the antidumping laws can be violated even though there has been no below-cost pricing or any intent to engage in predatory or dumping activity. Similarly, recognizing that cultural forces may cause exporters to sell at irrational prices, antidumping enforcement has relied less on the concept of rational business behavior and less on cost-based rules which measure injuries to competition but ignore injuries to producers.²⁰⁷

In carrying out this congressional judgment, an antidumping duty will be imposed on foreign merchandise when the International Trade Administration (ITA) determines that the merchandise "is being, or is likely to be, sold in the United States at less than its fair value," and the International Trade Commission (ITC) determines that a domestic industry is being materially

²⁰³ See *id.* at 49-79 (comparing and contrasting the enforcement procedures of OECD member countries).

²⁰⁴ For a discussion of the history of the antidumping statutes, see *USX Corp. v. United States*, 12 Ct. Int'l Trade 205, 209-10 (1988); Barceló, *supra* note 4, at 312-19.

²⁰⁵ The Antidumping Act of 1916, 15 U.S.C. § 72 (1988), was an antitrust statute aimed at international predatory pricing. This statute, however, has proved to be both untenable and is rarely used. See *supra* note 12; see also Barceló, *supra* note 4, at 314; Davidow, *supra* note 4, at 40; Kaplan & Kuhbach, *supra* note 4, at 451.

²⁰⁶ *USX*, 12 Ct. Int'l Trade at 211.

²⁰⁷ See *id.*

injured or threatened with material injury, or that the establishment of an industry is being materially retarded "by reason of" the import or sale of such merchandise.²⁰⁸ If this duty is imposed, the duty will be "equal to the amount by which the [foreign market] value exceeds the [U.S.] price for the merchandise."²⁰⁹

The ITA may commence an antidumping investigation on its own initiative or in response to a petition filed on behalf of an affected industry.²¹⁰ During the course of an investigation, the ITC will make a preliminary determination about whether there is a "reasonable indication" of material injury²¹¹ and the ITA will determine whether there is a "reasonable basis to believe" that merchandise is being sold at less than fair value.²¹² In the event that affirmative determinations are made, the ITA will order the suspension of liquidation of all entries subject to those determinations and the posting of a cash deposit or a bond for each of the entries in an amount equal to the estimated average dumping margin.²¹³ Assuming that the investigation is not terminated or suspended by a withdrawal or agreement, both the ITC and ITA will then make their final determinations. If these final determinations affirm the earlier findings, the ITA will issue an antidumping order that directs customs officials to assess the duty and requires the offending party to deposit the estimated antidumping duties pending liquidation.²¹⁴ An antidumping order may be reviewed annually to redetermine the foreign market value, the U.S. price, and the margin between the two.²¹⁵ During this review process, importers have the opportunity to demonstrate that the imported merchandise has not been dumped and that they are entitled to a refund of the cash deposit.²¹⁶

²⁰⁸ 19 U.S.C. § 1673 (1994).

²⁰⁹ *Id.*

²¹⁰ *See id.* § 1673a.

²¹¹ *Id.* § 1673b(a)(1).

²¹² *Id.* § 1673b(b)(1)(A).

²¹³ *See id.* § 1673b(d).

²¹⁴ *See id.* § 1673e.

²¹⁵ *See id.* § 1675(a)(1).

²¹⁶ *See Victor, The Interface of Trade/Competition Law and Policy: An Overview, supra* note 4, at 403.

3.1.1. ITA/ITC Antidumping Investigation

Antidumping investigations focus on three issues: (1) whether there is a material injury or threat thereof; (2) whether there is a causal connection between the material injury and the importation of the merchandise; and (3) whether the merchandise is being sold at less than fair value.²¹⁷ The first element, material injury, is defined as "harm which is not inconsequential, immaterial, or unimportant."²¹⁸ In determining whether such an injury exists, the ITC considers whether the volume of imports, or any increase in that volume, is significant in either absolute or relative terms.²¹⁹ It also examines whether there has been a substantial price underselling of the imported merchandise.²²⁰ Additionally, the ITC considers whether the imports depress domestic prices or prevent price increases which would have otherwise occurred.²²¹

The ITC also must examine the impact of the imports on the domestic producers themselves. The Commission considers a wide variety of factors including: (1) decreases in output, market share, profits, sales, and capacity utilization;²²² (2) negative effects on cash flows, inventories, employment, wages, and growth;²²³ and (3) limitations on both present and future product development.²²⁴ When the ITC examines a threat of material injury, it will pay particular attention to such factors as: (1) increases in production capacity in the exporting country;²²⁵ (2) rapid increases in U.S. market penetration;²²⁶ (3) the probability that imports will depress domestic prices;²²⁷ and (4) any

²¹⁷ See 19 U.S.C. § 1673 (1994); see also Victor, *The Interface of Trade/Competition Law and Policy: An Overview*, *supra* note 4, at 402.

²¹⁸ See *id.* § 1677(7)(A).

²¹⁹ See *id.* § 1677(7)(C)(i).

²²⁰ See *id.* § 1677(7)(C)(ii)(I).

²²¹ See *id.* § 1677(7)(C)(ii)(II).

²²² See *id.* § 1677(7)(C)(iii)(I).

²²³ See *id.* § 1677(7)(C)(iii)(III).

²²⁴ See *id.* § 1677(7)(C)(iii)(IV). Additionally, in evaluating the volume of imports and the effect of those imports on domestic prices, the ITC "shall cumulatively assess the volume and effect of imports . . ." from two or more countries of like products subject to investigation. *Id.* § 1677(7)(G)(i).

²²⁵ See *id.* § 1677(7)(F)(i)(II).

²²⁶ See *id.* § 1677(7)(F)(i)(III).

²²⁷ See *id.* § 1677(7)(F)(i)(IV).

other demonstrable trends indicating an adverse effect on domestic industries.²²⁸

If it appears that a domestic industry is being materially injured,²²⁹ the ITC must investigate whether that injury is causally linked to the importation of the foreign merchandise. This requirement is easily established. First, causation is determined by an "injury to industry" standard rather than by an "injury to competition" standard.²³⁰ Second, the imports "need not be the sole or even principal cause" of the material injury.²³¹ Instead, the imports need only be a contributing cause, and the statutory prerequisite will be satisfied if those imports contribute, even minimally, to the woes of the domestic industry.²³² As a result, when a variety of both foreign and domestic factors combine to create adverse industry conditions, the ITC is "precluded from weighing" one factor against another.²³³

Finally, the ITA must determine whether the merchandise is being sold in the United States at less than its fair value and, if so, the amount of the duty that should be imposed. In order to make these determinations, the ITA must compare the U.S. price with the "normal value."²³⁴ In doing so, the U.S. price will be designated as either the "export price,"²³⁵ or the "constructed export price."²³⁶ Whichever is chosen, the price will be in-

²²⁸ See *id.* § 1677(7)(F)(i)(IX); see also *id.* § 1677(7)(F1) (noting that the "Commission may cumulatively assess the volume and price effects of imports . . . from all countries . . .").

²²⁹ See *id.* §§ 1677(4)(A), 1677(4)(D), 1677(10).

²³⁰ *USX Corp. v. United States*, 12 Ct. Int'l Trade 205, 209 (1988).

²³¹ *British Steel Corp. v. United States*, 8 Ct. Int'l Trade 86, 97 (1984).

²³² See *id.* at 96.

²³³ *Id.*

²³⁴ 19 U.S.C. § 1677b(a) (1994). The "normal value" is "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . ." *Id.* § 1677b(a)(1)(B)(i).

²³⁵ "The term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States . . . to an unaffiliated purchaser for exportation to the United States . . ." *Id.* § 1677a(a).

²³⁶ "The term 'constructed export price' means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States

creased to reflect: (1) any costs and expenses involved in readying the merchandise for shipment;²³⁷ (2) the amount of any taxes or import duties that have been rebated or not collected by the exporting country;²³⁸ and (3) "the amount of any countervailing duty imposed . . . to offset an export subsidy"²³⁹ Similarly, this price will be decreased to reflect: (1) any costs, expenses, export taxes, or U.S. import duties incident to bringing the merchandise to the United States;²⁴⁰ (2) any sales commissions or other selling costs incurred in the United States;²⁴¹ and (3) any value, such as labor or material costs, added in the United States before the merchandise is sold.²⁴²

The export price must then be compared with the "normal value".²⁴³ If the merchandise is not sold for home consumption, or if the quantity of sales is inadequate to form a valid comparison, then the normal value may be deemed to be the price at which the merchandise is sold for exportation to countries other than the United States.²⁴⁴ In either of these cases, however, if the ITA finds that the merchandise was sold at prices that did not permit the recovery of all costs, then those sales will be disregarded in determining the normal value.²⁴⁵

In the event that the merchandise is not sold for domestic consumption, and as a general rule, if the information regarding third-country sales is inadequate, the ITA may construct the normal value.²⁴⁶ This "constructed value" will also be used when there are inadequate sales due to the fact that below-cost

before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter. . . ." *Id.* § 1677a(b).

²³⁷ See *id.* § 1677a(c)(1)(A).

²³⁸ See *id.* § 1677a(c)(1)(B).

²³⁹ *Id.* § 1677a(c)(1)(C).

²⁴⁰ See *id.* § 1677a(c)(2)(A)-(B).

²⁴¹ See *id.* § 1677a(d)(1).

²⁴² See *id.* § 1677a(d)(2).

²⁴³ See *supra* note 234.

²⁴⁴ See *id.* § 1677b(a)(1)(B)-(C).

²⁴⁵ See *id.* § 1677b(b)(1).

²⁴⁶ See *id.* § 1677b(a)(4); see also Applebaum & Grace, *supra* note 4, at 504 (discussing generally the implications "and elements of constructed value").

sales were excluded.²⁴⁷ The constructed value reflects: (1) “the cost of materials and fabrication or other processing . . .” used to produce the merchandise;²⁴⁸ (2) the actual amounts incurred and earned for selling and other expenses, and for profits;²⁴⁹ and (3) the cost of placing the merchandise in a condition to ship to the United States.²⁵⁰

The ITA then compares the resulting normal value to the export or constructed export price. In examining the difference between the two values, the ITA is authorized to make adjustments to account for differences in quantities sold or other differences in the circumstances of sale.²⁵¹ In arriving at its final determination, the ITA is directed to verify the information upon which it has relied,²⁵² but if it is unable to do so, it is authorized to use the facts otherwise available, including those submitted in the original petition.²⁵³ If the ITA finds that the merchandise has been sold at less than its fair value, and the ITC finds there was an actual or threatened material injury and that a causal connection exists between the injury and the importation of the merchandise, an antidumping order will be issued.²⁵⁴

Before critiquing these statutory provisions, some of the arguments in their support may be noted. First, while the promotion of consumer welfare is the cornerstone of antitrust policy, this purpose must compete with a variety of other national interests and social values for political attention. For example, certain provisions of the antidumping statute might favor the protection of domestic manufacturers and their employees over consumer welfare, whether economically justifiable or not. Any criticism of the statute on these grounds, therefore, should be viewed in light of the fact that Congress may be balancing a variety of competing domestic interests.

Second, dumping may be considered anticompetitive, even

²⁴⁷ 19 U.S.C. § 1677b(b)(1) (1994).

²⁴⁸ *Id.* § 1677b(e)(1).

²⁴⁹ *See id.* § 1677b(e)(2)(A). If the “actual amounts” cannot be obtained, the statute provides for an alternative method of expense and profit computation. *See id.* § 1677e(2)(B).

²⁵⁰ *See id.* § 1677b(e)(3).

²⁵¹ *See id.* § 1677b(a)(7)(A)-(B).

²⁵² *See id.* § 1677f(i)(1).

²⁵³ *See id.* § 1677e(a).

²⁵⁴ *See id.* § 1673; *see also supra* note 217 and accompanying text.

when viewed from a consumer welfare perspective. Dumping represents a means by which a foreign producer can exploit its market power at home to enhance its presence abroad.²⁵⁵ Therefore, it is a practice that can be used to drive domestic producers from the market and to deter the profits and cash flow necessary to stimulate domestic growth and innovation.²⁵⁶ Although consumers may initially benefit from the dumping of low-priced goods, the consequences of dumping ultimately will have a negative effect on the long-term welfare of consumers.²⁵⁷ Moreover, when dumping and government subsidies are combined, inefficient foreign firms may be capable of destroying more efficient domestic producers, thereby resulting in a misallocation of global resources and a decline in consumer welfare.²⁵⁸

Finally, it is often argued that the antidumping laws are necessary to neutralize artificially created competitive advantages,²⁵⁹ or to offset foreign practices that cause distortions in the market.²⁶⁰ By providing an interface between differing economic, social, and political systems, which often provide various incentives to dump,²⁶¹ the antidumping laws can ensure a level playing field in the international marketplace.²⁶²

3.2. *A Myriad of Problems*

The antidumping statutes, designed to achieve objectives substantially different than those of the antitrust laws, are based more on political realities than on modern economic theory. These statutes may have deleterious effects, such as protecting inefficient producers, legitimizing supracompetitive prices, and preventing consumers from reaping the benefits of global competition. This antidumping approach has led to a substantial body of critical commentary that focuses on the discriminatory

²⁵⁵ See Barceló, *supra* note 4, at 313; Eckes, *supra* note 4, at 423.

²⁵⁶ See Eckes, *supra* note 4, at 423.

²⁵⁷ See Ong, *supra* note 4, at 430.

²⁵⁸ See Eckes, *supra* note 4, at 423 (recognizing that dumping hurts consumers located in the exporting country); Ong, *supra* note 4, at 430-31.

²⁵⁹ See Wood, *supra* note 1, at 1167-73, 1183-92 (discussing artificial advantages).

²⁶⁰ See Ong, *supra* note 4, at 432.

²⁶¹ See Kaplan & Kuhbach, *supra* note 4, at 456.

²⁶² See Eckes, *supra* note 4, at 424 (noting that trade remedies, acting as safety valves, allow barriers to be reduced).

treatment of foreign producers, the lack of a meaningful injury requirement, the adverse effects to efficiency and consumer welfare, and a variety of procedural problems that cause arbitrary application and business uncertainty.

The antidumping laws discriminate against foreign producers by denying them the opportunity to engage in pricing policies that would be lawful if undertaken by domestic producers. While international price discrimination is illegal *per se*, domestic price discrimination is unlawful only when a producer does not have any relevant defenses and a plaintiff can demonstrate a substantial competitive injury. The Robinson-Patman Act, for example, provides that a producer can engage in price discrimination if the lower price was offered "in good faith to meet an equally low price of a competitor . . ." ²⁶³ This defense is not available under the antidumping laws. A foreign producer selling at lower prices in the United States solely to meet the equally low prices of its U.S. competitors, therefore, would be guilty of dumping.

Under the Robinson-Patman Act, a domestic firm selling its product in New York for \$20 would be allowed to reduce its price in California to \$18 if its competitors in that market were selling at that lower price. A foreign producer, however, selling a like product in its home country for \$20, would not be entitled to lower its price in order to compete in California. While Congress has indicated that such "technical dumping" should not be of substantial concern, any attempt at leniency has not had much support in subsequent years. ²⁶⁴

This unfairness is magnified by the method of establishing dumping margins. For example, dumping margins may exist despite the fact that the average price charged in the United States actually meets, or even exceeds, the average price charged in the exporter's home market. ²⁶⁵ This anomaly results from ignoring "negative margins," where the foreign market value is actually less

²⁶³ 15 U.S.C. § 13(b) (1994).

²⁶⁴ See Davidow, *supra* note 4, at 43; Wood, *supra* note 1, at 1189-90 n.122. For a discussion concerning the lack of a "meeting competition" defense, see Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, *supra* note 4, at 410; Applebaum & Grace, *supra* note 4, at 509-10; Kaplan & Kuhbach, *supra* note 4, at 447; Victor, *Task Force Report on the Interface Between International Trade Law and Policy and Competition Law and Policy: Introduction*, *supra* note 4, at 465.

²⁶⁵ See Applebaum & Grace, *supra* note 4, at 507.

than the U.S. price when computing the total dollar value of the dumping margins.²⁶⁶

Applebaum and Grace demonstrate this result using a hypothetical involving a firm selling thirty units of a product in the United States.²⁶⁷ The firm sells ten units at \$75 each, ten units at \$100 each, and ten units at \$125 each. If the foreign market value was \$100 per unit, then the average U.S. sale would equal that value. Since negative margins, or sales at \$125 are excluded, however, a weighted-average dumping margin of 8.34% would be imposed.²⁶⁸ Moreover, even if the price actually charged in the United States was exactly the same as, or perhaps even above, the price charged in the home market, an antidumping margin would still exist once the actual U.S. price was adjusted downward to reflect transportation costs, selling expenses, and U.S. import duties.²⁶⁹ As a result, even where there is no actual price discrimination between the two markets, the ITA may find that discrimination exists.²⁷⁰

The Robinson-Patman Act also provides a cost justification defense that allows price differentials based on "differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are . . . sold or delivered."²⁷¹ The antidumping laws, in determining foreign market value, make a similar allowance for price differentials resulting from the sale of differing commercial quantities or from other differences in the circumstances of sale.²⁷² Although adjustments for selling and delivery costs will be made, "adjustments for variations in production costs are only granted where the merchandise sold in the United States is different from that sold in the home market, or, in extremely rare circumstances, where the goods are sold in different quantities in the two markets."²⁷³ Considering that the size of the U.S. market may

²⁶⁶ *Id.* at 506.

²⁶⁷ *See id.*

²⁶⁸ *See id.* This margin equals the total dollar value of margins (\$250), divided by the total dollar value of U.S. sales (\$3,000). *See id.*

²⁶⁹ *See supra* notes 240-42 and accompanying text.

²⁷⁰ *See Applebaum & Grace, supra* note 4, at 508.

²⁷¹ 15 U.S.C. § 13(a) (1994).

²⁷² *See* 19 U.S.C. § 1677b(a)(6)(C) (1994).

²⁷³ *Applebaum & Grace, supra* note 4, at 511 (citations omitted).

be much larger than that of the exporting country, the need for providing a more complete cost-justification defense becomes apparent.

An injury standard that is substantially different from the one applied to domestic firms also perpetuates discrimination against foreign producers. The Robinson-Patman Act, applicable solely to domestic cases, prohibits price discrimination only where its effect may substantially hinder competition or tend to establish a monopoly.²⁷⁴ The legality of domestic price discrimination, therefore, will be determined by an injury-to-competition standard, rather than by an injury-to-competing-industry standard. The severe restrictions outlined in *Brooke Group* will apply, and recovery will be denied, absent proof of a substantial market share and a reasonable probability of recoupment.²⁷⁵

The antidumping laws do not require any injury to competition. Rather, an injury results if the imports cause harm that is not inconsequential, immaterial, or unimportant to a domestic industry.²⁷⁶ Other contributing causes, including domestic conditions, will be deemed irrelevant.²⁷⁷ Moreover, by focusing on the effects to competitors, rather than to competition, and thereby dismissing the importance of market structure, the antidumping laws impose liability on foreign producers who have substantially less market share than that required by the antitrust laws that apply to domestic producers. A dumping margin can be imposed, therefore, on a small foreign producer who has merely kept the prices of its larger U.S. competitors below supracompetitive levels.²⁷⁸

Similarly, the less-than-fair-value criteria must not be equated with the concept of predatory pricing. Since less-than-fair value is determined by comparing the export or constructed export

²⁷⁴ See 15 U.S.C. § 13(a) (1994).

²⁷⁵ See *supra* notes 153-75 and accompanying text.

²⁷⁶ See 19 U.S.C. § 1673 (listing "material injury" as an element of antidumping violations); *Id.* § 1677(7)(A) (defining "material injury").

²⁷⁷ See 19 U.S.C. § 1677(7)(B) (1994); *British Steel Corp. v. United States*, 8 Ct. Int'l Trade 88, 96-97 (1984).

²⁷⁸ See Davidow, *supra* note 4, at 44 (noting that "foreign firms can be found to be dumping and to have caused injury when, for instance, a foreign seller with three per cent of the United States' market gains an additional one per cent at the expense of an American rival with more than twenty per cent of the market"); see also *id.* at 43 (stating that "injury has been found where foreign pricing held domestic pricing at relatively low levels . . .").

price to the normal value, sales in the United States that are above marginal cost, or even above total cost, may nevertheless be subject to an antidumping order.

A foreign producer, for example, selling its product for \$25 per unit in the exporting country and for \$20 per unit in the United States may be subject to an antidumping order even though the total cost per unit is only \$15. Costs and expenses, while often relevant in determining the export and constructed export price and normal value, are not a benchmark for legality. Additionally, the effects of the dual standard—which holds domestic producers liable only for truly anticompetitive behavior, while holding foreign competitors liable for mere price discrimination—are magnified because the “anti-dumping measures have almost exclusively burdened nonpredatory dumping.”²⁷⁹

The issue of costs becomes relevant in two situations. First, the ITA will disregard those sales made at a price below-cost in determining normal value by examining home or third-market sales.²⁸⁰ The ITA will not apply the average variable cost standard generally employed in antitrust cases, but will instead apply the cost standard described by the statute.²⁸¹ Disregarding below-cost sales raises the normal value, thereby increasing both the size of the margin that will be imposed and the likelihood of a dumping violation.

Second, cost analysis will be employed when the ITA compares the U.S. price to the constructed value of the imported merchandise. The constructed value is based on the costs of materials, fabrication and other processing, general expenses, profit, and the expenses necessary to ready the merchandise for shipment.²⁸² The constructed value, however, will not be based on average variable costs but rather on fully allocated costs

²⁷⁹ Barceló, *supra* note 4, at 313-14; see also Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, *supra* note 4, at 412 (noting that the “garden variety dumping case is a price-to-price comparison . . . that does not consider cost at all”); Warner, *supra* note 4, at 830 (reporting that “[i]n thirty Canadian cases since 1984 in which antidumping duties were imposed, none could be supported on the grounds of a concern over predatory pricing” (citation omitted)).

²⁸⁰ See 19 U.S.C. § 1677b(b)(1) (1994).

²⁸¹ See *id.* § 1677b(b)(1).

²⁸² See *id.* § 1677b(e).

including a profit margin.²⁸³ Applying a constructed value as the appropriate measure further discriminates against foreign producers. In effect, domestic producers are permitted to set prices as low as their average variable cost without incurring antitrust complications. In attempting to compete, however, foreign producers are compelled to offer their products at a price equal to fully allocated costs because any lower price would be construed as dumping. This approach not only punishes nonpredatory behavior, but also penalizes sellers who are willing to price their goods between average variable cost and average total cost, or who are willing to earn a smaller profit.²⁸⁴ Not surprisingly, U.S. producers often allege below-cost home-market sales in their dumping complaints.²⁸⁵

In addition to discriminating against foreign producers, the antidumping laws also reduce both efficiency and consumer welfare. First, in examining the issue of material injury, the ITC considers: (1) whether the volume of imports is significant; (2) whether the imports depress domestic prices or prevent price increases; and (3) whether the imports have had an adverse impact on domestic producers.²⁸⁶ Both higher volume and lower prices increase the likelihood of finding a material injury. From a consumer welfare perspective, however, increased volume, lower prices, and injury to inefficient producers are beneficial.

Besides encouraging wealth transfers from consumers to

²⁸³ For discussions concerning the distinction between average variable cost and the fully allocated cost basis under the antidumping statutes, see Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, *supra* note 4, at 411, 412; Applebaum & Grace, *supra* note 4, at 513-514; Davidow, *supra* note 4, at 43-44; Kaplan & Kuhbach, *supra* note 4, at 448; Warner, *supra* note 4, at 801-02.

²⁸⁴ See Warner, *supra* note 4, at 802, 828.

²⁸⁵ See *id.* at 802; see also Applebaum & Grace, *supra* note 4, at 508 (observing that "in recent years, more than half of the antidumping petitions filed by U.S. producers have contained allegations of below-cost sales in the foreign home market").

²⁸⁶ See 19 U.S.C. § 1677(7)(B)-(C) (1994). A similar reduction of efficiency and consumer welfare encompasses the test for a "threat of material injury." *Id.* § 1677(7)(F). This analysis also demonstrates substantial concern for: (1) "any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country;" (2) increases in U.S. market penetration; (3) depressing effects on prices; and (4) under utilized capacity in the exporting country. *Id.* § 1677(7)(F)(i).

producers²⁸⁷ through higher prices and lower consumer choice, antidumping policy often subsidizes inefficient domestic industries by insulating them from more competitive foreign rivals. One commentator has noted that “[t]rade policy consistently bets on the wrong horse” by rewarding rent-seekers who cannot win in open-market competition.²⁸⁸ This trend undermines the ability of U.S. businesses to compete in the future. Antidumping laws not only harm producers who rely on foreign components for their finished product, but also tend to reduce the incentives for inefficient firms to rebuild their facilities or engage in product innovation. Moreover, because businesses are denied the right to fail, domestic assets are not redeployed to more fruitful and competitive uses.

The antidumping laws also frustrate the efficient allocation of global resources. Dumping margins are based on price comparisons rather than on the existence of below-cost predation. Thus, a dumping determination is in no way related to the relative efficiencies of the foreign and domestic firms. If a foreign producer sells its product at a lower price in the United States than in the home market, a dumping margin will be imposed. It is irrelevant that the U.S. price was above the producer’s costs and that the producer’s costs were substantially below those of the complaining industry. The antidumping laws, therefore, often discourage the growth of global specialization by artificially increasing a foreign competitor’s costs to a level above those of less efficient domestic producers.²⁸⁹

Finally, the antidumping laws present a variety of procedural problems. One commentator has indicated that the ITC has not

²⁸⁷ See *id.* § 1677(7)(F). See generally Lande, *supra* note 7 (discussing the efficiency aspects of wealth transfers in antitrust law). For a discussion concerning antidumping law’s encouragement of higher prices, see Morris, *supra* note 4, at 945-53; Victor, *The Interface of Trade/Competition Law and Policy: An Overview*, *supra* note 4, at 399-400.

²⁸⁸ Elzinga, *supra* note 4, at 444. “A crude definition of rent-seeking is using the power of the state to increase one person’s wealth at the expense of another’s.” *Id.* at 439.

²⁸⁹ See Victor, *Task Force Report on the Interface Between International Trade Law and Policy and Competition Law and Policy: Introduction*, *supra* note 4, at 465 (concerning the injurious effects to more efficient foreign producers); Warner, *supra* note 4, at 802 (stating that a foreign producer who has an overhead of less than ten percent or a profit margin of less than eight percent “will be found to be dumping”).

developed a coherent or predictable approach to defining the allegedly injured industry.²⁹⁰ The injury determination will substantially depend on the manner in which “like products” are defined, much in the same way that an antitrust finding depends on the definition of the relevant product and geographic markets. Professor Wood suggests that the ITC could improve the accuracy and predictability of its decisions by adjusting its market definition process.²⁹¹ Additionally, because problems in obtaining accurate information render demand elasticity and supply substitution difficult to determine, Professor Wood believes the Justice Department’s 1984 *Merger Guidelines* provide the best available test.²⁹²

Other commentators also have concluded that antidumping proceedings create a number of antitrust problems. In addition to providing a source of sham litigation, the antidumping laws are structured so that competing domestic firms act collectively when pursuing an antidumping case.²⁹³ This feature raises concerns about the exchange of sensitive pricing and market information required to institute and prosecute the petition.²⁹⁴ Furthermore, serious issues surround the use of informal settlements between competing domestic parties.²⁹⁵

Other procedural inadequacies include: (1) the lack of discovery rights; (2) the leniency in evidentiary requirements; (3) the use of inflated and unreliable information pursuant to the “best evidence available” rule; and (4) the use of arbitrary and irrelevant statistics in determining less than fair value.²⁹⁶ This list is far from exhaustive. For example, it has become increasingly difficult to identify a U.S. product for the purpose of protecting domestic employers. With the growth of multinational

²⁹⁰ See Wood, *supra* note 1, at 1175.

²⁹¹ See *id.* at 1178.

²⁹² See *id.* at 1178-80.

²⁹³ See Applebaum & Grace, *supra* note 4, at 517; see also Davidow, *supra* note 4, at 46; Pierre F. de Ravel d’Esclapon, *Non-Price Predation and the Improper Use of U.S. Unfair Trade Laws*, 56 ANTITRUST L.J. 543, 552-53 (1987).

²⁹⁴ See Applebaum & Grace, *supra* note 4, at 517.

²⁹⁵ See *id.*

²⁹⁶ See Applebaum & Grace, *supra* note 4, at 512 (reporting on the lack of discovery rights, the inapplicability of the Administrative Procedure Act, and lax evidentiary standards); Davidow, *supra* note 4, at 44 (describing inflated and unreliable information); Elzinga, *supra* note 4, at 442-43 (noting the concoction of statistical information).

corporations, many U.S. companies are manufacturing their products abroad and many foreign firms are establishing production facilities in the United States.²⁹⁷ These multinational corporations accounted for over seventy-five percent of all U.S. merchandise trade and approximately forty percent of intrafirm trade.²⁹⁸

The procedural issues surrounding antidumping determinations create a disrupted and uncertain international business environment.²⁹⁹ This uncertainty extends beyond the initial imposition of the antidumping order because the size of the dumping margin will fluctuate constantly over the course of subsequent administrative reviews.³⁰⁰ This environment, when coupled with the discriminatory treatment of foreign producers and a total disregard for efficiency considerations, frustrates both international trade and the exploitation of comparative advantage.

4. THE WTO ANTIDUMPING CODE

The WTO Antidumping Code, embodied in "GATT 1994,"³⁰¹ closely resembles the antidumping laws of the United States. As a GATT signatory, the United States should establish domestic laws consistent with its international obligations. Otherwise, U.S. domestic laws that do not conform to international obligations might nullify or impair the benefits accorded to other signatories.

The WTO Code, however, also substantially reflects the political influence of the United States. Because the United States refused to sign any agreement that reduced the effectiveness of its

²⁹⁷ One commentator has noted that "Texas Instruments has its home office in Dallas but assembles and produces most of its DRAM chips in the Far East. Mitsubishi has its headquarters in Japan, but it employs 250 people at a \$20 million DRAM assembly plant in North Carolina." Elzinga, *supra* note 4, at 443.

²⁹⁸ See THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, *supra* note 46, at 207.

²⁹⁹ See Victor, *The Interface of Trade/Competition Law and Policy: An Overview*, *supra* note 4, at 403.

³⁰⁰ See 19 U.S.C. § 1675; Applebaum & Grace, *supra* note 4, at 507 ("Because the administrative reviews cover different time periods than the original investigation, the resulting margins usually differ from the cash deposits required in the antidumping duty order."); Warner, *supra* note 4, at 813.

³⁰¹ See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.1, *reprinted in* FINAL TEXTS, *supra* note 29, at 145.

trade remedies, most of the proposals submitted by the United States were incorporated into the Code.

4.1. *The Basic Code Provisions*

The Antidumping Code defines dumping, material injury, and causal relationship in a manner similar to U.S. antidumping statutes. Dumping, for example, is defined as the introduction of merchandise “into the commerce of another country at less than its normal value”³⁰² A dumping violation is determined by comparing the export price of the product with its home-market price or, where necessary, with either third-country prices or constructed values.³⁰³ Sales that do not cover both fixed and variable costs are disregarded when determining the home-market or third-country price.³⁰⁴ If a constructed value is used, it is defined to include all production costs as well as a reasonable amount for profits and for administrative, selling, and general expenses.³⁰⁵ The profit amount chosen is based on the exporter’s actual data, but when this is unavailable, alternative measures are provided to determine the actual amounts of both profit and expenses.³⁰⁶ The ultimate test for dumping under the Antidumping Code is based on the price-to-price relationship outlined in U.S. law.³⁰⁷ The Code, therefore, ignores competitive and efficiency considerations and finds international price discrimination a *per se* violation of international law.

The Code focuses on injuries to producers rather than to consumers. The existence of an injury is determined in light of: (1) the volume of the imports; (2) the depression of domestic prices; (3) the prevention of price increases; and (4) the impact to domestic producers in terms of sales, profits, market share, and employment.³⁰⁸ These effects may be cumulatively assessed

³⁰² *Id.* (art. 2.1).

³⁰³ *See id.* (art. 2.2).

³⁰⁴ *See id.*

³⁰⁵ *See id.* at 146 (art. 2.2.2).

³⁰⁶ *See id.* at 146-47 (art. 2.2.2(i)-(iii)).

³⁰⁷ *See id.* at 147 (art. 2.4).

³⁰⁸ *See id.* at 148-49 (arts. 3.1-3.2, 3.4) (describing the determination of injury); *id.* at 149 (art. 3.7) (governing the “determination of a threat of material injury” by examining such factors as the increasing rate of imports, excess capacity of the exporter, effects on prices, and the size of inventories).

when imports from more than one country are being investigated.³⁰⁹

In determining whether a causal relationship exists between dumped imports and material injury, the Code clearly requires that domestic authorities consider all "known factors other than the dumped imports" that might conceivably be injuring the industry.³¹⁰ These factors would include: (1) the volume and prices of nondumped imports; (2) contraction in demand; (3) changes in consumption patterns; (4) developments in technology; (5) current levels of industrial productivity; and (6) competition between foreign and domestic producers.³¹¹ Injuries caused by these factors "must not be attributed to the dumped imports."³¹²

Although this provision could be viewed as placing substantial restraints on the material injury determination, the scope of this provision is limited. Domestic authorities, even after eliminating the effects of these factors, can find that dumped imports are at least one of the contributing causes of the injury.³¹³ Moreover, this provision is limited to the injury determination and is irrelevant when determining the size of the dumping margin to be imposed. Once a material injury is established and a contributing causal link is found, the authorities can enter an antidumping order equal to the entire difference between the adjusted export price and the product's normal value.³¹⁴ In other words, once the minimum requisite injury has been established, the magnitude of that injury has no bearing on the magnitude of the antidumping margin. The fact that a domestic industry also has been injured by its own inefficiency need not be considered in the margin computation.

While the dumping, material injury, and causation provisions are the central concerns of the WTO Antidumping Code, substantial emphasis also is placed on the methodology employed in domestic antidumping proceedings, the requirements of transparency and due process, and the use of international dispute

³⁰⁹ See *id.* at 148 (art. 3.3).

³¹⁰ *Id.* at 149 (art. 3.5).

³¹¹ See *id.*

³¹² *Id.*

³¹³ See *id.* (arts. 3.5, 3.6).

³¹⁴ See *id.* at 158-59 (art. 9.4).

settlement procedures.³¹⁵ A provision of the Code requires that an antidumping investigation be terminated whenever the margin of dumping is *de minimis*, or the volume of the dumped import is negligible.³¹⁶ A margin is considered *de minimis* when it is less than two percent of the export price and the volume of a dumped import is considered negligible when it represents less than three percent of the total import of like products.³¹⁷

In addressing domestic proceedings, the Antidumping Code also: (1) imposes time limitations on antidumping investigations;³¹⁸ (2) creates criteria for the imposition of provisional remedies and the use of settlement agreements;³¹⁹ (3) recognizes that employee unions will have standing to institute antidumping proceedings;³²⁰ and (4) requires the maintenance of an independent domestic tribunal for purposes of judicial review.³²¹ The Code also recognizes that when an interested party fails to provide requested information or impedes an investigation, preliminary and final orders may be based on the best evidence available, including that presented in the complainant's petition.³²² While the WTO Code instructs courts to view such evidence with "special circumspection," it also recognizes that a party's lack of cooperation "could lead to a result which is less favourable" to that party.³²³ Finally, in limiting the duration of an antidumping order, the Code provides that an order shall remain in effect only for as long as it is necessary to counteract the injurious dumping.³²⁴ The Code mandates that an antidumping order "shall be terminated on a date not later than five years from its imposition," or most recent review, unless the domestic authorities determine that the expiration of the duty "would be likely to lead to a continuation or recurrence of dumping and

³¹⁵ See *id.* at 162-65 (arts. 13, 16-17).

³¹⁶ See *id.* at 152 (art. 5.8).

³¹⁷ See *id.*

³¹⁸ See *id.* (art. 5.10).

³¹⁹ See *id.* at 156 (art. 7).

³²⁰ See *id.* at 152 (art. 5.4 n.14). This provision was inserted at the insistence of the United States.

³²¹ See *id.* at 162 (art. 13).

³²² See *id.* at 154 (art. 6.8).

³²³ *Id.* at 168 (Annex II, ¶ 7).

³²⁴ See *id.* at 160 (art. 11.1).

injury.”³²⁵

The Antidumping Code provides that all interested parties must be notified of the initiation of antidumping proceedings and further requires public notice of the basis for all dumping and injury allegations.³²⁶ All parties must be given ample opportunity to submit evidence on their own behalf and be adequately notified of all the information that the authorities will require in preparation of the case.³²⁷ Similarly, notice sufficient in scope to explain all conclusions of law and fact must be supplied to all parties.³²⁸ Finally, the Code establishes a Committee on Anti-Dumping Practices, composed of representatives of each WTO member, to which all antidumping actions must be reported.³²⁹ Members also are obliged to inform the Committee about the competency of the domestic authority to conduct investigations, the procedures governing those investigations, and any changes in domestic antidumping law or regulation.³³⁰

With regard to the international resolution of antidumping disputes, the Antidumping Code provides that any WTO member who believes its benefits under the Agreement are being “nullified or impaired” because of an antidumping order may seek consultation with the offending member.³³¹ If this consultation does not result in a satisfactory resolution, the matter may be referred to the WTO Dispute Settlement Body, which will establish a panel to hear the dispute.³³² The panel will determine whether the establishment of the facts by the domestic authority was proper and whether the evaluation of these facts was unbiased and objective.³³³ As long as these basic fairness requirements have been met, however, the panel will not overturn the order even if the panel might have reached a different factual conclusion.³³⁴ Moreover, when interpreting the actual provisions of the WTO

³²⁵ *Id.* at 160-61 (art. 11.3).

³²⁶ *See id.* at 161 (art. 12.1).

³²⁷ *See id.* at 153 (arts. 6.1, 6.2).

³²⁸ *See id.* at 161 (art. 12.2).

³²⁹ *See id.* at 163-64 (arts. 16.1, 16.4).

³³⁰ *See id.* at 163-64 (arts. 16.1, 16.4, 16.5).

³³¹ *Id.* at 164 (art. 17.3).

³³² *See id.* at 164 (arts. 17.4, 17.5).

³³³ *See id.* at 165 (art. 17.6(i)).

³³⁴ *See id.*

Agreement, if the panel finds that a relevant provision “admits of more than one permissible interpretation,” the antidumping measure shall be found “to be in conformity with the Agreement if it rests upon one of those permissible interpretations.”³³⁵

Once the panel has rendered its decision, its report will be adopted by the Dispute Settlement Body and will become binding on the parties. The Dispute Settlement Body may reject the panel’s decision by a unanimous consensus.³³⁶

In the event that the offending party does not comply with the recommendations and rulings of an adopted report, the complainant will be authorized to suspend concessions or other obligations otherwise due to the offending party under the terms of the WTO Agreement.³³⁷ Moreover, if the complainant believes that it would not be effective to suspend concessions only in the trading sector giving rise to the dispute, the complainant may be authorized to suspend concessions in other trading sectors as well.³³⁸

4.2. *The U.S. Influence*

The Antidumping Code creates a detailed procedure for determining the existence of dumping and material injury. It is designed to encourage openness, to ensure due process in the domestic setting, and to provide an international arbiter to promote fairness and uniformity in the application of domestic regulation. Despite these goals, the practical effect of the Code is to institutionalize the use of domestic trade remedies and to permit the insulation of domestic industries from international competition.

The United States was largely isolated in its antidumping negotiations because “[v]irtually all the other 115 participants in the Uruguay Round” believed that antidumping laws were “a

³³⁵ *Id.* at 165 (art. 17.6(ii)).

³³⁶ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, art. 16.4, reprinted in FINAL TEXTS, *supra* note 29, at 363; see also *id.* at 365 (art. 17.14). “The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if *no* Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.” *Id.* at 354 (art. 2.4 n.1) (emphasis added).

³³⁷ See *id.* at 367-68 (arts. 22.1-22.3).

³³⁸ See *id.*

form of creeping protectionism.”³³⁹ The Uruguay Round of negotiations, however, must be viewed as a package, involving substantial compromises in areas such as agriculture, textiles, tariff reduction, subsidies, the protection of intellectual property, market access for services, and the powers of the WTO. In negotiating this package, it became clear to the participants that they would have to concede to a variety of antidumping provisions to appease the United States if the WTO was to be established. The U.S. Trade Representative, as well as numerous Congressional leaders, had indicated strongly that the Uruguay Round Agreement would not be passed by Congress if it weakened any U.S. trade remedy.³⁴⁰ The final text of the Antidumping Code, therefore, resembles a U.S. wish list more than it does an international consensus. This is readily apparent in light of proposals made by the United States near the end of the Uruguay Round negotiations.

The most significant of these proposals dealt with the standard of review that would be used by WTO panels in their evaluation of domestic antidumping measures. The United States was concerned that the new WTO dispute settlement procedures would enable international panels to easily overturn domestic measures and to substitute their opinions for those of U.S. administrative authorities. This concern was at least partially based on the change that would occur in the consensus requirement. Prior to the new Agreement, a panel report could be adopted only by a unanimous consensus. A report, therefore, would be adopted unless *any* GATT member objected to its adoption. Under the new WTO Agreement, this process is reversed and a report is adopted unless there is a unanimous consensus not to adopt it.³⁴¹

In November 1993, the United States presented a proposal that limits the scope of panel review and “restrict[s] the ability of dispute settlement panels . . . to overturn U.S. antidumping decisions.”³⁴² In the explanation accompanying the proposal, the United States indicated that:

³³⁹ *GATT Participants Criticize New U.S. Antidumping Proposal*, *supra* note 64, at 2004.

³⁴⁰ See *U.S. Seen Gaining in Bid to Avert Any Weakening of U.S. Antidumping Rules*, 10 Int'l Trade Rep. (BNA) No. 48, at 2040 (Dec. 8, 1993).

³⁴¹ See *supra* note 336 and accompanying text.

³⁴² *U.S. Seen Gaining in Bid to Avert Any Weakening of U.S. Antidumping Rules*, *supra* note 340, at 2040.

[A] panel's proper role should be to determine whether the action of the investigating authority falls within the range of actions that would reasonably implement the obligation to be performed, and not to determine whether the authority has developed what that particular panel would consider to be the "best" possible means of implementing the obligation.³⁴³

The language incorporated in the final draft of the Antidumping Code is consistent with this demand. The panel's review of factual issues is limited to due process questions concerning the proper establishment of facts and their unbiased evaluation.³⁴⁴ Where the Agreement is susceptible to more than one interpretation, a panel must defer to a domestic measure that is based on one of those competing interpretations.³⁴⁵ In the Executive Summary submitted to Congress, indicating the President's intention to enter the Uruguay Agreement, this standard of review was described as "the most important aspect of the new antidumping agreement."³⁴⁶ By acknowledging that there may be more than one permissible interpretation of the Agreement and the facts involved in a dispute, and by requiring panels to defer to permissible interpretations by WTO members, this standard "will enable the United States to continue enforcing U.S. antidumping laws."³⁴⁷ Although more authority has been delegated to the Dispute Settlement Body concerning the resolution of international disputes, this authority, in the area of antidumping remedies, is considerably weakened by the adoption of the standard of review established in Article 17.6.

A variety of other U.S. concerns were raised by a preliminary draft suggested by former GATT Director General Arthur Dunkel. Some suspected that the Dunkel draft text would: (1) deny unions the right to institute antidumping petitions; (2)

³⁴³ *Id.* (citing to the explanation accompanying the proposal).

³⁴⁴ See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 17.6, *reprinted in* FINAL TEXTS, *supra* note 29, at 165.

³⁴⁵ See *id.*

³⁴⁶ Executive Summary, 58 Fed. Reg. 67,268, 67,277 (1993).

³⁴⁷ *Id.*

prohibit the cumulation of imports when determining the effects of dumping; (3) eliminate antidumping duties after five years through its sunset provision unless an affected industry could prove injury again; and (4) apply an inadequate approach to anti-circumvention.³⁴⁸

In response to these concerns, the Dunkel draft was further amended at the insistence of the United States. First, a footnote was added to Article Five indicating that the WTO Members were on notice that in some Member countries employees or their representatives have the right to file antidumping applications.³⁴⁹ Second, the final draft specifically provides that "investigating authorities may cumulatively assess the effects" of imports where the imports from more than one country are being investigated and where it is appropriate to do so in light of competitive conditions.³⁵⁰ Furthermore, countries that individually account for less than three percent of the volume of dumped imports may be included in the investigation if those countries collectively account for more than seven percent of the volume of dumped imports.³⁵¹ Third, the Dunkel draft sunset provision was revised to indicate that an antidumping duty will be eliminated after five years unless the domestic authorities determine, on the basis of a review that was either self-initiated or requested by the industry, that the termination would probably lead to a continuation or recurrence of the dumping or injury.³⁵² Finally, the Antidumping Code does not "limit U.S. discretion to discipline diversionary dumping" or "inhibit the application of current U.S. anti-circumvention provisions."³⁵³ Although the final text of the Code contains no reference to circumvention, a Ministerial Decision attached to the text recognizes that the issue of circumvention was discussed in the negotiations and that uniform rules

³⁴⁸ See *GATT Participants Criticize New U.S. Antidumping Proposal*, *supra* note 64, at 2004; *U.S. Seen Gaining in Bid to Avert Any Weakening of U.S. Antidumping Rules*, *supra* note 340, at 2040.

³⁴⁹ Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade 1994, art. 5.4 n.14, *reprinted in* FINAL TEXTS, *supra* note 29, at 152.

³⁵⁰ *Id.* at 148 (art. 3.3).

³⁵¹ See *id.* at 152 (art. 5.8).

³⁵² See *id.* at 160-61 (art. 11.3).

³⁵³ Executive Summary, *supra* note 346, at 67,276.

addressing this problem would be desirable.³⁵⁴ As a result, the Decision states that the problem of circumvention will be referred to the Committee on Antidumping Practices for resolution.³⁵⁵

In addressing the final draft of the Antidumping Code, the President's Executive Summary emphasized that although the new agreement would require some changes in existing U.S. law, it would not in any way weaken U.S. trade remedies. The new agreement will incorporate "important aspects of U.S. antidumping practice not previously recognized," thereby making these practices "immune from GATT challenge."³⁵⁶

Overall, the United States was successful in achieving its antidumping objectives and in protecting the interests of its more vocal political constituencies. Rather than amending U.S. law to conform to the international consensus, it appears that the Antidumping Code was amended substantially to conform to U.S. law. This, however, will not be without substantial costs. In light of the single undertaking concept of the WTO Agreement, whereby signatories must accept the Agreement "as a whole,"³⁵⁷ the U.S. approach to dumping now will be adopted by other nations. This approach discriminates against foreign producers by: (1) providing a less demanding injury to competitors standard; (2) failing to provide defenses to foreign producers that are available to domestic producers; and (3) measuring legality through the use

³⁵⁴ See *id.*; Decision on Anti-Circumvention, *reprinted in* FINAL TEXTS, *supra* note 29, at 401.

³⁵⁵ See Decision on Anti-Circumvention, *reprinted in* FINAL TEXTS, *supra* note 29, at 401.

³⁵⁶ Executive Summary, *supra* note 346, at 67,276 (offering as examples the ITC's provisions regarding cumulation of injury and the Department of Commerce's practice of disregarding below-cost sales in determining the fair value of export sales).

³⁵⁷ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, ¶ 4, *reprinted in* FINAL TEXTS, *supra* note 29, at 7 ("The representatives agree that the WTO Agreement shall be open for acceptance as a whole . . ."); see also Agreement Establishing the World Trade Organization, art. II.2, *reprinted in* FINAL TEXTS, *supra* note 29, at 9 ("The agreements and associated legal instruments included in Annexes 1, 2 and 3 . . . are integral parts of this Agreement, binding on all Members."); *id.* at 17 (art. XIV.1) ("[A]cceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto."). The only exceptions to the single undertaking concept involve the Plurilateral Trade Agreements regarding civil aircraft, government procurement, dairy, and bovine meat. See Plurilateral Trade Agreements, *reprinted in* FINAL TEXTS, *supra* note 29, at 383.

of differing cost standards.³⁵⁸ By dismissing the relevance of efficiency and consumer welfare, and by applying fair trade concepts rather than antitrust theory to foreign entities, this approach fundamentally favors domestic producers. Thus while political accolades may be bestowed on U.S. negotiators, their success will be a mixed blessing at best.

5. CREATING A NEW APPROACH

Previous articles have questioned whether the pursuit of economic efficiency should be the sole goal of domestic antitrust policy.³⁵⁹ The positioning of efficiency within the hierarchy of social values inherently involves a subjective decision-making process, based on the visions and biases of antitrust caretakers. Although the value of efficiency is universally recognized, its importance relative to other values is subject to some dispute.

In the international context, however, the pursuit of efficiency takes on additional social and distributive qualities. Because the social well-being of a nation, whether in terms of education, health care, housing, or political stability, depends on its economic well-being, nations must not create artificial barriers that protect one nation at the expense of another. These barriers do not make economic sense because the health of the domestic economy increasingly is dependent on the health of the international economy. Moreover, these barriers inhibit the ability of undeveloped nations to use their comparative advantages to reverse the tide of poverty. Whether based on sound economic principles or on more humanistic pursuits, the efficiency criteria must determine the validity of business conduct in the area of international trade.

The antidumping laws have no legitimate role in the application of an efficiency benchmark. In recognizing this fact, several commentators have argued that the antidumping laws should be repealed and that domestic producers should rely on predatory

³⁵⁸ See *supra* sections 1, 3.

³⁵⁹ See Cann, *Toward the Depoliticization of Takeover Theory: Creation of an Innovation Factor*, *supra* note 7; Cann, *Vertical Restraints and the "Efficiency" Influence - Does Any Room Remain for More Traditional Antitrust Values and More Innovative Antitrust Policies?*, *supra* note 7; Cann, *Section 7 of the Clayton Act and the Pursuit of Economic "Objectivity": Is There Any Role for Social and Political Values in Merger Policy?*, *supra* note 7.

pricing laws for their remedies.³⁶⁰ The problem with such an argument, however, is that the predatory pricing remedy has become an oxymoron. In light of the narrow recoupment standard applied in predatory pricing determinations, recovery for predatory pricing is extremely rare.³⁶¹ In the international setting, when a producer alleges predatory activity by a foreign firm in the U.S. market, the market power component will make recovery almost impossible. As a result, in order to repeal the antidumping laws, the predatory pricing remedy must be revised to afford some form of realistic recovery to domestic victims.

The courts, in examining the likelihood or rationality of predatory activity, must not only consider the new theories based on strategic corporate behavior, but they also must recognize the motivational distinctions that exist between domestic and international price predation. Although this Article acknowledges that unsuccessful predatory schemes can increase the welfare of U.S. consumers, it will propose a new approach to both recoupment and market power. This approach will examine recoupment in terms of a rewards system³⁶² within a diversified international marketplace, and will define market power in terms of the ability of less efficient firms to influence negatively the behavior of more efficient rivals.

The definitions of recoupment and market power used in this Article are designed to implement the goals of the WTO.³⁶³ First, the definitions recognize both that there is a distinction between U.S. and global consumer welfare and that protecting the interests of U.S. consumers may encourage global inefficiency. Second, in recognizing that dumping is viable only where segregated markets exist, these definitions may spur the opening of foreign markets by adjusting predatory benchmarks to reflect closed-market industrial policies. After developing this proposed new approach to the concepts of market power and recoupment, the definitions will be analyzed in light of a variety of issues such as: (1) refraining from chilling price competition or encouraging

³⁶⁰ See Warner, *supra* note 4.

³⁶¹ See *supra* notes 192-93 and accompanying text.

³⁶² The term "rewards system" was suggested by Professor Jeffrey Gale of Loyola Marymount University during discussions with the author.

³⁶³ The proposed definition of recoupment is developed *infra* sections 5.2, 5.3. A proposed meaning of market power is set forth *infra* section 5.4.

sham litigation; (2) being consistent with national treatment requirements; and (3) establishing a workable and enforceable set of standards. Finally this proposal will submit a series of valid resolutions to each of these concerns.

5.1. *The Need To Consider Strategic Behavior*

5.1.1. *The Basic Theories*

Modern industrial organization theory suggests that predatory pricing might be more common than previously believed. New research indicates that predatory pricing policies "can make excellent theoretical sense,"³⁶⁴ and that because recoupment has a variety of different forms, predatory conduct is not necessarily more costly to the predator than to the victim.³⁶⁵ By acknowledging that predatory pricing policies can encompass different time periods, and by recognizing that information and financial resources can be asymmetric among competitors and potential competitors, these strategic models explore the profitability and the feasibility of anticompetitive conduct.³⁶⁶ Some commentators note that the arguments concerning the rarity of predatory pricing are based on the false assumption that when prices are raised during the period of recoupment, new firms may simply enter the market on an equal basis with the incumbent predator.³⁶⁷ This assumption, according to Milgrom and Roberts, ignores the fact that product sales and an actual presence within the market during one time period may have a direct impact on both future costs and demand.³⁶⁸ When consumers incur substantial switching costs in changing from the incumbent predator's brand to the brand of a new competitor, any new entrant is at a disadvantage because it must compensate its customers for those additional costs.³⁶⁹ Similarly, where strong experience curves are involved, new entrants are often at a decided disadvantage with respect to their initial costs of production.³⁷⁰

³⁶⁴ Milgrom & Roberts, *supra* note 32, at 115.

³⁶⁵ See Ordovery & Saloner, *supra* note 32, at 590.

³⁶⁶ See *id.* at 545-62, 591.

³⁶⁷ See Milgrom & Roberts, *supra* note 32, at 115-16.

³⁶⁸ See *id.*

³⁶⁹ See *id.*

³⁷⁰ See *id.* at 116.

Recognizing that strategic behavior during one time period may affect market conditions in a later time period, and questioning the assumption of parity between incumbents and new entrants, experts argue that the sacrifice of current revenues may result in future rewards.³⁷¹ For example, it might be rational for a predator to reduce its price in order to deter the adoption of new technology being offered by a competitor.³⁷² Although this strategy might sacrifice current revenues, it could also lead to a larger customer base.³⁷³ Furthermore, since the compatibility of components is often an important purchasing determinant, and securing a large customer base might increase the value of the predator's product to potential buyers, the predator might rationally lower its prices below cost in order to secure a large clientele.³⁷⁴ Additionally, market participation is often crucial for product development. A company forced out of the market by a competitor during the early stages of product development will find later re-entry prohibitive because of the costs involved.³⁷⁵

Milgrom and Roberts divide predatory strategies into two major categories: those dealing with differences in the ability to sustain losses, and those dealing with attempts to influence the expectations of rivals. The former consists of a deep-pocket strategy in which a firm with substantial resources lowers its price to a level that cannot be sustained by its rivals. Imposing losses on the rival by forcing a reduction in its limited capital assets and a lower profit level, the predator also inhibits the rival's ability to borrow capital and to ride out the predatory episode.³⁷⁶ To succeed, the predator need not lower its price below marginal cost; rather, to force the rival from the market, prices need be lowered only to a level below the rival's costs.³⁷⁷ The fact that such a practice could be labeled predatory even when the victim's costs were higher than those of the predator, thus indicating a

³⁷¹ See *id.* at 116-17.

³⁷² See *id.* at 117.

³⁷³ See *id.*

³⁷⁴ See *id.*

³⁷⁵ See Kaplan & Kuhbach, *supra* note 4, at 452.

³⁷⁶ See Milgrom & Roberts, *supra* note 32, at 118-23; Ordoover & Saloner, *supra* note 32, at 548-50.

³⁷⁷ See Milgrom & Roberts, *supra* note 32, at 123; Ordoover & Saloner, *supra* note 32, at 548.

lower level of efficiency, will be addressed later in this Article.

The second category of strategic predation is based on the assumption that corporate decisions, including those to enter or exit a market, are based on expectations of profit. A predator can affect those expectations, and thus alter entry or exit decisions, by imposing artificially low prices.³⁷⁸ The existence of low prices in a market may act as a signal to potential entrants that market demand is weak, that the incumbent is willing to engage in predatory behavior, or that the incumbent is a highly efficient firm with substantially lower costs than the potential entrant.³⁷⁹ Although none of these market conditions may be present, the existence of imperfect information may result in distorted or mistaken judgments concerning potential profitability. Additionally, the potential entrant's lack of an experience curve and the presence of multiproduct lines and economies of scale may further reduce the ability of a potential entrant to accurately judge market conditions or to identify a predator's actual costs.³⁸⁰ A potential competitor may therefore decide not to enter a market although it might have been profitable to do so. These prices need only be below the potential rival's long-run average costs and not below the predator's marginal cost.³⁸¹ In addition to engaging in such signaling, a predator might also attempt to build a reputation for toughness by preying on existing rivals.³⁸² The purpose of this strategy may be to deter entry by potential competitors or to reduce the aggressiveness of existing competitors. Although this strategy might not be profitable *vis-a-vis* a particular victim, it represents an investment in a less competitive, and thus more profitable, future market. This attempt to build a predatory reputation is especially relevant where the predator operates in multiproduct or multigeographic markets because the gains from the predation are not limited to the market in which the predation actually occurs.³⁸³ Even when the predator cannot recoup its losses in the predated market, it may recoup in other non-

³⁷⁸ See Milgrom & Roberts, *supra* note 32, at 123.

³⁷⁹ See *id.* at 123-25.

³⁸⁰ See PREDATORY PRICING, *supra* note 27, at 12.

³⁸¹ See Milgrom & Roberts, *supra* note 32, at 129 (applying Post-Chicago economics to multimarket recoupment).

³⁸² See *id.* at 131.

³⁸³ See *id.* at 132.

predated markets unburdened by predatory costs. The possibility for multimarket recoupment provides a rational basis for predatory activity that should not be dismissed by Chicago School theory.³⁸⁴

These pricing strategies may also be accompanied by a variety of nonpricing strategies. A predator, for example, might develop substantial excess capacity in an attempt to deter market entry.³⁸⁵ The predator would thus demonstrate both its capacity to increase output and its willingness to engage in vicious competition.³⁸⁶ Additionally, a predator might: (1) choose to increase its rival's costs through the use of sham proceedings or through the misuse of the regulatory process; (2) engage in excessive product creation, product redesign, or product promotion; (3) promote the adoption of specialized product standards; or (4) encourage vertical foreclosure through the use of agreements restricting the supply of inputs or the availability of distribution channels.³⁸⁷

The term predatory pricing is defined by organizational theorists in a manner that is quite different than that used by antitrust enforcers. Under organizational theory, a price may be predatory even though it is above any measure of the predator's costs. Predation is defined as the intentional harm or discipline of a rival, or potential rival, by charging a price, below a profit-maximizing level, which is sufficiently low compared to the rival's costs to achieve the desired result.³⁸⁸ The *Brooke Group* Court, however, indicated that predatory pricing involves pricing below some measure of the predator's costs, and that above-cost prices that are lower than the costs of the predator's competitors do not inflict an injury to competition recognized under the antitrust

³⁸⁴ See generally PREDATORY PRICING, *supra* note 27, at 9-13 (discussing the economics of predation); Ordover & Saloner, *supra* note 32, at 550-56 (comparing predation models); Baker, *supra* note 14, at 589-92; Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 ANTITRUST L.J. 645, 648-49 (1989) [hereinafter *Recent Developments*] (explaining the "new economics" of predatory pricing).

³⁸⁵ See PREDATORY PRICING, *supra* note 27, at 9.

³⁸⁶ See *id.* at 9, 26; INTERIM REPORT, *supra* note 30, at 13.

³⁸⁷ See PREDATORY PRICING, *supra* note 27, at 13-15; *Recent Developments*, *supra* note 384, at 647-52; Ordover & Saloner, *supra* note 32, at 562-79.

³⁸⁸ See Baker, *supra* note 14, at 591; see also Milgrom & Roberts, *supra* note 32, at 117, 129, 130, 132-33.

laws.³⁸⁹ The ability to charge a low, but above-cost, price is possible because the predator is more efficient than the prey. Even below-cost pricing, however, can be pro-competitive if: (1) new products or new entrants are involved; (2) experience curves or forward pricing will result in lower costs in the future; (3) obsolescence or changing consumer patterns are present; or (4) excess capacity or a need to engage in loss-minimizing are involved.³⁹⁰

Despite this conflict in definition, antitrust enforcers must recognize that many truisms of the Chicago school have now come under fire. Predatory strategies may make rational economic sense and recoupment may be achieved in ways not contemplated by older economic models. While these strategies do not require it, below-cost pricing may be consistent with the goals of these predatory schemes. By charging below-cost prices, rather than prices merely below a rival's cost, a predator may hasten the effects of its chosen strategy. Factors such as the time value of money and a predator's lack of perfect information about the prey's costs or access to capital markets could influence whether below-cost pricing would be used. Moreover, if the predator is less efficient than the prey, below-cost pricing is necessary for the strategy to succeed.

While this proposal is aimed solely at below-cost pricing strategies that are designed to injure more efficient producers, these insights must be considered when determining the probability that predation has occurred. Furthermore, antitrust enforcers must acknowledge that certain pricing policies can both enhance welfare and frustrate market entry, thereby reducing future competition.³⁹¹

5.1.2. *The Judicial Posture*

The lower courts have demonstrated a general reluctance to analyze strategic pricing behavior. Although courts have consid-

³⁸⁹ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578, 2587-88 (1993).

³⁹⁰ See S. REP. NO. 403, *supra* note 4, at 24; PREDATORY PRICING, *supra* note 27, at 82.

³⁹¹ See generally *Milgrom & Roberts*, *supra* note 32, at 117-18 (discussing the anomalous situation where predation might be necessary to arrive at the socially efficient outcome).

ered nonprice predatory strategies such as excessive advertising, new product introduction, product redesign, and the use of foreclosure,³⁹² they have basically ignored arguments concerning pricing policies. In recognizing the relationship among vigorous price competition, consumer welfare, and the rewarding of efficiencies, the courts generally are reluctant to look beyond the predator's price/cost correlation.³⁹³ Although the lower courts differ in their approach to average variable cost and average total cost benchmarks and disagree over the relevance of barriers to entry when prices fall between these two benchmarks, they consistently look to the costs of the predator and not of the rival when making their decisions.³⁹⁴ Furthermore, these courts often declare predatory intent irrelevant or at least subject to substantial suspicion, ignore the effects of operating in multiple markets, and do not consider the consequences to long-term consumer welfare.³⁹⁵

Additionally, the concept of limit pricing, which involves setting prices above cost but below short-term profit maximizing levels to discourage new entry, has generally been dismissed. In *Barry Wright Corp. v. ITT Grinnell Corp.*,³⁹⁶ the First Circuit held that the courts are not equipped to distinguish between

³⁹² See *Transamerica Computer Co. v. International Business Mach. Corp.*, 698 F.2d 1377, 1382-83 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230-39 (1st Cir. 1983); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 93-95 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

³⁹³ See, e.g., *Northeastern Tel. Co.*, 651 F.2d at 88-91; *Transamerica Computer Co.*, 698 F.2d at 1384-89; *Barry Wright Corp.*, 724 F.2d at 235-236.

³⁹⁴ See, e.g., *Northeastern Tel. Co.*, 651 F.2d at 88-91; *Transamerica Computer Co.*, 698 F.2d at 1384-89; *Barry Wright Corp.*, 724 F.2d at 235-236.

³⁹⁵ See *supra* notes 117-135 and accompanying text (discussing the approaches taken by the various circuit courts); see also *Morgan v. Ponder*, 892 F.2d 1355, 1362-63 (8th Cir. 1989) (describing the effects of operating in multiple markets); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990) (holding that "intent plays no useful role"); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1503 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989) (noting that intent is irrelevant when price is above average total costs); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d at 232-33 (reporting that intent is too speculative to be reliable); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d at 87 n.15, 88-89 (noting that while long-term consumer welfare should be given greater emphasis than short-run considerations, the courts do not have "workable criteria for reaching this goal").

³⁹⁶ 724 F.2d 227.

disciplinary price cuts and legitimate price reductions aimed at increasing a firm's ability to compete.³⁹⁷ In order to determine whether a price reduction was profit maximizing in the short-term, a court would have to assess not only the relevant costs involved, but also the elasticity of demand, the response of competitors to shifts in price, and the changes in unit costs resulting from increases in the volume of production.³⁹⁸ By entertaining limit pricing allegations, therefore, the courts would allow disgruntled competitors to use antitrust laws to raise prices and stimulate tacit cartels. The ultimate effect would be to force producers to forego legitimate business activity and to penalize procompetitive price reductions.³⁹⁹

A notable exception to this approach, and one that has been substantially criticized, is the decision rendered in *Transamerica Computer Co. v. International Business Mach. Corp.*⁴⁰⁰ The Ninth Circuit held that prices above total cost could be predatory, and thus refused to apply conclusive presumptions based solely on the relationship between price and cost.⁴⁰¹ Recognizing the importance of intent, the court noted that producers may sometimes lower their prices for strategic reasons, thereby harming consumer welfare in the long-run.⁴⁰² The court recognized that by temporarily reducing prices to a level above average total cost but below the level of short-term profit maximization whenever a potential competitor appeared ready to enter the market, a predator could discourage entry and establish a reputation for toughness. The court also recognized that limit-pricing may constitute a predatory practice prohibited by the antitrust laws and that the courts have the right to examine long-run consequences when evaluating the competitive impact of a pricing strategy.⁴⁰³ In light of recent Supreme Court decisions, however, it is arguable that strategic pricing analysis has no basis in existing law. The Court in *Brooke Group* indicated that the plaintiff must demonstrate that the prices were below some appropriate measure of the predator's costs in

³⁹⁷ See *id.* at 234.

³⁹⁸ See *id.* at 235.

³⁹⁹ See *id.* at 234-35.

⁴⁰⁰ 698 F.2d at 1377.

⁴⁰¹ See *id.* at 1387-89.

⁴⁰² See *id.* at 1387.

⁴⁰³ See *id.*

order to prevail in a predatory pricing action.⁴⁰⁴ Prices that are above-cost, even when they are below general market levels or below a rival's costs, do not inflict an antitrust injury to competition.⁴⁰⁵ Even where an oligopolist lowers its price to a competitive level in order "to demonstrate to a maverick the unprofitability of straying from the group,"⁴⁰⁶ or even where the reduction in price is designed "to induce or reestablish supracompetitive pricing," it is illogical for the antitrust laws to condemn such a practice.⁴⁰⁷ Any intent to signal other market participants, or potential participants, or to build a reputation for toughness is irrelevant in the absence of a price below the predator's cost.

While the Court in *Brooke Group* expanded the recoupment requirement, its position concerning above-cost pricing was consistent with its previous decisions. In *Cargill, Inc. v. Monfort of Colo., Inc.*,⁴⁰⁸ for example, the plaintiff claimed that the defendant, after completing the challenged merger, would lower its prices to some level at or slightly above its costs in order to increase its market share at the expense of its smaller rivals.⁴⁰⁹ The Court held that the antitrust laws were not designed to protect small businesses from competition, and that attempts to increase market share through price reductions are not strategies that should be prohibited.⁴¹⁰

Similarly, in confronting allegations concerning limit pricing and below-normal profits, the Court held in *Atlantic Richfield Co. v. USA Petroleum Co.* that low prices, as long as they are above predatory levels, do not threaten competition.⁴¹¹ Thus, a plaintiff's losses resulting from a defendant's acts of pricing below

⁴⁰⁴ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578, 2587 (1993).

⁴⁰⁵ See *id.* at 2588.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ 479 U.S. 104.

⁴⁰⁹ See *id.* at 114.

⁴¹⁰ See *id.* at 116.

⁴¹¹ See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990). In a dissenting opinion, Justice Stevens rejected the majority's holding, stating that a limit-pricing strategy could gradually force competitors from the market, thus dampening competition. See *id.* at 347, 347 n.2.

general market levels or below a rival's costs are not recoverable.⁴¹²

Despite this powerful language, an argument may be made that the Supreme Court has not completely forbidden the use of strategic pricing analysis. In *Matsushita*, the Court indicated that reducing prices in order to increase business is often "the very essence of competition"⁴¹³ and that to prevail on a conspiracy allegation the plaintiff must show that the defendants "conspired to price predatorially in the American market."⁴¹⁴ In addressing the issue of what constitutes predatory pricing, however, the Court indicated that while "it may be that only direct evidence of below-cost pricing"⁴¹⁵ will be sufficient, the Court would refrain from considering "whether recovery should *ever* be available . . . when the pricing in question is above some measure of incremental cost."⁴¹⁶ The Court defined predatory pricing as "pricing below some appropriate measure of cost"⁴¹⁷ or "pricing below the level necessary to sell their products"⁴¹⁸ The Court has consistently discussed predation in terms of "below-market prices,"⁴¹⁹ pricing "below the competitive level,"⁴²⁰ and selling at prices "lower than necessary to obtain sales."⁴²¹

While it is true that many commentators have equated the term predatory pricing with below-cost sales, the Court did not do so in *Matsushita*. Instead, it provided two alternative definitions for this term. While it is correct to rely on *Matsushita* to support the contention that only predatory pricing is prohibited by the antitrust laws, it is incorrect to rely on *Matsushita* to support the fact that only below-cost pricing is prohibited. The term predatory, at least as used in *Matsushita*, must be read only as it was explained within that case.

The Supreme Court consistently has reserved the issue

⁴¹² See *id.* at 340 (citations omitted).

⁴¹³ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

⁴¹⁴ *Id.* at 584 n.7.

⁴¹⁵ *Id.* at 585 n.9.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 584 n.8.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 596.

⁴²⁰ *Id.* at 588.

⁴²¹ *Id.* at 593 n.18.

concerning the proper definition of predatory pricing. Despite its strong language in support of a below-cost definition, the Court in *Atlantic Richfield* admitted that it was not determining whether the dictum in *Matsushita* was “an accurate statement of the law.”⁴²² Similarly, the Court in *Cargill, Inc. v. Monfort of Colo., Inc.* specifically noted that it was not deciding whether recovery should ever be available when the price is above incremental cost or “whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation.”⁴²³

The Supreme Court has demonstrated a willingness to entertain Post-Chicago arguments. The most notable example of this is *Eastman Kodak Co. v. Image Technical Services, Inc.*⁴²⁴ In response to a growing number of independent service organizations (“ISOs”) competing with Kodak for the servicing of its equipment, Kodak instituted a policy of tying service to the sale of its replacement parts.⁴²⁵ While Kodak had a monopoly share of the market of its replacement parts, it did not have market power in the interbrand market of photocopying and micrographic equipment.⁴²⁶

In response to claims that it had unlawfully tied the sale of services to the sale of replacement parts and that it had monopolized, or attempted to monopolize, the services market, Kodak argued that because it did not have market power in the interbrand equipment market, any finding of market power in the derivative aftermarket for services was precluded as a matter of law.⁴²⁷ This argument was based on the theory that if Kodak raised its prices for parts and services to a point that was above the competitive level, potential equipment purchasers would stop buying Kodak equipment and would switch to a competing producer offering a more attractive product package.⁴²⁸ Any increase in profits resulting from market power in the services

⁴²² *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341 n.10 (1990).

⁴²³ *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 n.12 (1986); see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578, 2587 n.1 (1993).

⁴²⁴ 504 U.S. at 451.

⁴²⁵ See *id.* at 457-58.

⁴²⁶ See *id.* at 456-58, 464-65, 465 n.10.

⁴²⁷ See *id.* at 465-66.

⁴²⁸ See *id.*

market would be offset by a reduction in profits in the interbrand equipment market.⁴²⁹

Contrary to *Matsushita* and its progeny, the Court in *Kodak* demonstrated a willingness to base its determination on actual market behavior rather than solely on economic theory. The Court not only expressed approval of the appellate court's observation that "market imperfections can keep economic theories about how consumers will act from mirroring reality,"⁴³⁰ it proposed that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities" should not be favored by the antitrust laws.⁴³¹

In addressing *Kodak's* argument, the Court indicated that it would not accept a theory "on faith,"⁴³² and that the existence of significant information and switching costs could create a less responsive connection between the prices for services and parts and the volume of equipment sales.⁴³³ Consumers, therefore, would have to know the total price of the package of equipment, parts, and service at the time they purchased the product.⁴³⁴ In order to do so, consumers would have to engage in a sophisticated, difficult, and expensive analysis of the life cycle of the product, which may vary among purchasers and which may be impossible to determine at the time of initial purchase.⁴³⁵ In light of the high information costs, the Court would not assume that customers would engage in such an analysis.⁴³⁶ Moreover, even if larger consumers would be willing and able to do so, *Kodak* could conceivably price discriminate between those consumers who were sophisticated and those who were not.⁴³⁷

In questioning the theoretical link between service prices and equipment sales, the Court also considered the costs to current owners of switching to a different brand of product.⁴³⁸ If

⁴²⁹ See *id.* at 466.

⁴³⁰ *Id.* at 460 (quoting *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 617 (9th Cir. 1990)).

⁴³¹ *Kodak*, 504 U.S. at 466.

⁴³² *Id.* at 481 n.29.

⁴³³ See *id.* at 473.

⁴³⁴ See *id.*

⁴³⁵ See *id.* at 473-74.

⁴³⁶ See *id.* at 475-76.

⁴³⁷ See *id.* at 475.

⁴³⁸ See *id.* at 476-77.

switching costs were high, current owners who were locked-in to the product would be willing to tolerate some measure of higher prices before turning to a competitor.⁴³⁹ The higher the switching costs, and the larger the installed base of existing users, the higher that tolerance would be.⁴⁴⁰ The Court held that it was conceivable that Kodak possessed market power in the derivative markets because of the substantial initial outlay involved in purchasing the product⁴⁴¹ and the fact that a relevant market may consist of a single product brand.⁴⁴²

The seemingly conflicting approaches taken in *Brooke Group* and *Kodak* are explainable. One commentator has argued that the Court in *Kodak* was receptive to the Post-Chicago theories that were presented by the parties and accorded with the facts under review.⁴⁴³ In *Brooke Group*, Post-Chicago theories were not argued before the Court. As a result, the Court naturally relied on the Chicago school economic model with which it was most familiar.⁴⁴⁴ The notion that a predator can recoup its losses in a market separate from that in which the predation occurred, for example, was not presented to the Court in *Brooke Group* because the parties stipulated that branded and generic cigarettes were different segments of the same market.⁴⁴⁵

The Court in *Brooke Group* refused “to create a per se rule of nonliability for predatory price discrimination” if recoupment was possible by means of “supracompetitive oligopoly pricing.”⁴⁴⁶ Although a concerted predatory pricing scheme would be unlikely, especially where there is no express coordination and the parties must rely on uncertain signals to achieve tacit concerted action, the Court recognized that a predatory pricing scheme designed to create or preserve an oligopoly can injure consumers in the same way as one designed to create a monopoly.⁴⁴⁷ As a result, despite the unlikelihood that such a practice would be

⁴³⁹ See *id.* at 476.

⁴⁴⁰ See *id.*

⁴⁴¹ See *id.* at 477.

⁴⁴² See *id.* at 481.

⁴⁴³ See Baker, *supra* note 14, at 602-03.

⁴⁴⁴ See *id.* at 603.

⁴⁴⁵ See *id.* at 595.

⁴⁴⁶ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578, 2591 (1993).

⁴⁴⁷ See *id.*

attempted, "when the realities of the market . . . indicate that it has occurred . . . theory will not stand in the way of liability."⁴⁴⁸ This holding not only extends the relevance of recoupment beyond the traditional bounds of monopoly models,⁴⁴⁹ but it also demonstrates a willingness to allow facts to overcome economic theory.

The antitrust laws have expanded and contracted to reflect the social, political, and economic conditions of a particular time.⁴⁵⁰ In light of the changing international marketplace, and because foreign courts have exhibited some willingness to explore a variety of strategic issues, such as those surrounding multiple markets, selective predation, cross-subsidization, shared dominant position, rival perception, and long-term competitive effect,⁴⁵¹ further antitrust adjustment is now necessary.

5.2. *The Need to Internationalize the Concept of Recoupment*

The current approach to predatory pricing is based on the assumption that such a practice is "rarely tried, and even more rarely successful."⁴⁵² This assumption is based on the belief that predatory pricing schemes involve substantial risk because short-term losses are inevitable while long-term gains, which depend on changing consumer patterns and the predator's ability to outlast its victim and absorb increasing demand, are merely speculative. In light of these risks and the assumption that businesses always act as rational profit-maximizers, predatory pricing has been viewed as inherently self-detering. As a result, antitrust enforcement has adhered to the policy that it is better to allow some predatory practices to go undetected than to mistakenly punish or inhibit legitimate pricing activities.⁴⁵³ These assumptions, however, are not applicable to the international marketplace.⁴⁵⁴

⁴⁴⁸ See *id.*

⁴⁴⁹ See Baker, *supra* note 14, at 594.

⁴⁵⁰ See Cann, *Vertical Restraints and the "Efficiency" Influence - Does Any Room Remain for More Traditional Antitrust Values and More Innovative Antitrust Policies?*, *supra* note 7, at 483.

⁴⁵¹ See, e.g., PREDATORY PRICING, *supra* note 27, at 49-79 (discussing international predatory pricing enforcement actions).

⁴⁵² *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

⁴⁵³ See *supra* notes 26-28, 97-109 and accompanying text.

⁴⁵⁴ See Epstein, *supra* note 31, at 46; Semeraro, *supra* note 22, at 623, 640-43.

5.2.1. Segregated Markets and the Likelihood of Predation

While the U.S. market is far from perfectly competitive, U.S. antitrust enforcement is based on a free-market ideology. Businesses are granted the opportunity to succeed or fail and the market exploits its self-correcting capabilities. In terms of the Chicago School, "consumer welfare will be the greatest . . . when the market is free (both from governmental interference and monopolistic output restrictions) to direct or allocate society's resources to those locations most responsive to consumer wishes, and when businesses are permitted to pursue productive efficiencies in order to satisfy those wishes."⁴⁵⁵ The mixture of these two forms of efficiency determines the overall wealth of society,⁴⁵⁶ and the market will naturally gravitate toward an optimal efficiency mixture.⁴⁵⁷

The success of the free-market approach, however, depends on the ability of goods and services to move freely throughout the entire U.S. market, thereby providing suppliers of those goods and services with the opportunity to compete. It is this competitive opportunity, for example, that deters price discrimination, since discriminatory activity would only invite arbitrage. The U.S. antitrust laws, which attempt to provide a federal umbrella or an equal playing field for all market participants, must be viewed in conjunction with the Commerce Clause of the U.S. Constitution.⁴⁵⁸ This provision has been interpreted to prohibit the States from discriminating against interstate commerce, from placing undue burdens on interstate commerce, and from engaging in economic protectionism in order to promote state interests.⁴⁵⁹

⁴⁵⁵ See Cann, *Vertical Restraints and the "Efficiency" Influence - Does Any Room Remain for More Traditional Antitrust Values and More Innovative Antitrust Policies?*, *supra* note 7, at 488-89.

⁴⁵⁶ See BORK, *supra* note 7, at 91.

⁴⁵⁷ See Rowe, *supra* note 14, at 1548 ("[T]he Efficiency Model posits that consumers benefit from a free, competitive market that forces producers to make the most, at the least cost, sold at the lowest prices."); *id.* at 1549 ("The market ensures efficiency and cures inefficiency . . .").

⁴⁵⁸ See U.S. CONST. art. I, § 8, cl. 3.

⁴⁵⁹ See, e.g., *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (invalidating an Ohio statute that discriminated against products manufactured out of state); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (finding unconstitutional a New York statute that set

By prohibiting state-created barriers to entry, the Commerce Clause provides the requisite competitive environment on which free-market theories and antitrust enforcement are based.

There is no international analogue to the Commerce Clause. While the new WTO Agreement is aimed at reducing both tariff and non-tariff barriers,⁴⁶⁰ it does not eliminate the ability of nations to insulate their domestic industries from the rigors of competition. While barriers to trade are less conspicuous, often taking the form of product standards, testing and certification, closed corporate cultures, sociopolitical distribution systems, and intentionally passive antitrust enforcement, they may be effective in protecting domestic markets.

When a producer operates in a domestic market that is protected from outside competition and that is based on a monopolistic or oligopolistic market structure, it has the ability to price discriminate between domestic and foreign consumers.⁴⁶¹ Assuming that a producer has a motive for predation, the ability to segregate domestic and foreign markets increases the likelihood that the producer will engage in predatory pricing activity.⁴⁶² Predatory pricing is believed to be both rare and self-detering because of the substantial risks involved.⁴⁶³ If these risks can be reduced, therefore, the likelihood of predation would increase.⁴⁶⁴

The existence and use of segregated markets can reduce the risks ordinarily associated with predatory pricing. First, the existence of segregated markets eliminates the ability of competi-

ceiling limits on liquor prices offered by wholesalers); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (finding violative of the Commerce Clause a Wisconsin statute that barred the operation of trucks exceeding a certain length); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (holding unconstitutional an Arizona law limiting the length of railroad trains).

⁴⁶⁰ See Agreement Establishing the World Trade Organization, *reprinted in* FINAL TEXTS, *supra* note 29, at 9; *see also supra* notes 47-57 and accompanying text.

⁴⁶¹ See Warner, *supra* note 4, at 819-20, 839.

⁴⁶² See *id.*

⁴⁶³ See, e.g., BORK, *supra* note 7, at 155 (suggesting that predatory price cutting is unlikely to exist).

⁴⁶⁴ See generally Epstein, *supra* note 31, at 43-46 (discussing the prerequisites for international predation); Benz, *supra* note 22 (discussing how companies garner market share through below-cost pricing and suggesting options to address the problem).

tors or potential competitors to engage in the practice of arbitrage.⁴⁶⁵ When there is free movement of goods, any attempt at price discrimination will be met by either competitive entry into the higher-priced market or by a series of transactions between buyers and sellers across the two markets until a price equilibrium is established.⁴⁶⁶ In the international setting, however, a producer in a protected domestic market has the ability to charge monopolistic prices in that market and predatorily low prices in the export market simultaneously, without the risk that exported goods will reappear domestically at more competitive prices.⁴⁶⁷ Any pricing equilibrium will be precluded and home monopoly profits will be protected because the products may move only in one direction.⁴⁶⁸

Second, when markets cannot be adequately segregated, a potential predator considering below-cost sales will be facing substantially greater losses, which must be recouped later, than a predator who has the ability to sell some of its production at above-cost prices. As the Court indicated in *Matsushita*, the success of a predatory strategy depends on the ability to depress the market price "for all buyers" in the relevant market.⁴⁶⁹ If the predator cannot offer its predatory price to all consumers, the victim can continue to sell at a higher price to satisfy the remaining demand.⁴⁷⁰ Similarly, commentators have noted that a predator who lowers prices only in a segment of the market cannot succeed, because this practice would merely induce the victim to direct its sales elsewhere.⁴⁷¹ The predator must therefore lower its price throughout the market in order to either exclude its rivals or to deter future entry.⁴⁷² Moreover, these market-wide losses will continue to increase when the predator is forced to absorb the unsatisfied demand resulting from the

⁴⁶⁵ See Warner, *supra* note 4, at 839.

⁴⁶⁶ See Semeraro, *supra* note 22, at 625-26.

⁴⁶⁷ See *id.*

⁴⁶⁸ See *id.* at 624-26; Warner, *supra* note 4, at 839.

⁴⁶⁹ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590 (1986).

⁴⁷⁰ See *id.*

⁴⁷¹ See Elzinga & Mills, *supra* note 23, at 572.

⁴⁷² See *id.*

victim's reduction in output.⁴⁷³

In light of a predator's ability to restrict its losses to only a portion of its total sales when segregated markets are involved, several commentators have recognized that the existence of segregated markets can increase the likelihood of predation.⁴⁷⁴ Areeda and Turner, for example, have recognized that:

Price discrimination might be thought to increase the likelihood of predation by risking only a portion of the [predator's] business while threatening the entire business of smaller rivals who are confined to the geographic area in which the selective price cut was made or who serve primarily those customers who will benefit from the price reduction.⁴⁷⁵

Similarly, Semeraro provides a summary of this argument in noting that predation is more likely to occur internationally than domestically, because a domestic predator must reduce its price on all of the units that it sells, while a foreign predator needs to lower its price only on that portion of its output sold in the United States.⁴⁷⁶ Because the predation costs to the foreign predator are lower, its accompanying risks are lower as well.⁴⁷⁷ As a result, not only is predation more apt to occur, but the threat of predation by a foreign competitor becomes more credible, and thereby more capable of influencing the behavior of domestic firms.⁴⁷⁸

The aforementioned arguments do not imply that domestic markets are incapable of segregation. Foreign producers may not always face lower predation costs and domestic firms may not always face higher predation costs. Producers located in countries

⁴⁷³ See McGee, *supra* note 101, at 296; see also *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986); *Matsushita*, 475 U.S. at 593 n.17.

⁴⁷⁴ See, e.g., *VINER*, *supra* note 22; Areeda & Turner, *supra* note 101; Epstein, *supra* note 31; Semeraro, *supra* note 22.

⁴⁷⁵ Areeda & Turner, *supra* note 101, at 724; see also *id.* at 724-28 (recommending that any recovery for price discrimination be limited to the situation where the lower price was below marginal cost).

⁴⁷⁶ See Semeraro, *supra* note 22, at 627-29, 643; see also Epstein, *supra* note 31, at 44-45.

⁴⁷⁷ See Semeraro, *supra* note 22, at 628.

⁴⁷⁸ See *id.*

with substantial barriers to entry, however, have the ability to price discriminate, and thereby limit their predatory investment to non-domestic markets.⁴⁷⁹

A third argument is founded upon the Vinerian dumping hypothetical. Viner demonstrated that dumping⁴⁸⁰ may be employed for a variety of reasons including the disposal of excess inventory, the development of trade connections in a new market, and the elimination or frustration of competition in the market where the dumping occurs.⁴⁸¹ Viner also indicated that dumping may be used to maintain full production in existing plant facilities without inviting cutthroat price competition within the domestic market.⁴⁸²

Central to Viner's analysis is the proposition that dumping can be profitable not only when the export price is below the home market price, but also when the export price is below the average cost of production.⁴⁸³ Viner argued that:

If an increase in the volume of output brings a decrease in the average cost of production, what is lost in the sale of a portion of the output at less than the average cost may be more than made up by the reduction in the average cost for the remainder of the output.⁴⁸⁴

As a result, where costs decline as output is increased, it is profitable for a firm to increase output—even when it is necessary to dump any excess at prices below the average cost of production—whenever the losses incurred in the export market are less than the additional profits earned through cost savings in the home market.⁴⁸⁵

In his example,⁴⁸⁶ Viner hypothesizes a producer selling its total output of 100,000 units in its home market at \$4.75 per unit.

⁴⁷⁹ See Epstein, *supra* note 31, at 44.

⁴⁸⁰ See VINER, *supra* note 22, at 3 (defining dumping as “price-discrimination between national markets”).

⁴⁸¹ See *id.* at 23-31.

⁴⁸² See *id.* at 23, 27-28, 94-95.

⁴⁸³ See *id.* at 113-14, 123-24.

⁴⁸⁴ *Id.* at 123.

⁴⁸⁵ See *id.* at 113-14, 124.

⁴⁸⁶ See *id.* at 124-25.

If the average cost of production is \$4.50 per unit, the producer realizes a profit of \$25,000. If output is increased to 200,000 units, however, costs are reduced to \$3.60 per unit. If 100,000 units are then sold abroad at below cost for \$3.50 and the other 100,000 are sold domestically for \$4.75, the producer realizes \$105,000 in profits.⁴⁸⁷ This strategy is rational when a producer can only sell part of its maximum output domestically at prices above the competitive level.⁴⁸⁸ Dumping enables producers to both increase their output, thereby achieving economies of scale, and maintain their supracompetitive pricing structures at home.⁴⁸⁹

Viner's arguments are directed primarily towards dumping, not predatory pricing. Although Viner discusses "predatory dumping" as a means for eliminating or frustrating the development of competition,⁴⁹⁰ this term is used to describe the dumper's motivation, rather than below cost sales.⁴⁹¹ Nevertheless, Viner's argument supports the proposition that predatory pricing is more likely in the international setting.

First, if international predatory pricing were to be defined in terms of selling below average total cost,⁴⁹² Viner's analysis would be directly applicable. Even if predatory pricing is defined as sales below marginal cost, the actual losses of such sales could

⁴⁸⁷ See *id.* at 125 (\$115,000 home-market profit, minus \$10,000 export-market loss).

⁴⁸⁸ See *id.* at 27-28 (discussing the domestic price in such a situation).

⁴⁸⁹ See *id.* at 27-28, 131. Viner notes that an essential ingredient of such a strategy is the existence of a monopoly in the home market. See *id.* at 94. Viner states that "dumping on other than a sporadic basis was typically, if not invariably, confined to monopolistic producers' combinations." *Id.* Viner continues:

If there is competition in the domestic market, the concern which dumps a portion of its output in foreign markets in order to reduce the supply and maintain or raise the prices in the domestic market must bear by itself all the sacrifice involved in the export at reduced prices and must share with all its domestic competitors the advantage accruing from the reduction in the domestic supply. . . . It is only to a monopoly that export dumping has attractions greater than those of moderate domestic price-cutting.

Id. at 95. See Benz, *supra* note 22, at 711-13, 739-40 (discussing Viner's approach).

⁴⁹⁰ See VINER, *supra* note 22, at 26-27, 120-22.

⁴⁹¹ See *id.* at 23.

⁴⁹² See generally, Epstein, *supra* note 31, at 42 (discussing average total cost as the predatory pricing standard).

be partially offset by increased revenues obtained in the protected home market.⁴⁹³ These increased revenues result from lower average costs and the maintenance of a supracompetitive price unaffected by the additional output.⁴⁹⁴ As a result, even when the predatory practice results in an overall loss, it is lower than the loss incurred by a producer predating in a competitive market. As the costs, and thus the risks, of predation are reduced, predatory pricing becomes a more rational strategy in terms of the risk/reward continuum.⁴⁹⁵ The relationship between risks and rewards is neither static nor universal, but varies depending on the market environment.

Viner's observations also shed light on other controversial predatory pricing issues such as simultaneous recoupment,⁴⁹⁶ staying power,⁴⁹⁷ and cross-subsidization.⁴⁹⁸ Simultaneous recoupment means that in some cases a predator, instead of defeating its victim and then recouping its losses, may recoup during the predatory episode itself.⁴⁹⁹ In their analysis of the *Brooke Group* decision, for example, Elzinga and Mills examined the allegation that Brown & Williamson could simultaneously recoup its losses by reaping monopoly profits for full-revenue branded cigarettes.⁵⁰⁰ Elzinga and Mills concluded that the reasoning behind this scheme was flawed unless there was some factor, lacking in this case, preventing consumers from switching to the lower priced segment.⁵⁰¹

In the international setting, however, consumers in the higher-priced domestic market may be prevented from switching to the lower-priced export market because barriers to entry prohibit arbitrage.⁵⁰² The foreign producer, therefore, simultaneously may recoup some of its loss. This recoupment equals the

⁴⁹³ See Benz, *supra* note 22, at 711-13 (discussing these strategies).

⁴⁹⁴ See *id.*; VINER, *supra* note 22, at 124-25.

⁴⁹⁵ See Benz, *supra* note 22, at 711-13.

⁴⁹⁶ See Elzinga & Mills, *supra* note 23, at 569-70 (discussing simultaneous recoupment).

⁴⁹⁷ See Epstein, *supra* note 31, at 44 (discussing staying power).

⁴⁹⁸ See Benz, *supra* note 22, at 708-09 (discussing cross-subsidization).

⁴⁹⁹ See Elzinga & Mills, *supra* note 23, at 569-70.

⁵⁰⁰ See *id.* at 569-70, 575-76.

⁵⁰¹ See *id.* at 569-70.

⁵⁰² See *id.* at 573-74 (noting that under *Brooke Group*, entry conditions constitute one variable impacting recoupment potential).

difference between the average total cost before the output increase and this cost after the output increase, as the home market price remains unchanged.⁵⁰³ That simultaneous recoupment was not established in *Brooke Group*, therefore, does not inhibit the application of this doctrine to international predatory pricing.

Increased staying power and cross-subsidization explain why some producers are better able to engage in predatory pricing activity than their rivals. Staying power, or the capacity of a predator to outlast its prey, is necessary for successful predatory activity.⁵⁰⁴ Monopoly profits in the protected home market and both domestic and export subsidies by a foreign government substantially enhance a foreign predator's ability to defeat rivals.⁵⁰⁵ Moreover, because domestic consumers and governments can share predatory losses, a foreign firm's ability to increase market share persists for a substantially longer time period than that afforded domestic firms in unprotected and unsubsidized markets.⁵⁰⁶

Cross-subsidization, or the use of monopoly profits in one market to fund a predatory campaign in another,⁵⁰⁷ has been subjected to substantial criticism. In *Matsushita*, the Court held that while the ability to obtain supracompetitive profits in Japan might indicate the ability to sustain great losses in the United States over a substantial period of time, the defendants would have no motive for incurring such losses absent a strong likelihood that their conspiracy would succeed.⁵⁰⁸ Similarly, production capacity exceeding domestic demand would not explain why the defendants "would be willing to lose money in the United States . . . without some reasonable prospect of recouping their investment."⁵⁰⁹

As a result, monopolistic domestic markets have been viewed only as a means for staving off bankruptcy, not for reducing

⁵⁰³ See *supra* notes 487-88 and accompanying text (describing an example of this tactic).

⁵⁰⁴ See Epstein, *supra* note 31, at 44.

⁵⁰⁵ See *id.*; see also Benz, *supra* note 22, at 696-701.

⁵⁰⁶ See Epstein, *supra* note 31, at 44-46.

⁵⁰⁷ See *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584; Wood, *supra* note 1, at 1168 n.59; Benz, *supra* note 22, at 696, 708-09.

⁵⁰⁸ See *Matsushita*, 475 U.S. at 593.

⁵⁰⁹ *Id.* at 593 n.18.

predation costs.⁵¹⁰ As indicated in *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, lost profits and unremunerative prices are equally expensive for both monopolists and non-monopolists.⁵¹¹ The idea of a foreign firm increasing its domestic market price to subsidize losses abroad is irrational because a monopolist is always charging the highest possible price at home regardless of its predatory activities abroad.⁵¹²

A monopolist can not raise its home market price in order to subsidize overseas predation because that price is already set at its optimal level. Nevertheless, when price is insulated from the effects of increased output because output is both exported and denied re-entry into the protected market, a monopolist can increase its profit by reducing production costs.⁵¹³ Thus, although predatory pricing may lead to an overall loss, a monopolistic market's existence may enable the predator to cross-subsidize some of the predatory episode.⁵¹⁴ The concept of cross-subsidization, therefore, should be viewed in terms of the ability to increase domestic revenues, not domestic prices.⁵¹⁵ Although these increased revenues may not equal the losses incurred, they may be a direct result of encouraging sales through a predatory campaign. If increased domestic revenues are a direct result of intentional losses in a foreign market, some degree of cross-subsidization arguably exists.

Second, substantial resources, derived from both monopolistic profits and governmental subsidies, not only increase a firm's ability to engage in traditional forms of predation, but also increase the firm's ability to engage in strategic behavior.⁵¹⁶ For example, the ability to outlast a rival allows predators to develop larger customer bases and to increase consumer switching costs. A large purse helps predators lower a rival's profits, inhibit a

⁵¹⁰ See *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 89 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).

⁵¹¹ See *id.*

⁵¹² See KENNETH DAM, *THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 169 (1970) (cited in Wood, *supra* note 1, at 1168 n.59).

⁵¹³ See *supra* notes 486-89 and accompanying text (discussing such tactics).

⁵¹⁴ See *id.*

⁵¹⁵ See *id.*

⁵¹⁶ See *supra* notes 374-75 and accompanying text; see also Benz, *supra* note 22, at 713-14.

rival's borrowing ability, and affects expectations concerning consumer demand and potential market rewards.⁵¹⁷ A substantial war chest and a substantial excess capacity can also aid in the development of a reputation for toughness and recoupment in several non-predated international markets.⁵¹⁸

Finally, arguments undermining the relevance of monopolistic foreign markets, and the resulting ability to fund predatory campaigns, are based on the mistaken belief that the structure of a foreign market has no causal relationship to the reasonable expectation of recoupment. This belief is misplaced on two accounts. First, a foreign market's structure may allow for the partial recoupment or cross-subsidization of predatory losses.⁵¹⁹ More importantly, however, the failure to recognize the relationship between foreign market conditions and predation is based on a very limited view of recoupment. The concept of recoupment must no longer be limited to the simple recovery of financial losses directly attributable to a particular predatory episode. Instead, recoupment must be defined in terms of a substantially broader system of rewards. When viewed in this light, the direct relationship between foreign market structure and culture, and the ability to recoup will become substantially more apparent.

Predatory pricing in the United States generally has been viewed as pricing below marginal or average variable cost.⁵²⁰ As a result, a firm capable of lowering its marginal costs, even if this increases fixed costs, is less likely to be found liable for predation because the pricing floor also would be lowered. Two firms, therefore, having identical total costs would be treated differently under U.S. law if their marginal costs differed. Although it could be argued that differential treatment merely reflects recognition of differential efficiency,⁵²¹ this argument loses credibility when considered in an international environment.

Epstein has argued that using marginal cost as the benchmark for international predation is unreliable and inadequate for

⁵¹⁷ See *supra* notes 367-70 and accompanying text.

⁵¹⁸ See *id.*

⁵¹⁹ See Epstein, *supra* note 31, at 46-56 (discussing foreign market structures).

⁵²⁰ See *id.* at 41-42 ("using a marginal cost standard for defining predatory prices, as is used within the United States . . .").

⁵²¹ See *supra* notes 108-09 and accompanying text.

measuring relative efficiency.⁵²² Not only are there differences in accounting practices among nations, but substantial differences in cost structures also prohibit the assumption that firms with higher fixed costs and lower variable costs are necessarily more efficient.⁵²³ In the United States, for example, wages are generally a variable cost, thus raising the predatory pricing floor.⁵²⁴ In nations where tradition or governmental policy provides for lifetime employment, however, labor costs are more often fixed.⁵²⁵ Thus, although the variable costs of firms in such nations may be lower than those in the United States, these firms are not necessarily more efficient.⁵²⁶ Similarly, cost structures may vary according to the degree of vertical integration and the manner of product distribution.⁵²⁷

Reliance upon a fixed/variable cost distinction thus may lead to unusual results. Political and cultural factors may influence a nation's views toward employment, organizational structure, and product distribution, thus leading to lower marginal costs in foreign firms than in their U.S. competitors.⁵²⁸ These firms are less likely to be found liable under U.S. law since they will be entitled to set prices at levels below those permitted for equally efficient U.S. firms.⁵²⁹ The building of a production facility, with high fixed and low variable costs, is a case in point. Although these facilities may lower marginal costs, and thus lower the price at which the product may be lawfully sold in the United States, they do not necessarily reflect the need to meet consumer demand. Instead, these facilities may be constructed for social purposes such as increasing employment or avoiding lay-offs during economic downturns. This creates chronic and structural over-capacity that often is encouraged by the existence of both cartels and national industrial policies.⁵³⁰

⁵²² See Epstein, *supra* note 31, at 61 (“[S]hort-run marginal cost should not be used in such comparisons. . .”).

⁵²³ See *id.* at 52-53.

⁵²⁴ See *id.* at 53-54.

⁵²⁵ See *id.* at 54.

⁵²⁶ See *id.* (“It would be far from obvious . . . that these foreign plants are economically more efficient.”).

⁵²⁷ See *id.*

⁵²⁸ See Benz, *supra* note 22, at 698-704.

⁵²⁹ See *id.* at 700.

⁵³⁰ See *id.* at 697-98 n.10, 703, 703-04 n.38, 729 n.143.

Moreover, when employment is ensured by means of excess capacity, fixed costs tend to rise.⁵³¹ This cost structure, in turn, provides incentives to reduce average total costs by increasing production to maximum capacity and selling excess output overseas.⁵³² Cost reductions are generally viewed as socially beneficial, but if not accompanied by lower prices in the protected home market, they may be used to partially offset or subsidize predatory losses. As a result, U.S. predatory pricing law, with its emphasis on marginal costs, may be rewarding artificially created cost structures. By doing so, these laws may be merely condoning social idiosyncrasies unrelated to efficiency gains, and leading to both overproduction and predatory pricing practices consistent with the Viner rationale.⁵³³

These effects are further magnified because antitrust laws do not consider the presence of government subsidies when determining an alleged predator's costs. Relief from the adverse impact of foreign subsidies instead must be sought under countervailing duty statutes.⁵³⁴ In a perfect world, it seems appropriate to consider the level of public assistance when determining actual costs of production. For example, if marginal costs were lowered by government-supported research and development, or by sophisticated government-subsidized equipment, the marginal cost benchmark should be adjusted upward to reflect such enterprise-specific assistance.⁵³⁵ By adjusting the level at which predatory and nonpredatory prices are distinguished, antitrust enforcers could better protect the interests of efficient competitors. U.S. trade legislation, and the WTO provisions on which it is based, apparently precludes using antitrust mechanisms to counteract a subsidy's effect.

Although both subsidies and segregated markets affect the likelihood of predatory conduct, the fundamental question posed

⁵³¹ See *id.* (discussing chronic overcapacity and its results) (citation omitted); see also VINER, *supra* note 22, at 27-28, 94, 117-120; Epstein, *supra* note 31, at 47-48; Warner, *supra* note 4, at 830-33.

⁵³² See VINER, *supra* note 22, at 94.

⁵³³ See Epstein, *supra* note 31, at 48-50.

⁵³⁴ See 19 U.S.C. §§ 1671-1671h (1994).

⁵³⁵ See Agreement on Subsidies and Countervailing Measures, art. 2, reprinted in FINAL TEXTS, *supra* note 29, at 229; Barceló, *supra* note 4, at 319-30 (discussing government subsidies); Benz, *supra* note 22, at 698-701 (describing government subsidies).

in *Matsushita* remains to be addressed. Despite the existence of the ability to predate and recoup a portion of predatory losses, no firm intentionally incurs losses without rational reasons. This Article will now discuss why foreign producers might find predatory pricing rewarding. By examining the prospect of non-universal rationality, it will become apparent that recoupment is often quite achievable.

5.2.2. *The Lack Of Universal Rationality*

In *Matsushita*, the Court did not consider recoupment as a prerequisite for conspiratorial liability. The Court, however, did look to recoupment as the primary determinant of the likelihood of a conspiracy attempt and whether the inference of a conspiracy, as opposed to one of independent conduct, is reasonable in light of the economic circumstances.⁵³⁶ After examining prevailing economic conditions, the Court concluded that the alleged conspiracy would have been “implausible,” “irrational,” and “economically senseless,”⁵³⁷ and thus held that a conspiracy did not exist.

In reaching this conclusion, the Court overlooked the complexities of the international market. After noting that conspiracies are inherently speculative and substantially more difficult to accomplish than single-firm predation, the Court indicated that a conspiracy would depend on the continued cooperation of the conspirators, that each conspirator would have a strong incentive to cheat, and that decades of apparent failure was strong evidence against the conspiracy’s existence.⁵³⁸

By adhering to this Chicago School rhetoric, the Court perpetuated three fundamental fallacies. First, the Court assumed that the concept of rationality is internationally uniform and that all businesses, despite their origin, share common values and corporate goals. Second, the Court assumed that the concept of recoupment is defined solely in terms of the achievement and

⁵³⁶ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (announcing that to survive summary judgment, a plaintiff “must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents”).

⁵³⁷ *Id.* at 587, 593-98.

⁵³⁸ See *id.* at 588-93.

maintenance of market power and the recovery of financial losses through the acquisition of monopoly profits within the predated market.⁵³⁹ Finally, the Court assumed that the ability to cooperate, the incentive to cheat, and the creation of time horizons are universal axioms that remain unaltered by corporate culture.

5.3. *The Effects of Cultural Differences*

5.3.1. *The Hofstede Study*

One of the world's leading authorities on international organizational culture has proposed that "there are no such things as universal management theories."⁵⁴⁰ Because the management function cannot be isolated from other societal forces, managerial processes, goals, and philosophies only can be understood by examining a nation's historical and cultural characteristics.⁵⁴¹ The concept of management may vary substantially from country to country, and any attempt by one nation to apply its management theories to another must be questioned.⁵⁴²

In attempting to identify cultural differences between nations and to develop theories concerning the management process, Hofstede applies a series of bipolar dimensions to explain basic societal characteristics.⁵⁴³ One dimension, individualism versus collectivism, refers to "the degree to which people . . . prefer to act as individuals rather than as members of [particular] groups . . . In collectivist societies a child learns to respect the group to which it belongs, usually the family," to remain loyal to that group throughout his or her lifetime, and "to differentiate between in-group members and out-group members (that is, all other people)."⁵⁴⁴ Another dimension, uncertainty avoidance, describes the degree to which people prefer structured situations

⁵³⁹ See *id.* at 588-89.

⁵⁴⁰ Geert Hofstede, *Cultural Constraints in Management Theories*, EXECUTIVE, Feb. 1993, at 81, 81.

⁵⁴¹ See *id.* at 88-89.

⁵⁴² See *id.* at 89.

⁵⁴³ Although Hofstede describes five dimensions, this discussion describes only three.

⁵⁴⁴ *Id.* at 89-90.

and clear rules establishing acceptable conduct.⁵⁴⁵ Nations that demonstrate a high preference for uncertainty avoidance are more rigid and less willing to accept change or differences among its members.⁵⁴⁶ A third dimension, long-term versus short-term orientation, is based on a study performed by Michael Harris Bond.⁵⁴⁷ This dimension differentiates between long-term “values oriented towards the future, like thrift (saving) and persistence,” and short-term “values . . . oriented towards the past and present, like respect for tradition and fulfilling social obligations.”⁵⁴⁸

Hofstede’s study highlights several critical distinctions between nations. First, the United States scored extremely high in the individualism dimension.⁵⁴⁹ This score reflects a low reliance on, and loyalty to, the group, and a lower degree of differentiation between group and non-group members. It also represents a strong belief in the merits of markets as well as competition between individuals.⁵⁵⁰ In other nations, such as Indonesia and China, individualism scores were extremely low.⁵⁵¹ While the United States demonstrated a low uncertainty avoidance score, Japan, France, and Russia prefer a more structured society and encourage homogeneity and risk avoidance.⁵⁵² Finally, the study determined that while the United States is short-term oriented, China and Japan are extremely long-term oriented.⁵⁵³

These important cultural distinctions demonstrate that assumptions based on the U.S. view towards predatory pricing may not apply to firms located outside of the United States. Cultural differences may affect the manner in which a firm compares the benefits of open competition to the benefits of more limited or structured competition. These differences may affect the willingness of a firm to place national or group interests, such as employment stability and economic development, above those

⁵⁴⁵ See *id.* at 90.

⁵⁴⁶ See *id.*

⁵⁴⁷ See *id.*

⁵⁴⁸ *Id.*

⁵⁴⁹ See *id.* at 91 (Table 1).

⁵⁵⁰ See *id.*

⁵⁵¹ See *id.*

⁵⁵² See *id.*

⁵⁵³ See *id.*

of either the individual or the single corporate enterprise. Finally, divergent perspectives may affect: (1) the willingness and the ability to engage in group activity, such as conspiracies; (2) the desire for consensus and harmony; (3) the degree to which social and business obligations are respected; (4) the likelihood of cheating or undertaking maverick activity; (5) the time horizons for traditional recoupment; and (6) the desirability of pursuing short-term profit maximization as opposed to long-term market growth.

To better understand these differences and the effects they have on corporate conduct, this Article will now examine the cultural characteristics of Japan and China. These countries have been selected for analysis because they represent present or future powers within the international market and because their cultures contrast starkly with that of the United States.

5.3.2. *Japan and the Group Orientation*

Japanese society has developed from a self-contained, homogeneous population, whose thinking has been shaped by a combination of Shintoism, Buddhism, and Confucianism.⁵⁵⁴ The teachings of Confucianism are of primary interest because they exemplify the rationality of Japanese business conduct. Confucianism emphasizes the importance of maintaining social order and of exhibiting unquestioned obedience to the family, whether the natural family, the corporate family, or the nation itself.⁵⁵⁵ The desire for social order has produced a group identity that: (1) enhances conformity;⁵⁵⁶ (2) values harmony and loyalty;⁵⁵⁷ (3) encourages nationalism;⁵⁵⁸ and (4) permits substantial coordination within broad business networks (*keiretsu*) and between these networks and the Japanese government.⁵⁵⁹ Moreover, the pursuit of social order may be observed in a variety of national

⁵⁵⁴ See Richard G. Linowes, *The Japanese Manager's Traumatic Entry into the United States: Understanding the American-Japanese Cultural Divide*, EXECUTIVE, Nov. 1993, at 21, 23-24.

⁵⁵⁵ See *id.* at 24, 32; ARTHUR WHITEHILL, JAPANESE MANAGEMENT: TRADITION AND TRANSITION 6-7 (1991).

⁵⁵⁶ See Linowes, *supra* note 554, at 24.

⁵⁵⁷ See *id.* at 27.

⁵⁵⁸ See WHITEHILL, *supra* note 555, at 99.

⁵⁵⁹ See *id.* at 30.

policies, such as lifetime employment and the pursuit of long-term economic growth rather than short-term profit maximization.⁵⁶⁰

Many of these issues have been addressed by commentators attempting to demonstrate the links between Japanese culture and Japanese business conduct.⁵⁶¹ Groupism “has been a fact of life existing from the earliest periods of Japanese history”⁵⁶² and is one of the most significant differences between the value systems of Japan and the United States.⁵⁶³ Japanese culture respects a strong sense of loyalty and shared obligation, and encourages conformity and a consensus-building mentality.⁵⁶⁴ The success of any individual is measured by the group’s success, regardless of whether the group is defined in terms of a work-group, a company, a network of companies, or the nation of Japan.⁵⁶⁵

The Japanese value system is consistent with the development of the *keiretsu*, which are large networks of companies that are horizontally and vertically linked.⁵⁶⁶ The pursuit of harmony, consensus, and group welfare supports extensive cooperation between cartel members based on long-established and trusted business relationships.⁵⁶⁷ As a result, “[t]he Japanese have no fear whatever of cartelization and, in fact, see cartels as an element of competitive strength.”⁵⁶⁸ Similarly, although substantial abuses are now the subject of increasing criticism in Japan, individual ethics or principles historically have been set aside when necessary to “maintain the group,” preserve “interfirm

⁵⁶⁰ See Hofstede, *supra* note 540, at 83-84.

⁵⁶¹ See generally WHITEHILL, *supra* note 555 (depicting Japanese management styles and corporate culture).

⁵⁶² *Id.* at 8.

⁵⁶³ *Id.* at 52.

⁵⁶⁴ See *id.* at 47-48, 54-55, 88, 160-61. A popular Japanese expression notes that “the nail that stands up gets hammered down.” Linowes, *supra* note 554, at 24.

⁵⁶⁵ See WHITEHILL, *supra* note 555, at 117-18. A proposal is circulated to all affected individuals for final approval or veto. “The Japanese decision-making process . . . is one of diffusion rather than outright delegation. Japan’s top managers can be, and often are, as autocratic as any in the world.” *Id.* at 160. “In this sense, the system may best be thought of as a confirmation-authorization process.” *Id.* at 160-61.

⁵⁶⁶ See Linowes, *supra* note 554, at 30; Whitehill, *supra* note 555, at 94-98.

⁵⁶⁷ See Linowes, *supra* note 554, at 30.

⁵⁶⁸ WHITEHILL, *supra* note 555, at 92.

harmony," or protect the nation.⁵⁶⁹ As a result of centuries of collective traditions, and despite recent elections which reflect a growing degree of consumer unrest, the *keiretsu* remain the dominant market force within the Japanese industrial structure.⁵⁷⁰ Moreover, interfirm cooperation will continue to exert a substantial influence on both the domestic Japanese market and the export strategies of *keiretsu* members.

The close working relationship between the business community and the Japanese government⁵⁷¹ also supports the group orientation of the *keiretsu* system,⁵⁷² the open communication that exists among *keiretsu* members,⁵⁷³ and the pursuit of social order. A "survival mentality" or a "national mission" has long been a substantial part of Japanese ideology, and as a result, a powerful and effective consensus concerning national goals has often emerged.⁵⁷⁴ This strong national purpose reinforces the idea that what is beneficial for Japan is also in the best individual interest of each citizen.⁵⁷⁵ The pursuit of these unitary interests has resulted in a system of capitalism that is quite different from that envisioned by Adam Smith. The private sector, the political system, and the professional government bureaucracy are united in a close and "incestuous relationship."⁵⁷⁶ The *keiretsu* and the Japanese Ministry of International Trade and Industry cooperate to create industrial policy through a system of administrative guidance, preempting formal law by means of a private decision-making process.⁵⁷⁷ Administrative guidance may also reward or punish enterprises through over-regulation or deregulation, or through funneling capital to companies whose "goals conform to national policy."⁵⁷⁸

In order to understand the rationality of Japanese business

⁵⁶⁹ Linowes, *supra* note 554, at 30.

⁵⁷⁰ See WHITEHILL, *supra* note 555, at 100 (noting that the Mitsui Group is made up of almost 2,000 companies).

⁵⁷¹ See *id.* at 92.

⁵⁷² See *id.* at 8.

⁵⁷³ See *id.* at 213-19.

⁵⁷⁴ *Id.* at 15-16, 99.

⁵⁷⁵ See *id.* at 51, 99.

⁵⁷⁶ *Id.* at 21 (citing S. PRAKASH SETHI ET AL., THE FALSE PROMISE OF THE JAPANESE MIRACLE 16 (1984)).

⁵⁷⁷ See *id.* at 93.

⁵⁷⁸ See *id.*

conduct and its relationship to U.S. predatory pricing assumptions, two traditional and interrelated Japanese policies must be examined. First, the core of Japanese business enterprise is the permanent worker group, where workers are "for all practical purposes tenured."⁵⁷⁹ Although changing economic conditions may no longer permit companies to guarantee all workers lifetime employment, the aspiration remains.⁵⁸⁰ As a result, it appears that the concept of lifetime employment will endure in the Japanese economy for a substantial period of time.⁵⁸¹

The aspiration of lifetime employment has a profound effect on the goals, motives, and allegiances of Japanese management.⁵⁸² Assuming that managers feel a greater loyalty to their workers than to their stockholders, decisions concerning variables such as capacity level, productivity level, the relative importance of expanded market share and increased return-on-investment, and even the desirability of incurring losses will assume a significantly different dimension. Japanese managers have historically viewed their responsibilities to their employees as more important than their responsibilities to provide dividends for capital suppliers; therefore, the pressures to demonstrate short-term profits or to engage in short-term strategies have been reduced considerably.⁵⁸³

A second policy reflected in Japanese corporate conduct concerns the fervent pursuit of economic growth. Two characteristics of Japanese corporations "[are] their unrelenting focus on competitive position"⁵⁸⁴ and their preoccupation with market share rather than the Westernized objective of return-on-investment.⁵⁸⁵ When capital or expense investments must be made to maintain or increase market share they are made "with little regard for the short-term returns" of the project.⁵⁸⁶ Japanese

⁵⁷⁹ Hofstede, *supra* note 540, at 83-84.

⁵⁸⁰ See WHITEHILL, *supra* note 555, at 52, 97.

⁵⁸¹ See *id.* at 125, 131-33.

⁵⁸² See *id.* at 128-33.

⁵⁸³ See *id.* at 151, 279 (citations omitted).

⁵⁸⁴ Benz, *supra* note 22, at 704-05 n.41 (citing JAMES C. ABEGGLEN & GEORGE STALK, JR., *KAISHA, THE JAPANESE CORPORATION*, 276-77 (1985)).

⁵⁸⁵ See *id.*

⁵⁸⁶ *Id.* at 708-09 n.55 (citing JAMES C. ABEGGLEN & GEORGE STALK, JR., *KAISHA, THE JAPANESE CORPORATION*, 177-78 (1985)); see also Semeraro, *supra* note 22, at 644 n.124.

managers are not beholden to shareholder pressures, and thus they are more able to pursue long-term interests than their U.S. counterparts.⁵⁸⁷ Japanese managers exhibit both "a commendable patience" and "a willingness to accept ambiguity, uncertainty, and imperfection in the short run to achieve success in the longer-term."⁵⁸⁸

By emphasizing market share rather than immediate profit-maximization, by aspiring to provide lifetime employment for their workers, and by honoring and conforming to the goals of their corporate network and the nation, Japanese managers have naturally developed a rewards system and a resulting view of rational business conduct that are far removed from the Chicago School ideal. Although it is difficult to interpret the effects of these cultural differences, especially in the context of developing an antitrust policy, the failure to do so will inevitably lead to an erroneous understanding of pricing activity.

5.3.3. *China and the Socialist Market Economy*

Because of the rapid changes occurring in the People's Republic of China, it is difficult to present an accurate characterization of the Chinese business enterprise. Any attempt to understand China's business climate is further complicated under the new market socialism, as businesses may take a wide variety of forms ranging from private entities to state-owned enterprises.⁵⁸⁹ These businesses will be subject to differing degrees of state control,⁵⁹⁰ and the degree of autonomy will affect the motives, goals, and anticipated rewards of corporate managers. Whether a particular activity represents rational business conduct depends on, and should be evaluated in light of, the type of business enterprise involved.

The Chinese government, in attempting to develop a hybrid economic system known as market socialism, has introduced a variety of reforms and market freedoms designed to: (1) promote growth and productivity; (2) provide increased rewards and

⁵⁸⁷ See WHITEHILL, *supra* note 555, at 88-89.

⁵⁸⁸ *Id.* at 151.

⁵⁸⁹ See Ruth L. Wang et al., *Enterprise Autonomy and Market Structures in China*, in ORGANIZATION AND MANAGEMENT IN CHINA 1979-1990, 23, 24 (Oded Shenkar ed., 1991).

⁵⁹⁰ See *id.*

incentives to managers; and (3) introduce some performance criteria by de-emphasizing the guarantee of job security.⁵⁹¹ Nevertheless, many important Chinese industrial enterprises are still influenced by the central planning tendencies of the Chinese Communist Party and by a socialist society that has, at least historically, viewed all organizations as instruments of the state.⁵⁹² This paradox encourages the central bureaucracy to attempt to plan and coordinate economic development while it simultaneously captures the benefits of a more open marketplace.⁵⁹³

In addressing this paradox, commentators have described the traditional Chinese industrial enterprise as a system that possesses a “‘parallel’ authority structure” under which “administrative” and “party” authority co-exist.⁵⁹⁴ By maintaining a presence within the authority structure, the Communist Party has reserved an active, integrated, and influential role in most of the enterprise’s decisions, including those concerning employee compensation, the appointment of company administrators, and the assurance that party policies are followed.⁵⁹⁵ Few decisions made within the context of the traditional industrial enterprise are based solely on business considerations familiar to the Western manager. Instead, most traditional Chinese business enterprise decisions are influenced by political or ideological tenets. This generalization does not apply to all Chinese enterprises, however, since smaller firms may possess a higher degree of autonomy than traditional industrial enterprises. Moreover, as privatization becomes more widespread in China and enterprises become more profit-motivat-

⁵⁹¹ See Lee A. Graf et al., *Perceptions of Desirable Organizational Reforms in Chinese Enterprises*, in ORGANIZATION AND MANAGEMENT IN CHINA 1979-1990, *supra* note 589, at 47, 47-48; John R. Schermerhorn & Mee-Kau Nyaw, *Managerial Leadership in Chinese Industrial Enterprises*, in ORGANIZATION AND MANAGEMENT IN CHINA 1979-1990, *supra* note 589, at 9, 10.

⁵⁹² See Schermerhorn & Nyaw, *supra* note 591, at 10-11.

⁵⁹³ See Michael Minor & B. Curtis Hamm, *The “Little Dragons” as Role Models*, in ORGANIZATION AND MANAGEMENT IN CHINA 1979-1990, *supra* note 589, at 85, 91.

⁵⁹⁴ Schermerhorn & Nyaw, *supra* note 591, at 12. The administrative authority includes the Workers’ Congress, the factory director, the management cadre, work group leaders, and the workers. See *id.* at 14. The party authority consists of the enterprise party committee, the first secretary, the party cadre, the party group leaders, and the members of the workers holding party. See *id.*

⁵⁹⁵ See *id.* at 13.

ed, political and ideological policies may become less important.

The existence of a substantial state influence has also affected the willingness of managers to make any decisions at all. Generations of strict controls have produced managers who often are incapable or unwilling to make any real decisions or to accept responsibility for them.⁵⁹⁶ The Chinese economic and political environment has fostered a "learned helplessness" among the leadership of large industrial enterprises.⁵⁹⁷

The rationality behind Chinese conduct is further complicated because large Chinese business enterprises often have many sociopolitical characteristics. There is a general lack of separation among the "the business entity, the government, and the society."⁵⁹⁸ The traditional Chinese industrial enterprise consists of three interrelated systems, "life support," "sociopolitical support," and "business and operations."⁵⁹⁹ A large portion of the firm's daily operations revolve around the "life support" or social assistance system, through which the employer assists the worker's family in meeting housing, health care, child care, educational, and recreational needs.⁶⁰⁰ The "sociopolitical support" system is designed to provide spiritual guidance, to advance the socialist ideology, and to provide the Communist Party with a political presence in the enterprise.⁶⁰¹ The "business and operations" system involves the actual production of goods, and represents the portion of the enterprise with which U.S. producers are more familiar.⁶⁰² These three support systems extend the responsibilities of Chinese managers far beyond those of their U.S. counterparts.⁶⁰³

Finally, as with any new entrant to the international market,

⁵⁹⁶ See Oded Shenkar, *Introduction to ORGANIZATION AND MANAGEMENT IN CHINA 1979-1990*, *supra* note 589, at 1, 2-3.

⁵⁹⁷ Schermerhorn & Nyaw, *supra* note 591, at 16-17 (defining "learned helplessness" as the tendency of persons who have been subject to strict control to lose confidence in their ability to succeed).

⁵⁹⁸ Inga S. Baird et al., *Joint Venture Success: A Sino-U.S. Perspective*, in *ORGANIZATION AND MANAGEMENT IN CHINA 1979-1990*, *supra* note 589, at 126.

⁵⁹⁹ Schermerhorn & Nyaw, *supra* note 591, at 11-12.

⁶⁰⁰ *Id.* at 12.

⁶⁰¹ See *id.* at 11.

⁶⁰² See *id.* at 12.

⁶⁰³ See *id.*

short-term profit-maximization cannot be the primary goal of Chinese enterprises. Instead, Chinese businesses must first aim to establish product recognition and a reputation for dependability concerning the fulfillment of business obligations and the timely shipment of ordered merchandise.⁶⁰⁴

The Chinese government recently has instituted a number of economic and developmental reforms. For example, some enterprises have incorporated the concept of performance-based pay, the linking of compensation to enterprise profitability,⁶⁰⁵ and motivational bonuses into their managerial structure.⁶⁰⁶ The government also has attempted to: (1) grant more autonomy to enterprise directors; (2) increase privatization efforts; (3) reduce the burdens of licensing and increase transparency where licensing is required; (4) increase the level of foreign trade and investment in order to acquire technology and information; and (5) relax the control of foreign trade corporations.⁶⁰⁷ Moreover, China and the United States have entered into understandings and agreements concerning prison labor, the protection of intellectual property, and market access.⁶⁰⁸

Despite these advances, China remains a nation in transition. Its history of central planning will continue to retard the development of a profit-maximization mentality. Although entrepreneurship has increased, especially in the small business sector, the state will continue to exert substantial influence over China's industrial sector. Individual leadership initiative will continue to be restricted by the Chinese government, especially after the events at Tiananmen Square.⁶⁰⁹ A tradition of unity between the employer and state and the imposition of nonprofit and sociopolitical responsibilities on the management cadre cannot be eliminated overnight. Similarly, an evaluation and rewards

⁶⁰⁴ See Shenkar, *supra* note 596, at 4 (indicating that one of the Chinese leadership's primary objectives is to "enhance reputation and market recognition for Chinese products").

⁶⁰⁵ See *id.* at 1, 4.

⁶⁰⁶ See Graf et al., *supra* note 591, at 53.

⁶⁰⁷ See Shenkar, *supra* note 596, at 4; Heidi Vernon-Wortzel et al., *The People's Republic of China as an Exporter*, in ORGANIZATION AND MANAGEMENT IN CHINA 1979-1990, *supra* note 589, at 161, 166-67.

⁶⁰⁸ See THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, *supra* note 46, at 221-22.

⁶⁰⁹ See Schermerhorn & Nyaw, *supra* note 591, at 16.

system tied to merit and profitability cannot immediately replace a system that traditionally has been based on "good 'citizenship,'"⁶¹⁰ seniority,⁶¹¹ and job security.⁶¹² As a result, although China has been moving from a command economy to a socialist market economy and although its anticipated entry to the WTO will re-enforce China's movements toward economic reform, it will still be some time before U.S. business assumptions can be applied to Chinese managers.

5.3.4. *A Summary: Recoupment as a Rewards System*

The issue concerning the ability to recoup arises in two contexts. First, as in *Matsushita*, the ability to recoup can be examined to determine the rationality of the alleged conduct and whether it was likely or probable that the defendants had engaged in a predatory conspiracy.⁶¹³ Second, as demonstrated by *Brooke Group*, the ability to recoup can be viewed as a prerequisite for recovery even if predatory pricing has actually occurred.⁶¹⁴ In both cases, recoupment is defined in terms of the ability to reap subsequent monopoly profits in the predated market.⁶¹⁵

When determining the rationality of business conduct, the courts must consider the potential use of strategic behavior, the ability to segregate international markets, and the effects of political and cultural diversity. In summarizing the observations previously presented, this subsection examines recoupment in terms of a rewards system, and proposes that the availability of a variety of rewards, including subsequent monopoly profits, can provide a rational basis for predatory pricing activity.

Defining recoupment in terms of a rewards system may aid antitrust enforcers in applying the insights of industrial organization theory. For example, a substantial presence within a market at a particular period of time may constitute a predatory reward if it is recognized that a predatory pricing strategy may encompass

⁶¹⁰ *Id.*

⁶¹¹ See Graf et al., *supra* note 591, at 53.

⁶¹² See Mee-Kau Nyaw, *The Significance and Managerial Roles of Trade Unions in Joint Ventures with China*, in ORGANIZATION AND MANAGEMENT IN CHINA 1979-1990, *supra* note 589, at 114.

⁶¹³ See *Matsushita*, 475 U.S. at 585-95.

⁶¹⁴ See *Brooke Group*, 113 S. Ct. at 2587-88.

⁶¹⁵ See *id.* at 2588; *Matsushita*, 475 U.S. at 588-89.

different time periods and that both information and financial resources can be asymmetric among competitors and potential competitors.⁶¹⁶ The theoretical parity between market incumbents and, either new or potential, entrants has been seriously questioned, and it has been recognized that a market presence during one time period may have a direct impact on both future demand and future costs.⁶¹⁷ Similarly, the exercise of strategic behavior during one time period can affect competitive conditions in another. As a result, the sacrifice of current revenues in order to deter entry by a potential competitor can lead to a variety of strategic rewards.⁶¹⁸

The ability to alter future market conditions or future market perceptions may be used to: (1) establish a consumer tolerance for higher prices by increasing or solidifying a consumer base;⁶¹⁹ (2) increase switching and information costs;⁶²⁰ (3) deter the adoption of newer but less widely used technology;⁶²¹ (4) inhibit competition at a critical stage of product development;⁶²² and (5) increase the costs associated with the acquisition of experience.⁶²³ Moreover, where information is imperfect, it may be used to alter the potential entrants' perceptions about market profitability, market demand, the incumbent's willingness to predate, or the incumbent's level of efficiency.⁶²⁴ Similarly, a substantial market presence may also allow for the creation of a reputation for toughness whereby predatory losses can be recouped in markets other than that in which the predation occurred.⁶²⁵ The resulting rewards are based on the advantages which market participants have over those firms outside of the market. Traditional notions of equality between incumbents and potential entrants must no longer be assumed.⁶²⁶

⁶¹⁶ See Ordovery & Saloner, *supra* note 32, at 591.

⁶¹⁷ See Milgrom & Roberts, *supra* note 32, at 116.

⁶¹⁸ See *supra* section 5.1.

⁶¹⁹ See Milgrom & Roberts, *supra* note 32, at 117.

⁶²⁰ See *id.* at 116.

⁶²¹ See *id.* at 117.

⁶²² See Kaplan & Kuhbach, *supra* note 4, at 451-52.

⁶²³ See Milgrom & Roberts, *supra* note 32, at 116.

⁶²⁴ See *id.* at 123-25.

⁶²⁵ See *id.* at 131-33.

⁶²⁶ See *supra* section 5.1.

In addition to the rewards achievable through the use of strategic behavior, the existence of segregated international markets and the ability to price discriminate between domestic and foreign consumers provides the opportunity to recoup at least a portion of predatory losses.⁶²⁷ By increasing the volume of output, a foreign producer could lower the average cost of production for all units produced, including those sold domestically and abroad.⁶²⁸ The revenues lost on the sale of a portion of the increased output at prices below average cost could be offset by the cost savings enjoyed on the remainder of the units.⁶²⁹ Even if some units were sold abroad at less than average variable cost, the losses incurred would be partially offset by the increased revenues obtained in the protected domestic market.⁶³⁰ As a result, even where predatory pricing would lead to an overall loss, this loss would be less than that incurred by producers selling in nonsegregated markets.⁶³¹ A foreign producer is capable of simultaneously recouping or cross-subsidizing predatory losses equal to the difference between the average total cost before the increase in output and the average total cost after the increase in output on all sales taking place within the protected market.⁶³² While an increase in home-market revenues would only constitute a partial reward for incurring losses overseas, this reward may be sufficient to justify predatory activity when combined with one or more other rewards.

Considering the effects of cultural diversity, it also becomes clear that predatory rewards may include substantially more than the subsequent recovery of monopoly profits. A national culture that strongly emphasizes economic growth and development, for example, may be reflected in a corporate culture that views increased market share as a more important reward than return-on-investment.⁶³³ The likelihood that this corporate culture exists is enhanced when: (1) individual success is measured by the

⁶²⁷ See *supra* notes 480-519 (discussing the Viner dumping analysis to predatory pricing).

⁶²⁸ See *id.*

⁶²⁹ See *id.*

⁶³⁰ See *id.*

⁶³¹ See *id.*

⁶³² See *id.*

⁶³³ See Benz, *supra* note 22, at 704-05 n.41, 708 n.55.

success of the group;⁶³⁴ (2) corporate success is measured by world share;⁶³⁵ (3) nationalism and a survival mentality are strong;⁶³⁶ and (4) managers are able to engage in long-term strategies free from the profit-oriented pressures of corporate shareholders.⁶³⁷ The relative importance of market share and return-on-investment may depend on factors such as: (1) the stage of a nation's economic development; (2) the need to establish a market presence; (3) the need to acquire hard currency; (4) the degree of governmental ownership or influence;⁶³⁸ (5) the relationship between performance and evaluation;⁶³⁹ and (6) the degree to which non-business or sociological responsibilities are imposed on managers.⁶⁴⁰

Despite the preoccupation⁶⁴¹ with market share that exists within segments of the international market, antitrust enforcers continue to assume that all market participants value profit-maximization over growth.⁶⁴² Unfortunately, the consequences of this assumption have been painfully clear to U.S. producers who have lost substantial market share.⁶⁴³

Closely related to the goal of increased market share is the pursuit of stable or secure domestic employment. Historical and cultural obligations existing between employers and workers are

⁶³⁴ See *supra* note 565 and accompanying text.

⁶³⁵ See Benz, *supra* note 22, at 704-05 n.41 (citing JAMES C. ABEGGLEN & GEORGE STALK, JR., *KAISHA, THE JAPANESE CORPORATION 276-77* (1985)).

⁶³⁶ See WHITEHILL, *supra* note 555, at 99.

⁶³⁷ See *id.* at 695, 697 n.9, 704-05 n.41, 705 n.42, 708-09 n.55, 729 n.143, 738-39 n.193, 740-41.

⁶³⁸ See *supra* section 5.3.2.

⁶³⁹ See *id.*

⁶⁴⁰ See *id.*

⁶⁴¹ See Benz, *supra* note 22, at 704-05 n.41 (citing JAMES C. ABEGGLEN & GEORGE STALK, JR., *KAISHA, THE JAPANESE CORPORATION 276-77* (1985)).

⁶⁴² See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 604 (1985) (White, J., dissenting).

⁶⁴³ See *Matsushita*, 475 U.S. at 591 (noting that while the shares of RCA and Zenith in the retail television market "did not decline appreciably during the 1970's," the defendants' share rose from 20% or less to close to 50%); see also Benz, *supra* note 22, at 697 n.9 ("In 1976 U.S. producers held 95.1% and Japanese producers held 3.7% of the U.S. market [in machine tools], but by 1981 the U.S. share of the market had fallen to 48.7% while the Japanese share had risen to 50.1%." (citing Richard D. Copaken, *The Houdaille Petition: A New Weapon Against Unfair Industry Targeting Practices*, 17 GEO. WASH. J. INT'L L. & ECON. 211, 214 (1983))).

substantially stronger in some nations than in others.⁶⁴⁴ Although the adoption of the downsizing approach by many market participants may eventually mandate adjustments in ideology, the reward of employment security, whether defined in terms of actual lifetime employment or merely the aspiration thereof, will continue to be pursued for some time to come.⁶⁴⁵

The goal of employment security, however, results in an unusual effect upon the laws of supply and demand. In order to increase or secure employment opportunities, firms overproduce, and prices are set at whatever level is necessary to dispose of the oversupply.⁶⁴⁶ The societal goal of employment stability has been made an integral part of the business decision-making process. While this mixture of social and business criteria may be foreign to the U.S. manager, the financial losses resulting from such a policy may be more than outweighed by the accompanying social gains.⁶⁴⁷

By implementing societal goals, whether in the form of increased economic development, increased exports and market share, enhanced employment security, or the advancement of a political ideology, foreign producers may also be rewarded by means of accruing governmental favor.⁶⁴⁸ The reward of governmental favor, while certainly beyond the scope of traditional notions of recoupment or rational profit-maximization models, may be a major determinant in business decision-making when there is a close relationship between the business community and the government. Governmental favor may take the form of investment incentives, tax relief, subsidies, public/private joint ventures, deregulation, or the condoning of monopolization or

⁶⁴⁴ See Epstein, *supra* note 31, at 54.

⁶⁴⁵ See WHITEHILL, *supra* note 555, at 125, 131-33.

⁶⁴⁶ See Benz, *supra* note 22, at 738-39 n. 193 (citing JAMES C. ABEGGLEN & GEORGE STALK, JR., *KAISHA, THE JAPANESE CORPORATION* 6 (1985)) ("Prices are set not at the level that the market will bear but as low as necessary to expand the market to fit the available capacity."). For a discussion on the issues of employment and excess capacity, including the market power ramifications of excess capacity, see *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986); *Matsushita*, 475 U.S. at 593 n.18; *PREDATORY PRICING*, *supra* note 27, at 9, 26, 92 n.35; Kaplan & Kuhbach, *supra* note 4, at 455-56; Benz, *supra* note 22, at 697 n.10, 708 n.55, 738 n.193; Warner, *supra* note 4, at 830-33.

⁶⁴⁷ See *supra* section 5.3.2.

⁶⁴⁸ See Benz, *supra* note 22, at 697-707.

cartelization through the lax enforcement of antitrust laws.⁶⁴⁹

Although the discussion above indicates that not all businesses are rational short-term profit-maximizers, it may be assumed that all businesses are rational. When predatory pricing activity can achieve corporate goals, as defined not only by the corporation, but by the societal and governmental structures in which it operates, there are a variety of rewards that can be used to counterbalance the short-term loss and to elevate predatory activity to the level of sound business practice.

Below-cost pricing may be a prerequisite for accomplishing these corporate and social goals when a corporation is attempting to establish a foothold within a market. Although this is often the goal of sophisticated corporations located in highly industrialized nations, the need to establish product demand, goodwill, and distribution channels is of particular importance to infant industries in developing nations. These industries may be efficient in terms of general labor costs, but inefficient in terms of labor skills and production technology. Below-cost pricing, therefore, often is necessary to achieve the rewards of successful entry and future cost reduction. Moreover, any efficiency or technology gains acquired during the entry process will tend to provide spillover rewards to both the firm itself and to other businesses located within the developing nation's economy.⁶⁵⁰

Generally, the addition of a new competitor to the market is beneficial to competition. It enhances consumer choice, stimulates rivalry and innovation, and restricts the ability of others to elevate their prices.⁶⁵¹ As a result, below-cost pricing undertaken to permit market entry should not give rise to any substantial antitrust concern.

Unfortunately, the point at which a new entrant becomes a market incumbent is unclear. Problems arise when the new entrant, having established a substantial foothold, continues to engage in below-cost sales. At this point, the entrant may be seeking unearned and unjustified rewards. For example, a foreign entrant who is already receiving a variety of cultural-specific rewards may continue to engage in below-cost pricing in an

⁶⁴⁹ See *id.*

⁶⁵⁰ See *id.* at 713, 719 n.93 (citations omitted) (discussing spillover effects).

⁶⁵¹ David W. Barnes, *Revolutionary Antitrust: Efficiency, Ideology, and Democracy*, 58 U. CIN. L. REV. 59, 107 (1989).

attempt to further deter investment by other potential entrants or incumbents. By lowering the rate of profitability within the industry, a foreign producer may attempt to stabilize the existing market not only in terms of the number of competitors, but in terms of research and development, innovation, or technological advancement.⁶⁵²

A less efficient producer, therefore, may be rewarded with an opportunity to compete with its more productive rivals. In *Matsushita*, for example, it was argued that the influx of television sets at depressed prices substantially reduced the financial rates of return on production facilities located within the United States, thereby rendering any future investment in such facilities uneconomic.⁶⁵³ In a industry that soon would become profitless, the U.S. producers were forced to take dramatic cost-cutting measures, including those that affected research, product development, and future efficiency.⁶⁵⁴ Limit pricing⁶⁵⁵ might have been used to accomplish the same result, but market power is a requirement for the successful use of this theory.⁶⁵⁶

The ability to achieve these rewards should also be examined in light of the ability of foreign producers to cooperate with each other and to coordinate their activities toward the accomplishment of these goals. The U.S. Supreme Court has indicated that predatory pricing conspiracies are inherently "speculative,"⁶⁵⁷ that they are "incalculably more difficult to execute"⁶⁵⁸ than single-firm predation, and that, once created, these conspiracies are

⁶⁵² See PHILLIP AREEDA & DONALD F. TURNER, III *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 159-64 (1978).

⁶⁵³ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 602 n.2 (1986) (White, J., dissenting).

⁶⁵⁴ See *Benz*, *supra* note 22, at 740 n.200 (citing a letter from former Zenith counsel).

⁶⁵⁵ See *Transamerica Computer Co. v. International Business Mach. Corp.*, 698 F.2d 1377, 1387 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983) (defining limit pricing as setting "prices above average total cost but below the short-term profit-maximizing level so as to discourage new entrants and thereby maximize profits over the long run"); see also *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234-35 (1st Cir. 1983) (alluding to difficulties in determining whether a price reduction is profit-maximizing in the short run).

⁶⁵⁶ See AREEDA & TURNER, *supra* note 652, at 159-60.

⁶⁵⁷ *Matsushita*, 475 U.S. at 588.

⁶⁵⁸ *Id.* at 590.

difficult to maintain.⁶⁵⁹ Anticompetitive coordination may be based on only the most tenuous of agreements. Because these agreements are illegal, they must be substantially invisible. As a result, coordination is generally doomed by a strong incentive to cheat in order to avoid predatory losses and by the desire to free ride on the actions of co-conspirators.⁶⁶⁰

Such beliefs are invalid when applied to conspiracies having their origins abroad. The ability to conspire successfully depends on the ability to coordinate the actions of the conspirators,⁶⁶¹ and the ability of the conspirators to communicate directly with each other.⁶⁶² A successful conspiracy also depends on variables such as: (1) the incentive to cheat and deviate from the group;⁶⁶³ (2) the capacity to punish those who fail to conform;⁶⁶⁴ (3) the degree to which conspiratorial agreements are condoned by the government;⁶⁶⁵ and (4) the nature of the rewards to be achieved by the conspiracy.⁶⁶⁶

As a result, whether a conspiracy is incalculably difficult to maintain depends on the cultural characteristics of the nation in which the conspiracy was created and maintained.⁶⁶⁷ In many nations, for example, a sense of collectivism and a loyalty to the group are viewed as substantially more important than the right to pursue individual goals.⁶⁶⁸ The ability to maintain cooperation between business entities is greater in a society that: (1) encourages conformity; (2) values consensus building and risk avoidance; (3) emphasizes the importance of maintaining and respecting the group; and (4) stresses the pursuit of social order.⁶⁶⁹ This ability also is increased where: (1) the conspirators are already involved in domestic cartelization or interlocking

⁶⁵⁹ *Id.* at 589.

⁶⁶⁰ *See id.* at 590; *see also* Elzinga & Mills, *supra* note 23, at 576.

⁶⁶¹ *See* John S. McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 U. CHI. L. REV. 191, 198 (1960).

⁶⁶² *See id.* at 200.

⁶⁶³ *See id.* at 197 ("In cartels the first problem is that of defection . . .").

⁶⁶⁴ *See id.* at 196-98.

⁶⁶⁵ *See id.* at 202.

⁶⁶⁶ *See id.* at 200-04.

⁶⁶⁷ *See supra* section 5.3.1.

⁶⁶⁸ *See id.*

⁶⁶⁹ *See generally* WHITEHILL, *supra* note 555 (discussing cultural differences and how they affect the business environment).

relationships; (2) communication channels among network members have already been established; (3) unbridled competition is viewed with disfavor; and (4) the government provides a unifying and guiding influence.⁶⁷⁰

The incentive to adhere to the terms of a conspiracy also can be affected by a variety of other factors. The U.S. Supreme Court, for example, has assumed that all predatory pricing conspiracies are designed to obtain future monopoly profits.⁶⁷¹ The probability of achieving this goal in the international setting is slight because the predator must defeat not only its prey but all other potential global competitors and therefore the willingness to cheat is enhanced. Where, however, the goal of the conspiracy is more modest—such as increasing the level of exports or market share, providing employment opportunities, or gaining access to hard currency—the greater probability of success might reduce the incentive to cheat. Similarly, a business enterprise that is less profit-oriented, that possesses a variety of sociopolitical responsibilities, and that is free to pursue long-term strategies might be less likely to engage in cheating for the purpose of acquiring a short-term gain.

The incentive to cheat is affected by the ability of co-conspirators to punish those who fail to follow the agreement.⁶⁷² One commentator, for example, indicates that “excess capacity can facilitate coordination by increasing the ability of the oligopoly to punish firms that deviate.”⁶⁷³ Furthermore, the members of a particular conspiracy also may be members of a much broader business network that encompasses a variety of other business obligations, interdependencies, and relationships.⁶⁷⁴ As a result, the failure to honor an agreement with a member of that network may lead to the imposition of sanctions by other members of that group whose goodwill is a prerequisite for corporate survival.⁶⁷⁵ Moreover, if interfirm cooperation advances national interests, a

⁶⁷⁰ See generally *id.* (observing that it is easier to maintain such relationships in Japan than in the United States because of the cultural differences and their effect on the corporate climate).

⁶⁷¹ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986).

⁶⁷² See McGee, *supra* note 661, at 196-98.

⁶⁷³ Baker, *supra* note 14, at 600.

⁶⁷⁴ See WHITEHILL, *supra* note 555, at 95-96, 100-01 (describing *keiretsu*).

⁶⁷⁵ See *id.* at 94-96.

willingness to jeopardize the success of that cooperation might result in varying degrees of governmental disfavor.⁶⁷⁶

Both the ability to conspire and the willingness to deviate from the agreement will vary from culture to culture. Where anticompetitive conspiracies are viewed with disdain, conspirators may be forced to rely on a series of nebulous signals or tacit collusion. On the other hand, where the competitive process is viewed differently, conspirators may be allowed to engage in more blatant forms of interfirm cooperation. These observations should not be used to criticize the enforcement procedures of different nations because to do so would impose the cultural history and the economic beliefs of one nation on another. The degree of tolerance accorded anticompetitive conspiracies has nothing to do with morality, but is instead a reflection of differing attitudes toward alternative economic systems. These attitudes, in turn, are founded on centuries of cultural, political, and philosophical influences that vary substantially among nations. As a result, an anticompetitive conspiracy may be viewed as either a method of reducing consumer welfare or as a means for achieving a variety of social goals.

In either case, the use of strategic behavior, the ability to segregate markets, and the existence of a variety of different predatory rationales and predatory rewards can result in below-cost pricing behavior that is based on sound business judgment. This, however, addresses only one-half of the predatory equation. Because predatory pricing results in lower prices for U.S. consumers, the question remains why the United States should be concerned with predatory pricing activity absent the ability to obtain market power and subsequently to raise prices above the competitive level. The answer is that even in the absence of traditional market power, predatory pricing activity: (1) reduces global efficiency; (2) substantially injures more efficient producers; (3) imposes considerable social and total welfare costs on both the United States and other nations; (4) endangers the long-term interests of the world's consumers; and (5) severely frustrates the goals of the WTO Agreement.⁶⁷⁷ In support of these contentions, it will be argued that the concepts of market power and

⁶⁷⁶ See *id.* at 92-93.

⁶⁷⁷ See Agreement Establishing the World Trade Organization, *reprinted in* FINAL TEXTS, *supra* note 29, at 9.

recoupment must be viewed in light of relative efficiencies, and that these concepts must be used as tools to implement the spirit of the WTO Agreement and to reduce or eliminate U.S. reliance on antidumping remedies.

5.4. *The Need to Redefine the Concept of Market Power*

The antitrust laws are designed to protect "competition, not competitors."⁶⁷⁸ Despite the fact that competition is "inherently vague and not self defining,"⁶⁷⁹ it is identified with the promotion of economic efficiency. As the court noted in *Roland Machinery Co. v. Dresser Indus.*,⁶⁸⁰ competition is merely the reflection of "the allocation of resources in which economic welfare . . . is maximized."⁶⁸¹ It is believed "that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."⁶⁸²

As a result, anticompetitive conduct often has been tied to the ability of a firm to harm an equally or more efficient business rival, thus causing a decrease in the overall efficiency of the relevant market.⁶⁸³ Barring the application of the rarely used *per se* rule, only those activities that demonstrate the potential to harm competitors on non-efficiency grounds, and thus to harm the market itself, should be matters of public concern.⁶⁸⁴ Similarly, business strategies that restrain competition will be acceptable when these activities enhance the efficiency of the imposing firm and thus the efficiency of the market in which it operates.⁶⁸⁵ Restrictions that tend to increase output, decrease cost, or lower consumer prices will be viewed as procompetitive rather than restrictive under a rule of reason analysis.⁶⁸⁶

⁶⁷⁸ *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

⁶⁷⁹ Lande, *supra* note 7, at 81.

⁶⁸⁰ See *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380 (7th Cir. 1984).

⁶⁸¹ *Id.* at 395.

⁶⁸² *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

⁶⁸³ See *Transamerica Computer Co. v. International Business Mach.*, 698 F.2d 1377, 1384 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983).

⁶⁸⁴ See *AREEDA & TURNER*, *supra* note 652, at 153-54.

⁶⁸⁵ See *generally id.* (proposing that not all competition restraints should be prohibited under the Sherman Act).

⁶⁸⁶ See *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 103, 109-20 (1984) (holding that a fair examination of the

In order to equate increased efficiency with increased competition, antitrust policymakers must arrive at a consensus concerning the nature of economic efficiency. This concept could be defined in terms of national welfare or net welfare, where gains to consumers would be weighed against losses to producers. A total welfare standard, therefore, would reflect both consumer surplus and producer surplus.⁶⁸⁷ Moreover, a total welfare standard

impact of a restraint might include an examination of the efficiencies and pro-competitive justifications involved); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 19-20 (1979) (noting that the decision to apply the *per se* rule or the rule of reason depends upon whether the restriction was designed to increase economic efficiency and render markets more competitive); *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (indicating that even the exchange of price information may increase economic efficiency and render markets more competitive); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977) (stating that vertical restrictions may stimulate interbrand competition by allowing the manufacturer to achieve distribution efficiencies); *Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989) (stating that to be anticompetitive, a practice must be capable of materially impacting an equally efficient competitor or permanently eliminating an efficient competitor); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (discussing the ability to exclude equally efficient competitors); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 87 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) (describing competition in terms of relative efficiency); and *In re Beltone Elecs. Corp.*, 100 F.T.C. 68, 208, 217 (1982) (holding that the party imposing restraints may defend based on pro-competitive efficiencies). *But cf.* Lawrence A. Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1232 (1977) (warning that the antitrust laws address values other than economic efficiency and that courtrooms are not merely "laboratories for empirical investigation of issues framed by economists").

⁶⁸⁷ See Morris, *supra* note 4, at 945-46 n.4.

Economists equate economic efficiency with total welfare. In individual market analyses, . . . economists use the term "consumer welfare" (or "consumer surplus") to describe the benefits of buyers, and economists use the term "producer welfare" (or "producer surplus") to describe the benefits of suppliers. Total welfare simply equals the sum of consumer welfare and producer welfare.

Id. at 945-46 n.4; see also Hawk, *supra* note 64, at 1164 ("In an economy open to imports and foreign competition, the antitrust policy objective might be a net national welfare standard which aggregates the citizens' consumer surplus and the profits of domestic firms . . ."). *But see* Ordovery & Saloner, *supra* note 32, at 578 (emphasis omitted):

The losses to firms, in terms of diverted profits, can, in principle, outweigh gains in consumers' surplus causing domestic social welfare to fall. . . . Yet, there is no persuasive reason why the foreign government should be kept to the same standards of conduct as that which applies to domestic and foreign firms.

could include not only losses in market share and profits on the part of efficient firms, but it could reflect a variety of other social costs as well. These social costs could include the preclusion of entry investment, the idling of resources, expenditures for job training, expenditures for unemployment and welfare benefits, and the redeployment of resources to less efficient endeavors.⁶⁸⁸

Consistent with Chicago School ideology, however, economic efficiency has instead become synonymous with consumer welfare. U.S. antitrust policy, and the policy of many OECD nations is based on the exclusive goal of maximizing that welfare.⁶⁸⁹ In order to accomplish this goal, the market must be free both to direct or allocate society's resources to the locations most responsive to consumer wishes and to allow businesses to pursue productive efficiencies to satisfy those wishes.⁶⁹⁰

A market must be able to engage in perpetual self-correction. It is not surprising, therefore, that the primary, if not exclusive, evil to be avoided is the creation and exercise of market power that inhibits or frustrates the corrective process.⁶⁹¹ The focus of the market power inquiry will be directed at a defendant's ability to raise prices and restrict output.⁶⁹² When price and supply are unresponsive to consumer preference, lower output redirects resources to less desirable uses and higher prices result in the imposition of a tax on purchasers.⁶⁹³ Market power is generally determined by the size of the defendant's market share, and because market power is generally a prerequisite for antitrust

⁶⁸⁸ See Epstein, *supra* note 31, at 48-50.

⁶⁸⁹ Cf., e.g., *National Collegiate Athletic Ass'n*, 468 U.S. at 107 (observing that the Sherman Act was designed as a prescription for consumer welfare); BORK, *supra* note 7, at 7, 51 (arguing that the basic goal of antitrust law should be to maximize consumer welfare); INTERIM REPORT, *supra* note 30, at 2, 5, 9 (providing that competition policy is primarily designed to enhance economic efficiency and to ensure the efficient allocation of resources).

⁶⁹⁰ The importance of the latter factor is emphasized in BORK, *supra* note 7, at 405 (concluding that the "[f]ailure to consider productive efficiency . . . is probably the major reason for the deformation of antitrust's doctrines").

⁶⁹¹ The self-detering characteristics of markets are discussed *supra* section 2.1.

⁶⁹² See *infra* section 5.4.2.

⁶⁹³ See THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS, *supra* note 46, at 174 (concerning the taxing of purchasers); *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 106-08 (1984); *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969).

liability, firms lacking substantial market share are often free to engage in activities that would be unlawful when undertaken by larger firms.⁶⁹⁴ The OECD has clearly adopted the position that a predator must have “some real measure of market power before a predation rule should apply”⁶⁹⁵ and that when the relevant market structure makes it unlikely that market power could be exercised, any predatory pricing inquiry should end.⁶⁹⁶

By their very nature, both international dumping and predatory pricing practices will seldom, if ever, meet these consumer welfare criteria. Both of these practices involve lowering consumer prices rather than imposing a consumer tax.⁶⁹⁷ Both tend to increase the amount of goods that are immediately available to purchasers rather than restrict the quantity of output.⁶⁹⁸ Furthermore, while the dumping remedy does not require market power, the international pricing predator, who participates in the most extreme form of dumping, will seldom possess a sufficient share of the international market to meet the market power prerequisite.

These criteria are applied because antitrust enforcers have chosen to define competition solely in terms of consumer welfare. This reflects a conscious decision, and not an economic truism, that the antitrust laws will be limited to addressing the needs of consumers; the total or net welfare of the nation will be left to other forms of governmental intervention.

Additionally, the fear of market power, and its justification as a prerequisite for liability, are based on the belief that the ability to exclude a business rival is predicated on the existence of market power⁶⁹⁹ and that any temporary market failure will be quickly

⁶⁹⁴ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578, 2589 (1993) (stating that market power is a prerequisite for antitrust liability); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988), *cert. denied* 490 U.S. 1084 (1989); see also *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 464 (1992) (looking to market share as a gauge for market power); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (holding that a “naked” restriction on price or output cannot be justified in the absence of market power).

⁶⁹⁵ PREDATORY PRICING, *supra* note 27, at 31.

⁶⁹⁶ See *id.* at 82.

⁶⁹⁷ See *supra* section 1.1

⁶⁹⁸ See *id.*

⁶⁹⁹ See *AREEDA & TURNER*, *supra* note 652, at 300-02 (“The definition of exclusionary conduct is predicated on the existence of substantial market

corrected in its absence. This belief is based on the assumption that because business entities are rational profit maximizers, they would not attempt predatory activities unless they possessed market power or had the realistic expectation of achieving it. The existence of different rationales and rewards tends to indicate that these beliefs may be misplaced. Not only is the international market far less free to self-correct, but the ability to exclude may be exercised by firms possessing substantially less market share than that traditionally viewed as necessary.

5.4.1. *The Consumer Welfare Focus in an Imperfect World*

In a perfect world, all firms would compete on an equal basis. Each would be subject to the same governmental regulation, government subsidies and international barriers to entry would not exist, competition would be based on the merits of quality and cost containment, and prices would closely approximate marginal cost. In such a world, a lower price could only represent greater productive efficiency, or extremely irrational and self-destructive behavior. Under these circumstances, antitrust policy could be limited to prohibiting the creation and exercise of market power. Without market power, predatory pricing could never be sustained and, strategically, this impossibility would be known to all potential targets. This policy could thus be directed exclusively at protecting consumer welfare because the most efficient competitors would always survive. Similarly, any firm that could not compete in such a market would not be worthy of protection.

Unfortunately, the international marketplace is far from perfect. Economic, cultural, and governmental environments vary widely throughout the world, as do the incentives and opportunities created by those environments. As a result, while focusing on the short-term consumer welfare of U.S. purchasers may be an adequate policy in a closed domestic economy,⁷⁰⁰ this policy fails

power.”).

⁷⁰⁰ One commentator has argued that

A net national welfare standard, rather than the domestic consumer welfare standard, might be more appropriate in the international context. In a closed economy, the primary . . . policy objective is consumer welfare In an economy open to imports and foreign

to consider the effects of external influences. This policy also fails to provide any impetus for efficiency-based international competition and it fails to provide any stimulus for the opening of foreign markets. Until attitudes toward efficiency and market power change, antidumping advocates will continue to argue the necessity for a level playing field among international competitors, and potential predatory pricing plaintiffs will be channeled away from antitrust remedies, and toward discriminatory and efficiency-inhibiting antidumping relief.

As a result of these failures, it is conceivable that a less efficient foreign producer could substantially injure, and actually exclude, a more efficient U.S. rival.⁷⁰¹ The existence of government subsidies and home-market monopoly profits, when coupled with a variety of nationalistic and cultural incentives that emphasize the acquisition of market share, provides foreign firms with both the will and the ability to outlast their more efficient free-market rivals.⁷⁰² While this practice may be efficient in terms of short-term U.S. consumer welfare, it is extremely wasteful in terms of productive efficiency and imposes significant social or public costs.⁷⁰³

The failure of antitrust policy to protect the productive U.S. firm from international price predation is even more interesting given that productive efficiencies are considered important in a variety of other domestic antitrust contexts. Several lower courts have held that a pricing policy will not be anticompetitive unless the policy is "capable of materially impacting on an equally efficient plaintiff's viability as a market competitor."⁷⁰⁴ Furthermore, some commentators have noted that only conduct "which permanently eliminates efficient competitors . . . should be

competition, the antitrust policy objective might be a net national welfare standard

Hawk, *supra* note 64, at 1164 (footnote omitted).

⁷⁰¹ See Epstein, *supra* note 31, at 48-49; see also Ong, *supra* note 4, at 431 ("[M]assive subsidies distort competition by enabling less efficient producers to drive more efficient producers from the market.").

⁷⁰² See, e.g., Eckes, *supra* note 4, at 423-24 (discussing subsidies to European steel makers which ultimately "exacerbated the decline of the U.S. steel industry"); see also Ong, *supra* note 4, at 430-31; Benz, *supra* note 22, at 695, 699-701, 716-720, 741.

⁷⁰³ See Eckes, *supra* note 4, at 423-24; Epstein, *supra* note 31, at 43-50, Ong, *supra* note 4, at 430-31; Benz, *supra* note 22, at 695, 699-701, 716-20, 741.

⁷⁰⁴ Morgan v. Ponder, 892 F.2d 1355, 1363 (8th Cir. 1989).

prohibited.⁷⁰⁵ The incremental cost benchmark is based on the belief that pricing above marginal cost could only be used to harm less efficient firms, and thus should not be a matter of antitrust concern, while pricing below marginal cost could damage more efficient rivals and thus should be suspect.⁷⁰⁶

By de-emphasizing the relevance of productive efficiencies, the current consumer welfare focus also encourages both a global and domestic misallocation of resources.⁷⁰⁷ It is ironic in the wake of the WTO agreement that as global economies become more interdependent and as more nations develop competition policies aimed at increasing allocative efficiency, defined in terms of the welfare of consumers located in the particular nation, overall global wealth may actually decline.

Assume, for illustrative purposes, that company A ("A"), a foreign producer, produces product X ("X") at an unsubsidized cost of \$10 per unit. A, however, receives either an undetectable or lawful domestic subsidy of \$2 per unit or, alternatively, because it can support a loss by means of monopoly profits at home, it sells the product in the United States for \$8 per unit. Assuming that A lacks market power, and thus cannot later recoup its losses, the U.S. consumer receives a \$2 benefit from the predatory price. Furthermore, assume that at least one U.S. company ("B"), which was producing or could have produced X more efficiently at a cost of \$9 per unit, is deterred from competing. B therefore chooses to produce product Y instead at a cost of \$15 per unit. Finally, assume that A, if it had chosen to produce product Y, could have done so at a cost of \$12 per unit. For a variety of reasons, such as a desire to gain a foothold in the product market for X, anticipated spillover effects, or nationalistic pressures to engage in technological rather than labor-intensive industries, and in light of the existence of finite resources, A continues to produce product X rather than product Y.

⁷⁰⁵ *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344 (8th Cir. 1987) (discussing Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975)).

⁷⁰⁶ See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (holding that "[w]hen prices exceed incremental costs" they will not "have a tendency to exclude or eliminate equally efficient competitors").

⁷⁰⁷ For discussions concerning misallocation of resources, see Eckes, *supra* note 4, at 423; Epstein, *supra* note 31, at 46-50; Benz, *supra* note 22, at 695, 701, 716-20, 741, 743.

Under such circumstances, it could be argued that company A would be inefficiently producing product X and company B would be inefficiently producing product Y. As a result, there would be a global loss of \$1 for every X produced, by producing X for \$10 rather than \$9, and a global loss of \$3 for every Y produced, by producing Y for \$15 rather than \$12. Moreover, from a domestic standpoint, the U.S. consumer would be saving \$2 on every X that was purchased, but spending \$3 more on every Y that was purchased. Assuming similar quantities, U.S. consumer welfare would be reduced by \$1 per pair of purchases.

Such a scenario highlights the importance of freely permitting global specialization. Foreign firms must be absolutely free to manufacture and export those products which they can produce more efficiently than their competitors. The free movement of goods must not be inhibited by the use, or by the threatened misuse, of antidumping policies designed to protect domestic industries from alleged price discrimination regardless of the relative efficiencies of the foreign and domestic firms. At the same time, inefficient foreign competitors, who can compete only by offering their products at prices that are below cost, should be discouraged from engaging in such activities. Similarly, more efficient U.S. firms should be protected from possible predatory exclusion and must be encouraged to enter new markets, to invest in research and development, and to take legitimate business risks in the expectation of reasonable profits. While specialization may cause some U.S. industries to contract, others will reap the rewards of substantial expansion.⁷⁰⁸ Moreover, long-term consumer welfare will be enhanced not only when consumers are free from potential monopoly prices, but also when they are free to reap the benefits of new and better products.⁷⁰⁹ These products will be forthcoming only when efficient domestic firms are allowed to generate the profitability and cash flow necessary for their development.⁷¹⁰

Finally, policymakers must resist the temptation to believe that foreign subsidies, which create lower prices for U.S. consum-

⁷⁰⁸ See THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, *supra* note 46, at 46 (arguing that NAFTA will produce this effect).

⁷⁰⁹ See Eckes, *supra* note 4, at 423.

⁷¹⁰ See *id.* For a discussion of long-term consumer welfare, see Ong, *supra* note 4, at 429-30; Benz, *supra* note 22, at 701; Semeraro, *supra* note 22, at 629-31.

ers, result in social costs only to foreign countries or that home-market monopoly profits impose costs only on foreign and domestic consumers.⁷¹¹ In addition to the costs resulting from either exclusion or the loss of profitability and cash flow, these practices may lead to a variety of other opportunity losses as well. The existence of artificially high prices in foreign countries, for example, reduces the level of disposable income or purchasing power in the hands of foreign consumers. If prices were to be lowered, foreign consumers would be capable of buying additional products from the United States. Similarly, the money used to subsidize inefficient enterprises could be better spent on developing the educational system or the transportation and communication infrastructures of the country. These actions would attract additional foreign investment, providing U.S. companies with expansion opportunities, and would tend to raise the nation's standard of living and demand for U.S. products. If accompanied by additional U.S. output, such an increase in demand could benefit U.S. consumers by means of increasing economies of scale, lowering consumer prices, and encouraging product development.

Both U.S. producer welfare and U.S. consumer welfare are inescapably linked to the market conditions existing abroad. The current consumer welfare focus, with its emphasis on short-term price reductions for U.S. purchasers, fails to recognize this interplay. As a result, a new predatory pricing policy must be established that will reduce the political pressure to protect inefficient U.S. industries and provide more realistic protection to U.S. businesses from the pricing strategies of less efficient foreign entities. By doing so, this policy would spur not only a redeployment of economic resources, but would enhance both consumer welfare and U.S. global competitiveness.⁷¹²

5.4.2. *Market Power: An Elusive Concept*

Both the courts and commentators have been authoritative concerning the definition of market power and its place as a

⁷¹¹ See Warner, *supra* note 4, at 823-24 (discussing the fact that the home country bears the social costs resulting from high-priced home-market sales when nonpredatory price discrimination is employed).

⁷¹² On the problem of consumer welfare and U.S. global competitiveness, see Victor, *The Interface of Trade/Competition Law and Policy: An Overview*, *supra* note 4, at 399-400.

predatory pricing prerequisite. First, market power historically has been defined as the ability of a seller, or a group of sellers acting in concert, to raise prices or restrict output by excluding a rival, severely disciplining a rival, or deterring entry by a potential rival.⁷¹³ Second, the presence or absence of such a power has been determined primarily by examining the size of the defendant's market share.⁷¹⁴ Third, in the absence of market power or the ability to acquire market power, prohibitions of below-cost pricing do not apply.⁷¹⁵

Despite the piety of these rules, the concept of market power is extremely elusive and depends on how the relevant product and geographic markets are defined. In the international setting, market power is subject to widely divergent views concerning both its relevance and the percentage of market share necessary to give rise to its existence.⁷¹⁶ The definition of market power varies depending upon both the nature of the restraint imposed and the statutory section applied.⁷¹⁷ The definition also is subject to significant qualification depending on the existence of both excess capacity and asymmetric market conditions.⁷¹⁸

Antitrust enforcers will always retain a significant degree of discretion when determining the parameters of the relevant product and geographic markets. As a result, the size of a defendant's market share, which, in turn, depends on how the market is defined, will remain a somewhat subjective determination. The relevant market is defined according to a variety of rules, such as reasonable interchangeability of products, price sensitivity and cross elasticity of demand, production substitution and cross-elasticity of supply.⁷¹⁹ The lack of perfect information

⁷¹³ See *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 464 (1992); *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984); *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

⁷¹⁴ *Kodak*, 504 U.S. at 464; *McGahee*, 858 F.2d at 1505.

⁷¹⁵ See PREDATORY PRICING, *supra* note 27, at 23-32 (discussing the various approaches to applying a predatory pricing rule).

⁷¹⁶ See *id.* at 31.

⁷¹⁷ See discussion *infra* notes 724-34 and accompanying text.

⁷¹⁸ See *infra* notes 735-39.

⁷¹⁹ See *United States v. Continental Can Co.*, 378 U.S. 441, 449 (1964); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 276 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 n.42 (1962); *United States v. E.I. du*

concerning market conditions and consumer/supplier response, however, combined with a host of interpretations to which information is susceptible, invariably requires that choices be made among various alternatives. As economic analysis becomes more sophisticated and the number of relevant economic factors increases, the number of options confronting decisionmakers will also multiply.

As a result, the relevant markets can be defined in whatever manner necessary to achieve the desired outcome in the case. The effect of product differentiation on market definition, for example, continues to be a source of debate. Product differentiation can be used to alter consumer tastes and thereby disaggregate a seemingly uniform market;⁷²⁰ it thus should be a major criterion in determining market power. As the court noted in *Graphic Prods. Distribs., Inc. v. Itek Corp.*,⁷²¹ product differentiation, which may be acquired by activities such as advertising and styling, enables a firm to raise its prices above the purely competitive level without the loss of a substantial share of its business.⁷²² As a result, substantial product differentiation may cause the relevant product market to contract and the resulting market power to expand. If *Kodak* is followed in future cases, even a single brand of a product could be the relevant market for Sherman Act purposes.⁷²³

In addition to the subjective nature of market definition, the concept of market power is far from lucid for a variety of other reasons. First, the size of the market share necessary to give rise to market power has not been universally accepted. In the United States, for example, various courts and commentators have argued

Pont de Nemours & Co., 351 U.S. 377, 404 (1956); *Equifax, Inc. v. FTC*, 618 F.2d 63, 66 (9th Cir. 1980); *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 307-08 (7th Cir. 1976); *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 899 (S.D.N.Y. 1965); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 592 (S.D.N.Y. 1958).

⁷²⁰ See *Hearing on the Oversight on Department of Justice's Vertical Restraints Guidelines Before the Committee on the Judiciary*, 99th Cong., 1st Sess. 64-65 (1985) (statement of Lawrence A. Sullivan).

⁷²¹ *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560 (11th Cir. 1983).

⁷²² See *id.* at 1570 n.15 (citation omitted).

⁷²³ See *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 481 (1992).

that a market share of 50% may be sufficient;⁷²⁴ a market share of 50% is insufficient;⁷²⁵ a market share of 55% is sufficient if accompanied by other market characteristics;⁷²⁶ a market share of 60% should be adequate;⁷²⁷ and a market share of 60% should be inadequate.⁷²⁸

In contrast, many nations would apparently exhibit market power concerns at market share levels substantially lower than those required in the United States. In Australia, for example, a 40% market share has been held to imply a substantial degree of market power.⁷²⁹ In Canada, the new predatory pricing guidelines indicate that a producer that possesses 35% or more of the market will be considered to have the power to unilaterally affect industry pricing.⁷³⁰ In Portugal, a dominant position has been defined as 30% or more of the national market,⁷³¹ while in France, a firm was found to possess dominance with a 36% share of the overall market, if accompanied by a larger share in a relevant submarket.⁷³² Furthermore, some nations have a variety of statutes that either downplay or eliminate the need for market power analysis. Some of these statutes outlaw sales-at-a-loss and are thus oriented toward unfair competition,⁷³³ while

⁷²⁴ See *U.S. Anchor Mfg. v. Rule Indus.*, 7 F.3d 986, 1001 (11th Cir. 1993) (stating that less than 50% is inadequate as a matter of law), *cert. denied*, 114 S. Ct. 2710 (1994); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969) (stating that a 50% share may be sufficient).

⁷²⁵ See *United States v. Empire Gas Corp.*, 537 F.2d 296, 305-07 (8th Cir. 1976) (holding that a 50% share did not present a dangerous probability of success in achieving market power), *cert. denied*, 429 U.S. 1122 (1977).

⁷²⁶ See *Kelco Disposal v. Browning-Ferris Indus.*, 845 F.2d 404, 409 (2d Cir. 1988) (noting that above 55% is sufficient along with other market characteristics), *aff'd*, 492 U.S. 257 (1989).

⁷²⁷ See *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1506 (11th Cir. 1988) (proposing that 60-65% is sufficient to present a genuine issue of material fact), *cert. denied*, 490 U.S. 1084 (1989); Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 292 (1977) (stating that 60% is necessary).

⁷²⁸ See Phillip Areeda & Donald F. Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337, 1348 (1978) (proposing that 60% is not enough).

⁷²⁹ See Warner, *supra* note 4, at 848.

⁷³⁰ See *Canadian Predatory Pricing Policy Stresses Market Orientation Approach*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1568, at 725 (June 4, 1992); see also Warner, *supra* note 4, at 864.

⁷³¹ See PREDATORY PRICING, *supra* note 27, at 42.

⁷³² See *id.* at 56-57.

⁷³³ See *id.* at 7-8.

others are aimed at prohibiting cartel activity or illegal predatory conduct specifically directly toward destroying a particular rival.⁷³⁴

Although it is important to recognize that countries will differ over the degree of market share necessary to constitute market power, it is even more important to recognize that no precise level of market share can ever be established. This is because the market share/market power relationship depends upon a variety of market conditions. Where barriers to entry are low, it would seem appropriate to increase the market share level necessary to establish market power. Alternatively, where barriers to entry are substantial, a finding of market power would appear justified at market share levels significantly lower than those otherwise required. Moreover, the relative sizes of the market participants would affect the market share/market power mix.⁷³⁵ A firm that is twice as large as the next largest competitor should be subject to substantially greater antitrust scrutiny.⁷³⁶

The argument that market power can never be viewed solely in terms of market share is highlighted by the fact that a firm's actual market power, or at least its realistic potential for acquiring such power, is greatly influenced by its level of excess capacity. A firm that controls a substantial share of the market, for example, but possesses no excess capacity, would not engage in a predatory pricing scheme since it would be unable to meet the resulting increase in demand. At the same time, a firm with a more modest market share, but possessing excess capacity, could be a much more powerful market participant. As the U.S. Supreme Court recognized in *Cargill*,⁷³⁷ "It is possible that a firm with a low market share might nevertheless have sufficient excess capacity to enable it rapidly to expand its output and

⁷³⁴ See *id.* at 7-8, 33-35, 36-38, 40-41, 47-48, 59-60, 60-61, 77; see also Warner, *supra* note 4, at 843-44, 860.

⁷³⁵ See *Canadian Predatory Pricing Policy Stresses Market Orientation Approach*, *supra* note 730, at 725 (reporting that the Canadian predatory pricing guidelines, while establishing a 35% market share threshold, also employ considerations concerning the "number of sellers, the degree of size inequality among the firms, and trends in market share over time"); see also Warner, *supra* note 4, at 864.

⁷³⁶ See Warner, *supra* note 4, at 864 (stating that the Canadian Bureau of Competition Policy requires that a predator must be at least twice as large as its competitor).

⁷³⁷ *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986).

absorb the market shares of its rivals.⁷³⁸ As a result, predatory pricing would be a rational strategy if the predator had either a substantial market share, or a substantial degree of excess capacity that would enable it to gain a large market share.⁷³⁹

The market power concept also depends on the type of anticompetitive conduct being examined. Conduct involving actual monopolization under Section 2 of the Sherman Act is at one extreme.⁷⁴⁰ In order for an allegation of actual monopolization to be successful, the defendant must possess monopoly power rather than simply market power.⁷⁴¹ Alternatively, when a predatory pricing claim is based on a section 2 attempted monopolization allegation, the plaintiff must instead demonstrate “a dangerous probability” of achieving monopoly power.⁷⁴² While proving a dangerous probability of success will require evidence of the defendant’s ability to recoup its losses through the exercise of market power, the degree of that power will be somewhat less than that required in an actual monopolization case. As the court noted in *Northern Propane*,⁷⁴³ whether a defendant has sufficient market power to be dangerously close to acquiring a monopoly “requires analysis and proof of the same character, but not the same quantum, as would be necessary to establish monopoly power.”⁷⁴⁴ Furthermore, if a predatory pricing action is brought under the primary-line price discrimination provisions of the Robinson-Patman Act, a plaintiff will only be required to show a “reasonable possibility” that a substantial injury to competition will result.⁷⁴⁵ Although the Court in *Brooke Group* clearly indicated that a Robinson-Patman claim would be subject to the same recoupment standard as a Sherman

⁷³⁸ *Id.* at 119-20 n.15.

⁷³⁹ See PREDATORY PRICING, *supra* note 27, at 81 (noting that in order to pursue a feasible predatory pricing strategy, the “predator must have a very substantial share of the market or at least the capacity to acquire such a share”).

⁷⁴⁰ See 15 U.S.C. § 2 (1994).

⁷⁴¹ See *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

⁷⁴² *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2587 (1993) (quoting *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 890 (1993)).

⁷⁴³ 858 F.2d 1487.

⁷⁴⁴ *Id.* at 1505.

⁷⁴⁵ *Brooke Group*, 113 S.Ct. at 2587.

Act section 2 attempted monopolization case,⁷⁴⁶ the incipency aspects of the Robinson-Patman Act provide ample opportunity for a lessening of the market power requirement.⁷⁴⁷

At the other end of the spectrum are those activities that are prohibited even without a detailed analysis of market power. As the Supreme Court has noted, proof of actual detrimental effects on competition "can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'"⁷⁴⁸ As a result, because "the absence of proof of market power does not justify a naked restriction on price or output,"⁷⁴⁹ and "market power is only one test of 'reasonableness,'"⁷⁵⁰ this restriction will be "presumed unreasonable without inquiry into the particular market context in which it is found."⁷⁵¹ Sherman Act section 1 conspiracies designed to either raise price or restrict output generally fall within the auspices of this approach.

The evidentiary requirements involved in other types of section 1 allegations also support the premise that the concept of market power varies. In a tying case, for example, the defendant only needs sufficient economic power over the tying product to appreciably restrain competition in the market for the tied product.⁷⁵² This power need not be in the form of a monopoly or even a dominant position within the market.⁷⁵³ Instead, this power may be sufficient even though it "falls far short of dominance and even though the power exists only with respect to some of the buyers in the market."⁷⁵⁴ Moreover, when predatory pricing is alleged within the context of a section 1 conspiracy, it can still be argued, despite *Brooke Group*, that the market power

⁷⁴⁶ See *id.* at 2587-88.

⁷⁴⁷ See *id.* at 2602-04 (Stevens, J., dissenting).

⁷⁴⁸ *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (citation omitted).

⁷⁴⁹ *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 (1984).

⁷⁵⁰ *Id.* at 110 n.42 (quoting with approval the Solicitor General) (citation omitted).

⁷⁵¹ *Id.* at 100.

⁷⁵² See *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 502-03 (1969).

⁷⁵³ See *id.*

⁷⁵⁴ *Id.* at 503 (noting that an "appreciable restraint results whenever the seller can exert some power over some of the buyers in the market").

of the conspirators is totally irrelevant. The conspiracy to restrain trade is prohibited when accompanied by an antitrust injury to the plaintiff.⁷⁵⁵ The potential success of the illegal agreement or its effect on consumer welfare should not be at issue.⁷⁵⁶ As a result, although the ability to recoup and the possession of market power may be relevant in determining the rationality of the alleged predation, it is not a prerequisite for a finding of unlawful conduct.

5.4.3. *Market Power: A Set of Proposed Alternatives*

The emphasis on the evils of market power directly reflects an economic and political tradition that stresses the importance of entrepreneurial freedom and the sanctity of the invisible hand of free-market forces.⁷⁵⁷ Antitrust policymakers must be able to adapt the law to the social, political, and economic conditions of a given time. As a result, the concept of market power has remained both elusive and subjectively applied. Since the definition of market power is only a function of policy rather than an economic truism, it is possible to alter its nature in light of external international impediments.

Whether predatory pricing is redefined unilaterally or by a WTO agreement, it is important to recognize the nature of the market power compromise involved. The current market power requirement has negated any antitrust remedy for international price predation.⁷⁵⁸ It is unlikely that a single seller would have dominance in the world market. It is equally unlikely that any conspiracy among sellers would ever be found to be economically feasible in light of *Matsushita*.⁷⁵⁹ On the other hand, the

⁷⁵⁵ See *supra* notes 185-89 and accompanying text.

⁷⁵⁶ See *supra* notes 185-89; see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2602 (1993) (Stevens, J., dissenting) ("Section 1 of the Sherman Act requires proof of a conspiracy. It is the joint plan to restrain trade, however, and not its success, that is prohibited by Section 1."); S. REP. NO. 403, *supra* note 4, at 8 (noting the "long-standing rule that a predatory pricing conspiracy is illegal without regard to its actual or potential market effect" (footnote omitted)).

⁷⁵⁷ See *supra* notes 194-99 and accompanying text.

⁷⁵⁸ See discussion *supra* section 1.

⁷⁵⁹ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

antidumping laws have no market power requirement at all.⁷⁶⁰ Instead, they simply require a material injury that is “not inconsequential, immaterial, or unimportant.”⁷⁶¹ The imports under investigation “need not be the sole or even principal cause” of the material injury.⁷⁶² As a result, the antidumping prerequisite will be met if the imports contribute, even slightly, to the problems of the affected industry.⁷⁶³

By proposing a compromise concerning this dichotomy, this Article is not suggesting that legitimate market dominance or market power be condemned. Nor is the Article proposing the condemnation of excess capacity or the sale of products at prices with which U.S. producers cannot compete. Neither price discrimination nor the practice of dumping would be attached. What must be condemned is the international sale of goods at below-cost prices. By allowing a set of provable defenses such as new entry, obsolescence, and reasonable expectations of future costs, such a condemnation would have the effect of punishing only two forms or producers—those who, irrespective of their relative efficiency, possess a predatory motive and those who, regardless of their motives, are simply less efficient. Any firm that chooses to price its product below its costs would fall within one of three categories: 1) temporary justification; 2) active predation; or 3) relative inefficiency. By exempting the first and condemning the latter two, this compromise would not be designed to protect U.S. businesses, but would be designed to protect *efficient* businesses throughout the world.

Any potentially adverse effects resulting from an increase in successful predatory pricing claims will be more than offset by the pro-competitive effects stemming from the abolition of antidumping remedies. By recognizing the overall benefits that would accrue from this trade-off, policymakers would be free to consider the concept of market power in light of a variety of different perspectives.

An actual predatory pricing conspiracy among competitors, when accompanied by sufficient below-cost sales to establish an antitrust injury to the plaintiff, should be condemned. While it

⁷⁶⁰ See 19 U.S.C. § 1673 (1994).

⁷⁶¹ 19 U.S.C. § 1677(7)(A) (1994).

⁷⁶² *British Steel Corp. v. United States*, 8 Ct. Int'l Trade 86, 97 (1984).

⁷⁶³ See *id.*

is true that *de minimis* sales would not give rise to an antitrust injury, the presence or absence of market power should play no role in determining whether recovery should be granted when the existence of a conspiracy can be demonstrated. In *Matsushita*, the court examined the issue of market power not as a prerequisite to recovery, but as a factor to be used in determining the likelihood of whether a conspiracy existed.⁷⁶⁴ In *Brooke Group*, market power was a prerequisite to recovery, but the decision was limited to Robinson-Patman and Sherman section 2 allegations.⁷⁶⁵ As a result, where a section 1 conspiracy is demonstrated, market power and consumer welfare effects should be irrelevant.

In the event that there are several foreign producers selling in the United States at below-cost prices, but making their pricing decisions independently and not pursuant to a conspiracy, policymakers should consider applying the concept of cumulative market power. The purpose of this doctrine is “to allow causation of material injury to be established in cases where the cumulated sources are not capable of being found injurious when viewed independently.”⁷⁶⁶ In the predatory pricing context, this doctrine could be applied where non-conspiring predators individually lack market power, but where their combined predatory sales have the potential for excluding or injuring U.S. producers and long-term consumer interests.

The courts have defined market power in terms of the ability to restrict output and raise price.⁷⁶⁷ On occasion, however, the U.S. Supreme Court has expressed concerns over the “ability to alter the interaction of supply and demand” and the need for price and output to be “responsive to demand.”⁷⁶⁸ The Court has not required proof of market power when an anticompetitive activity “is inconsistent with the Sherman Act’s command that price and supply be responsive to consumer preference.”⁷⁶⁹ As a result, a firm that intentionally chooses to produce so much of a product

⁷⁶⁴ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986).

⁷⁶⁵ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2586-91 (1993).

⁷⁶⁶ *USX Corp. v. United States*, 12 Ct. Int’l Trade 205, 219 (1988).

⁷⁶⁷ See discussion *supra* section 5.4.2.

⁷⁶⁸ *National Collegiate Athletic Ass’n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 109-10 (1984).

⁷⁶⁹ *Id.* at 110.

that it can be sold only when offered at below-cost prices is hardly acting in a manner responsive to consumer preference. In this case, consumers would clearly be indicating that they valued the product itself somewhat less than they valued the resources dedicated to its production. The stimulation of additional purchases would represent an unlawful alteration of the acceptable rules of supply and demand.

Policymakers must learn to resist the temptation to view market power solely in terms of actual exclusion from the market or blatant deterrence of market entry.⁷⁷⁰ They also must not tie market power to a traditional form of recoupment that encompasses only the subsequent acquisition of monopoly profits.⁷⁷¹ The concepts of market power, recoupment, and rationality are inherently linked and any attempt to examine one of these aspects without considering the others will only lead to misleading conclusions.

The ability to engage in strategic behavior, the existence of segregated markets, and the effects of political and cultural diversity must be considered when determining the rationality of business conduct.⁷⁷² Recoupment must be viewed in terms of a rewards system, where consideration is given to: (1) the ability to maintain a presence within the market at a particular period of time; (2) alter future market conditions and perceptions; (3) engage in at least partial cross-subsidization; and (4) influence the level of research and development, cash flow, and available capital.⁷⁷³ Other more culture-specific rewards also must be recognized such as the pursuit of market share rather than return-on-investment, the creation of stable employment environments, the acquisition of hard currency, and the governmental favor acquired through the realization of national goals.⁷⁷⁴ Policymakers must understand both the purposes behind business conduct and the actual rewards to be recouped therefrom in order to use the market power prohibition to guard against the increasing manipulation of consumer and producer decisionmaking.

The concept of market power must be tied to the ability of a

⁷⁷⁰ See *supra* section 5.4.2.

⁷⁷¹ See *supra* section 5.4.2.

⁷⁷² See Baker, *supra* note 14, at 594-98.

⁷⁷³ See *id.* (discussing the approach of the *Brooke Group* court).

⁷⁷⁴ See *supra* section 5.3.

firm to injure or discipline an equally or more efficient business rival and it should be designed in such a way that it helps stimulate the opening of foreign markets.⁷⁷⁵ In a competitive market, the best indication that a firm is more productively efficient than its rival is that it is capable of earning a profit, or at least avoiding a loss, while selling its product at a price that is lower than that of its competitor. Alternatively, a firm that is unable to match the price of a nonpredating competitor, other than by selling its product at a below-cost price, is deemed a less efficient business entity. A profit, or the absence of loss, is defined in terms of a particular product being sold in a particular market, rather than in terms of a firm's overall profitability. Overall profitability could simply reflect the sale of a large number of different products, some of which were sold at prices well above cost, or the ability to price discriminate and thereby earn monopoly profits in one or more geographical markets.

When examining the price/cost relationships, problems can arise concerning multiproduct firms and cost averaging, the applicability of the meeting competition defense, the proper cost benchmark to be employed, the existence of forward pricing, and the difficulties involved in international discovery. Nevertheless, the current market structure/market power approach, although an excellent mechanism for dismissing predatory pricing claims, does not reflect the concerns of relative efficiency, the resulting misallocation of global resources, the real support given to antidumping advocates, and the ultimate goals of the new WTO Agreement. By creating a link between the concept of market power and productive efficiency—by defining market power in terms of the ability to harm more efficient rivals⁷⁷⁶ and by assuming that below-cost pricing reflects either predatory intent or lower efficiency in the absence of a defense—this proposal enhances global economic welfare by encouraging competition on the merits. Moreover, by limiting punishment solely to below-cost sales, whether conducted by active predators or less efficient producers, this approach ties market power to a total or a net

⁷⁷⁵ See *supra* note 84.

⁷⁷⁶ See Wood, *supra* note 1, at 1173 (discussing the relationships between efficiency and injury under the antidumping statutes).

global efficiency standard.⁷⁷⁷

The antidumping laws often are justified as a means of offsetting market access restrictions that exist in many exporting countries and that underlie the ability of exporting firms to dump.⁷⁷⁸ As a result, any predatory pricing policy that aims at abolishing the antidumping laws must attempt to fill the vacuum caused by their absence. Because dumping only occurs when markets are segregated, the best approach would be to tie predatory pricing to the opening of foreign markets. As those markets become subject to the rigors of outside competition, the ability to dump would decrease.

One mechanism for achieving this result would be to create a fundamental link between the possession of market power in the exporting country and the market power prerequisite under U.S. antitrust laws. While not a truism, a firm's possession of market power in its own country could imply that the market was closed to the forces of outside competition.

For example, assume that a foreign producer, firm X ("X"), is selling its product in the United States at a price that is admittedly below cost. X has a 10% share of the U.S. market and a 5% share of the world market. It also has, however, a 95% share of the domestic market, a percentage that could imply the existence of market access restrictions. If the relevant geographic market were defined in terms of the two nations—the United States, the country in which the alleged predation was occurring, *and* the home country, in which the firm has a monopoly—the likelihood

⁷⁷⁷ See *id.* (discussing a proposal that attempts to strike a balance between producer interests and consumer welfare under the antidumping and countervailing duty statutes, and that places substantial importance on efficiency criteria).

[T]he injury that should be legally recognized [under the antidumping and countervailing duty statutes] is the injury suffered because the practice in question causes lost market share or sales to a competitively structured industry. If the competing foreign firm is more efficient, adjusting for any advantage conferred by the unfair trade practice, or if the U.S. industry does not conform roughly to the model of a competitive (and hence efficient) market, a closer look at the injury suffered is required. Only the injury that corresponds to the loss that a competitive industry would suffer should be recognized—should "count" toward satisfaction of the injury requirement in the statutes.

Id. at 1173.

⁷⁷⁸ See Hoekman & Mavroidis, *supra* note 4, at 1.

that X would have market power in the alternatively defined market would increase. This market definition both narrows and broadens the traditional approach to market determination. It excludes all geographical areas, other than the United States and the home country of X, from the relevant market even though the predator and the victim may actually compete in those areas around the world. It also includes the home country of X, despite the fact that the U.S. victim may not be competing in that country due to market access restrictions. Additionally, if excess capacity were considered, the market power of many foreign competitors also would increase because of this market definition.

The advantage of finding a greater degree of market power and of increasing the likelihood that a predatory pricing allegation would succeed is that it tends to punish firms that earn monopoly profits in closed markets and that have the ability to engage in dumping. When the relevant geographical market is defined as the consuming and producing nations, the likelihood of punishment is directly proportionate to the degree of foreclosure. The higher the degree of domestic market foreclosure, the greater the likelihood that the requisite market power exists. If entry barriers were lowered, the fear of an adverse predatory pricing ruling would be reduced.

Another potential advantage of this approach is that antitrust enforcers could exert some influence over foreign conspirators. A predator that possesses only a non-dominant share of its home market, but who is a member of a conspiracy that dominates the market, should be deemed to individually possess the degree of market power held by the conspiracy as a whole. This standard is justified because the dominant conspiracy serves to exclude outside competitors, providing each individual predator with a source of monopoly profits.

Whether viewed in the context of single-firm or conspiratorial market share, the existence and exercise of market power would still be required under this approach before predatory pricing liability would attach. Because the relevant geographic market is defined in a manner that enlarges the market power of the predator, it can be argued that traditional notions of consumer welfare should be applied. Nevertheless, the possession of market power is best examined in terms of the ability to harm, although not necessarily exclude, a more efficient rival.

The concept of market power, like all antitrust theory, should

never be immune from critical inquiry. Like the approach to the broad issue of protectionism, the approach to market power is constantly subject to alteration by judicial interpretation and statutory amendment. These arguments, however, are limited to potential developments in domestic law. A second approach, to which this Article now turns, would be to alter the international law established by the WTO Agreement.

5.5. *The Creation of a WTO Standard*

The world is not ready for a universal antitrust code or to accept an international enforcement authority.⁷⁷⁹ A universal antitrust code requires substantially more economic integration and market access.⁷⁸⁰ Furthermore, nations would have to be granted significant latitude to develop competition policies consistent with their individual “needs, current stage of economic and institutional development, legal systems and competition history and experience.”⁷⁸¹ For example, while an emphasis on consumer welfare may be appropriate in some economies, many developing nations emphasize the protection of their producers and the advancement of their industrial base when establishing or enforcing an antitrust agenda.

As a result, this Article does not suggest the creation of a private party cause of action under the antidumping laws. Such a remedy would at once violate the WTO Agreement, which provides that an antidumping action may only be initiated and conducted by a member nation,⁷⁸² and would proliferate an

⁷⁷⁹ Indeed, even the head of the Department of Justice’s Antitrust Division concedes: “I’ll be dead before a world antitrust enforcement authority is established.” Interview: *Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice*, *supra* note 78, at 9.

⁷⁸⁰ See Hoekman & Mavroidis, *supra* note 4, at 3-10, 28, 30-31. Hoekman and Mavroidis state that “[i]f a credible argument could be made that the abolition of antidumping would follow the adoption of common competition policies, this would greatly strengthen the case of those calling for international competition rules.” *Id.* at 28. They note, however, that “the precondition for this to be possible appears to be that countries are ready to contemplate significantly deeper integration (including free trade) than they have been willing to pursue in the recent past.” *Id.*

⁷⁸¹ INTERIM REPORT, *supra* note 30, at 6.

⁷⁸² See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 1 n.1, *reprinted in* FINAL TEXTS, *supra* note 29, at 145; *see also* S. REP. NO. 403, *supra* note 4, at 13.

already discriminatory, efficiency-intolerant form of statutory relief. Likewise, this Article does not suggest that the antidumping laws be amended to seek out only predatory dumping. Such an approach could lead to the application of a dual standard, with domestic predation judged by a consumer welfare perspective and foreign predation judged by a producer welfare perspective. This conflict would be inconsistent with the goals of national treatment. Below-cost dumping could be harmonized with the consumer welfare approach of the antitrust laws. Unfortunately, in light of the current recoupment and market power prerequisites, harmony would only result in the extinction of international predatory pricing remedies.

U.S. antitrust policy adequately protects domestic consumers from foreign conduct that would diminish the consumers' short-term welfare.⁷⁸³ A foreign cartel, for example, reaping monopoly profits in the United States presumably would be challenged by the Department of Justice. Moreover, foreign conduct that injures U.S. exporters can be attacked regardless of whether such conduct directly harms U.S. consumers.⁷⁸⁴ While protecting both consumers and exporters, however, current antitrust policy fails to provide any realistic remedies for domestic producers competing in the U.S. market against foreign rivals engaged in predatory pricing activities.

Confronted with the political necessity of providing domestic producers with protection, policymakers may choose to overcompensate through the use of antidumping laws and grant relief whenever imports, even if more efficiently produced, contribute minimally to a domestic injury. In contrast, policymakers could reduce or eliminate antidumping remedies by providing U.S. businesses with a realistic opportunity to recover for injuries caused by predatory pricing. This opportunity could be provided by: (1) recognizing the fallacy of universal rationality; (2) adopting a broader and more culturally diverse approach to international recoupment; (3) de-emphasizing the relevance of market power; and (4) concentrating on the issue of relative

⁷⁸³ See *U.S. Broadens Enforcement Posture on Foreign Application of Sherman Act*, Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 479 (Apr. 9, 1992) (quoting former Chief of the Antitrust Division James Rill as saying that the Department of Justice has "always applied our law to challenge . . . cartels aimed at raising prices to [U.S.] consumers . . .").

⁷⁸⁴ See *id.*

efficiency.

By defining international competition in terms of relative efficiency, rather than in terms of single-nation consumer welfare, this approach would be more consistent with the global welfare theories in the WTO Agreement. The WTO Agreement is designed to enhance global well-being.⁷⁸⁵ It neither views competition in terms of enhancing the consumer welfare of one nation at the expense of another, nor proposes that the existence of low prices in one area of the world resulting from the availability of subsidies or monopolistic profits in another, is beneficial to competition. Instead, it recognizes that free competition, based on free trade and market access, is the mechanism by which standards of living, real income, and employment rates can be raised throughout the world and by which the world's resources will be best employed.⁷⁸⁶

Additionally, the WTO Agreement places substantial importance on relieving the plight of developing countries. It contains many references to special treatment for developing country members in the areas of dumping, subsidies, trade in services, trade-related investment measures, technical barriers to trade, and trade-related aspects of intellectual property.⁷⁸⁷ It also expresses concern over the need to increase exports from these nations. Furthermore, the Agreement emphasizes the importance of disseminating knowledge and transferring technology to developing nations and for a reallocation of productive resources to ensure that these nations share in the growth of international

⁷⁸⁵ See Agreement Establishing the World Trade Organization, Preamble, *reprinted in* FINAL TEXTS, *supra* note 29, at 5.

⁷⁸⁶ See *id.*

⁷⁸⁷ See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 15, *reprinted in* FINAL TEXTS, *supra* note 29, at 163; see, e.g., Agreement on Subsidies and Countervailing Measures, art. 27, *reprinted in* FINAL TEXTS, *supra* note 29, at 257-59 (providing for a procedure that allows developing nations to subsidize exports); General Agreement on Trade in Services, Preamble, art. IV, *reprinted in* FINAL TEXTS, *supra* note 29, at 285, 287-88; Agreement on Trade-Related Investment Measures, Preamble, art. 4, *reprinted in* FINAL TEXTS, *supra* note 29, at 139, 140; Agreement on Technical Barriers to Trade, Preamble, arts. 11, 12, *reprinted in* FINAL TEXTS, *supra* note 29, at 117, 127-29; Agreement on Trade-Related Aspects of Intellectual Property Rights, Preamble, art. 66, *reprinted in* FINAL TEXTS, *supra* note 29, at 320, 348; Decision on Measures in Favour of Least-Developed Countries, *reprinted in* FINAL TEXTS, *supra* note 29, at 385.

trade.⁷⁸⁸ As a result, although the WTO Agreement is framed in terms of economic trade, it also has a strong social component.

The efficiency-based predation rule proposed in this Article does not recognize the existence of geographical boundaries. It is not tied to the welfare of any individual nation, but instead reflects the ability of producers to compete on the basis of merit. If this rule could be applied without chilling lawful price competition, encouraging delay or sham litigation, or violating the doctrine of national treatment, it would be, in conjunction with the elimination of dumping remedies, an excellent foundation for advancing the goals set forth in the WTO Agreement.

5.6. *The Ability of the WTO to Act*

In their discussion of competition policy and the GATT, Hoekman and Mavroidis noted two substantial limitations on the scope of the GATT regulatory mechanism. First, they noted that the GATT only dealt with governmental policies and thus private anticompetitive practices were beyond its reach.⁷⁸⁹ If a contracting Member approved or supported those private anticompetitive practices, however, the GATT dispute settlement procedures could be invoked.⁷⁹⁰ This governmental support could consist of passive tolerance, such as the non-enforcement of antitrust laws, or more active involvement, such as the creation of an antitrust exemption or a subsidy.⁷⁹¹ As a result, while GATT did not specifically address the issue of competition policy, certain GATT mechanisms could reach a variety of antitrust-related allegations.⁷⁹² These mechanisms included violation complaints—where an activity violated the Agreement itself—and non-violation complaints—where an activity nullified or impaired an existing concession.⁷⁹³

⁷⁸⁸ See, e.g., Decision on Measures in Favour of Least-Developed Countries, reprinted in FINAL TEXTS, *supra* note 29, at 385-86 (stating that least-developed countries “shall be accorded substantially increased technical assistance in the development . . . of their production and export bases . . . [and] in trade promotion . . . to enable them to maximize the benefits from liberalized access to markets”).

⁷⁸⁹ Hoekman & Mavroidis, *supra* note 4, at 10, 22.

⁷⁹⁰ See *id.* at 10.

⁷⁹¹ See *id.* at 10, 23, 25, 27, 31.

⁷⁹² See *id.* at 10, 25, 27.

⁷⁹³ See *id.*

Second, because the GATT primarily focused on the issue of market access, restrictive business practices that produced only extraterritorial effects were not subject to GATT sanctions under the non-violation complaint procedure because “only practices that deny market access opportunities in the *domestic* market can be the object of such complaints.”⁷⁹⁴ Unless an action directly violated the Agreement itself, as in the case of an export subsidy, practices by private parties and actions or inactions on the part of the government concerning those practices would not be subject to GATT if they only affected export markets.⁷⁹⁵ Thus, although there are exceptions for direct violations of the Agreement, the GATT mechanism was restricted to anticompetitive behavior affecting the competitive conditions within the importing country.⁷⁹⁶

The new WTO Agreement does not fundamentally alter these general limitations concerning the international sale of goods. These limitations, however, should not have an inhibiting effect on the ability of the WTO to adopt a universal definition of predatory pricing. First, there is a precedent for the adoption of a WTO agreement binding on individual contracting Members that could be implemented by means of parallel domestic enforcement against private parties located in foreign countries.⁷⁹⁷ The WTO Antidumping Code permits an action against a private foreign firm regardless of whether its government supported or approved the dumping practices conducted by that firm.⁷⁹⁸

Second, predatory pricing rules could be viewed as access oriented. For example, domestic legislation that prohibits the sale of products at below-cost prices, regardless of the nation's particular posture concerning recoupment and market power, directly raises issues about market access. Moreover, access conditions in foreign markets, which enable foreign firms to segregate consumers and reap monopoly profits, are directly

⁷⁹⁴ *Id.* at 24.

⁷⁹⁵ *See id.* at 23-24, 28.

⁷⁹⁶ *See id.* at 28.

⁷⁹⁷ *See id.* at 6.

⁷⁹⁸ *See id.* (noting that Article VI of the GATT permits “governmental measures (antidumping) intended to offset perceived *private* anticompetitive behaviour (dumping”).

linked to the ability to predate in export markets.⁷⁹⁹ As a result, market access in one country and predatory pricing in another often raise identical issues.

The WTO Agreement specifically notes that the WTO may “provide the forum for further negotiations among its Members concerning their multilateral trade relations,” as well as “a framework for the implementation of the results of such negotiations”⁸⁰⁰ Hence, the creation of a universal standard concerning predatory pricing can be the subject of further negotiations.

A WTO predatory pricing standard would be enforced by way of private party or governmental action brought before a designated domestic tribunal and not before a WTO panel. While a general definition would be provided by the WTO, predatory pricing allegations would be brought in a manner consistent with the prevailing national law. If one Member believes that another Member is in direct violation of the WTO Agreement by applying a predatory pricing standard that is in conflict with the standard created by the WTO, however, that nation could then seek redress before a WTO panel. As a result, the mandates in Article 23 of the WTO Dispute Settlement Understanding would apply only to an action on the part of a nation and not to the original private party or governmental proceeding.⁸⁰¹

Finally, many countries severely limit or do not provide for private party enforcement of their antitrust laws. While there is a growing sentiment in favor of allowing such an enforcement mechanism,⁸⁰² the proposal presented in this Article would not require such changes. In accordance with domestic law, each nation would be free to decide whether predatory pricing actions may be instituted by private business entities or whether such actions are within the exclusive control of governmental authorities. Whichever enforcement mechanism is selected, the domestic tribunal must apply the predatory pricing standard created by the

⁷⁹⁹ See *supra* section 5.2.1.

⁸⁰⁰ Agreement Establishing the World Trade Organization, art. III, *reprinted in* FINAL TEXTS, *supra* note 29, at 10.

⁸⁰¹ Article 23 provides that Members shall adhere to WTO standards of procedure when seeking redress for violations of obligations or impairments of benefits. See Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23, *reprinted in* FINAL TEXTS, *supra* note 29, at 370.

⁸⁰² See INTERIM REPORT, *supra* note 30, at 20.

WTO.

5.7. *The Nature of a WTO Standard*

Subject to several defenses, qualifications, and explanations, a WTO predatory pricing standard should be adopted so that all systematic below-cost sales conducted in one Member country by a business entity whose principal place of business is located in another Member country are *prima facie* illegal. The burden of proof would be placed on the alleged predator to present a recognizable justification for its below-cost pricing structure. This standard would apply only to international sales. Member nations would be free to retain or adopt any approach when deciding predatory pricing cases between domestic producers.

Furthermore, the *prima facie* standard would be applied regardless of the presence or absence of predatory intent. This standard would be designed to punish both producers who engage in below-cost sales with a predatory motive and producers who lack predatory intent but, due to their relative inefficiency, must sell at below-cost prices in order to compete. On the other hand, the existence of predatory intent could be relevant when determining the level of damages. International predatory pricing relief should be limited to single, rather than treble, damages unless predatory intent, as judged by a substantial burden of proof, is demonstrated. Finally, this standard could be applied regardless of the presence or absence of market power or, alternatively, in accordance with a substantially different approach to the market power determination.

The validity of this standard can only be examined in light of the fundamental changes in the WTO Antidumping Code and parallel domestic legislation proposed in this Article. Governmental authorities and domestic industries will no longer have the right to initiate antidumping proceedings. Instead, recourse will be limited to the initiation of a predatory pricing complaint on the basis of below-cost sales. The antidumping remedy will serve as a default mechanism that can be invoked only when a predatory pricing defendant fails to provide accurate cost data, fails to comply with lawful discovery orders, or attempts to delay an ongoing predatory pricing proceeding.

In exchange for relegating antidumping relief to a default position and limiting the size of recoverable damages in most predatory pricing cases, a substantial reduction in the recoupment

and market power prerequisites would be possible. The concepts of recoupment and market power are both inherently subjective and substantially dependent on a number of variables. The concept of recoupment, for example, should reflect: (1) the motivational distinctions between domestic and international predation; (2) the myriad of cultural factors that influence corporate environments and rewards; (3) the lack of a universal rationality regarding such factors as individualism and short-term profit maximization; and (4) the availability of risk reduction through segregated markets and governmental intervention.⁸⁰³ Similarly, the degree of market power will depend on: (1) market definition; (2) market conditions; (3) the existence of informational and financial asymmetries; (4) the availability of excess capacity; and (5) the nature of the alleged antitrust violation.⁸⁰⁴

If the WTO could enforce a global consumer welfare standard, or if every nation were able to enact and enforce consumer-oriented antitrust laws, market power and recoupment would satisfactorily govern predatory pricing analysis. In the absence of ideal global enforcement, however, focusing on these prerequisites serves only to reward some consumers at the expense of others, thereby inhibiting the efficient allocation of global resources. As a result, the proposed standard should be applied without considering these prerequisites. In the event that this position proves to be politically unacceptable, however, these concepts of market power and recoupment should be redefined in substantially broader terms that would reflect the importance of relative efficiency. For example, the ability of a predator to injure a more efficient rival or to reduce its viability as a future competitor must be included in the market power determination. Moreover, these prerequisites should be limited to single firm, as opposed to conspiratorial, predation and they should encompass all potential distortions to consumer preference. Finally, they should be applied in a manner that recognizes strategic rewards and the diversity of recoupment, the effects of excess capacity and cumulative market power, and the potential for more innovative approaches to market definition.

The adoption of a WTO standard that substantially broadens the scope of predatory pricing recovery in international cases

⁸⁰³ See *supra* section 5.4.1.

⁸⁰⁴ See *supra* section 5.4.

requires the dismissal of several anticipated counterarguments. First, because the pursuit of increased market share through a price reduction is the essence of competition, the chosen standard must not chill lawful price competition by means of unfair or indefinite application.⁸⁰⁵ In order for producers to compete vigorously and for consumers to benefit from that competition, businesses must be able to distinguish clearly between lawful and unlawful conduct.⁸⁰⁶ Second, while the goal of providing a realistic opportunity to deter international predatory pricing is justifiable, the mechanism must be designed to discourage the commencement of sham proceedings. It would be a hollow victory if the incidence of international predatory pricing were reduced, but a substantial tool for conducting non-price predation was established in its place. Finally, in order to determine whether an alleged predator is guilty of below-cost pricing, considerable information about costs must be made available to enforcement authorities. The sources of this information will be located in another country and thus discovery may be problematic. As Donald Baker has indicated, broad U.S. discovery procedures often are viewed by foreign governments and enterprises as offensive and imperialistic, especially when aimed at dealings between the government and the nation's businesses.⁸⁰⁷ Furthermore, even assuming that information eventually will be exchanged, the discovery mechanism can be an effective delaying strategy.⁸⁰⁸ Antitrust lawsuits, for example, have been considerably longer in duration than trade-related antidumping and countervailing duty actions due to the substantial rights of discovery that are provided.⁸⁰⁹

Whenever any form of conduct is legally condemned, actions

⁸⁰⁵ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

⁸⁰⁶ *Cf. id.* (“[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.” (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d. 227, 234 (1st Cir. 1983))).

⁸⁰⁷ See Baker, *supra* note 4, at 1156-57.

⁸⁰⁸ See, e.g., S. REP. NO. 403, *supra* note 4, at 21 n.2 (acknowledging that litigation devices including discovery can be “protracted, expensive, and risky”).

⁸⁰⁹ See Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, *supra* note 4, at 416 (“[M]ost trade law cases take only approximately a year to complete, rather than the many years involved in the typical private antitrust suit.”).

at the margin of legality may be inhibited by the desire to avoid risk or uncertainty. The effects of condemning one activity, however, must be weighed against the effects of legalizing another so that a net benefit or loss can be determined. The existence, use, and threatened use of the antidumping remedy substantially chills price competition and invites non-price predation. One commentator notes that because the Commerce Department rarely declines to initiate an investigation, “[t]he mere filing of an antidumping . . . petition can have a chilling effect on competition.”⁸¹⁰ The initiation of an investigation creates substantial uncertainty on the part of U.S. importers because they will be held responsible for payment if an antidumping duty is imposed.⁸¹¹ Because they cannot be certain of their eventual exposure until the proceeding is terminated or a review is conducted, U.S. buyers may feel compelled to switch to domestic suppliers, even where the prices charged by those suppliers are higher.⁸¹² This incentive to switch to higher-price suppliers will likely result in higher prices to the ultimate consumer, and also may encourage the filing of less than credible petitions. As another commentator has observed, many U.S. firms are willing to “seek protection and engage in rent-seeking” by means of manipulating U.S. trade policy.⁸¹³

Dumping remedies also have a much more direct impact on the domestic consumer price level. Exporters, fearing that an antidumping petition will be filed, may charge higher prices than necessary.⁸¹⁴ Further, the price-discrimination focus of antidumping laws often has the effect of prohibiting price reductions.⁸¹⁵ For example, assume that a foreign producer manufactures a product at a cost of \$10 per unit and sells that product in its home market for \$15 per unit. Less efficient U.S. producers manufacture the same product for \$12 per unit and sell their output in the domestic market for \$17 per unit. In light of

⁸¹⁰ de Ravel d’Esclapon, *supra* note 293, at 548.

⁸¹¹ *See id.*

⁸¹² *See id.*

⁸¹³ Elzinga, *supra* note 4, at 444.

⁸¹⁴ *See Morris, supra* note 4, at 953 (“[E]xporters to the United States might sell at significantly lower prices but for ITC enforcement of the antidumping laws.”); *see also* de Ravel d’Esclapon, *supra* note 293, at 549 (concluding that producers not named in any petition may fear future filings).

⁸¹⁵ *See Morris, supra* note 4, at 953.

the uncertainty surrounding antidumping adjustments and the potential damage caused by the filing of an antidumping petition, the foreign producer might be concerned about undercutting the \$17 price established by U.S. manufacturers. But the foreign producer, otherwise willing to accept some risk, would be prohibited from charging in the U.S. market anything below the \$15 level. As a result, any chilling influence would be substantially greater under the existing antitrust/antidumping regime than under the proposal presented in this Article.

In attempting to compare the net benefit or loss that would result from this proposal, two other points should be briefly reiterated. First, the procedures employed in antidumping actions can lead to anticompetitive behavior and price-chilling effects. These laws require collective action between competing domestic firms when preparing the antidumping petition, and concerns, therefore, may be raised about the exchange of highly sensitive and otherwise confidential information. For example, informational exchanges concerning sales, prices, profits, losses, and production levels may lead to price-fixing or price stabilization in the future.⁸¹⁶ Moreover, informal settlement agreements between the contesting parties would raise further antitrust problems because these would represent horizontal agreements among direct competitors.⁸¹⁷

Second, since the WTO standard only would apply to international predation, it makes substantially less compelling the argument that predatory pricing is both rare and inherently self-detering and that almost any rule restricting pricing policy would merely serve to chill lawful conduct. International predators often have the ability to lower predatory risk through the use of governmental subsidies, simultaneous recoupment, cross-subsidization, and discriminatory practices that restrict losses to only a portion of total sales.⁸¹⁸ Because the presence of lower risk would be accompanied by a reduction in self-deterrence, the current reluctance to regulate is unjustified in the international

⁸¹⁶ See de Ravel d'Esclapon, *supra* note 293, at 551; see also Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, *supra* note 4, at 414-15; Applebaum & Grace, *supra* note 4, at 517.

⁸¹⁷ See Applebaum & Grace, *supra* note 4, at 517; see also de Ravel d'Esclapon, *supra* note 293, at 552-53.

⁸¹⁸ See *supra* sections 5.2.1, 5.3.4.

setting.⁸¹⁹

In an attempt to inhibit sham proceedings, and thus to deter their chilling effect on price competition, the proposed WTO standard generally limits recovery to single damages. This limitation, however, would be accompanied by the alteration or elimination of the market power and recoupment prerequisites. As a result, the new WTO standard would represent two fundamental principles. First, there will be substantially less to gain by the initiation of a frivolous lawsuit and there will be substantially less to lose by a refusal to negotiate a settlement. Second, parties who have been victims of predatory pricing strategies will have the ability to recover irrespective of any effect, or lack thereof, on short-term consumer welfare.

Existing U.S. procedures provide a variety of incentives for initiating less-than-credible antitrust suits. By providing treble damages,⁸²⁰ the antitrust statutes exert substantial pressure on defendants, regardless of the legitimacy of the claim, to settle in order to avoid potentially devastating losses. Moreover, the ability of a successful plaintiff to recover attorney's fees and costs from the defendant,⁸²¹ coupled with both the ability to pursue a claim on a contingency fee basis and the lack of liability for defendant's costs, lowers the plaintiff's monetary risk when pursuing marginal allegations.⁸²² Other nations, however, have refused to provide such incentives. In Canada, for example, where recovery is limited to single damages, and where an unsuccessful plaintiff is generally required to pay a substantial portion of a defendant's costs,⁸²³ the balance between risk and reward has been altered significantly.

Although the availability of treble damages is a valuable

⁸¹⁹ See Semeraro, *supra* note 22, at 623.

⁸²⁰ See Clayton Act, 15 U.S.C. § 15(a) (1994).

⁸²¹ See *id.* § 15.

⁸²² See, e.g., Warner, *supra* note 4, at 878-79 (discussing differences in procedure and enforcement between Canadian and U.S. antitrust laws); see also Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, *supra* note 4, at 416 (noting some of the advantages of an antitrust suit over a trade law action, including "injunctive relief, treble damages, attorneys' fees, [and] full discovery rights").

⁸²³ See Calvin S. Goldman & John D. Bodrug, *The Canadian Price Discrimination Enforcement Guidelines and Their Application to Cross-Border Transactions*, 62 ANTITRUST L.J. 635, 639-40 (1994); Warner, *supra* note 4, at 878-79.

deterrent to anticompetitive behavior, and provides the necessary impetus for private-party enforcement of the antitrust laws, the particular risks involved in regulating international pricing activity require limitations on these incentives. As a result, a WTO standard, while providing broader rights and more realistic opportunities for recovery, should generally limit relief to single damages. Additionally, WTO Members might also consider the effects of imposing costs on unsuccessful plaintiffs.

The concepts of limiting recovery to single damages and imposing costs and attorney's fees on unsuccessful plaintiffs previously have been employed by U.S. antitrust laws. The Export Trading Company Act of 1982,⁸²⁴ for example, modifies "the application of the antitrust laws to certain export trade."⁸²⁵ It provides that a party "who has been injured as a result of conduct engaged in under a certificate of review" issued to a U.S. exporter shall only recover actual, as opposed to treble, damages.⁸²⁶ The courts may award both costs and reasonable attorney's fees "to the person against whom the claim is brought."⁸²⁷ Similarly, the National Cooperative Research and Production Act of 1993⁸²⁸ provides that antitrust claims arising out of a qualified joint venture shall be limited to the actual damages sustained,⁸²⁹ and that costs and reasonable attorney's fees shall be awarded to the prevailing defendant "if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith."⁸³⁰

Under the proposed WTO standard, however, single damage recovery, and potentially the imposition of costs against unsuccessful complainants, would be applied when the plaintiff was seeking relief pursuant to the standard's reduced burden of proof. In other words, the WTO standard could provide single damage recovery to victims of predatory pricing without proof of intent, market power, or the ability to recoup losses. In determining actual damages, however, tribunals must examine not only issues

⁸²⁴ 15 U.S.C. §§ 4001-4021 (1994).

⁸²⁵ *Id.* § 4001(b).

⁸²⁶ *Id.* § 4016(b)(1).

⁸²⁷ *Id.* § 4016(b)(4).

⁸²⁸ *Id.* §§ 4301-4306 (1994).

⁸²⁹ *See id.* § 4303(a).

⁸³⁰ *Id.* § 4304(a)(2).

concerning lost profits and market share, but they also must be willing to explore the more subtle effects that result from the reduction in cash flow, research and development, and innovation. This flexibility is required because, in the absence of market power, more visible effects, such as actual exclusion from the market, may be lacking.

Alternatively, if a plaintiff could demonstrate the existence of predation coupled with either the presence of market power or a dangerous probability of achieving market power, then treble damages could be awarded. Because the dangers are considerable, the award of punitive damages and the strengthening of the deterrence mechanism would be warranted. Moreover, where a predatory conspiracy could be demonstrated, treble damages should be imposed even in the absence of market power. The availability of treble damages in either of these cases, however, would be negotiated by the Member countries during the process of creating the WTO standard. While treble damages would be appropriate under these circumstances, other nations may not be willing to adopt this U.S. measure of damages.

Finally, irrespective of the burden of proof applied or the damages sought, the WTO standard must require that all settlements between the parties be approved by the tribunal. Unlike cases dealing with other substantive issues, settlements concerning alleged anticompetitive activity can result in the conspiratorial conduct the law is designed to prevent. As a result, any settlement between the parties involving an agreement between competitors must be carefully scrutinized for its potential impact on future price competition.

In order to enforce an international predatory pricing standard, a mechanism must exist that encourages the sharing of information among nations, the exchange of information between litigating parties, and the timely pursuit of litigation proceedings. The proposed WTO standard should be framed, therefore, as a plurilateral trade agreement to which individual Member nations can choose, or refuse, to become signatories. By choosing to become a signatory, a nation would accept three primary obligations. First, the nation would become responsible for enforcing the basic provisions of the standard, such as the definition of predatory pricing, the relevance and nature of market power, and the imposition of damages, in all cases involving predatory pricing by a non-domestic business entity. Second, the

nation would agree to forfeit its right to initiate antidumping proceedings against foreign firms located in another signatory country provided that those firms do not intentionally inhibit the operation of the agreement. Third, the nation would cooperate in sharing information among governmental antitrust authorities and would substantially encourage private party compliance with lawful discovery orders.

In exchange for accepting these obligations, a signatory nation would provide corresponding benefits to its domestic firms. First, those firms would have a realistic opportunity to recover damages for predatory pricing undertaken by their foreign competitors. Second, barring the existence of a conspiracy or substantial market power, the firms would be able to compete internationally without the fear of treble damage exposure. Third, and perhaps most importantly, the firms would be able to compete in other signatory countries without the fear that discriminatory and protectionist antidumping proceedings will be invoked. In contrast, firms located in countries that have refused to become signatories to the agreement will continue to face treble damages, at least in the United States, and the threatened or actual imposition of dumping remedies.

In order to ensure further the enforcement of this WTO standard, there must be a means to punish private party defendants in signatory countries who frustrate the operation of the standard through the exercise of bad faith, the provision of misinformation, or the use of intentional delay. One possible mechanism for punishing this activity is the imposition of treble damages in cases that would otherwise invoke only single damage relief. A second option would use import restraining orders, based upon the burden of proof generally applied in cases where preliminary injunctions are sought,⁸³¹ by which a plaintiff could temporarily enjoin the import of the product at below-cost prices. This order could be pursued through the judicial system or through an administrative body such as the Federal Trade Commission. One commentator has indicated, for example, that "the elapsed time between the start of an investigation and the decision to issue a prospective restraining order is comparable to the elapsed time between the initiation of an antidumping

⁸³¹ See FED. R. CIV. P. 65; see generally John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

investigation and the final material injury finding.”⁸³² As a result, a private party plaintiff “can . . . expect swift responses from enforcement agencies when there is true predatory pricing.”⁸³³ Whether a judicial or an administrative process is used, however, a preliminary injunction would help to counteract the fact that private litigation is more lengthy than a governmental antidumping action. By temporarily prohibiting the import of the product at a below-cost price, the plaintiff would be granted immediate relief and the defendant’s impetus to delay the proceeding would be substantially reduced.

A third, more controversial choice uses the antidumping statute as a default procedure. Under this approach, a court deciding that a defendant is systematically exhibiting bad faith or engaging in intentional delay could terminate the litigation and refer the case to the appropriate government agency for antidumping proceedings. While potentially burdensome, this mechanism would rarely be invoked since both parties would generally prefer predatory pricing litigation rather than antidumping proceedings.

From the plaintiff’s perspective, transferring the proceeding to an antidumping authority would eliminate the possibility of monetary damages. Even if dumping occurs, antidumping duties are paid to the government, not to the plaintiff or other members of the affected industry. Yet, arguably, antidumping duties can lead to direct economic rewards for the plaintiff. For example, if the duty raises the imported product’s price above that charged by the plaintiff, the plaintiff could increase profits by increasing its market share or by raising its price. Such conduct, however, presents substantial risks. A predatory-pricing plaintiff renounces the opportunity to recover direct and pocketable damages based on the assumptions that: (1) the plaintiff will prevail in its antidumping petition; (2) the duties imposed will force the foreign competitor’s price above the plaintiff’s price; (3) the plaintiff’s domestic competitors will similarly raise their prices; and (4) the foreign competitor will not simply lower its home-market price to avoid the duty.

The defendant has a similar interest in maintaining the dispute as a private action. In a private action, the defendant’s liability

⁸³² Warner, *supra* note 4, at 886-87.

⁸³³ *Id.* at 887.

generally would be limited to single damages, while penalties in antidumping proceedings reflect the entire difference between the predatory price and the higher home-market price. Assume, for example, that it costs a foreign predator \$10 per unit to manufacture a product. The predator sells that product for \$15 per unit in the domestic market, but for only \$8 per unit in the United States. Under the proposed WTO predation standard, the defendant's liability generally is limited to actual damages incurred by the plaintiff: in theory, \$2 per unit sold. Damages greater than that differential penalize lawful conduct, namely sales at or above \$10 per unit. Conceivably, however, the damages caused by a predatory campaign may be substantially greater than that \$2 differential and may include the short and long-term effects to the plaintiff's business entity. Pursuant to an antidumping proceeding, the defendant may be accountable for \$7 per unit. Even if the producer chose to avoid the antidumping duty, it would still be forced to give up some of its U.S. market share by raising U.S. prices or to forfeit profits at home by lowering home market prices. The increased risks associated with antidumping remedies substantially encourage defendants to honor the obligations undertaken by their signatory governments.

The proposed WTO standard is designed to reward efficiency, to punish inefficiency, and to encourage a global specialization that will enable nations to share in global wealth. Although predatory intent, market power, and ability to recoup predatory losses are relevant factors in an analysis of single-nation consumer welfare, they are irrelevant to the determination of relative efficiency and to the advancement of global welfare. As a result, the absence of these factors cannot relieve defendants from liability for actual damages.⁸³⁴

The proposed WTO standard, however, must recognize the realities of standard business conduct, permitting temporary below-cost prices to be defended on grounds such as excess inventory, seasonal demand fluctuations, obsolescence, and other temporary loss-minimizing activities.⁸³⁵ This perspective would also encourage promotional pricing by new entrants or in conjunction with the introduction of a new product. The WTO

⁸³⁴ These factors are relevant, however, for determining the appropriateness of treble damages. See *supra* p. 250-51.

⁸³⁵ See *supra* notes 135, 179-184 and accompanying text.

standard also should consider forward pricing—the expectation that costs will fall as production and sales increase.⁸³⁶

In regard to a meeting-competition defense, the Robinson-Patman Act permits domestic price discrimination where the lower price “was made in good faith to meet an equally low price of a competitor”⁸³⁷ Most courts have allowed good faith sellers to “reduce prices below the appropriate measure of cost”⁸³⁸ to meet competitors’ prices. “To force a company to maintain noncompetitive prices would be to turn the antitrust laws on their head.”⁸³⁹

This defense, however, invites potential problems. In the U.S. market, where competing businesses generally are subject to the same level of federal regulation and where business mobility is ensured by the Commerce Clause,⁸⁴⁰ the meeting-competition defense is justified. Price reductions increase consumer welfare and eventually drive inefficient competitors from the freely-operating market. In the international setting, however, businesses are not subject to equal levels of government regulation.⁸⁴¹ Unequal playing fields can prolong below-cost pricing and given that the proposed predatory pricing standard rewards efficiency, a meeting competition defense could be counterproductive. A meeting competition defense may be relevant in a pure price discrimination case, where the prices charged are above cost. In a predatory pricing case, however, this defense only promotes the survival of producers who must charge predatory prices in order to compete. If the predator is more efficient than its victim, the defense should also be curtailed in light of the questionable motives accompanying below-cost sales by a more efficient producer. The only reason for such a strategy, other than those already encompassed by the promotion, obsolescence, and express inventory defenses, is to meet an equally low predatory price of a competitor.

Due to the substantial distinction between price discrimination

⁸³⁶ See S. REP. NO. 403, *supra* note 4, at 24 (discussing the “practice of taking into account anticipated but as yet unrealized productivity gains”).

⁸³⁷ 15 U.S.C. § 13(b) (1994).

⁸³⁸ Denger & Herfort, *supra* note 23, at 553.

⁸³⁹ *Id.* (quoting *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982) (citations omitted)).

⁸⁴⁰ See *supra* notes 458-459 and accompanying text.

⁸⁴¹ See *supra* note 460-79 and accompanying text.

and international price predation, a meeting-competition defense should not be incorporated into the WTO standard. This defense, however, may be acceptable to stimulate the opening of foreign markets. For example, the defense could be available to firms operating from open markets and thus subject to meeting-competition strategies employed by foreign competitors. Alternatively, if a market is closed to international competition, and thus does not allow foreign competitors to meet the prices of domestic firms, extending the defense to firms operating from that market seems unreasonable.

Finally, the standard must respect the spirit of the new WTO Agreement concerning preferential treatment for developing nations. For example, the WTO specifically recognizes that these nations must "effective[ly] participat[e] in the world trading system,"⁸⁴² and that preferential market access is "an essential means for improving their trading opportunities."⁸⁴³ Similarly, developed Members must give "special regard . . . to developing country Members when considering the application of anti-dumping measures. . . ."⁸⁴⁴ Government assistance plays an important role in the economic development of these countries, and therefore, special subsidy exemptions and compliance periods must be provided to them.

In response to the special situation of developing or least-developed countries, the WTO standard should limit private party actions against producers located there. First, the already-existing defenses concerning new entrants and new products can provide substantial protection to infant industries in these nations. This approach, however, calls for the establishment of relevant time periods and market-share thresholds, similar to those in the area of subsidies.⁸⁴⁵ Second, a market power prerequisite could be added when the defendant is operating in a developing or least-developed nation. The slim possibility that such a defendant would have market power would protect producers from all

⁸⁴² Decision on Measures In Favour of Least-Developed Countries, *reprinted in* FINAL TEXTS, *supra* note 29, at 385, 385.

⁸⁴³ *Id.*

⁸⁴⁴ Agreement On Implementation of Article VI of the General Agreement On Tariffs and Trade 1994, art. XV, *reprinted in* FINAL TEXTS, *supra* note 29, at 145, 163.

⁸⁴⁵ See Agreement on Subsidies and Countervailing Measures, arts. 3, 27, *reprinted in* FINAL TEXTS, *supra* note 29, at 229, 257-59.

predatory pricing liability. Finally, the WTO standard could apply a market-share threshold, defined in terms of the market share of the nation rather than that of the individual firm. Below this level, all of the nation's producers of the relevant product would be immune from suit, regardless of a new entrant or a new product defense.

The WTO Agreement currently provides that once a nation reaches export competitiveness in a given product, it shall begin to phase out export subsidies for that product over a two-year period, if it is a developing country, or an eight-year period, if it is a least-developed country.⁸⁴⁶ The Agreement defines export competitiveness as the point at which the nation's exports in a particular product reaches a global share of at least 3.25% for two consecutive calendar years.⁸⁴⁷ A competitiveness threshold is similarly justified in the area of predatory pricing. Producers in a developing or least-developed nation, therefore, should be immune from predatory pricing liability until the nation's exports of the relevant product reach export competitiveness.

In proposing a WTO standard to govern international price predation, drafters must note the difficulties surrounding the price/cost determination. Fixed and variable costs often are indistinguishable, not only because of international definitional variations, but also because all costs become variable over time.⁸⁴⁸ Multiproduct firms, common production facilities, and joint costs further impair the accurate determination of a particular product's cost.⁸⁴⁹ Moreover, transfer pricing, forward pricing, and cross-subsidization,⁸⁵⁰ combined with the misrepresentation of costs,⁸⁵¹ inevitably cloud the true cost/price relationship.⁸⁵²

Despite these difficulties, neither international nor domestic

⁸⁴⁶ See *id.* at 258 (art. 27.5).

⁸⁴⁷ See *id.* (art. 27.6).

⁸⁴⁸ See *supra* notes 133-134, 522-27 and accompanying text.

⁸⁴⁹ See *supra* note 134 and accompanying text.

⁸⁵⁰ See *id.*

⁸⁵¹ See PREDATORY PRICING, *supra* note 27, at 82.

⁸⁵² See *supra* notes 133-34 and accompanying text; see also *Transamerica Computer Co. v. International Business Mach. Corp.*, 698 F.2d 1377, 1383-84 n.3, 1387 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 86-88, 89 n.19 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); PREDATORY PRICING, *supra* note 27, at 82-83.

predatory pricing can be condemned without examining the cost/price relationship. All legitimate approaches towards predatory pricing are ultimately based on whether the price level is at or above the cost level. The two-tier or market-structure approach,⁸⁵³ currently employed by the U.S. Supreme Court and supported by the OECD, does not negate this proposition.⁸⁵⁴ By first examining the relevant market structure to determine whether the market is conducive to the exercise of market power, the two-tier approach serves as a screening device, dismissing allegedly innocuous predatory pricing allegations.⁸⁵⁵ If the alleged predation poses potentially adverse market effects, the court must examine the actual price/cost relationship. Thus, although a wide variety of different tests or approaches may be employed to dismiss a predatory pricing case, only the price/cost analysis can actually impose predatory pricing liability.⁸⁵⁶ An examination of the price/cost relationship remains a fundamental prerequisite for imposing predatory liability. Otherwise, the most egregious of predatory pricing behavior becomes legalized.

Balancing these analytical difficulties against the need to protect productive efficiency, the WTO must determine which cost benchmark to apply. The WTO could adopt the reasonably anticipated average variable cost standard suggested by Areeda and Turner and applied by many courts.⁸⁵⁷ The advantage of such a benchmark is that pricing at the level of marginal cost results in both a competitive and a social optimum.⁸⁵⁸ Forcing firms to charge prices above marginal cost would not only reduce industry output and waste economic resources, but would also ensure the survival of less efficient rivals.⁸⁵⁹ One court has noted that marginal cost pricing "fosters competition on the basis of relative efficiency,"⁸⁶⁰ and the existence of a higher benchmark "would provide a price 'umbrella' under which less efficient firms could

⁸⁵³ See generally Joskow & Klevorick, *supra* note 131 (proposing the use of a two-tier approach or a market structure filter).

⁸⁵⁴ See *supra* section 2.1.; PREDATORY PRICING, *supra* note 27, at 82-83.

⁸⁵⁵ See *supra* notes 131, 201 and accompanying text.

⁸⁵⁶ See *supra* notes 117-31 and accompanying text.

⁸⁵⁷ See *supra* notes 111-31 and accompanying text.

⁸⁵⁸ See Areeda & Turner, *supra* note 101, at 711.

⁸⁵⁹ See *id.*

⁸⁶⁰ *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 80, 87 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

hide from the stresses and storms of competition.⁸⁶¹ Additionally, from a consumer's perspective, any standard above marginal or average variable cost forces some consumers to pay higher prices for, and others to entirely forgo, the product.⁸⁶²

Despite its difficulties, the WTO could displace the marginal cost standard with an average total cost standard.⁸⁶³ One commentator compellingly argues that the marginal cost benchmark, at least when applied in the international setting, has little validity as a measure of relative efficiency.⁸⁶⁴ Not only do accounting and recordkeeping practices differ among nations,⁸⁶⁵ but cultural-based differences in cost structures, including those related to wages, vertical integration, distribution methods, and the use of capacity substantially affect the fixed/variable cost relationship.⁸⁶⁶ Assumptions that firms with higher fixed costs and lower variable costs are necessarily more efficient remain unfounded.⁸⁶⁷

To account for exchange rate manipulation, import barriers, and indirect forms of governmental aid, Epstein argues that the United States should adopt an average total cost standard when examining price predation by foreign competitors.⁸⁶⁸ Yet, the average total cost benchmark could be justified on other grounds. For example, the increased likelihood of predatory pricing in the international setting,⁸⁶⁹ and the non-enforcement of antitrust laws by many governments, providing unquantifiable regulatory subsidies,⁸⁷⁰ warrant a more encompassing provision.

A preoccupation with short-term marginal costs could also reward artificially-created or culturally-biased cost structures, thereby condoning social idiosyncrasies unrelated to efficiency gains. Moreover, a short-term marginal cost focus does not

⁸⁶¹ *Id.*

⁸⁶² *See id.* at 90.

⁸⁶³ *See id.* at 88-90; *see also* S. REP. NO. 403, *supra* note 4, at 24.

⁸⁶⁴ *See* Epstein, *supra* note 31, at 51-52 ("[E]conomists . . . criticize the [marginal cost] rule for failing to reflect current economic theories on long-run efficiency. . . .").

⁸⁶⁵ *See id.* at 52.

⁸⁶⁶ *See id.* at 53-54.

⁸⁶⁷ *See id.* at 55.

⁸⁶⁸ *See generally id.* (urging the adoption of the average total cost standard).

⁸⁶⁹ *See supra* section 5.2.1.; *see also* S. REP. NO. 403, *supra* note 4, at 11.

⁸⁷⁰ *See* Hoekman & Mavroidis, *supra* note 4, at 26-27 (citation omitted).

necessarily ensure that the most efficient firm will prevail, even in the absence of cultural forces.⁸⁷¹ Some commentators note that this focus allows more efficient firms, with lower long-term marginal costs, to be driven from the market by less efficient firms, with lower short-term marginal costs.⁸⁷²

In determining an appropriate cost benchmark, the WTO membership should also consider whether subsidies⁸⁷³ should influence the creation or implementation of a cost standard. A variety of subsidies should be excluded when determining the ultimate nature of a WTO standard. One commentator indicates that many subsidies may actually correct market failures and may represent a major source of necessary public goods.⁸⁷⁴ Similarly, innumerable forms of governmental assistance are not only common throughout the world, but also apply domestically in a nondiscriminatory manner for political, economic, and social stability. Tying the existence of these subsidies to the decision concerning the appropriate nature of a WTO cost standard would invade governmental policy making and reject the sovereignty of other Members.

The WTO, however, has chosen to condemn other subsidies. For example, certain subsidies will be prohibited if they are contingent "upon export performance" or "upon the use of domestic over imported goods."⁸⁷⁵ Others will be deemed actionable if they injure the domestic industry of another Member, nullify or impair another Member's GATT benefits, or seriously prejudice another Member's interests.⁸⁷⁶ Moreover, even some non-actionable subsidies may be the subject of countermeasures if they fail to meet the conditions established by the Agreement⁸⁷⁷ or if they result in "serious adverse effects"⁸⁷⁸

⁸⁷¹ See Epstein, *supra* note 31, at 53-55.

⁸⁷² See e.g., McGee, *supra* note 101 at 301 (describing Posner's argument) (citation omitted).

⁸⁷³ Subsidies can be challenged only by means of governmental action and not by private party litigation. See Agreement on Subsidies and Countervailing Measures, arts. 10, 11.4, 32.1, *reprinted in* FINAL TEXTS, *supra* note 29, at 241-42, 260.

⁸⁷⁴ See Barceló, *supra* note 4, at 319-21.

⁸⁷⁵ Agreement on Subsidies and Countervailing Measures, art. 3, *reprinted in* FINAL TEXTS, *supra* note 29, at 231.

⁸⁷⁶ See *id.* at 233-35 (arts. 5-6).

⁸⁷⁷ See *id.* at 237-40 (arts. 8-9).

to the domestic industry of another Member.

If a condemned subsidy is subject to a countervailing duty, the relationship between subsidies and costs becomes irrelevant. Where such a subsidy, however, has neither been exempted nor made the subject of a countervailing duty, its relevance to costs becomes extremely problematic.

Although contradictory to the WTO Subsidies Agreement,⁸⁷⁹ subsidies of the same basic character as those condemned by the Agreement, but which are not subject to countervailing measures, theoretically should be relevant to the predatory pricing analysis. If the purpose of the WTO standard is to stimulate competition and enhance global welfare, it could be argued, again theoretically, that it may be appropriate to consider some forms of public assistance when determining the actual costs of production in predation cases. That the costs incurred by a producer have been lowered by a governmental subsidy does not mean that the actual cost of producing that product, in terms of the total resources dedicated to its production, has been altered in any way. As a result, if a producer's costs have been reduced by means of a subsidy that is not subject to a countervailing duty, it could be argued that the cost level at which predatory and nonpredatory prices are distinguished should be adjusted upward to reflect the presence of that assistance.

In addition to a host of problems arising out of the doctrines of comity, sovereign immunity, sovereign compulsion, and act of state,⁸⁸⁰ the consideration of subsidies within the context of a private party predatory pricing case would appear to directly violate the terms of the WTO Subsidies Agreement.⁸⁸¹ The Agreement provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."⁸⁸² The Agreement provides that countervailing duties may only be

⁸⁷⁸ *Id.* at 240 (art. 9.1).

⁸⁷⁹ See Agreement on Subsidies and Countervailing Measures, *reprinted in* FINAL TEXTS, *supra* note 29, at 229.

⁸⁸⁰ See INTERIM REPORT, *supra* note 30, at 8, 20, 21; Kaplan & Kuhbach, *supra* note 4, at 450; Benz, *supra* note 22, at 724-25, 733, 741-42.

⁸⁸¹ See generally Agreement on Subsidies and Countervailing Measures, art. 7, *reprinted in* FINAL TEXTS, *supra* note 29, at 235 (limiting recovery to Members only, and not to private parties).

⁸⁸² *Id.* at 260 (art 32.1) (footnote omitted).

imposed pursuant to an investigation initiated by a Member and conducted in accordance with a variety of substantive and procedural mandates outlined in the Agreement.⁸⁸³ Specifically, the investigation must be based on an application filed by an affected domestic industry and must be expressly supported by producers that account for at least 25% of total domestic production.⁸⁸⁴ In addition, the investigation may ultimately involve consultations between member nations and recourse to a WTO panel and the WTO Appellate Body.⁸⁸⁵

As the above provisions make evident, a predatory pricing action instituted by an individual plaintiff seeking monetary damages would not be a proper venue for the resolutions of such disputes. Nevertheless, the existence of subsidies directly affects the fundamental purpose of the proposed WTO standard, which is to protect the interests of more efficient business entities. The WTO, therefore, must not only respect the integrity of the Subsidies Agreement, but also must attempt to discourage subsidized predatory pricing episodes that may fall outside the realistic enforcement of that Agreement.

A myriad of problems will inevitably confront the WTO. One of the most challenging issues, that of determining the remedies to be awarded, appears to present insurmountable obstacles in light of the current WTO regime. Apparently, any injunctive or monetary relief awarded to a private plaintiff that is based on a finding of subsidized production contradicts the provisions of the Subsidies Agreement.⁸⁸⁶ For example, assume that an alleged predator produces a product at an average variable cost of \$10, but that this cost increases to \$12 if an existing subsidy is included in the calculation. Assume further that the product is sold in the United States at a price of \$11 per unit, that

⁸⁸³ See *id.* at 241-46 (arts. 10-13).

⁸⁸⁴ See *id.* at 242 (art. 11.4).

⁸⁸⁵ See *id.* at 241 (arts. 10-11) (discussing an investigation initiated by member nation); *id.* at 241-54 (arts. 11-23) (describing substantive and procedural mandates); *id.* at 241-43 (art. 11) (noting an application by or on behalf of a domestic industry); *id.* at 242 (art. 11.4) (proposing the twenty-five percent rule); *id.* (art. 11.6) (describing an investigation initiated without application under "special circumstances"); *id.* at 231, 235-36, 240, 245-46 (arts. 4.1-4.3, 7.1-7.3, 9.1-9.2, 13) (discussing consultations between members); *id.* at 231-32, 236 (arts. 4.4-4.8, 7.4-7.6) (describing the panels); *id.* at 232, 236 (arts. 4.9, 7.7) (determining the appeals system).

⁸⁸⁶ *Id.* at 231 (art. 7).

the predator has market power, and that the victim is driven out of the market. If a straight average variable cost standard is imposed, the victim would not be entitled to any form of traditional damages. Alternatively, if the subsidy is included in the variable cost calculation, the plaintiff could recover damages. As a result, any such award, which could only be granted when the effect of the subsidy was considered, represents nothing more than an alternative form of countervailing duty.

To counteract these problems, the WTO could simply permit private party enforcement of the anti-subsidies law. Alternatively, the WTO could adopt a sliding scale approach by which prices above average total cost would be lawful, prices below average variable cost would be unlawful, and prices falling between those two benchmarks would be examined in light of the existence of subsidies. Both of these approaches, however, are accompanied by their own sets of problems and therefore have no realistic possibility of being adopted.

Despite the relationship between subsidies and predatory pricing, the current international regime prohibits the harmonization of these procedures and accompanying remedies. Differences in national interests, in addition to tensions between the interests of nations and the interests of individuals, require an international compromise. This compromise would honor the spirit of the Subsidies Code and business entities that are victims of subsidized predation—where prices are above the actual costs borne by the producer, but below the real or subsidized costs of production—would seek relief through the countervailing duty application process.⁸⁸⁷ Additionally, assuming that antidumping remedies were largely eliminated, the compromise would promote the application of an average total cost benchmark with respect to more traditional predatory pricing actions.

The adoption of Epstein's "total cost" standard may provide more protection to a predatory pricing plaintiff than desired.⁸⁸⁸ In light of the political realities involved in proposing the abolition of antidumping remedies, however, such a standard may represent an achievable form of compromise. It is worth reiterating that the antidumping laws generally prohibit price

⁸⁸⁷ See *id.* at 241 (art. 10).

⁸⁸⁸ See Epstein, *supra* note 31, at 55-56.

discrimination regardless of the cost level,⁸⁸⁹ and that an imported product selling at five-times the level of average total cost would still be subject to antidumping duties if the adjusted home-market price were higher. The use of an average total cost standard, therefore, when coupled with the elimination of antidumping remedies would be more viable. Additionally, the availability of defenses, including those involving new entrants, new products, and forward pricing, could reduce any overprotection that might accompany the average total cost standard. As a result, this compromise would reinforce remedies that protect the interests of efficient producers while limiting remedies that do not preserve those interests.

Finally, in attempting to adopt an appropriate cost standard, the WTO could consider two further propositions. First, the WTO could mandate the inclusion of export subsidies into the calculation of a predator's cost. Not only are export subsidies the most blatant and clearly prohibited form of governmental assistance, but they also are more easily proven than other forms of public involvement. Second, the WTO could consider the possibility of establishing two different cost benchmarks. An average total cost standard could be applicable where the defendant's home product market lacks effective international competition, while an average variable cost standard could apply where such competition exists. This determination of the applicable standard could be made in light of market share thresholds that reflect the degree of like-product imports into the home market. This dual standard would further encourage the development of a more open international marketplace. Although the adoption of either caveat is not likely, these considerations may serve as sources for negotiation.

Although the U.S. Supreme Court has yet to decide the appropriate cost benchmark in predatory pricing cases, it is doubtful that the Court would choose to apply the average total cost standard. Additionally, most of the lower federal courts, when forced to examine the price/cost relationship, have applied some form of marginal cost theory.⁸⁹⁰ The application of an average total cost standard to cases involving international predation, therefore, would violate the national treatment

⁸⁸⁹ See, e.g., Robinson-Patman Act, 15 U.S.C. § 13(a) (1994).

⁸⁹⁰ See *supra* notes 117-31 and accompanying text.

provisions of the original GATT Agreement.⁸⁹¹ That Agreement provides that imports “be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale”⁸⁹² It also can be argued that the national treatment provisions would be violated if differing market power and recoupment standards were applied to international predators. Similarly, a violation would occur if differing rationales, rewards, incentives, and strategies were examined, and if the meeting competition defense were denied in international predatory pricing actions.

The adoption of a WTO standard would render moot any potential national treatment issues. As attested to by the variety of preferences granted to developing countries, the WTO has often found it beneficial to carve out exceptions to its general principles. The Antidumping Code not only provides remedies against foreign producers that could not be invoked against domestic rivals, it also prohibits price discriminating foreign firms from adopting the same defenses that would be available to domestic competitors.⁸⁹³ As a result, the adoption of a WTO standard that provides a predatory pricing definition applicable to all international actions, but that also allows national law to govern domestic predatory pricing disputes, represents nothing more than a supplementary agreement voluntarily undertaken by Member nations.

If a WTO standard is not adopted, the United States must alter its approach to the problem of predatory pricing. In this regard, the recommendations presented in this Article can be implemented without violating national treatment provisions. First, any discriminatory treatment that might result from the implementation of this proposal would be substantially less than that already permitted under the WTO Antidumping Code. Second, this proposal can be applied in a nondiscriminatory manner.

The discriminatory aspects of the antidumping laws deny foreign producers the opportunity to engage in pricing policies

⁸⁹¹ See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. 3, 61 Stat. (5) A3, A18-19, 55 U.N.T.S. 194, 204-08.

⁸⁹² See *id.* 61 Stat. (5) at A18, 55 U.N.T.S. at 206 (art. 3.4).

⁸⁹³ See 19 U.S.C. § 1677(a)-(b) (1994).

that would be lawful if undertaken by a domestic producer. These antidumping laws deny foreign producers a variety of defenses that are available to their domestic rivals, and they impose liability for a lower market share than would be required domestically. Additionally, they apply a less-than-fair-value criterion rather than the marginal cost standard applied in most domestic antitrust cases.⁸⁹⁴ Finally, the antidumping laws fail to impose any substantial competitive injury or consumer welfare requirement.⁸⁹⁵

Although the application of the presented proposal demands significant changes in views toward predatory pricing, it may be applied consistently with the spirit of national treatment. While the ultimate result may sometimes differ depending on whether a domestic or foreign predator is involved, the standard applied in all cases would be the same. A universally applied standard that recognizes the importance of considering strategic behavior might nevertheless lead to differing outcomes because the ability to engage in such behavior depends on domestic conditions. Similarly, a universal rule based on an assumption of rational business conduct might lead to different judicial outcomes because the concept of rationality may vary substantially among nations. Any requirement of recoupment, while applied evenly to both domestic and foreign producers, could also lead to diverse results when viewed in terms of varying profit and market share goals, governmental involvement, abilities to conspire, culture-specific rewards, and international market structure.

The presented proposal does not require that separate rules be applied to foreign and domestic producers. The same fundamental rules can be applied to both domestic and international predation, but these rules must also be applied in a manner that is free from Westernized assumptions and that respects the realities of global diversity.

6. CONCLUSION

In July 1995, the New York Times reported that “[i]n the

⁸⁹⁴ See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2, reprinted in FINAL TEXTS, *supra* note 29, at 145-48 (detailing the WTO Antidumping Code’s determination of dumping, which is based on a “less than normal value” concept).

⁸⁹⁵ *Id.*

early 1950's, more than 90 American companies made television sets. Today, the last American-owned television manufacturer, the Zenith Electronics Corporation, gave up its battle to survive on its own and agreed to sell a controlling interest to a South Korean industrial giant.⁸⁹⁶ Following the sales of the RCA and General Electric brands to Thomson of France, Magnavox to Philips of the Netherlands, and Motorola's television business to Matsushita of Japan, the sale of Zenith was a reminder of the U.S. inability to compete in the global marketplace.⁸⁹⁷

These transactions raise the fundamental issue presented in this Article. If these sales reflect the fact that foreign producers are more efficient than their U.S. counterparts because of technological advancement or lower labor and production costs, then such transfers of productive resources are justified. Although such transfers sometimes are painful to domestic industries, all nations are entitled to exploit their comparative advantages.

In encouraging the efficient allocation of resources, however, certain potential risks must be recognized. In the *Matsushita* case,⁸⁹⁸ for example, the influx of television sets at depressed prices was alleged to have substantially reduced investment return rates, thereby destroying the incentive for any future investment in production facilities.⁸⁹⁹ In an industry rendered profitless, U.S. producers were forced to engage in cost-cutting measures, including those affecting research, product development, and future efficiency.⁹⁰⁰

If an enterprise fails as a result of its own inefficiency or lack of foresight, such allegations must be ignored. Business failure, as well as success, is a natural risk of the free enterprise system. If this decline in profits is due to foreign subsidies or below-cost pricing, however, the law must be capable of recognizing its true cause. Thus, antitrust enforcers must be able to investigate the realities of the global market and demonstrate a willingness to look beyond the boundaries of parochial economic theory.

⁸⁹⁶ Barnaby J. Feder, *Last U.S. TV Maker Will Sell Control to Koreans*, N.Y. TIMES, July 18, 1995, at A1.

⁸⁹⁷ *Id.* at A1, D2.

⁸⁹⁸ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁸⁹⁹ See *id.* at 602 n.2 (White, J., dissenting).

⁹⁰⁰ Benz, *supra* note 22, at 740 n.200 (citing a letter from Philip J. Curtis, former counsel to Zenith, to Steven F. Benz (Oct. 1, 1989)).

The presented proposal is based on the belief that governments must move beyond policies focusing solely on a single nation's welfare. These policies inhibit the creation of global wealth, enrich one nation at another's expense, and prevent most nations from improving their economic environment. Governments must adopt an approach recognizing that growing economic interdependence requires a fusion of foreign and domestic policy reflecting the link between domestic economies and the international marketplace. This approach, whether viewed in terms of sound economic policy or in terms of the pursuit of social goals, establishes relative efficiency as the benchmark of valid international business conduct. By denying protection to unproductive entities and defining competition in terms of actual efficiency rather than a particular nation's consumer welfare, this efficiency criteria not only promotes the free-trade and social values inherent in the WTO Agreement, but also encourages competition on the merits transcending geographic boundaries.

Antidumping laws, based more on political bias than on modern economic thought, serve no useful purpose under the proposed approach. Such laws ignore relative efficiencies, and thus they often subsidize inefficient domestic enterprises, legitimize supracompetitive prices, and prevent consumers from reaping the benefits of global competition and specialization. The WTO Antidumping Code institutionalizes this remedy, and thus further encourages a misallocation of global resources.⁹⁰¹

To reduce reliance on antidumping laws, a mechanism must be created to eliminate the resulting economic and political vacuum. By refusing to recognize international diversity and denying the fact that predation is more likely in the international setting, current antitrust models cannot meet this challenge. Moreover, these models will continue to be inadequate as long as they assume the existence of free and self-correcting market forces that are not present in the international setting. The current approach denies potential recovery for international price predation by defining competition in terms of consumer welfare, creating unrealistic recoupment and market power requirements, and substituting the court's economic expertise for that of corporate managers.

This Article has presented several recommendations that can be implemented in a variety of forms and to a variety of degrees.

⁹⁰¹ See *supra* sections 3, 4.1.

These recommendations, however, are all based on the fundamental fact that universal rationality does not exist. Managerial goals and philosophies can only be understood by exploring the historical and cultural characteristics of a nation, including individualism and collectivism, uncertainty and risk avoidance, and time orientation.⁹⁰²

Business decisions are affected by factors such as: (1) the pursuit of consensus and social order; (2) the relative importance of profits and market share; (3) the relative value attached to structured competition; (4) the influence of governments and the sociopolitical nature of the enterprise; and (5) the degree of loyalty owed to the worker, group, and nation.⁹⁰³ Because there are no managerial axioms unaltered by corporate culture, the legal system must no longer pigeonhole antitrust doctrines. By defining recoupment, for example, solely in terms of recovering same-market monopoly profits, or by viewing the incentive and ability to conspire through a universal lens, the judiciary has merely supplied simple answers to complicated questions.

This does not imply that predatory pricing cases must now become social science exercises. Any rule requiring the consideration of all factors in predation cases is not only unworkable, but also invites substantial subjectivity. Nationalistic assumptions, however, must be discarded and a new perspective on international predation, based on the recognition of global diversity, must be created. This perspective would serve as a foundation for developing policies concerning: (1) the nature and relevance of market power and recoupment; (2) the appropriate cost benchmark; (3) the long-term relationship between producer and consumer welfare; and (4) the burden of proof necessary to survive summary judgment.

In developing this global perspective, antitrust policymakers must first discard the assumption that international price predation is rare and self-detering. Segregated markets, governmental support, and the potential for cross-subsidization and simultaneous recoupment undermine the accuracy of this assumption. Similarly, it should no longer be assumed that: (1) there is only one motive for price predation; (2) all predatory conspiracies are uniformly doomed; (3) below-cost pricing is merely a gift to

⁹⁰² See *supra* section 5.3.1.

⁹⁰³ See *supra* section 5.3.

consumers, unencumbered by other welfare effects; and (4) market failures are quickly corrected as goods move freely throughout the global marketplace.

Policymakers should instead assume that predation encompasses a variety of public and private rewards and that strategies designed to reap those rewards often result in substantial costs to domestic and global welfare. Moreover, policymakers must consider the existence of asymmetric information and financial resources, the lack of parity between market incumbents and new entrants, and the ability to alter rivals' expectations.⁹⁰⁴ Furthermore, the reluctance to find predation should be tempered by recognition of the lack of international agreement about market power. Because market definition is inherently subjective, and because market power depends on factors such as the market restraint involved, the structure of the particular market, and the nation in which the wrong occurred, traditional notions of market power and recoupment should not be the sole determinants of lawful pricing activity.

By questioning the universality of Western theory, antitrust policymakers can strike a far better balance between the interests of consumers and efficient producers. In an international market lacking a common social, political, and economic identity, such a balance is a prerequisite for understanding predation and providing realistic opportunities for private party recovery.

Increasing the availability of predatory pricing relief is an appropriate basis for challenging current antidumping legislation. Different compromises tying expanded predatory pricing remedies to a reduction in the availability of antidumping relief should be explored. These compromises include using an average total cost standard, applying alternative market definitions, and eliminating the traditional market power prerequisite. Various damage and default mechanisms, encouraging timely cooperation in the judicial process and discouraging frivolous proceedings also should be explored. Although these compromises are more dramatic than current laws, Uruguay Round participants, with the exception of the United States, would favor judgment by a more demanding antitrust standard if released from the draconian provisions of

⁹⁰⁴ See *supra* section 5.

antidumping laws.⁹⁰⁵

While focusing on the tensions in the antidumping/antitrust dichotomy, this Article has emphasized the fact that these tensions are symbolic of a major policy decision confronting the United States. The United States has the power to help create a new international economic order either by unilateral action or by exercising its considerable influence within the WTO. In such an order, the legality of international pricing strategies is determined by the relative efficiencies of the competitors and not by the fact that a higher price is being charged elsewhere. When viewed in its broader perspective, such a policy can stimulate substantial social and economic change. By further reducing barriers to trade and promoting efficiency and specialization, this approach not only increases global income, but it also provides an opportunity for more nations to share in the resulting wealth. Sound economic policy thus could serve as the basis for addressing the international community's social needs.

The decision to pursue this order will have its detractors. Less productive enterprises will find little solace in increased competition or in the fact that the transfer of their protected wealth will benefit less fortunate economies. As a result, it must be understood that the decision to seek a new economic order will not be based on difficulties surrounding appropriate cost benchmarks or dissimilarities in international accounting practices. Instead, such a decision clearly will depend on whether the United States can exhibit the political will and global leadership that will be required.

⁹⁰⁵ The United States was isolated in its antidumping negotiations since “[v]irtually all the other 115 participants in the Uruguay Round have said that antidumping laws . . . are a form of creeping protectionism.” *GATT Participants Criticize New U.S. Antidumping Proposal*, *supra* note 64, at 2004.