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ENFORCING THE ANTIDUMPING LAWS: THE TELEVISION DUMPING CASE

*John J. Nevin**

Dumping is the practice of selling products in an export market at a price below the price at which a comparable product is sold in the home market or selling a product in an export market at a price below its cost of production. Article VI of the General Agreement on Tariffs and Trade (GATT) states: "dumping . . . is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party . . ." ¹

No American industry has been more characterized by employee layoffs, widespread plant shutdowns, financial losses, mergers and corporate liquidations than has the American television industry. More than a decade ago American television producers concluded that it was the dumping of Japanese television receivers in the American market that was causing the financial distress in the domestic industry and turned to the Government of the United States for the protection against dumping supposedly afforded by the Antidumping Act of 1921.²

As required by the Antidumping Act of 1921, American television manufacturers, in March of 1968, submitted their dumping complaint to the U.S. Treasury.³ Treasury took almost three years to respond but in December of 1970 advised the U.S. Tariff Commission (later the International Trade Commission) that Japanese television receivers were being dumped in the United States.⁴ Three months later the Tariff Commission found that the American industry was being injured by the dumping.⁵ Upon being advised of the injury finding, the Secretary of the Treasury became responsible for assessing a special dumping duty in the amount of the difference between the "purchase price" of the dumped merchandise in the United States and the "foreign market value" of that merchandise.⁶

The three years between the submission of the dumping complaint in 1968 and the Tariff Commission's injury finding in 1971 were years of financial crisis for American television producers. In 1968, nine of the sixteen American producers lost money. In 1969, eight of the remaining fifteen U.S. producers lost money. In 1970, ten of the fifteen U.S. producers lost money.⁷

Despite the economic chaos that was apparent in the television industry a decade ago, Treasury has done essentially nothing to collect the television dumping duties that are mandated by law. The television dumping case is

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1. General Agreement on Tariffs and Trade, March 1969, art. IV, para. 1.
2. Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11 (codified at 19 U.S.C. §§ 160-172) (1978).
3. Under 19 U.S.C. 160(c)(1) information may be given to the Secretary in order to initiate an investigation. Through its attorneys, the Imports Committee, Tube Division, Electronic Industries Association notified the Commissioner of Customs of the antidumping violations in a letter dated March 22, 1968.
4. 35 Fed. Reg. 18,768 (1970).
5. News Release, United States Tariff Commission, Determination of Injury in Investigation No. AA1921-66 (March 4, 1971).
6. The amount of the duty to be collected by the Secretary of the Treasury on such merchandise is set forth in 19 U.S.C. § 161 (1978).
7. TC Publication 436 (1971).

a ten-year long story of false and fraudulent submissions made by television importers to the Government of the United States and of unconscionable delays on the part of those importers in providing information that had been requested by the U.S. Government. The television case also provides instances in which the U.S. Treasury itself has been as deceitful as the importers and as responsible as they for long delays in the enforcement of the law.

THE HISTORY OF THE DUMPING CASE

When the Tariff Commission reached its injury finding in 1971, the Customs Service, which reports to Treasury, undertook to determine television dumping margins by establishing the difference between the "purchase price" of imported Japanese television sets and their "foreign market value." The effort was concentrated on establishing the foreign market values for Customs assumed that the purchase prices had been correctly stated on Customs documents submitted at the time television sets had been imported. That assumption would later prove to be invalid.

In 1963, the Japanese television manufacturers, with the approval of Japan's Ministry of International Trade and Industry (MITI) entered into written agreements establishing, among other things, the minimum prices at which Japanese television receivers would be sold to American purchasers.⁸ The minimum prices became known as check prices. For many years the documents submitted to Customs by large importers of Japanese television receivers almost invariably showed purchase prices that were the same as the minimum prices listed in the Japanese check price agreements.

In 1970, Zenith Radio Corporation advised Treasury, in a confidential meeting, of its belief that the check prices being used by importers on Customs documents were not in fact the real prices at which imported Japanese television receivers had been purchased. Zenith Radio Corporation supported its assertion with an independent consultant's report stating that Japanese television manufacturers were offering substantial rebates to American purchasers who had ostensibly purchased at the check prices.⁹ By failing to report the rebates to Customs, the American importer could avoid television dumping penalties that might later be assessed.

Zenith urged Treasury in 1970 to investigate the financial records of large American television importers to determine the validity of the rebate assertions. Treasury refused to pursue the matter. Some years later, however, a document produced in International Trade Commission hearings¹⁰ would show that, within a few months of the supposedly confidential meeting in Treasury, manufacturers and importers of Japanese television sets were warned by a U.S. attorney for the Electronic Industries Association of Japan that Zenith was "placing pressure on the U.S. Treasury Department" to investigate double pricing. The document, dated October 22, 1970, noted that: "Zenith had not produced any substantiating data to backup the charges." It went on to say: "Whether our files of

8. These agreements are explained in a statement submitted by the Japanese Ministry of International Trade and Industry (MITI) to the United States District Court for the Eastern District of Pennsylvania in the case of *In re Japanese Electronic Products Antitrust Litigation*, 402 F. Supp. 244 (E.D. Pa. 1974).

9. Mentor International, Report on Imported Television Set Pricing Phase II (Sept. 19, 1969) (Prepared for Zenith Radio Corporation).

10. *Television Receivers, Color and Monochrome, Assembled or not Assembled, Finished or not Finished, and Subassemblies Thereof: Hearings Before the United States International Trade Commission* 1340-41 (Jan. 21, 1977).

correspondence and old purchase orders should be purged will have to be discussed with our legal people."¹¹

Between March of 1971 and April of 1972 Treasury collected about \$1 million in television dumping duties.¹² In March of 1972, however, the assessment of dumping duties on Japanese television receivers was stopped and not resumed until March of 1978. At no time during the six years from March of 1972 until March of 1978 did Treasury acknowledge that the assessment process mandated by American law had been halted. The six-year interruption has never been explained.

The Congress, in the Trade Act of 1974, authorized the International Trade Commission to investigate unfair trade practices allegations either in response to a complaint from an American manufacturer or on its own initiative.¹³ Early in 1976 GTE-Sylvania filed an unfair trade practices complaint against Japanese television manufacturers with the International Trade Commission.¹⁴ The Sylvania complaint alleged "the existence of predatory pricing schemes resulting in below-cost and unreasonably low-cost pricing of such television sets in the United States." A few months later the International Trade Commission announced a broader investigation of possible violations of American antidumping, customs fraud and antitrust laws associated with television importation.¹⁵

The two ITC investigations became immersed in delay and controversy. Japan's Foreign Office refused for an extended period of time to grant visas to a team of Sylvania lawyers and accountants seeking to gather evidence in Japan. The Departments of State, Treasury and Justice moved in concert to restrict severely the proposed unfair trade practices investigations. Treasury claimed sole responsibility for investigating dumping and related customs fraud allegations and refused to permit ITC investigators to see Customs' files. Justice similarly claimed exclusive responsibility for antitrust investigations.

In September of 1976, the Secretary of the Treasury wrote to the Commission explaining the reasons for Treasury's refusal to cooperate with Commission investigators. With reference to the television dumping case, the Secretary said: "As required by the Act, dumping duties are being, and will continue to be, assessed on merchandise subject to the finding so long as it is sold at less than foreign market value or, as appropriate, constructed value."¹⁶ The Secretary's assertion was totally inaccurate and completely misleading. At the time the letter was written, four and one-half years had elapsed since Treasury had last assessed a television dumping duty.

While the authority of the ITC to investigate unfair trade practices associated with television importation was being debated in 1976, color television imports from Japan jumped from 1,044,000 units in 1975 to 2,530,000 units

11. This document was originally produced in response to a subpoena duces tecum served by Zenith Radio Corporation on The Magnavox Company in the course of discovery proceedings in *In re Japanese Electronic Products Antitrust Litigation*, 402 F. Supp. 244 (E.D. Pa. 1974).

12. *Assessment and Collection of Duties Under the Antidumping Act of 1921: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means, 95th Cong., 2d Sess. 14 (1978)* (statement of Robert Mundheim, General Counsel, Department of the Treasury).

13. Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (Supp. 1978).

14. GTE-Sylvania filed its complaint on January 15, 1976. The United States International Trade Commission issued a Notice of Investigation No. 337-TA-23 on March 29, 1976.

15. 41 Fed. Reg. 14,949 (1976).

16. Letter from William Simon, Secretary of the Treasury, to Will E. Leonard, Chairman of the United States International Trade Commission (received September 24, 1976).

in 1976.¹⁷ As a result, COMPACT¹⁸, a group representing American television industry labor unions and manufacturers petitioned the International Trade Commission for tariff or quota protection against the flood of color television imports from Japan. Late in 1976 the Commission voted to hold hearings on the quota petition and to suspend its investigations of unfair trade practices with respect to television importation.

In January of 1977 Zenith, although not a member of COMPACT, testified on behalf of the petitioners.¹⁹ In its testimony Zenith demonstrated, from television sales brochures obtained in Japan, that the least expensive 19-inch color television receivers available for sale in Japan were priced at 150,000 yen or something over \$500 at the then existent exchange rate of about 300 yen to the dollar. Zenith also showed an advertisement for a 19-inch color television imported from Japan and offered for sale in the United States at a price under \$300. Zenith submitted to the Commission engineering analyses that showed that the Japanese receivers sold in the home market for over \$500 were essentially identical to the Japanese receivers being sold in the United States for less than \$300.

Zenith recommended in the hearings that any tariff or quota protection provided the American television industry be limited to the time period necessary to determine the validity of the unfair trade practices allegations. Following the hearings, however, the United States negotiated a television Orderly Marketing Agreement with Japan.²⁰ Sylvania's unfair trade practices complaint was settled through a consent decree.²¹ The broader unfair practices investigation proposed by the Commission itself was terminated despite the unchallenged charges of dumping and other unfair trade practices that had been presented to the Commission.

A little more than a year after the OMA had been negotiated, the Special Representative for Trade Negotiations gave to the Trade Subcommittee of the House of Representatives a copy of a side letter that had been provided to the Government of Japan at the time the Orderly Marketing Agreement was signed.²² The side letter had not previously been made public. In the side letter the Japanese Government was assured by the United States that the International Trade Commission would be urged to terminate its investigation of television dumping and leave the dumping issue entirely in the hands of the Department of Treasury. The Government of Japan was also assured that "The Treasury Department will carry out these efforts in strict conformity with the International Antidumping Code."

17. United States Department of Commerce statistics.

18. The members of COMPACT are: Industrial Union Department, AFL-CIO; Allied Industrial Workers of America, International Union; American Flint Glass Workers Union of North America; Communications Workers of America; International Association of Machinists; International Brotherhood of Electrical Workers; International Union of Electrical, Radio & Machine Workers; United Furniture Workers of America; United Steelworkers of America; Corning Glass Works; GTE-Sylvania Incorporated; Owens-Illinois, Inc.; Sprague Electric Company; and Wells-Gardner Electronics Corporation.

19. *Public Hearing on Investigation No. TA-201-19 Before the United States International Trade Commission* (January 8, 1977).

20. The Orderly Marketing Agreement (OMA) provided for a voluntary limitation of color television exports to the United States. Orderly Marketing Agreement, March 22, 1977, United States-Japan.

21. *In re Certain Color Television Receiving Sets*, Consent Order, 337 TA 23, United States International Trade Commission (July 29, 1977).

22. Letter from Robert S. Strauss to His Excellency Fumihiko Togo, Ambassador Extraordinary and Plenipotentiary of Japan (May 20, 1977). The contents of the letter were read into the record at the hearing. *Multilateral Trade Negotiations: Hearing before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 16 (1978) (statement of Ambassador Robert Strauss).

The Congress, almost ten years earlier, had categorically rejected the International Antidumping Code.²³ In Title II of the Renegotiation Amendments Act of 1968 the Congress had directed the Secretary of the Treasury to "resolve any conflict between the Antidumping Code and the Antidumping Act, 1921, in favor of the Act . . ." and to "take into account the provisions of the International Antidumping Code only insofar as they are consistent with the Antidumping Act, 1921."²⁴ If the side letter represented an effort to evade the intent of Congress, it is highly improbable that the Special Representative for Trade Negotiations was himself responsible for that effort. He had, at the time the side letter was signed, held his position for less than three months and would have had no reason, from his prior experience, to be familiar with the 1968 Congressional action.

In early 1977, as the International Trade Commission hearings were ending, the U.S. Customs Service obtained information indicating that the purchase prices declared on Customs documents at the time television receivers had been imported into the United States may have been falsely stated. According to a report directed to the Commissioner of Customs: "A voluntary tender of duties was made by an importer (Gambles) in early 1977. The importer's records show that the Japanese manufacturer Mitsubishi was engaged in 'double pricing,' i.e., presenting Customs an invoice showing one price while the actual or true price was in fact lower. Such a practice effectively reduces or eliminates dumping duties."²⁵

The disclosure led Customs immediately to review records available to the public in an antitrust case Zenith had filed in 1974.²⁶ Customs learned from that review that other importers had also been engaged in double pricing. According to the report to the Commissioner of Customs: "Subsequent to the double invoicing disclosure, the Office of Investigations undertook a massive inquiry of large importers of TV's including large mass retailers as well as subsidiaries of Japanese TV producers. The investigation revealed rebate schemes as well as other practices directed to the masking of potential antidumping duties."²⁷ In March of 1978 the U.S. Customs Service turned over to the Criminal Division of the Department of Justice evidence, with respect to undisclosed kickbacks and rebates, that it had accumulated to support possible prosecutions for fraud.

Early in 1979, in a front page story on the television dumping case, the *New York Times* quoted from an internal Customs memorandum in which a senior Customs officer had written: "the U.S. Customs Service has at present in its possession documented evidence that Japanese producers of television receivers, in concert with certain U.S. purchasers, have engaged in double invoicing to circumvent the provisions of the U.S. antidumping statutes."²⁸ The *Times* reported that grand juries were then considering evidence in what was described "as the largest fraud inquiry in the recent history of the Customs Service." As many as eighty American companies were reported to be under investigation including three of this country's leading retailers.²⁹

23. S. Rep. No. 1385, 90th Cong., 2d Sess. 4539 (1968).

24. Renegotiation Amendments Act of 1968, Pub. L. 90-634, 82 Stat. 1345 (1968).

25. Memorandum from V. Hann, Acting Assistant Commissioner (Operations), Department of the Treasury, United States Customs Service, to the Commissioner of Customs (April 1978).

26. *In re Japanese Electronic Products Antitrust Litigation*, 402 F. Supp. 244 (E.D. Pa. 1974).

27. See note 25 *supra*.

28. Hersh, *Inquiry Told of Customs Fraud in Imports of Japanese TV Sets*, *The N.Y. Times*, Jan. 24, 1979, § 1, at 1, col. 1.

29. *Id.*

On March 30, 1979, the *New York Times* reported that Alexander's Inc., a department store chain, had pleaded guilty in federal court to a customs fraud charge involving the importation of thousands of television sets from Japan.³⁰ Alexander's was reported by the government to have submitted an invoice indicating it had paid \$72.00 for each Japanese television it had imported. In fact, Alexander's had paid about \$47.00 for it had obtained a rebate of approximately \$25.00 per set.³¹ The fact that eighty American companies, including three of this country's largest retailers, were involved in customs fraud investigations suggested how pervasive the dumping and customs fraud schemes had been. The disclosure that Alexander's had obtained rebates approximating \$25.00 from a price reported to have been \$72.00 suggested how predatory those schemes had been.

The evidence indicating that many importers had deceived Customs, with respect to the prices at which Japanese television sets had been purchased in the United States, led Customs to investigate intensively the accuracy of information that had been submitted by importers with respect to the foreign market values of those receivers. Reporting on that investigation to the Under Secretary of the Treasury, the Commissioner of Customs said: "In the television case we have uncovered considerable evidence that the basic information submitted by a number of Japanese television manufacturers is false."³²

A Customs officer, explaining the results of the investigation to a large group of attorneys for television importers, was more specific. He noted that Customs had found that "a significant number of the foreign market value submissions appeared questionable on their face when compared to cost of production submissions," and that when Customs had formally requested access to Japanese cost of production data that had been submitted to the International Trade Commission, the manufacturers had "either refused to supply the information, or refused to respond at all . . ." ³³

The Customs Service borrowed technical experts from the International Trade Commission and the Federal Communications Commission to check the data the manufacturers had submitted to pair sets imported into the United States with sets sold in Japan. The experts concluded that "in a substantial number of cases the sets identified by the manufacturers as the sets sold in the Japanese home market most comparable to the sets exported to the United States were, in fact, not the most comparable, but, rather, quite different."³⁴

Labor in Japan is paid on the basis of seniority. It is possible for a long service employee to be paid twice or three times as much for the same work as is paid to a very short service employee. According to Customs, the Japanese manufacturers had claimed that "only the most experienced workers were used to manufacture sets sold in Japan, while the relatively inexperienced workers were used in producing sets exported to the United States." Customs investigators found this claim "virtually impossible to verify."³⁵

30. Lubasch, *Alexander's Guilty Plea on Imports*, N.Y. Times, March 30, 1979, § D, at 1, col. 6.

31. *Id.*

32. Memorandum from Robert Chasen, Commissioner of Customs, to Bette Anderson, Under Secretary of the Treasury, and Robert Mundheim, General Counsel of the Department of Treasury (October 18, 1977).

33. Disclosure Meeting Regarding the Japanese T.V. Dumping Cases, May 13, 1978 (statement of Irving W. Smith, Jr., Chief of the Value Division).

34. *Id.*

35. *Id.*

In late 1977 the Commissioner of Customs concluded that information submitted by the television manufacturers could not be relied upon to establish foreign market value in the television case. He concluded those values could be developed quickly and accurately by using information derived from Japanese Commodity Tax reports. In a letter to the Under Secretary of Treasury the Commissioner supported his decision to adopt the Commodity Tax approach when he said:

aside from the question of the integrity of the information received, we are also of the opinion that the existing administrative procedures necessitating the collection and analysis of vast amounts of commercial information before an antidumping appraisalment can be performed represents a perversion of the intent of the Act, in that delays for unreasonable periods of time negate the remedial protection intended by Congress for the affected United States industry.³⁶

The Government of Japan levies a Commodity Tax on all television receivers produced for sale in the Japanese market. The Japanese Commodity Tax law stipulates that the tax is to be based on the freely offered selling price of the product "for sales to all purchasers in ordinary wholesale quantities and in the ordinary course of wholesale trade"³⁷ The American Antidumping Act of 1921 defines the foreign market value as the price at which the product is offered for sale "in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption"³⁸

The two definitions were so nearly identical as to lead the Commissioner of Customs to conclude that the task of establishing the foreign market value of Japanese television receivers imported into the United States could be accomplished with speed and accuracy by using the representations as to home market wholesale prices the Japanese manufacturers themselves had made to the Government of Japan. By mid-December, the Commodity Tax approach to establish foreign market values had been approved by the responsible legal authorities in both Customs and Treasury. On March 17 the Customs Service took action to assess \$400 million of television dumping penalties covering receivers imported during the period from April of 1972 through early January of 1977.

On March 27, 1978, Minister Yoshio Kawahara delivered to the Treasury Department a copy of a note addressed to the State Department from the Government of Japan.³⁹ The note strongly protested the method Customs had used to establish dumping duties. Following the meeting with Kawahara, Treasury decided to delay the assessment of all but \$46 million of the television dumping penalties.

The \$46 million assessment covered a time period from the beginning of 1972 through June of 1973. The Treasury's decision to limit assessments to the period ending in June of 1973 was made despite a strenuous written recommendation by the Commissioner of Customs that the Treasury proceed

36. See note 32 *supra*.

37. Commodity Tax Law (Japan), § 11(1) and (2).

38. 19 U.S.C. § 164 (1978).

39. Note from the Government of Japan to the United States Department of State (received by the Department of the Treasury, April 27, 1978).

with the previously approved plan to assess television dumping duties through January of 1977.⁴⁰

On March 30, 1978, telegrams were sent to all U.S. Customs field offices directing that television dumping assessments relating to shipments made subsequent to June of 1973 be deleted from notices that were to be posted on March 31, 1978.⁴¹ The necessary deletions were made by hand by Customs field personnel before the bulletins were posted. Treasury then announced that the Customs Service had assessed dumping duties of \$46 million against importers of Japanese television receivers.⁴²

On April 10, 1978, Congressmen Charles A. Vanik and Dan Rostenkowski released a statement to the press challenging the action Treasury had undertaken. They said:

We understand that the department limited its original action in this long drawn-out case to one year of assessments so as to minimize the adverse impact on importers—and, probably, to avoid banner headlines on the extent of Japanese dumping in the American market. But the magnitude of the present dumping liability on imported Japanese televisions is a problem of Treasury's own making, since it is responsible for its failure to enforce the antidumping act in a vigorous and timely fashion.

The history in this particular case of the lack of enforcement of the law as it was written calls for a reconsideration by the Congress of where the responsibility for administering the act should be placed. The degree to which counsel for importers have been permitted to tie the hands of government counsel in procedural snarls raises serious questions as to whether Treasury intends to enforce the antidumping act at all. It is unfortunate that the Treasury Department thought it appropriate to consult both with counsel for the importers and representatives of the Japanese Government as to its proposed action in this case but did not see fit to consult with Congress or representatives of the domestic industry.⁴³

The Congressmen's concern with respect to the impact of private meetings between Treasury officials and representatives of Japanese manufacturers was echoed in an April 18, 1978 memorandum written by U.S. Customs Office of Regulations and Rulings attorneys to the Assistant Commissioner of Customs. The Customs attorneys had been asked to hold disclosure conferences with attorneys for television importers, Japanese manufacturers and certain Japanese Government officials. The memo said:

Our difficulties at these meetings have been compounded by the fact that Treasury has issued vague and conflicting information to the affected importers/manufacturers/Government of Japan officials, concerning particular facets of its policy, while again providing very little direct communication with Customs. Effectively, Customs has been placed in the position of discovering Treasury policy through the often dubious representations of the affected parties.

The entire range of problems which have surfaced during the disclosure conferences (especially the conference with Japanese Government officials)

40. Memorandum from Robert Chasen, the Commissioner of Customs, to the General Counsel of the Department of the Treasury (March 1978).

41. Telex dated March 30, 1978 to all Regional Commissioners, District Directors, and Area Directors of the United States Customs Service.

42. News Release, Department of the Treasury (March 31, 1978).

43. News Release, Congressmen Charles Vanick and Dan Rostenkowski (April 10, 1978).

seem to be related to the parties' understanding that the liquidations of March 31 were in some way considered to be 'provisional' in nature, that Treasury took this action primarily because of Congressional pressure, and that Treasury does not expect that the \$46 million in dumping duties assessed to date in any way represents a final ascertainment of the liability due and owing.

Rather, those affected anticipate that the assessed amount will be mitigated through informal government-to-government negotiations, or relatively informal contacts between manufacturers and Treasury.⁴⁴

In July of 1978 the legal advisory and review function of the Customs Office of Regulations and Rulings was transferred from the Commissioner of Customs to Treasury's Chief Counsel.⁴⁵ At the same time the recommendation function of the Commissioner of Customs, in connection with dumping cases, was transferred to Treasury's General Counsel. The reorganization effectively removed from the Bureau of Customs the authority and responsibility for recommending or initiating action to enforce American antidumping laws. By year end, however, it would be clear that the Office of Regulations and Rulings attorneys had been correct in discerning that an effort would be made to settle the television dumping case informally rather than in the manner anticipated in the antidumping law.

The effort in 1977 and early 1978 to collect the \$400 million in television dumping duties had been code named "Project Omega" by the Customs officers involved. Following the decision to reduce the assessments from \$400 million to \$46 million, however, the "Project Omega" task force was disbanded. The Senior Customs Attorney who had led the task force described the Treasury action for *Time* magazine as follows: "Treasury pulled the plug. Out of the blue they disbanded us. When I protested they told me I would be fired if I continued to protest." *Time* reported that that attorney "who spent 13 years working on antidumping matters, was moved to a new job: processing Freedom of Information Act applications."⁴⁶

In September of 1978 the House of Representatives Subcommittee on Trade held oversight hearings on the Assessment and Collection of Duties Under the Antidumping Act of 1921. At the time of the hearings no effort had yet been made to collect the \$46 million in dumping duties that had been assessed six months earlier. In response to a question from Congressman Rostenkowski as to when Treasury would collect the \$46 million, Treasury's General Counsel testified: "I would say we are right on the threshold of it."⁴⁷

In regard to when action would be taken to assess duties on television sets imported after June 30, 1973, Treasury's General Counsel said: "First, the Customs Service will move promptly to assess another portion of the backlog, including all televisions imported up to January 1975." He then added: "Two, the Customs Service will thereafter assess the remainder of the backlog as rapidly as its ability to process the full case permits." The Commissioner of Customs later presented a chart to the subcommittee that showed the \$350 million in potential television dumping duties for the period June 30, 1973

44. Memorandum from Customs Attorneys to the Assistant Commissioner (Regulations and Rulings) (April 18, 1978).

45. Memorandum from Leonard Lehman, Assistant Commissioner, (Regulations and Rulings), United States Customs Service, to all attorneys of the Office of Regulations and Rulings (July 17, 1978).

46. *Time*, March 26, 1979, at 64.

47. See note 12 *supra*.

through January of 1977. He advised the committee that Customs planned to clean up that backlog in about six months.

Treasury's General Counsel explained to the subcommittee that if an importer could establish that there were differences in the cost of producing television sets sold in Japan and sets sold in the United States, or that there were differences in certain circumstances of sale (such as advertising costs or warranty costs) then appropriate adjustments would have to be made to wholesale prices before establishing dumping margins.

The General Counsel's testimony included comments on Customs past experience with submissions previously made by Japanese television manufacturers to support claims for cost of production or circumstance of sale adjustment. He said that for the period 1972 through July of 1973 "information submitted by all but one manufacturer was unreliable or incomplete or both." He went on to say: "the Customs Service has concluded that the claims for adjustments for differences in costs of production and circumstances of sale submitted by the manufacturers during the July 1973 to January 1975 period are not reliable and should not be allowed in computing the dumping duties." The General Counsel then articulated Treasury's policy with respect to future claims for adjustment saying: "the Customs Service will consider evidence of adjustment claims as sufficiently persuasive only if that evidence is prepared with express reference to manufacturers' documentation . . . and only if all of the documentation is subject to satisfactory field verification."⁴⁸

In late December of 1978, however, Treasury's General Counsel sought the support of Congressmen Charles Vanik and Dan Rostenkowski for a proposal to settle the television dumping case for about \$50 million.⁴⁹ Television dumping penalties for receivers imported between March of 1972 and January of 1977 had been estimated to total \$400 million. Because of the rapid change in the yen-dollar relationship, dumping penalties for receivers imported in 1977 and 1978 were expected to total an additional \$200 million. The \$50 million settlement would have amounted to less than ten cents on the dollar.

The Treasury proposal also contemplated that civil penalties that might be assessed for the failure to disclose rebates and kickbacks would be settled for an additional \$5 to \$10 million. If the kickbacks and rebates were as widespread as many suspect, the civil penalties that could be assessed to importers would approximate \$200 million. The settlement of the possibly very substantial civil penalties, before grand juries acted in the criminal cases, would have permitted importers to plead guilty or nolo contendere to criminal charges, pay the criminal penalties, which are normally less severe than the civil penalties, and avoid a public trial.

Congressmen Vanik and Rostenkowski flatly rejected the proposal. Congressman Vanik told the *New York Times*: "I certainly don't think we should compromise grand jury proceedings, and it would compromise them to try to dispose of this claim before the grand jury has settled the issue of fraud."⁵⁰

In the months following the September Trade Subcommittee hearings, virtually no action was taken to assess the \$350 million in dumping duties on receivers imported between June 30, 1973 and January of 1977 despite the assurances offered in the hearings that the backlog would be cleaned up in about six months. Shortly after the September hearings, Treasury did set

48. *Id.*

49. Hersh, *supra* note 28, at 1.

50. *Id.*

November 27, 1978 as the due date for payment of the \$46 million in dumping payments that it had told the Subcommittee it was "on the threshold" of collecting. The November due date was later extended to December 27, 1978, the December due date was then extended to January 27, 1979 and the January due date was finally extended to March 12, 1979.

On March 13, 1979, the Customs Service announced that importers would have to pay the \$46 million in dumping penalties that had been assessed but as yet had not been collected.⁵¹ The importers were told, however, that only part of the payment need be made in cash and that the remainder of the obligation could be fulfilled with promissory notes. There was no mention in the March announcement of what, if any, action would be taken to assess the still unliquidated dumping duties for imports after June 30, 1973.

The March announcement stated that the Customs Service expected by August 1, 1979 to complete its review of protests importers had filed to support their claims that the \$46 million assessment of dumping penalties should be reduced or eliminated. The importers had been permitted to support the protests with new documentation to replace the documentation that had previously been found by Customs to be unreliable.

Treasury, having disbanded the "Project Omega" task force, assigned a new group of nine staff attorneys to the task of dealing with the collection of the \$46 million in dumping duties that had been assessed on March 31, 1979. The group had been asked to "formulate 'estimates' of the amounts by which the dumping duties assessed on March 31, 1978, will be reduced." In a memorandum dated March 2, 1979 and signed by the nine staff attorneys, the group stated that:

It is our understanding that these 'estimates' will be used to help determine the portion of outstanding dumping duties which will be collected in March of this year. We understand that the amount of duty remaining after the 'estimated' circumstance of sale adjustments have been made, on a manufacturer by manufacturer basis, will be collected in cash. The balance is to be secured by promissory notes.⁵²

The attorneys summarized their concern with the possibility that their work might be misunderstood or misused with the statement:

[T]he entire 'estimate' exercise is premised upon a number of factual assumptions. Foremost among these assumptions is that all claims for adjustments will be established by the manufacturer to the satisfaction of Customs. We wish to point out that the figures derived during this exercise cannot, under any circumstances, be construed as having been accepted as substantiated to the satisfaction of the undersigned staff attorneys.⁵³

Each time the word "estimate" had been used in the memorandum, it had been placed in quotation marks. The memorandum suggested strongly that the new group of attorneys enlisted to replace Customs veterans in the television case were as determined as their predecessors to enforce the antidumping laws. As the claims for adjustment were being considered by Customs officers, the Japanese manufacturers launched public protests against the dumping assessments.

51. News Release, Department of the Treasury (March 13, 1979).

52. Memorandum to File from Staff Attorneys, Department of the Treasury, United States Custom Service (March 2, 1979).

53. *Id.*

In newspaper advertisements and in other appeals for support spokesmen for the Japanese television manufacturers asserted that the Customs decision to base dumping duties on "foreign market values" arrived at by using Japanese commodity tax information was unfair.⁵⁴ They asserted that adoption of the commodity tax formula represented "changing the rules after the game has started" for they had been previously led to believe that "foreign market values" in the case would be based on documentation they themselves had submitted to Customs. The opposing view, of course, contended that the long history of false and/or fraudulent submissions made to Customs by the manufacturers fully justified the adoption of an alternate approach to determining home market prices. The opposing point of view also contended that the values the Japanese manufacturers had assigned to television sets in paying taxes to their own government represented the best evidence available for establishing home market prices.

The newspaper advertisements and other appeals for support also asserted that Customs having adopted the commodity tax formula in 1978 had unfairly "made it retroactive—assessing penalties for the years 1971-'73." The opposing view contended, that the long delay in establishing assessments was attributable largely to deceit and delay on the part of the importers and manufacturers themselves and, thus, that delay could hardly be accepted as grounds for reducing the assessments. In addition the opposing view contended that the deceit and delay had already provided the importers and manufacturers with handsome returns for they had not yet paid in 1978 monies that might readily have been collected as early as 1972. With interest costs in the 8-10% range during the period the long delay had produced a substantial monetary benefit for the importers.

Eight years after the Tariff Commission had published its television case injury finding in 1971 it was still unclear as to whether the dumping penalties assessed in the television case would ultimately be determined by enforcement action undertaken by the Customs Service, by an agreement negotiated officially or unofficially by American and Japanese diplomats or by litigation. The long history of the television case had certainly made it clear, however, that the United States did not possess the will or the means to enforce its antidumping laws.

THE CONSEQUENCES OF DUMPING

When the Tariff Commission concluded in 1971 that the American television industry had been injured by dumping, it also concluded that the sellers of dumped Japanese receivers "have for the most part undersold U.S. manufacturers of television sets in the domestic market" and that sales of the dumped television receivers "have contributed substantially to declining prices of domestically produced television receivers."

The failure during the past eight years to impose the dumping penalties mandated by law has permitted importers of Japanese television sets to continue dumping. The dumping, in turn, has made it impossible for American producers to raise prices. (Appendix A)

In the last decade the prices of industrial commodities and the hourly earnings of American workers have doubled. Television prices have increased

54. The Washington Post, February 6, 1979, § A, at 8-9, col. 1.

by about 2%. Had American television producers raised their prices sufficiently to recover even a portion of the skyrocketing material and labor costs they were incurring, they would have been driven from the American television market by the importers of Japanese receivers as completely as they had some years earlier been driven from the American radio market.

The cost-price squeeze caused by the inability to raise prices has had a catastrophic impact on United States television industry earnings. In the ten years 1968-1977, American television producers other than Zenith earned pretax profits amounting to 2.1% of sales. In the five-year period, 1973-1977, American producers other than Zenith earned pretax profits averaging only 0.4% of sales. Pretax profits in American manufacturing industries other than the television industry have averaged approximately 8% of sales. (Appendix B)

In the five-year 1973-1977 period, some 60,000 jobs were eliminated in the American television industry.⁵⁵ About twenty American communities experienced the human and economic dislocations associated with the shutdown of a major television manufacturing facility.

Since 1973, five of America's best known television manufacturers have been forced into acquisitions or liquidation. In late 1973, Admiral was acquired by Rockwell International. In 1974, Motorola's television business was sold to Matsushita, the largest of the Japanese television companies. Later in 1974, Magnavox was acquired by an American affiliate of N.V. Philips Gloeilampenfabrieken of the Netherlands, Europe's largest television producer. Still later in 1974, Ford Motor Company sold its Philco television brand name and distribution assets to GTE-Sylvania. The Philco manufacturing assets were liquidated. In 1976, Warwick, a company that had supplied private-brand television products to Sears, was acquired by Sanyo of Japan. During 1978 General Electric sought, but failed to obtain Justice Department acceptance of a proposal to merge its television business with that of an American affiliate of Hitachi of Japan. By the end of 1978, Rockwell International had announced it would liquidate the Admiral television business it had acquired five years earlier.

The explanation for the financial difficulties of American television producers is not to be found in inadequate management. The explanation is to be found in the long continued dumping of Japanese television receivers in the American market.

Ford Motor Company, Motorola and Rockwell International have impressive records of efficiency and profitability in other industries. Each, however, incurred sizable losses in the American television market. General Electric is regarded to be among the best managed of American companies but after years of inadequate profits it found it necessary to seek to merge its television business with that of Hitachi of Japan.

In March of this year the least expensive 19-inch television receivers available for sale in Japan were still priced at about 150,000 yen. At the current exchange rate of about 200 yen to the dollar, that amounted to \$750. Comparable receivers imported from Japan for sale in the United States are priced under \$350. The least expensive large screen furniture models in Japan are now priced at about 390,000 yen or just under \$2000. Consoles with

55. *In the Investigation on Television Receivers and Certain Parts Thereof Pursuant to Section 201 of the Trade Act of 1974; Hearing Before the United States International Trade Commission*, January 18, 1977 (statement of I. W. Abel).

comparable features and screen sizes are readily available in the United States at prices of about \$750.

No nation has benefited more than Japan from the willingness of other nations to relax import restrictions and to encourage a free exchange of goods. Japan, however, while exploiting opportunities in the markets of its trading partners, has persisted in pursuing a protectionist policy at home. In 1976, color television sales in Japan exceeded 5 million units; fewer than 500 of those units were imported. (Appendix C)

The exclusions of foreign competition from the Japanese market is an essential part of an export strategy based on dumping. It has provided Japanese television producers with profits substantial enough in their home market to permit them to sell their products in the American market at prices so low as to displace and/or destroy domestic competitors. Television dumping on the scale that we have witnessed in the United States simply could not have been continued without the financial support resulting from very sizable profits in a protected home market.

CONCLUSION

Zenith has concluded from years of direct involvement in the television dumping case that policy-level officials of the U.S. Government have regarded the American television industry to be a pawn that might readily be sacrificed in order to avoid a diplomatic confrontation with Japan or to accomplish some other diplomatic objective. As a result of Treasury's avoidance for more than a decade of its responsibility to enforce the antidumping law, the stockholders and employees of American television companies have been effectively deprived of their right to the protection afforded by that law. The television case should, therefore, be of great concern to any who believe that this is a nation ruled by law and not by men.

The television dumping case raises serious economic issues that should be of concern to those interested in preserving this country's free enterprise system. In the last decade five major American producers have abandoned the television industry and other American producers have been so scarred by unlawful dumping as to be left far less competitive in the American market than they might otherwise have been.

If a firm is to prosper or even survive in the American enterprise system it must be able to invest in laboratories to improve technology and in plant and equipment to improve productivity. The funds required to support these investments must come either from corporate profits or from investors who believe that their investments will generate an adequate future return. An industry confronted with the predatory pricing associated with the dumping can neither earn the profits nor obtain the investor confidence needed to finance those investments.

Dumping has already produced economic chaos in the American television industry and in the American steel industry. The American semiconductor, computer and automobile industries are today, in varying degrees, threatened with that kind of chaos. Unless this country demonstrates the ability to enforce vigorously and quickly its antidumping laws, dozens of other American industries will be left exposed to assaults like that which has been mounted against the American television industry.

American trade deficits with Japan have jumped sharply since the oil crisis.

In 1974 and again in 1975 the U.S. trade deficit with Japan totaled \$1.7 billion. In 1976 the deficit rose to \$5.4 billion, in 1977 to \$8.1 billion and in 1978 it totaled \$11.6 billion.⁵⁶ The rapidly growing deficits with Japan have not occurred because of a sudden change in the relative productivity of Japanese and American manufacturers.

On the issue of productivity, many Americans have been confused by Department of Labor reports that manufacturing output per man-hour increased by 82% in Japan from 1967 to 1975 and by only 16% in the United States. The slower growth in American productivity and the low prices of imported television receivers and steel in the American market have apparently led many to conclude that the United States is at a productivity disadvantage. (Appendix D)

In 1975, the last year for which measurements are available, manufacturing output per man-hour in Japan was 64.9% of manufacturing output per man-hour in the United States. Expressed differently, in 1975 the average American manufacturing employee produced about 50% more per hour worked than did his counterpart in Japan. It is the absolute level of productivity, not the rate of productivity growth that determines a nation's ability to compete in world markets. America is certainly not at a productivity disadvantage.

In 1978, the American trade deficit totaled a staggering \$29 billion. Some \$14 billion of that deficit was incurred in trade with the thirteen members of the Organization of Petroleum Exporting Countries (OPEC); almost \$12 billion was incurred in trade with Japan alone and a \$3 billion deficit was incurred in trade with the rest of the world.⁵⁷

Official Washington apparently continues to believe that vigorous enforcement of this country's antidumping laws would be regarded by our trading partners to be protectionist and would, therefore, threaten the world trading system. A strong case can be made that nothing would threaten the world trading system more than the continuation of American trade deficits of the magnitude experienced in 1978 and the continuation of the instability in the value of the American dollar that has resulted from our 1977 and 1978 deficits.

Dumping can no more be tolerated than bribery as a tactic for increasing sales in a export market. Either dumping or bribery will improve the position of the user in the short term. Their long-term impact, however, is to weaken the confidence of the peoples of the world in the trade system and to generate the protectionist reactions that might ultimately destroy that system.

The \$400 million dumping finding suggests that during the 1972 to 1977 period, the average Japanese television set had been imported into the United States at about \$40 under its fair market value. A \$40 advantage at the time of importation would give the Japanese television sets a retail price advantage, relative to the products of domestic producers, of \$65 to \$75. That price advantage did not result because the Japanese were more efficient than their U.S. competitors, but rather because they had been able to violate American antidumping statutes with impunity for more than a decade.

There is a startling difference between the manner in which the American public and American leaders perceive the importance of foreign trade problems. The Chicago Council on Foreign Relations commissioned the Gallup organization, in late 1978, to measure the attitudes of the American public and American

56. United States Department of Commerce statistics.

57. *Id.*

leaders on a variety of foreign policy questions.⁵⁸ The two groups were asked to rate various foreign policy goals in terms of whether those goals were very important, somewhat important or not important. The 13 goals included: "Keeping up the value of the dollar, Securing adequate supplies of energy, Protecting jobs of American workers, Worldwide arms control, Containing Communism" and eight other items.

The goal of "Protecting jobs of American workers" was perceived by 78% of the American public to be very important; only 34% of the American leaders perceived that goal to be very important. Among the American public only one foreign policy goal "Keeping up the value of the dollar" was seen to be more important than protecting American jobs. Among the American leaders only four of the thirteen foreign policy goals were perceived to be less important than protecting American jobs. Among the American public, 45% of the respondents perceived "Protecting interests of American business abroad" to be very important; only 27% of the American leaders perceived that goal to be very important.⁵⁹

The attitudes of American leaders on foreign trade questions continue to be based on a Marshall Plan mentality that sees Europe and Japan as being so weak in economic matters as to require continuing American concessions and that sees the United States as being so strong as to be immune from economic injury no matter what trade concessions are made by its government. Treasury's long avoidance of its responsibility to enforce the antidumping laws in the television case is only one example of the American Government's willingness to wink at unfair and unlawful acts in foreign trade in order to avoid diplomatic confrontation. There are growing signs, however, that the United States Government is losing the support of the American public on trade matters. In August of 1978 the Harris Survey reported that by a margin of 61%-33% the American public now favors a greater restriction on imports rather than a continuation of this country's traditional policy of freer trade with most countries of the world.⁶⁰

Vigorous enforcement of American laws designed to control dumping and other unfair trade practices can be urged solely on the grounds that American stockholders and employees are entitled to the protection afforded by law. Vigorous enforcement of those laws can also be urged because dumping and other unfair trade practices constitute an intolerable threat to this country's free enterprise system and appear to have contributed substantially to our staggering trade deficits in recent years.

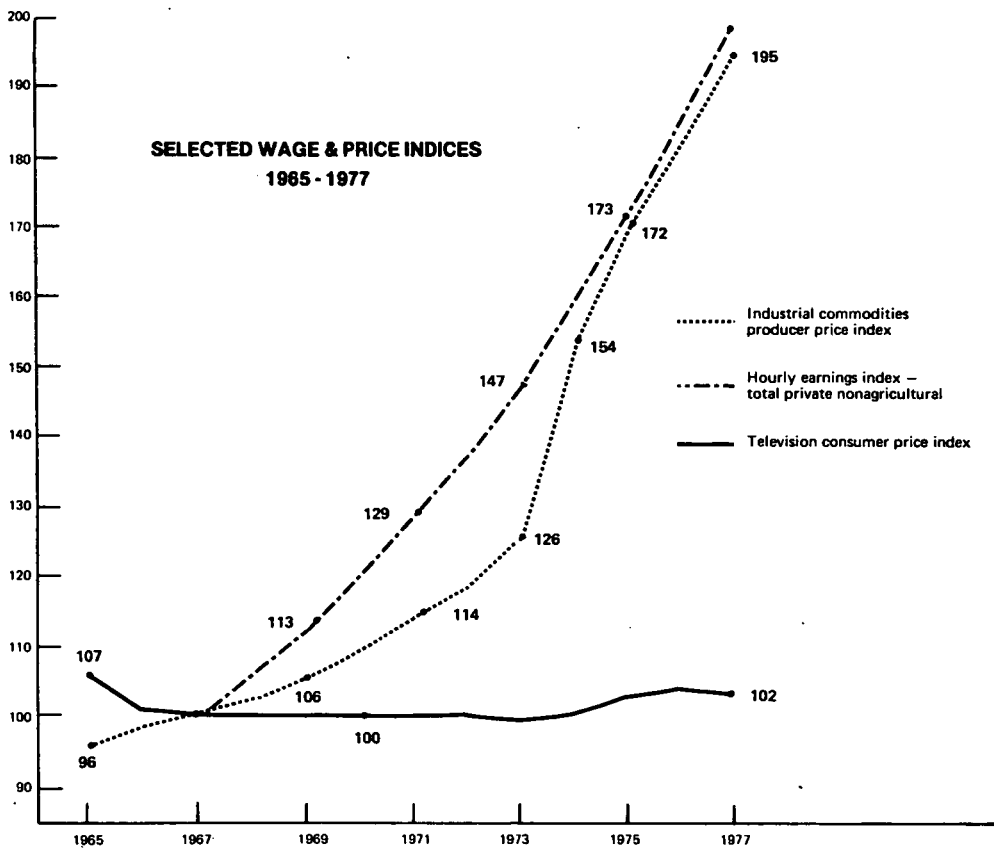
In the Harris Survey in which Americans by a 61%-33% margin favored a greater restriction on imports, the respondents agreed by a margin of 64%-26% with the statement: "We have been made suckers by other countries which restrict U.S. goods, but whose goods are free to come into this country." In commenting on the survey Lou Harris, however, noted: "There is a fundamental feeling in this country that if artificial barriers against American goods were removed or tempered, then our products could compete on a profitable basis."

58. Gallup, *Foreign Policy Goals for the United States—1978*, in *American Public Opinion and United States Foreign Policy 1979*, at 12 (John E. Reilly ed. 1979).

59. *Id.*

60. Harris, *Protectionist Sentiment is Growing on Imports*, *The Harris Survey* (August 10, 1978).

There is considerable reason to believe that what has been described as "protectionist sentiment" in the Congress and in the American public is not a cry for help from people who are unwilling or unable to compete. That so-called "protectionist sentiment" is in large part an angry reaction from citizens who believe the United States is being injured by unfair trade practices that its government has been unwilling or unable to control. A continued failure on the part of the United States Government to enforce laws prohibiting dumping and other unfair trade practices can have no other result than to lead increased numbers of Americans to withdraw their support from this country's traditional position of encouraging freer trade throughout the world.



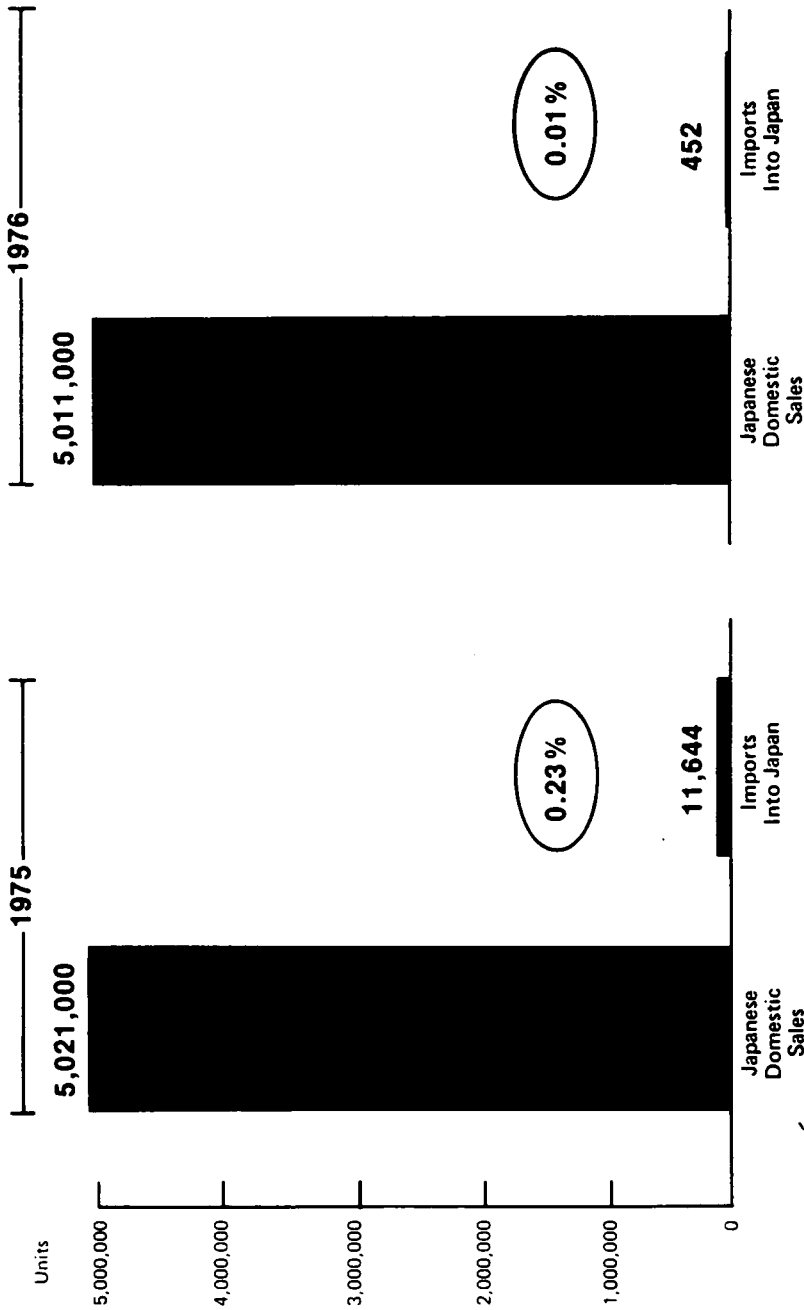
APPENDIX A

DOMESTIC TELEVISION INDUSTRY PROFITABILITY
(Dollars in Millions)

	<u>SALES</u>	<u>PRETAX OPERATING PROFIT</u>	<u>PROFIT AS PERCENT OF SALES</u>
<u>TEN YEARS 1968 - 1977</u>			
ZENITH	\$ 8,096	\$ 669	8.3%
ALL OTHERS	17,638	366	2.1
TOTAL INDUSTRY	25,734	1,035	4.0
<u>FIVE YEARS 1973 - 1977</u>			
ZENITH	\$ 4,732	\$ 284	6.0%
ALL OTHERS	8,376	34	0.4
TOTAL INDUSTRY	13,108	318	2.4
<u>1977</u>			
ZENITH	\$ 966	\$ 39	4.0%
ALL OTHERS	1,942	42	2.2
TOTAL INDUSTRY	2,908	81	2.8

Source: U.S. International Trade Commission

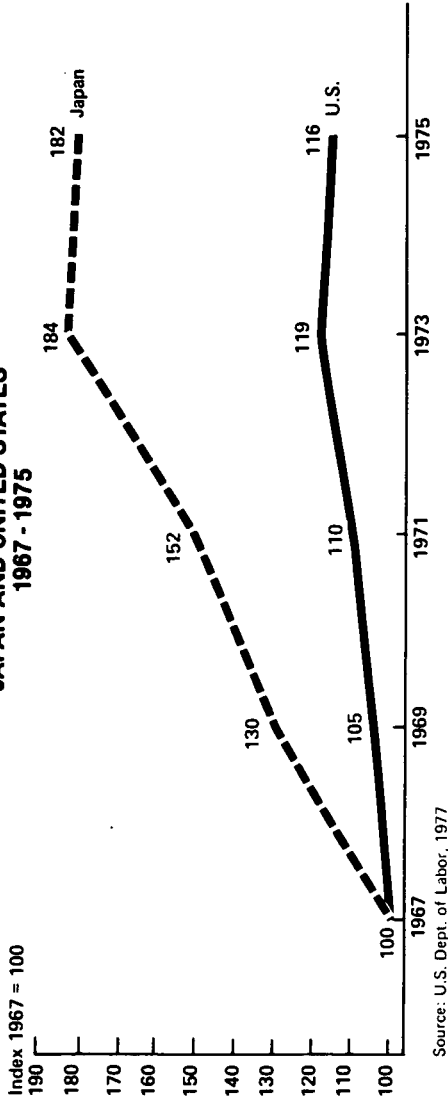
JAPANESE DOMESTIC SALES and IMPORTS
COLOR TELEVISION



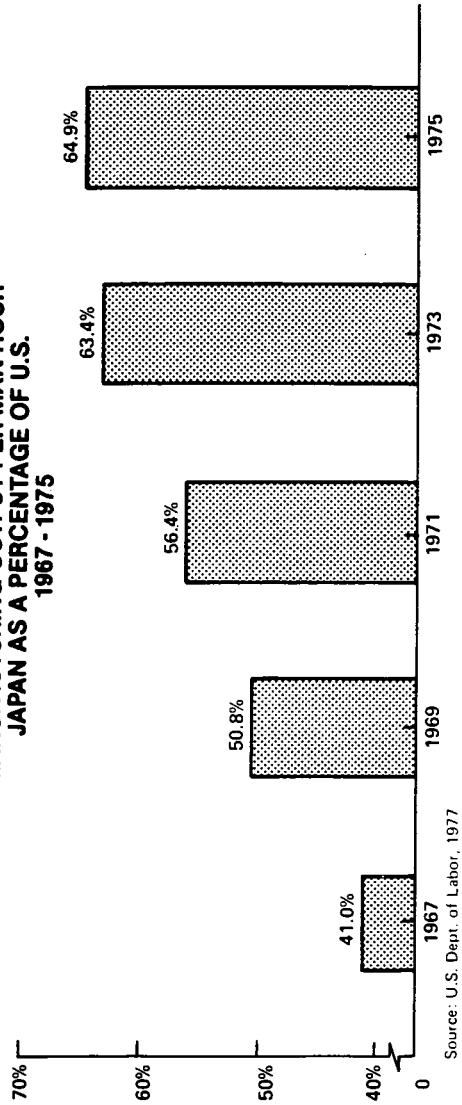
Source: Imports - Color TV: U.S. - Japan Trade Council
 Domestic Sales - Color TV: Electronics Industry Association Japan

APPENDIX C

**GROWTH IN MANUFACTURING OUTPUT PER MAN-HOUR
JAPAN AND UNITED STATES
1967 - 1975**



**MANUFACTURING OUTPUT PER MAN-HOUR
JAPAN AS A PERCENTAGE OF U.S.
1967 - 1975**



APPENDIX D