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THE NEW INTERNATIONAL ECONOMICS APPLIED: JAPANESE TELEVISIONS AND U.S. CONSUMERS

KENNETH G. ELZINGA*

I. INTRODUCTION

A common criticism of economists is that they never agree. At one time, economists who bridled at this criticism could cite the law of demand or the net positive benefits of free trade in rebuttal, for economists always could be counted on to concur that the quantity demanded would be inversely related to price, and that free trade would be a desirable policy for a nation to follow. Consensus about the law of demand remains, but there is now a demurring voice within the economics profession about the benefits of voluntary private transactions across national boundaries.¹

Economists who demur about free trade can hardly be called protectionists. Andersonites might be the better term. In accord with Anderson's law,² they are persuaded that any controversial issue, including that of international trade, will, upon further thought, reflection, and examination from a variety of perspectives, become even more controversial and complex. So complex, in fact, that the old answers may no longer apply. As a result of the search for alternative answers, there is a new learning among economists, sometimes called the new international economics. Its proponents contend that the new learning may better fit today's world of international trade.

The traditional case for free trade, taught to every student of economic principles, is based upon the concept of mutual gains from trade. Just as two neighbors who voluntarily make an informed exchange of assets are made better off by the transaction, citizens of different countries also can expand their choice set and become wealthier through in-

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1. For an excellent survey of the field, see STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS (P. Krugman ed. 1986) [hereinafter STRATEGIC TRADE POLICY].

2. "I have yet to see any problem, however complicated, which when you looked at it in the right way, did not become still more complicated." DICTIONARY OF CONTEMPORARY QUOTATIONS 10 (D. Eisel & J. Reddig eds. 1981).

ternational trade. The theory rests upon different national resource endowments, with each country having a comparative advantage in producing some goods and services relative to others. International trade, according to the conventional wisdom, permits all countries to expand their production possibility frontiers by focusing on their own economic specialties and trading with others who do the same.

The new international economics is rooted in the economic theories of monopoly and externality and represents a deceptively simple extension of these theories. Since monopolists make more money than competitors, countries whose trade is conducted by monopolists (or firms with significant market power) may be able to extract additional wealth — in economic parlance, rents — from their trading partners than would be the case if trade were carried out by exporters in competitively organized industries. This wealth can benefit the home country in the form of higher profits, higher wages, higher tax revenues, or some combination of the three.

The policy problem becomes sorting out those situations in which this process might actually work. The new learning is not confined to conventional monopolizing devices, such as mergers and cartels, but entails identifying industries where economies of scale and learning curves yield first-mover advantages. It then calls for promoting these industries, so that foreign competitors will find entry difficult, leaving home firms with a position of market power in export markets.

The externality issue revolves around whether market sectors can be identified, the expansion of which would confer benefits upon other sectors of the economy for which the unfettered market mechanism provides no stream of benefits. Such market sectors are generally considered to be those with a propensity or potential for technological innovation and interindustry diffusion of knowledge. If such industries exist and can be identified, an activist trade policy that promotes their development may confer benefits upon other sectors of the economy. A policy that is even neutral to the development of such industries may inhibit economic growth, particularly if other nations have trade policies that internalize these external economies.

The case for free trade, implicitly if not explicitly, is based on transactions being made in competitive markets. However, as economists specializing in international trade became aware of the focus on imperfect competition done by industrial organization economists, some lost their enthusiasm for the paradigmatic free trade model. Then, as economic models of imperfect competition and strategic behavior were applied to

trade between countries, the potential for government action to restrain free trade became intellectually more congenial.

The impetus for the new international economics, however, was not an accidental intrusion of oligopoly models into trade theory. Paul R. Krugman argues rather that the movement also has been fashioned by changing trade realities.³ The growing importance of international competition in the United States, the fact that trade patterns do not seem to be based on natural or human resource endowments so much as on technology and innovation, the purported advantages of large scale production, and even "accidental initial advantages" have combined to provoke a reexamination of the case for uninhibited free trade.

Japan is regularly cited as the country most successful at implementing the principles of the new learning on international trade. In particular, its Ministry of International Trade and Industry (MITI) is credited with giving government guidance and support to target sectors so that they can capture rents or generate external economies; MITI supposedly hinders the development of less favored firms and economic sectors in Japan.

One industry where MITI allegedly played a vital supporting role is that of consumer electronic products. In his article on Japanese industrial policy and the role of MITI, Kozo Yamamura singles out this industry, particularly the manufacture and marketing of television receivers, as an example of "how the policy adopted [by MITI] directly affected the market conduct of the [Japanese] firms in their efforts to increase their market share in . . . the United States."⁴

II. *MATSUSHITA V. ZENITH*

The data from a recent antitrust dispute provides an opportunity to flesh out, through a case study, the new learning in international trade. This particular antitrust case is especially opportune for detailed study for three reasons. First, it involves the television industry, which Yamamura and others cite as illustrating the benefits of an activist trade policy. Second, the process of discovery in this antitrust case opened up substantial detail concerning both the Japanese and the U.S. television industries. Third, opportunities for empirical research on the new learning in international economics are not common. This is in part because

3. Krugman, *Introduction: New Thinking About Trade Policy*, in STRATEGIC TRADE POLICY, *supra* note 1, at 1-22.

4. Yamamura, *Caveat Emptor: The Industrial Policy of Japan*, in STRATEGIC TRADE POLICY, *supra* note 1, at 169, 178. *See also id.* at 178-85.

the theoretical dimensions of the field are still developing and also because applying empirical flesh to the bones of oligopoly theory and strategic behavior has been one of the more difficult problems in industrial organization.

A single robin does not prove spring has arrived, and a single case study will not prove (or disprove) the merits or demerits of an activist trade policy. But this particular international trade episode, more than most, offers illumination about some of the issues raised in the new international economics because of the economic character of the industry involved, the alleged strategy of the defendants, and the putative relationship of the defendants and their government's activist trade policy. Through this single case study, a building block is fashioned for constructing an understanding of the potential for the rent-capturing process of a strategic trade policy.⁵

Within a few months of the Supreme Court's 5-4 opinion in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,⁶ the case had become a widely-cited and widely-discussed decision. What the Supreme Court decided in only seventeen pages of written text came after millions of pages of documents had been examined and thousands of hours of labor had been expended before the litigation got to the nation's highest court. Even by antitrust standards, *Matsushita v. Zenith* was what lawyers call "a big case."

A. *The Background of the Litigation*

Some antitrust cases involve allegations of conspiracy. Some entail allegations of predatory pricing. *Matsushita v. Zenith* was about both conspiracy and predatory pricing. The plaintiffs' charge was that several companies which were supposed to be independent competitors entered into a conspiracy to charge predatory prices in one market while collusively charging supracompetitive prices in another.⁷ Several laws were said to be violated by the defendants' behavior.⁸ But the Sherman Act

5. The case study that follows is based on and draws heavily from the author's analysis in Elzinga, *Collusive Predation: The Case of Matsushita v. Zenith*, in *THE ANTITRUST REVOLUTION* (J. Kwoka, Jr. & L.J. White eds. 1989).

6. 475 U.S. 574 (1986), *rev'g In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'g Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981). Matsushita won at the district court level and Zenith won at the appellate level. Throughout this article the author uses the term "plaintiffs" to refer to Zenith and NUE (National Union Electric Corporation), the original plaintiffs in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981).

7. *Matsushita*, 475 U.S. at 584.

8. Zenith and NUE alleged violations of Section 1 and 2 of the Sherman Act, Section 73 of the Wilson Tariff Act, Section 2(a) of the Robinson-Patman Act, and the Antidumping Act of 1916.

charges of a conspiracy to restrain trade and a collective attempt to monopolize were the focus of the action.

B. *The Players*

Matsushita was born in 1970 when National Union Electric Corporation (NUE) brought suit against a number of Japanese firms. NUE was the former Emerson Radio Company, a U.S. pioneer in the manufacture of radios and television receivers. Four years later, Zenith Radio Corporation filed a similar lawsuit against the same Japanese firms, and the two actions were consolidated.⁹ The principal defendants were seven Japanese firms: Matsushita, Toshiba, Hitachi, Sharp, Sanyo, Sony and Mitsubishi (the Japanese firms).¹⁰ These firms are among the largest business corporations in the world. In 1974, the seven firms had combined sales of over \$20 billion. Zenith and NUE are not "Mom and Pop" operations either, though Zenith is much larger than NUE.

The products covered by the charges in *Matsushita* embrace the entire consumer electronics products industry: television receivers, radios, tape players, and stereo equipment. However, the case was fought primarily over the relevant market of television receivers (televisions) in the United States.

Televisions are a consumer durable familiar to virtually everyone. They were originally the product of American and European inventors, and the U.S. industry was the world leader in production volume and quality until the mid-1960s. The birth of the Japanese industry came largely through licensing arrangements and technical assistance from U.S. companies. For example, American firms such as GE, RCA, Westinghouse, Western Electric and Zenith, along with European firms such as Philips, were prominent exporters to Japan of licensed technology. MITI, according to Yamamura, was the "doorman" governing the entrance of this western technology into Japan.¹¹

The basic charge against the Japanese firms in *Matsushita* was that they engaged in a massive global conspiracy lasting more than two decades the purpose of which was to destroy the American television industry. The strategy had two prongs: (1) charging monopoly prices in

475 U.S. at 578 (plaintiffs claimed that only the violations of the Antidumping Act did not involve conspiracy).

9. For a case history, see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 244, 245-46 (E.D. Pa. 1975).

10. There were several other defendants, including subsidiaries of the Japanese firms and some American firms such as Sears, Roebuck. Sony Corporation, one of the original principal defendants, settled with Zenith, but remained a defendant in the NUE half of the case.

11. Yamamura, *supra* note 4, at 173.

Japan, the defendants' home market, through a price-fixing conspiracy among the defendants there; and (2) using the monopoly profits made in Japan to subsidize below-cost, predatory pricing on export sales to the United States. Zenith and NUE claimed that in the short run U.S. producers such as themselves were economically harmed by the predatory pricing and that in the long run American consumers would end up paying monopoly prices on televisions after domestic competition was eliminated. Moreover, in the long run, the Japanese economy would benefit from the monopoly rents, the pursuit of which is encouraged by the new learning in international trade.

C. *Predatory Pricing in the United States*

Using monopoly profits made in one market to gain a monopoly position in another market is not a strategy first identified in the new international economics. The strategy is an old one, sometimes called war-chesting, and in U.S. antitrust annals it is often associated with some of the notorious trusts of an earlier industrial era. In international trade, the strategy also has a long tradition as one variation of dumping.¹² Most incidents of dumping do not have a predatory design, but predatory pricing in an export market is a subset of dumping. In *Matsushita* the defendants' war chest supposedly was derived from a cartelized home market largely shut off from outside competition.

From the perspective of an American consumer, what happened in the Japanese home market is of little economic consequence if predatory pricing did not take place in the United States. From the standpoint of MITI and Japanese television producers, a rent-seeking strategy to gain market power is of no benefit if a monopoly position in the U.S. is never obtained.¹³ Accordingly, the economic consequences of U.S. television

12. Technically, dumping is any form of price discrimination in international trade. "Dumping proper" is the form most commonly thought of as dumping, i.e., when similar goods are sold by a producer at a lower export than home market price. "Reverse dumping" occurs when the higher price is charged in the export market. See W. WARES, *THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY* 3-12 (1977).

13. There is one condition in the literature of the new international economics under which export subsidies might profit a country even if foreign rivals remain in the market (i.e., rivals need not be driven out by predation). This may occur when domestic and foreign rivals (in the absence of any trade policy) meet under conditions of Cournot (quantity-setting) competition. The result assumes only one exporter and a subsidy that transforms the exporter from a Cournot competitor to a Stackelberg leader. The subsidy could shift economic profits or rents to the country with the subsidy in amounts that exceed the cost of the subsidy. The development of this result is associated with James Brander and Barbara Spencer. For a summary of their work, see Brander, *Rationales for Strategic Trade and Industrial Policy*, in *STRATEGIC TRADE POLICY*, *supra* note 1, at 23-46; Spencer, *What Should Trade Policy Target?*, in *id.* at 69-90.

Jonathan Eaton and Gene M. Grossman show that this result pivots upon the competition being Cournot in character. See Eaton & Grossman, *Optimal Trade and Industrial Policy Under*

pricing by the Japanese producers and their resulting U.S. market position become the first areas of examination. In a later section, two features of the alleged Japanese home market conspiracy will be assessed. These features are the economic evidence for joint behavior and the economic rationale of using cartel profits made in one market to fund monopolizing activities in another.

D. *The Mechanics of Predatory Pricing in Matsushita*

Two Japanese organizations were said to form the heart of the export portion of the conspiracy: MITI and the JMEA (Japanese Machinery Exporters Association). Through MITI, minimum prices, called "check" (or "reference" or "benchmark") prices, were established governing the sale to the U.S. of consumer electronic products, including televisions. Through the JMEA the defendants allegedly adopted a "Five Company Rule" that limited each Japanese seller to only five wholesale customers in the United States. Under the Sherman Act, it would be illegal for a group of competitors to agree upon minimum prices and to agree not to compete against each other for particular customers in the manner described.¹⁴

The plaintiffs contended that not only were agreements made by the Japanese firms on the check prices, but also that there were additional agreements to go below the check price minimums. This disregard of the check prices was done, according to the plaintiffs, through secret rebates and discounts to U.S. customers. Zenith and NUE complained that these prices, or at least some of them, were artificially depressed and predatory. There are, then, two alleged strategies running concurrently here: prices that are predatory in the U.S. television market; and a collusive agreement to put them there. The economic theory of predation

Oligopoly, 101 Q.J. ECON. 383, 384 (1986). If the rivalry were over price instead of quantity (that is, if the firms were Bertrand competitors), the case supporting export subsidies or protection falls. Eaton and Grossman also show that even under Cournot competition, the argument for subsidy intervention does not hold when there is more than one exporting firm. Their work suggests that the rent-shifting leg of activist trade policy is limited to situations of limited policy relevance. This leaves only the rent-creating argument of the new international economics where an activist trade policy endeavors to benefit a nation's export firms by assisting them in monopoly creation. Such is the focus of this paper's examination.

14. While fixing minimum prices and dividing markets are both Sherman Act offenses, it is not crystal clear how rivals of firms adopting such behavior would be affected adversely by these practices. In fact, Zenith and NUE should have been the beneficiaries of such tactics, had they been carried out. If fixing minimum prices and dividing markets had constituted the plaintiffs' entire case, the district court would have denied them standing to sue, because they would not have been injured parties but rather economic beneficiaries. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1147-48 (E.D. Pa. 1981), *rev'd sub. nom. In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub. nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

sheds light on the first tactic; the economic theory of cartels illumines the second.

III. THE ECONOMIC THEORY OF PREDATION

Predatory pricing is a conscious strategy of pricing below cost on a sustained basis to eliminate or discipline one's rivals in order to maintain or establish monopoly power. When this strategy is successful, rivals expire or cede pricing leadership to the predator. The upshot of successful predatory pricing is the monopolization of a market, to the detriment of consumers of that product or service. The topic of predatory pricing has been widely discussed in academic circles during the past decade,¹⁵ and predatory pricing has been a central allegation in several important anti-trust cases that did not reach the Supreme Court in the decade prior to *Matsushita*.

In many antitrust cases involving predatory pricing, courts typically examine evidence comparing a defendant's prices with its costs. The most common methodology for comparing prices and costs used by courts today is adopted from the economic theory of the firm and was made famous in a 1975 article in the *Harvard Law Review*.¹⁶ This method, now called the Areeda-Turner test, entails comparing an alleged predator's price with its reasonably anticipated average *variable* cost (as a proxy for marginal cost) and rests on the assumption that a seller normally will not produce output if the market price is below the firm's out-of-pocket costs.¹⁷ In the economic theory of the firm, the average variable cost curve is associated with the firm's shut-down point. In a

15. The literature on predatory pricing is too large to cite here. For a selective introduction to the topic and the ongoing debate, see P. AREEDA, *ANTITRUST LAW* 114-67 (Supp. 1982); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 *YALE L.J.* 1 (1979); Beckenstein & Gabel, *Predation Rules: An Economic and Behavioral Analysis*, 31 *ANTITRUST BULL.* 29 (1986); Brodley & Hay, *Predatory Pricing: Competing Theories and the Evolution of Legal Standards*, 66 *CORNELL L. REV.* 738 (1981); Calvani & Lynch, *Predatory Pricing Under the Robinson-Patman and Sherman Acts: An Introduction*, 51 *ANTITRUST L.J.* 375 (1982); Dirlam, *Marginal Cost Pricing Tests for Predation: Naive Welfare Economics and Public Policy*, 26 *ANTITRUST BULL.* 769 (1981); Easterbrook, *Predatory Strategies and Counter-Strategies*, 48 *U. CHI. L. REV.* 263 (1981); Fisher, *On Predation and Victimless Crime*, 32 *ANTITRUST BULL.* 85 (1987); Isaac & Smith, *In Search of Predatory Pricing*, 93 *J. POL. ECON.* 320 (1985); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 *YALE L.J.* 213 (1979); Liebler, *Whither Predatory Pricing: From Areeda and Turner to Matsushita*, 61 *NOTRE DAME L. REV.* 1052 (1986); McGee, *Predatory Pricing Revisited*, 23 *J.L. & ECON.* 289 (1980); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 *J.L. & ECON.* 137 (1958); Shepherd, *Assessing "Predatory" Actions by Market Shares*, 31 *ANTITRUST BULL.* 1 (1986); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 *YALE L.J.* 284 (1977).

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

17. As Areeda and Turner put it:

Recognizing that marginal cost data are typically unavailable, we conclude that:

mechanical application of this theory, a price below the shut-down point should cause the firm to cease operations.¹⁸ If the firm chooses not to shut down, the inference is explored (or drawn) that the firm is engaging in predatory pricing.

It is inherent in predatory pricing that the predator must incur a short-run loss in order to impose losses on its prey. Zenith and NUE claimed that the Japanese defendants did, in fact, sell televisions in the U.S. at prices below cost.¹⁹

A. Predation as an Investment

In economic analysis, predation can be seen as being analogous to an investment. Initially, one incurs significant costs, in the form of losses, during the period of predation. These losses are, in effect, an investment in prospective monopoly profits. Justice Powell recognized this subtle facet of economic analysis when he wrote that:

The forgone profits [of predation] may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.²⁰

Figure 1 illustrates and compares a predator's losses during predation and its profits during recoupment. Assume that the competitive, pre-predation price is at a level of 100 and is represented by the distance OH. The total quantity sold per year at this price is also 100 and is represented by OC. Now suppose the predatory price of the Japanese sellers was equal to the distance OF, and assume this unremunerative price caused some U.S. sellers to leave the industry and others to cut back their output such that U.S. sales were only OA. Assume further that the demand curve remains unchanged.

(a) A price at or above reasonably anticipated average variable cost should be conclusively presumed lawful.

(b) A price below reasonably anticipated average variable cost should be conclusively presumed unlawful.

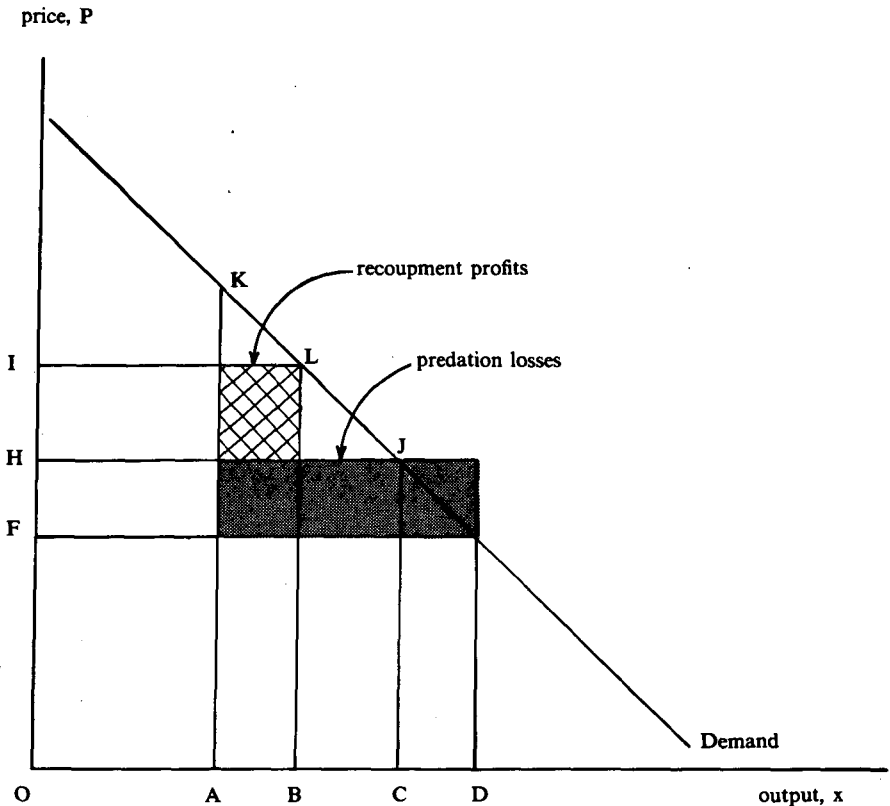
Id. at 733.

18. There are benign reasons why a firm may price below average variable cost. The firm may be unloading inventory at distress prices; it may be a new seller engaging in promotional pricing; it may be a new firm the output of which does not yet exploit expected lower costs due to a learning curve phenomenon; and its average variable cost curve may not reflect tax considerations that make pricing below this measure of cost profitable on a post-tax basis.

19. An economic expert for plaintiffs opined that four of the Japanese firms had sold televisions in the U.S. at prices at least below average cost. The district court judge, for reasons not assessed here, ruled that this price-cost evidence was inadmissible on the grounds that the construction of the cost and price data was unreliable. *Zenith*, 513 F. Supp. at 1129.

20. *Matsushita*, 475 U.S. at 588-89.

FIGURE 1



The total number of televisions consumers will buy during each year of predation is OD . Since U.S. producers have elected to produce only OA under the predatory conditions, the Japanese must produce the balance: AD . This means the Japanese firms' loss on each unit produced and sold is FH , the difference between the average competitive price OH (which is a proxy for long-run average costs, including a normal profit), and the predatory price OF . Thus, the predators' losses in every year of predation are depicted by the product of $HF \times AD$ (the shaded rectangle).

Figure 1 can be used to assess the prospects for recoupment by the defendants. Assume that when predation is over, the U.S. competition is beaten back and continues to produce only OA units. This means the Japanese firms cannot consider the total demand curve, as their own. They will raise prices during recoupment to maximize profits over the

“residual” demand curve, which is that portion of the demand curve southeast of point K.²¹

The predators’ profit-maximizing (monopolistic) price during recoupment is OI; their level of output is AB which is the difference between the total demand OB at the recoupment price and the output OA of their U.S. rivals. IH then is the profit on each set. The profit during each year of recoupment would be the product of IH x AB (the cross-hatched area). Based on Figure 1, a predatory pricing strategy would seem rational only if the value to the firm of the recoupment rectangle exceeded the cost to the firm of the loss rectangle. In the example shown, (visually) this does not occur. But the rectangles represent only an annual benefit and cost. The predatory strategy, in its loss stage and recoupment stage, may take several years. Figure 1, therefore, is a heuristic device. A simple comparison of the rectangles, by itself, cannot reveal the full costs and benefits of predation because of the tactic’s intertemporal dimension. But Figure 1 does illustrate certain parameters of a predation strategy.

B. Present Value and Predation

Economic analysis recognizes that a dollar tomorrow is worth less than a dollar today. Consequently, a rational predator or government bureau seeking to identify strategic sectors recognizes that the profit rectangle during recoupment must more than offset the loss rectangle during predation in order to compensate the firm for the time-value of the funds employed. In a more careful analysis of predation, the discounted character of the losses would be compared with the future stream of monopoly profits.²²

Whether the returns to investment in predation are sufficiently great to warrant the cost depends on how long and how far prices are below costs during the predation period, the rate of return the predator uses in making his investment decisions, the reentry rate of rivals during the recoupment period, and the length of the recoupment period. In addition, the more inelastic the market demand is, the better the prospects will be for a predator to become successful.

21. The profit-maximizing price for the predators will be the midpoint of the segment KJ for a linear demand curve. Any price southeast of J on the demand curve could not be a recoupment option for the Japanese sellers if they were predators since J itself shows the competitive price level. A price higher than K on the demand curve is not an option either. With the U.S. firms supplying OA already, nobody would pay such a price.

22. This approach has been developed in more detail and more rigorously in K. Elzinga & D. Mills, *Testing for Predation: Is Recoupment Feasible?* (Feb. 1988) (unpublished manuscript).

Using this analysis, Table 1 shows a series of conditions derived from the economic studies submitted by plaintiffs in *Matsushita*. The predatory price is expressed as a percentage of the prices that plaintiffs alleged would have prevailed absent predation. For example, in column one, for color televisions, the entry 62 reflects the plaintiffs' contention that the average prices charged by Japanese firms during the period 1968-1975 were 62% of the but-for-predation price. Column two shows the same calculation for black and white receivers. Both columns reflect the deep discounting allegedly engaged in by the Japanese.

TABLE 1: PREDATION IN TELEVISIONS

	Color Sets	Black and White Sets
Predatory Price	62	58
Years of Predation	10	13
Growth in Demand	5%	-2%
Japanese Beginning Market Share	5%	5%
Japanese Ending Market Share	42%	17%
Recoupment Price Range	119-138	100-106
Years of Recoupment	∞	*

* The alleged predatory pricing cartel could never recoup its predatory losses. Declining demand and increasing levels of non-Japanese imports and stable U.S. production levels would shrink Japanese sales to zero at prices above 100% of the open market level by the tenth year of the recoupment period.

Column one adopts plaintiffs' position that the period of predation ran at least from 1965 (when the Japanese first gained 5% of the market) to 1975 (the year after the cases were consolidated). Column two indicates that predation in black and white sets purportedly endured for at least 13 years. Given such deep discounting for such a long period, the losses (or magnitude of the investment in predation) would be enormous.

It would have been unrealistic for the defendants (or MITI) to expect the output of U.S. television producers to fall immediately to zero

under conditions of predatory pricing, if only because some consumers may prefer particular features of U.S. producers, such as cabinet styling; moreover, some retailers who carry a full line of appliances made by a particular U.S. manufacturer may be slow to substitute a Japanese brand of television sets. For these reasons and others, there would be some lag before U.S. firms drastically reduced or ceased their television production because of predatory price levels. But, if prices were in fact predatory, predator(s) could, at a minimum, reasonably expect the output of U.S. firms not to expand during the predation period. If domestically produced output remained constant, as column one of Table 1 assumes, the Japanese would capture all television sales stemming from demand growth. This would have given the defendants 42% of the color market by 1975.

The demand for black and white sets was declining during the period under consideration. Column two's calculations ascribe to the Japanese producers their actual share of the black and white segment at the end of the predation period: 17%. Japanese firms in the manufacturing sector at that time earned an average of 12.2% rate of return on assets.²³ If this approximates the alternative opportunity cost for the defendants of an investment in predatory pricing and if 1.2 is a reasonable estimate of the price elasticity of demand for televisions in the U.S.,²⁴ the size of the putative losses of the Japanese firms can be compared with the prospective returns supposedly available to offset them. From this, one can estimate how long and at what level remunerative recoupment prices would have to be for predation to be worthwhile.

Table 1 shows the range of prices the Japanese could have expected to charge during the recoupment period and the length of time they would have to charge them to make predation worth the effort. The analysis assumes that the rivals of the Japanese defendants sell the same number of televisions during the years of attempted recoupment as they did at the end of the predatory period. This assumption favors the prospect of the predation strategy being successful in that it means the rivals of the predators do not expand their output even if monopoly prices were being charged by the Japanese producers. The table suggests that even with this assumption, recoupment is impossible for the Japanese firms in either of the television segments. If recoupment could go on for infinity, it would not pay off for the Japanese firms in color televisions because the

23. D. HOLLAND, MEASURING PROFITABILITY AND CAPITAL COST Tables 1-8, at 9 (1984).

24. H. HOUTHAKKER & D.L. TAYLOR, CONSUMER DEMAND IN THE UNITED STATES 130 (1966).

huge initial losses swamp the modest price enhancement possible during recoupment. In the black and white segment, prospects are even worse. Because of declining demand, charging the best price they can for black and white sets (essentially the competitive price) shuts the Japanese firms out of the market in ten years.

By the analysis reflected in Table 1, the pricing strategy imputed to the Japanese firms by the plaintiffs in *Matsushita* requires that the defendant firms act irrationally. Because the investment characteristics of the market do not support a predation theory, this suggests some other explanation of the events described (such as lower costs or higher quality for the Japanese firms).

C. Market Power Prerequisite for Recoupment

Economic theory characterizes successful predation as a two-step sequence. The first step involves below-cost pricing to drive out or discipline rivals; to exercise the second, recoupment, requires monopoly power. A firm's market share often serves as a proxy for its market power. A seller with a low market share in a market with several sellers cannot dictate market price unilaterally. If it charges a price above the market level, the price will not be sustained because buyers, by assumption, have numerous alternatives. A firm (or group of firms acting collusively) with a large market share may not have significant market power either if customers perceive other products or services as close substitutes, or if entry into the market is easy.

The economic study of markets does not offer an exact benchmark for determining when a single firm has substantial market power (or a group of firms acting collusively has such power). In a market with moderate entry barriers, many economists would agree that for a firm to exercise market power unilaterally it must have at least 50% of the market under its control. Some economists would put the figure higher; others might go as low as 40%. The existence of entry barriers would strongly influence an economist's concern about high seller concentration. In the absence of entry barriers, for example, even high concentration would not enable the exercise of significant market power by firms in an industry.

Notwithstanding the economic devastation supposedly inflicted upon U.S. firms, the Japanese defendants' combined market share (in terms of unit sales) of black and white and of color sets sold to U.S. dealers never exceeded 50%.²⁵ Japanese-made color sets exported to the

25. *Zenith*, 513 F. Supp. at 1322.

U.S. went from less than 700,000 units in 1968 to almost 4,000,000 units by 1976. The numbers are impressive but not overwhelming. In 1965, the Japanese defendants supplied only about 10% of U.S. purchases of televisions; by 1970, the percentage had grown but was still under 30%.²⁶ If there were no collusion on export sales, a fortiori, the low market shares of individual Japanese firms would suggest that the defendants individually had no significant control over price. Indeed, Mitsubishi, in its biggest volume year in the U.S., sold less than one percent of the black and white and color sets purchased in this country.²⁷

Plaintiffs had difficulty persuading the court that the Japanese firms, even collectively, ever gained monopoly power, or had the prospect of gaining it to accomplish predation's recoupment stage. Economic reasoning persuaded the lower court that it was unnecessary to study or ascertain the height of any entry barriers in the television industry because of the low market shares of the defendants.

While NUE and certain other U.S. television producers did exit the business, Zenith remained a prominent seller. In 1973, the year before the NUE and Zenith cases were consolidated, Zenith had 23.8% of the color television market, selling more sets in the U.S. than any other seller; Zenith was followed by RCA, another U.S. producer, which at that time had 20.1% of the U.S. color market.²⁸ I know of no evidence that demonstrates that even today (some three decades after the rent-seeking strategy purportedly began) the Japanese television industry, individually or collectively, has market power in the U.S. television market.

D. Cheating in a Predatory Cartel

In the economic theory of the cartel, one of the most powerful concepts is that of the cheater. Cartel theory teaches that when a group of rivals collusively establishes prices at the joint-profit maximizing level, it will be economically advantageous for any one seller to operate outside the cartel rather than within. Outside the cartel, a seller—the cheater—can enjoy the high cartel price but not be subject to the output limitation imposed on insiders that makes the high price possible.

26. *Id.* at 1251. Mitsubishi owned no manufacturing facilities in Japan, so it is not evident under the plaintiffs' theory of the case how it benefited from a predatory export cartel. It could not use gains from Japanese production to finance losses in the United States. In fact, it is a buyer of televisions (which it resells); it has no incentive to see the Japanese home market monopolized or to do its share to drive U.S. manufacturers out of business.

27. *Id.* at 1285.

28. *Id.* at 1255.

Most cartels seek to raise prices. Thus, the cheater typically is the firm that tries to sneak outside, shade prices, and clandestinely sell larger outputs. But in a predatory cartel, the cheater does the reverse. If firms have agreed to charge prices *below* cost, the cheater's incentive is to sell less than its share of the jointly mandated amount considered necessary to drive out the rivals. The cheater concept has powerful applicability in analyzing *Matsushita*.

Plaintiffs maintained that under the auspices of MITI, Japanese sellers collusively set check prices. The check price minimums were to show the U.S. government that Japan wanted "fair competition" and should not be subject to tariffs and quotas that would be even more restrictive. Then, to circumvent the check prices, the Japanese sellers offered U.S. customers secret price cuts and rebates below the reference prices. Plaintiffs devoted some 2000 pages in their Final Pretrial Statement to describing details of this "rebate scheme." The documentation is a powerful showing of the many ways by which buyers can pay transaction prices that are lower than list prices. Zenith and NUE alleged that the prices the Japanese sellers netted after violating the check price minimums were unremunerative.

The factual record surrounding the check price violations is actually powerful evidence that these reference prices were not predatory because sellers sought additional sales at levels below them. It would be irrational (as a matter of economics) to want to sell "more than your share" at prices below cost, especially when such sales involved falsifying purchase orders, shipping documents, export validation forms, and U.S. Customs' invoices, entailed keeping double sets of books, and involved other types of concealment.²⁹

It is, nonetheless, proper to ask whether the secret rebates and clandestine discounts might not have been part of a concerted effort by the Japanese to move transaction prices down—perhaps without MITI's knowledge—to predatory levels. The fact difficult to square with such a conjecture is the apparent eagerness with which Japanese sellers sought to expand their sales at prices below the check price level, a level that allegedly was below production and marketing costs.

For example, an importer told Sharp (one of the seven principal defendants) that Sharp's competitors were rebating off the check prices and that if Sharp wanted any business it must be prepared to lower its prices

29. The Japanese sellers secretly would rebate to the customer the difference between the nominal price declared for export and import purposes and the actual transaction price quoted to the customer. These activities did not violate the antitrust laws but they did expose the Japanese producers to other legal action by the U.S. Bureau of Customs and the U.S. Treasury Department.

as well. Sharp obliged. When Matsushita was planning to acquire Motorola, a U.S. firm to which Sharp had sold televisions, Sharp requested Motorola executives not to tell Matsushita of its past rebates and deviations from the check prices.³⁰

The only economic rationale for an eagerness to expand one's share of below cost sales in a truly predatory cartel would be if a seller viewed its product line as being highly differentiated. If there were great customer inertia against switching brands, a cheating member of a predatory cartel might covet additional sales (even during the period of predation) knowing or believing that its new customers will not switch suppliers when prices are raised later to monopolistic levels.

Such a prospect does not square with consumer behavior in the television industry at the time of the alleged predation in *Matsushita*. Only Sony, among all the defendants, had significant brand recognition, and it sold at relatively high prices, not low prices. Large-scale buyers of Japanese televisions and other consumer electronics products, such as a K-Mart or a Woolco, who frequently attach their own "house brand" name to a product, do not become wedded to a particular manufacturer. Moreover, Japanese television manufacturers witnessed firsthand that American consumers were not locked-in to their first television brand. Many consumers switched from U.S. firms such as Philco and Admiral to firms such as Hitachi and Sanyo when they purchased their second television set (or replaced their first). Americans may be true to their school, but they are not known to be loyal to the manufacturer of their current television receiver, be it of U.S. or Japanese origin, when it comes to shopping for another.

Absent substantial product differentiation, the economic theory of cartels would predict the following type of behavior if there were a predatory export cartel: serious squabbling among the defendants, each seeking to cut back its *own* sales during the predatory period and requiring its rivals to incur more of the per unit losses associated with each additional television set produced and sold below cost. American importers would be unable to play one Japanese defendant off against another trying to get a lower price. If an American buyer tried to whipsaw a Japanese producer by demanding a lower price (or what is the same thing, a larger rebate), the Japanese producer would be eager to decline the offer and graciously allow his co-cartelist to make the sale—if prices were below cost as plaintiffs alleged.³¹

30. *Zenith*, 513 F. Supp. at 1247; see also *id.* at 1278.

31. Cartelization implies not only concerted behavior but also similar behavior. Rebates were

E. *The Economic Literature on Predatory Pricing*

Legal opinions have many footnotes. But they are not often references to economists. In *Matsushita*, the Supreme Court, to an extent not often seen, relied on economic studies of predation to influence its decision. Justice Powell mentioned the "consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."³²

The word "consensus" is an apt one; "unanimity" would not have been. Most of the historical studies of alleged episodes of predatory pricing have shown the charges to be unfounded. They tend to support the prediction of economic theory that predatory pricing will be difficult because of the large losses a successful predator must somehow offset. Nonetheless, there are some economists who remain persuaded that predatory pricing is, in particular markets, a matter of serious antitrust concern.

IV. THE LAW OF ONE PRICE

Without using the term, the district court addressed the applicability of the economist's law of one price to *Matsushita*. The law of one price says that in equilibrated competitive markets, sales of the same product will be at identical prices. Plaintiffs essentially were arguing as follows: If a television set sells for \$200 (in yen equivalent) in Japan, and the same set sells for \$150 in the U.S., sellers should increase supply in Japan and decrease supply in the U.S. (on the assumption that transportation costs are not substantial). In the process, through competitive arbitrage, only one price will result. If prices do not equalize, the argument continues, there must be a reason Japanese sellers do not expand sales in Japan (the home market conspiracy theory) and do not reduce sales in the U.S. (the predation theory). Capping off the argument is the closed Japanese market (for which there is much evidence), which prevents U.S. producers from accomplishing the arbitrage by increasing *their* shipments to Japan. The difficulty of obtaining retail and wholesale distribution appeared to be one of the main barriers to entry.

not offered to all customers, and the amount of rebates, when offered, varied as between defendants and between customers of the same defendant. Such disparate behavior squares more with independent rivalry than joint conduct. *See id.* at 1249.

32. *Matsushita*, 475 U.S. at 589. Some of the scholarly articles cited by the Court are Easterbrook, *Predatory Strategies and Counter-Strategies*, 48 U. CHI. L. REV. 263 (1981); Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958); McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289 (1980).

Plaintiffs offered evidence that compared defendants' home market prices for televisions with prices for U.S. export and argued that Japanese prices exceeded U.S. prices. Defendants claimed that this evidence was marred because the economists' *ceteris paribus* conditions were not met in making the comparison. That is, the sets were not identical in their engineering specifications, they were sold at different levels of distribution, and they bore different warranty and distribution costs in the two countries. The lower court agreed with the defendants' economic analysis that these differences made the law of one price inapplicable. In fact, Japanese export sales to the U.S. did not have a lockstep relationship either to their own or to U.S. prices. Some of the defendants, notably Sony, charged relatively high prices in the United States.³³ Conversely, some charged relatively low prices. Moreover, relative prices varied among different models among the Japanese defendants themselves as well as in comparison to their U.S. rivals.

There is still another consideration that argues for the defendants' economic theory. If the price levels in the U.S. were the result of competition between domestic sellers, a Japanese seller without market power who wishes to sell in the U.S. must be competitive with U.S. price levels—regardless of prices in Japan or anywhere else in the world. In short, if a television set of a given quality sells for \$175 in the U.S., and even if \$175 exceeds the marginal cost of Japanese producers, it would require neither a conspiracy hypothesis nor a predation hypothesis to account for sales by any of the Japanese sellers in the U.S. in the \$175 range. Such sales are consistent with each defendant's own independent economic interests and with normal business rivalry.

That Japanese firms often undercut established prices in the U.S. does not itself prove predation since the Japanese were new entrants in the U.S. market and the market is one where long-term cost reductions led price levels downward over time. In markets where economies of scale and learning-by-doing result in cost reductions, economic theory teaches that prices will trend downward. Frequently, such trends are led by the newer firms which are seeking to use low prices to help gain brand recognition, goodwill, and company reputation.³⁴

33. Sony was an awkward firm for plaintiffs to fit with the others. The prices charged by its profitable American arm, Sonam, were considerably higher than both the check prices and the prices of Zenith and NUE sets. See *Zenith*, 513 F. Supp. at 1282. How Sony's high prices could injure American firms was never specified.

34. The combination of established brand recognition, high combined market shares, and import protection may explain the higher prices defendants enjoyed in Japan. Together they controlled almost 95% of the Japanese market. But there is no credible evidence that transaction prices at the

A. *Economists and Inferential Evidence*

In the U.S., price-fixing conspiracies often do not leave “smoking guns”: direct evidence in the form a written agreement to charge joint profit-maximizing prices or a videotape of the conspiracy. Antitrust enforcement agencies often must use indirect or circumstantial evidence to prove price-fixing. However, in *Matsushita* there was direct evidence that the Japanese firms had, in fact, signed a document determining minimum export prices on television sales to the United States. Indeed, over time there were more than a dozen such agreements covering both black and white and color televisions.

This is the language of Article 8 of one such agreement (The Manufacturers’ Agreements):

The parties to this agreement shall not offer for sale, make a contract for sale or deliver to export businessmen goods at prices *lower than* the prices specified in attached Schedule 2.³⁵

Signatories could sell at or above the check prices.

The defendants claimed that these agreements were mandated by the Japanese government through MITI and therefore were immune from U.S. antitrust prosecution by the “act of state” and “sovereign compulsion” doctrines.³⁶ The plaintiffs contended that MITI did not compel joint action by the Japanese sellers and that MITI, at best, gave subsequent approval to the business strategy initiated by the defendants.³⁷

Regardless of MITI’s role or the lack thereof, it is not clear how Zenith and NUE (and other U.S. producers of televisions) could be harmed by foreign firms setting minimum prices. Zenith, for example, should have been delighted if Hitachi were hamstrung by legal minimums. All Zenith would need to do to compete, on the assumption of comparable quality and other terms, was charge a price less than the minimum to which Hitachi was bound.³⁸ Moreover, jointly setting minimum prices does not fit gracefully with a theory that prices are predatory.

The Five Company Rule also was not compelling evidence of a strategic trade policy at work. First, the rule did not always hold: Several

manufacturing level were higher in Japan. Higher prices at retail or wholesale in Japan relative to the U.S. probably are explained by higher distribution costs in Japan than in the United States.

35. *Zenith*, 513 F. Supp. at 1188 (emphasis in original).

36. *Id.* at 1187.

37. *Id.* at 1194-95.

38. Paradoxically, MITI and the defendants claimed the rationale behind the minimums was to *limit* the number of televisions exported to the United States and thus represented a strategy by the Japanese to limit or prevent even more severe U.S.-imposed trade restrictions upon Japanese goods through tariffs and quotas.

large American buyers, such as J.C. Penney, Sears, Roebuck, and Western Auto, purchased televisions from more than one of the seven Japanese sellers. Furthermore, the rule was easily circumvented: A defendant could make its American subsidiary one of the five and sell to anyone in the U.S. through that subsidiary. Moreover, the rule could not have injured Zenith and NUE (or other U.S. producers). Indeed, if the Five Company Rule had constrained Japanese sellers, it actually should have made it easier for Zenith and NUE to sell to any particular domestic buyer since that buyer allegedly was limited in its Japanese supply alternatives. From an economic perspective, the Five Company Rule runs contrary to the hypothesis of a low price export conspiracy. An organizer of a predatory cartel might have to say, "you must sell to these five" but not "you are *limited* to these five."

V. THE HOME MARKET CONSPIRACY

Price fixing in Japan was supposedly the means by which the Japanese sellers financed the sales of televisions at depressed prices in the United States. As sometimes happens in antitrust cases, when litigation proceeds from complaint to discovery, legal theories change. The district court noted early in its opinion that the war chest theory, which formed an important part of the plaintiffs' original charge, began to wane as the case progressed.³⁹ By the time of the summary judgment, the judge wrote: "Little is said at this stage about 'war-chesting,' apparently because plaintiffs finally recognized that there is no evidence of it in the record."⁴⁰

Earlier, in a controversial move, the lower court judge had rejected much of the written opinion of the plaintiffs' economic experts who contended that a home market conspiracy existed. These economists reviewed written materials that persuaded them, circumstantially, that a conspiracy existed. Much of this evidence was held to be untrustworthy and inadmissible. For example, one JMEA document contained this statement:

Thus, the businessmen involved have decided that, acting as one body, they will strive to maintain export order and, furthermore, to aim for

39. *Zenith*, 513 F. Supp. at 1127-28.

40. *Id.* at 1129. Indeed after surveying many of the documents concerning the meetings of Japanese executives about home market prices, Judge Becker concluded that discussions over home market prices were often discussions over how to maintain retailer margins (which may have lowered manufacturers' prices) and conversations about how prices were dropping in Japan to levels too low to enable manufacturers to break even. These were facts Judge Becker found difficult to square with the war chest theory. *Id.* at 1203-04.

steady expansion of exportation.⁴¹

Economists for the plaintiffs saw such documents as evidence of conspiratorial intent. In contrast, the lower court judge interpreted the document as merely expressing an intent to reduce trade friction between the U.S. and Japan. He dismissed much of the work of plaintiffs' economic experts as that of "conspiracyologists" and not the work of economists qua economists.⁴² Moreover, he ruled that making judgments about conspiracy based on circumstantial evidence of this sort is not the task of an expert economist. Judges and juries are supposed to make such decisions.

The issue of a home market conspiracy does lend itself to economic analysis quite different from "conspiracyology." Without trying to interpret the diaries of Japanese managers, or decipher the minutes of meetings between executives, or exegete the notes taken by subordinates, or discern the meaning of business memos, economic analysis can be used to address these two questions: (a) What would be the form of a home market conspiracy? and (b) What would be the economic rationale of using the proceeds from a home market conspiracy to support predation? A corollary of these questions is: To what extent does economic theory teach that evidence of parallel price discrimination between two separate national markets proves conspiracy?

Addressing the latter question first, the plaintiffs contended that parallel price discrimination was such strong inference of conspiracy that a trial was merited. The defendants argued that to go from a fact of sustained high prices in Japan and lower prices in the U.S. to the conclusion of conspiracy is not inference but rather speculation. The plaintiffs, it should be noted, never submitted any evidence of the rate of returns made by Japanese defendants on home market sales. They argued it should be sufficient simply to show a price difference.⁴³

The history as well as the theory of cartels reveals their instability. Cartels require coordination devices and rules of compliance to hold together diverse interests. The interests of this cartel would have been very diverse and complicated to coordinate if only because of the asymmetry of shares between defendants' sales in the home market and the export market. Firms like Sharp and Sanyo had rather small shares of the market for televisions and other consumer electronics products in Japan. They were relatively large sellers in the United States. Without side pay-

41. *Id.* at 1231.

42. *Id.* at 1138.

43. *Id.* at 1205.

ments, they would have been unlikely to absorb large losses on many sales in the U.S. that later would benefit their rivals whose losses were smaller, especially those rivals who, unlike themselves, had large shares of the Japanese market and who therefore should be the firms with the putatively large war chests.

A. *War Chests and Alternative Opportunity Costs*

Economic analysis often proceeds from assumption. At this juncture, assume that the Japanese firms had cartelized their home market and were making monopoly prices there. Assume too that the Japanese firms are considering a predation strategy in the United States. Plaintiffs in *Matsushita* argued that there is a connection or nexus between the circumstances in the two sets of assumptions: A successful television cartel in Japan renders more likely the adoption of a predatory campaign against the television industry in America. The profits from one market subsidize the other. This is the war chest theory of predation.

Economic analysis cautions against a quick adoption of such a theory. War chests, like everything else in the world of economics, do not come free. Their cost is the foregone profits that could have been earned by investing the purported monopoly profits made in Japan in some alternative endeavor. The alternatives would include relatively riskless opportunities for the funds such as government bonds. No rational firm would forego a more certain and immediate stream of income for a riskier and more long-term prospect of gain unless the opportunities for the future gains are very attractive.

If predation were an attractive strategy—that is, if it were financially attractive as an investment relative to other risk-adjusted alternatives—then potential predators would adopt this strategy of export pricing independent of their home market position. In other words, if a predatory strategy (involving short-term losses) is a profitable investment because of an expected future monopoly position, it is attractive regardless of whether cartelizing in the home market (or any other market) also has proven profitable.

At most, plaintiffs have posited a “convenience theory” of predatory conspiracy: Since the defendants allegedly were meeting already to set home market prices at high levels, it was convenient (as if someone had said, “since we’re all together anyway”) jointly to determine predatory prices for the United States. Agatha Christie might have sized up the convenience theory this way: It confuses motive with ability. If enormous profits were, in fact, being made in the Japanese home market, this

might have afforded the Japanese sellers the ability to finance a costly predatory campaign in the United States. It does not provide the motive.

VI. THE MAN WHO HAD LOTS TO READ

Judge Edward R. Becker, at the time serving on the U.S. District Court for the Eastern District of Pennsylvania, was the trial judge who in March of 1981 first decided *Matsushita*. It was his decision that eventually was appealed to the Supreme Court. His opinion was extraordinarily long, a reflection of the Brobdingnagian number of documents put before him. In 1980 alone, for example, 114 briefs and memoranda were filed in *Matsushita*. Nevertheless, in reaching his decision, Judge Becker relied heavily upon his own economic analysis as well as the economic arguments placed before him. When all was said and done, and much was said and done, he ruled that "despite years of discovery, the plaintiffs have failed to uncover any significant probative evidence that the defendants entered into an agreement or acted in concert with respect to exports to the United States in any manner which could in any way have injured plaintiffs."⁴⁴ Contrary to the conventional wisdom about Japan's strategic trade policy, Judge Becker could find no admissible evidence that "refers or relates to the setting or coordination of export prices . . . or any other aspect of the 'export' component of the 'unitary' conspiracy claimed by plaintiffs."⁴⁵

There were many documents that revealed meetings about home market conditions. But very few of these even contained references to exports; those that did were to exports in general, not exports that were U.S.-specific. There was some evidence that a Japanese trade association (the Electronic Industries Association of Japan) gathered and disseminated average prices of televisions sold for export, but no record of exchanges of current price information, much less agreement on prices or quantities of export.⁴⁶ Absent evidence of this character, plaintiffs' predation case becomes one requiring proof of predatory pricing by individual defendants. But none of these firms had enough market power, or even the prospect of sufficient market power, to prey successfully in a unilateral fashion. Judge Becker decided the case for the defendants on summary judgement.⁴⁷

The Circuit Court of Appeals was unpersuaded that Zenith and

44. *Id.* at 1117.

45. *Id.* at 1209.

46. *Id.* at 1207.

47. *Id.* at 1117.

NUE did not merit a trial. The appellate court, applying different standards of plausibility, would have admitted much of the evidence that Judge Becker held to be inadmissible, including the opinions and studies of economists employed by Zenith and NUE. But upon appeal to the Supreme Court, the highest court in the land thought otherwise (albeit narrowly).

Matsushita v. Zenith, from a purely legal perspective, is about when summary judgment—avoiding a full trial on the merits—is proper in an antitrust case. If the facts about a case, as they are put forward by a plaintiff prior to a full trial on the merits, are not in accord with economic analysis (or “make no economic sense” as the Supreme Court put it bluntly), then a plaintiff’s case may be dismissed without a burdensome and costly trial being imposed on the defendant(s). This puts economic theory in the role of a filter, sorting out inappropriate cases from those worthy of a court’s full consideration. *Matsushita* adds weight to the view that in antitrust, economic analysis counts. Moreover, *Matsushita* strengthens the view that vigorous price competition is so desirable and predatory pricing so rare that courts, to ensure more of the former, should set a high standard of proof for allegations of the latter.⁴⁸

VII. CONCLUSION

The new learning in international trade supports a targeted industrial policy for exporting firms that operate under regimes of imperfect competition. One basis for strategic trade policy is the potential for monopoly profits to be made by certain export industries. If a MITI-styled government agency can change the industry equilibrium in particular oligopolies to shift more profits to that nation’s producers, that nation will benefit from an activist trade policy. As J. David Richardson summarizes the new learning:

In their stylizations imperfect competition among small numbers of large firms make above-normal profit as fact of life. Taking such profit as given, then trade patterns that give a nation larger access to it are economically superior to other trade patterns. Trade policy can poten-

48. It was this concern that provoked the Antitrust Division of the Department of Justice to be a party to this litigation, filing an amicus brief. At the request of Zenith and NUE, the Antitrust Division in 1977 and 1978 investigated the plaintiffs’ claims and found them to be without antitrust merit. Brief for the United States as Amicus Curiae at 3, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 474 U.S. 574 (1986) (No. 83-2004).

Charles F. Rule, who was then Deputy Assistant Attorney General of the Antitrust Division, appeared before the Supreme Court in *Matsushita* and stated the Antitrust Division’s fears that if Judge Becker’s opinion were not upheld, the case would “offer strong encouragement . . . to beleaguered competitors seeking protection from the rigors of competition, and . . . that’s precisely the wrong thing that the antitrust laws should do.” Record at 21-22.

tially achieve such desirable trade patterns.⁴⁹

Jonathan Eaton and Gene M. Grossman have shown the conditions under which optimal intervention might be appropriate under various assumptions about the number of firms.⁵⁰ Grossman and Geoffrey Carliner have gone on to describe some of the difficulties and pitfalls in applying the theoretical apparatus of strategic trade policy.⁵¹ They are not insubstantial.

As U.S. firms face more international competition, it is appropriate that U.S. antitrust enforcement reflect this new competitive dimension. This already is happening in areas such as relevant market delineation where the tools of economic theory traditionally used in domestic antitrust disputes are now applied to wider markets.

At least thus far, the new learning in international economics has not made important inroads into antitrust involving U.S. and foreign litigants. There is, however, little doubt that attempts will be made to adapt the teachings of strategic trade policy to influence antitrust discussion and actual litigation. The heightened interest that courts and enforcement agencies have in economic reasoning is an invitation to consider the ramifications for antitrust policy these new theories purport to have. Moreover, the incentives domestic firms have to insulate themselves from foreign competition make it almost certain that the new learning in international trade will surface as the theoretical framework for antitrust cases of international character.

Any lessons for antitrust or for the new international economics to be drawn from the experience of the Japanese television case are limited, arguably, to only that episode. But three lessons do seem clearly taught by the facts drawn out in the litigation. First, had the United States engaged in a MITI-style trade policy to protect or cartelize its own domestic television industry, whatever rents this would have generated for the firms would have been at the expense of domestic consumers who would have been deprived of the benefits of Japanese output, with no prospect of offsetting rents appropriated in export markets. Second, if the Japanese television producers engaged in a strategy to gain monopoly rents for themselves or the Japanese economy, the policy failed. More than likely, this strategy was never attempted. Indeed, given the restrictions purportedly placed upon the Japanese television producers by

49. Richardson, *The New Political Economy of Trade Policy*, in STRATEGIC TRADE POLICY, *supra* note 1, at 269.

50. See generally Eaton & Grossman, *supra* note 13.

51. Carliner, *Industrial Policies from Emerging Industries*, in STRATEGIC TRADE POLICY, *supra* note 1, at 147-68; Grossman, *Strategic Trade Promotion: A Critique*, in *id.* at 47-48.

MITI, the question to be asked is not how does strategic trade policy assist the Japanese economy but rather how much were Japanese sellers hindered by MITI? There may be a third lesson at least suggested by *Matsushita* as well: in international trade policy, one should not too hastily discard the old learning for the new.

