STATEMENT OF

LLOYD CONSTANTINE

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

S. 2610

"THE INTERNATIONAL FAIR COMPETITION ACT OF 1992"

ON

APRIL 30, 1992

Senator Metzenbaum and members of the Committee. Thank you for this opportunity to testify concerning S. 2610, the "International Fair Competition Act of 1992".

Although I testify today only for myself, I will note my background. I am a member of the firm McDermott, Will & Emery, concentrating my practice in antitrust. I also teach Antitrust Law at Fordham Law School. For ten years ending in 1991 I was New York State's chief antitrust enforcement official, and from 1985 to 1989 coordinated antitrust enforcement for all fifty state attorneys general as Chairman of the Antitrust Task Force of the National Association of Attorneys General. In that capacity I acted as lead counsel in many multiple state cases, including the successful vertical price-fixing actions instituted against Minolta, Panasonic and Mitsubishi by 37, 49 and 50 states respectively.

I strongly support the goal of S. 2610, which is to fill gaps in both the United States antitrust and antidumping laws, which prevent these laws from effectively protecting the American economy from predatory and discriminatory pricing by firms based in countries with closed and/or trade restrained markets.

Before addressing the specifics of the bill and my suggestions for improving it, I should state for the record why I believe international price predation and discrimination harm our economy, and why our antitrust laws, as currently interpreted, do not provide a remedy for these practices.

Companies operating from countries with closed and/or trade restrained markets can subsidize below cost sales in the United

States with higher prices in their domestic market. When this happens who benefits? The big fallacy, which has now infected the judicial interpretation of U.S. antitrust laws, is that American consumers benefit and consumers in the home market are hurt. And although it is common to see, as I frequently do on New York City's 47th Street, Japanese tourists queued up to buy Japanese optical and consumer electronics products, these are merely the short term effects of

international predation and discrimination. Over the long haul, American firms shut out of the trading partners market begin the inexorable process of shifting production offshore or sourcing their products from foreign producers, and eventually abandoning the market altogether. At that point, the foreign manufacturers begins to recapture the losses not already recouped by supracompetive pricing in the home market, through a variety of mechanisms. They may extend price-fixing and market allocation agreements from their domestic cartel into the foreign market with virtual impunity, since foreign soil, distance and often complicity of their own government prevent effective enforcement of the U.S. antitrust laws in relation to such activities. They can extend their dominance of the target market into succeeding generations of products and complementary technologies They can buy up the remains of the battered American competitors at distress prices. The American workers who lost decent paying jobs in the targeted industry often wind up unemployed or relegated to lower paying jobs in the service sector.

The alleged benefits to American consumers of predatory and discriminatory low pricing are ephemeral and heavily overwhelmed by their corrosive affect on the American economy as a whole. Viewed in this light, trading partner predation brings to mind the famous Twilight Zone episode in which seemingly benevolent aliens come to earth with high tech gifts and carrying a book titled "To Serve Man" which turns out to be a cookbook.

I first viewed that episode of the Twilight Zone on an American made television. This would be almost impossible today for a variety of reasons, one of which was the failure of American consumer electronics firms to adequately respond to foreign technological competition. But the most important and proximate cause of the demise of the American television and consumer electronics industry was the coordinated action of the Japanese industry and government, aided and abetted by the inaction of our own government and defects in the American law. Senate 2610 is intended to address these defects by squarely confronting the Supreme Court's disastrous decision in Zenith v. Matsushita1 , a 1986 case in which the Assistant Attorney General in charge of the Antitrust Division argue in support of the Japanese Cartel.

The defendants in Matsushita, began production in the early 1950's with technology licensed to them by RCA and G.E., who could not make substantial sales in the closed Japanese market. In the 1950s the Cartel, with the connivance of the Japanese government,

began to dump and predatorily price in the U.S. while fixing high prices in Japan. By the time the Matsushita complaint was filed in 1974, a Commerce Department proceeding had resulted in a finding that the Japanese defendants had illegally dumped televisions in the United States, but only $1 million of the approximately $400 million in assessable dumping duties was collected . The Japanese Fail Trade Commission ("JFTC") had also quietly disposed of two proceedings against the Japanese producers for domestic price-fixing. An army of irate Japanese housewives had actually marched on the Matsushita headquarters to protest the inflated prices charged in the home market.

Even with all this, there might still have been some doubt in 1974 about the motive, method and ability of the Japanese industry to pull off such a grandiose scheme in an area of American dominance. But by November 12, 1985, with the American industry substantially destroyed, it was truly astounding for the United States to argue, as it did, that the alleged cartel should win because the conspiracy with which they were charged was economically irrationally. The U.S. argued that because the Japanese industry had no economically plausible means to recover

profits lost during decades of predatory pricing, that the defendants had never conspired. The U.S. also argued that evidence of a conspiracy into the court record should be excluded or discounted as consistent with a pro-competitive rationale. As Justice Frankfurter observed "history also has its judgment." The record evidence disregarded by the United States included (1) a system of fixed prices for goods exported to the U.S., arranged

by Japan's Ministry of International Trade and Industry ("MITI"); (2) an agreement to allocate American distributors according to the so-called "Five Company Rule"; (3) the Japanese domestic price-fixing plan, which by depressing home market consumption, released goods for export and also allowed for partial recoupment of profits lost in the U.S. By a margin of 5 to 4 the Supreme Court adopted the United State's position supporting Matsushita, reversing the Circuit court's decision in favor of Zenith.

Two personal postscripts to the decision are worth noting. First, in 1989 a consultant for the defendants confirmed to me what had been widely reported, i.e., that the JFTC had disposed of its price-fixing case against the cartel in such a way as to avoid giving credence to the plaintiffs' allegations in Matsushita2.

Second, as the States' antitrust chief I supervised an investigation which disclosed that in January 1988, many of the Matsushita defendants began another gambit to recover some of the profits lost during the predatory pricing conspiracy. These companies simultaneously adopted vigorous resale price maintenance programs and restrictions on price advertising. This investigation resulted in both the 1989 case by 49 states against Panasonic (Matsushita's brand name) and the 1991 suit by 50

states against Mitsubishi. In one document emanating from those investigations, an officer of one of the Japanese companies predicted that his plan to fix retail prices in the U.S. would have broad support, stating: "not only electronics companies but even automobile companies will follow us. In other words, they have an extremely positive view of our new sales program and wish us a big success. This confirms that what we are doing is right and will be appreciated by the society." Whether or not such interdependent behavior crossing company and industry lines strikes a Western economist as rational behavior, it is happening, and S. 2610 finally takes cognizance of this fact.

Senate 2610 directly addresses predatory and discriminatory pricing by trading partners with closed and/or trade restrained markets. Special rules and standards dealing with price predation and discrimination in the international context are necessary because the likelihood of such conduct and its effects are far greater in the international context than in relation to purely domestic competition. Over the last two decades antitrust law has developed a very healthy skepticism about the prevalence of predatory pricing and the competitive consequences of price discrimination, which many, including myself, believe rarely has adverse competitive consequences in the domestic context. However, predatory and discriminatory pricing is quite rational, plausible, and as we have seen widely practiced, when engaged in by firms operating from a closed and/or trade restrained home market.

Senate 2610 is correct in confronting this domestic - international dichotomy squarely, and prescribing different rules in the trading partner context.

One very serious problem with the current draft of S. 2610 is that it includes an effects test, which will probably render it useless. The bill requires that below cost pricing have the effect of "destroying, injuring or preventing the establishment of a line of commerce" in the United States or "lessening competition" in the United States before such pricing can be illegal. These terms would inevitably sweep in current judicial interpretations of what constitutes "lessening of competition" or injuring "a line of commerce." Under prevailing judicial constructions of "competition" and "line of commerce" the Matsushita defendants could successfully argue that the competition among such defendants in the U.S. would preclude any finding that "competition" as opposed to "competitions" have been harmed.

The effects test as currently drafted is as fatal to this bill's effectiveness as the intent test was to the 1916 private right to action for dumping3. However, it can be remedied by much more clearly and specifically defining the problem which the law is designed to address, which is the destruction of American industry by discriminatory and predatory practices emanating from countries with closed and/or trade restrained markets. Better still the effects test in Section 3 (a) (1) should be

entirely eliminated. It is unnecessary and will vitiate the salutary purposes of the bill. Students of antitrust history, such as professor Fox, will tell you that the adoption of such and effects test in the Clayton Act of 1914 was intended to render innocuous that statute's tough new substantive provisions and has sapped the law of most of its purpose and vitality.

A second defect in the bill is the provision which requires the Federal Trade Commission to issue guidelines that describe when a foreign market is substantially closed to effective international competition.

The FTC, which is coming back to life under Chairman Steiger's stewardship, will not want to be drawn into the inevitable political disputes involving the Special Trade Representative and the Commerce Department which this duty will inevitable engender. I would strongly recommend that the bill be redrafted to adopt objective quantitative standards, which would establish a prima facie case that a particular line of commerce in the trading partners market is substantially closed to American firms. One unfortunate lesson of the consumer electronics industry is that the U.S. government cannot always be relied upon to protect U.S. industry. I would formulate objective standards and let private parties enforce them.

I would be pleased to assist the Committee in adopting an approach to correct the two problems of which I have spoken. I have also annexed to my testimony a bill which I drafted at the request of Senators Bryan and Gorton after testifying in 1990 before the Committee on Commerce, Science and Transportation. It

was an attempt to deal with the same problems as are addressed in S. 2610. Thank you.

I will be pleased to answer any questions.

DRAFT BILL FOR SENATOR BRYAN: L. CONSTANTINE

A BILL

To amend the Sherman Act regarding predatory practices.

Be it enacted by the Senate and House of Representatives of the United States of American congress assembled, that this Act may be cited as "The Protection Against Predatory Practices Act of 1991".

Sec. 2 The Congress finds that

(1) Vigorous competition greatly benefits United States industries and consumers;

(2) predatory practices distort and diminish competition and cause harm to United States industries and consumers;

(3) recent court decisions have construed the antitrust law relating to predatory practices according to a very narrow economic theory, concerning the conditions which are considered necessary for predatory pricing to result in short term profits. These court decisions fail to consider other long term economic objectives of firms which engage in predatory practices, often with the encouragement and assistance of foreign governmental institutions. These economic objectives include extending dominance from a targeted industry into adjacent industries and into new but related technologies and markets.

(4) these court decisions also fail to enforce broader economic objectives of the antitrust laws, including the goal of maintaining a strong and diverse industrial sector.

(5) it is necessary to enact legislation which (a) defines and clearly prohibits anticompetitive predatory practices which are harming the United States economy; and, (b) which directs the Courts to enforce the sanctions against such conduct rather than attempting to predict when predatory conduct is economically plausible and will result in short term profits.

Sec.3 The Sherman Act is amended by redesignating section 8 and any references to section 8 as section 9 and by inserting between section 7 and section 9, as herein redesignated, the following new section:

"Sec. 8. (a) In any action based on section 1 or 3 of this Act, including an action brought by the United States or by a state Attorney General, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act which alleges a contract, combination or conspiracy between two or more persons, including a foreign governmental institution or entity, to prevent, eliminate or bar the entry of any person from engaging in any line of commerce or in any activity affecting commerce among the several States or with foreign nations, the fact that two or more persons contracted, combined or conspired to prevent, eliminate or bar the entry of any person from engaging in any line of commerce or in any activity affecting commerce among the several States or with foreign nations shall be sufficient to constitute a violation of such section, whether or not the plaintiff in such action can demonstrate the economic benefit to be derived by those alleged to have violated such section, except that nothing in this Act shall be construed to prevent the parties to such action from introducing evidence regarding the

economic benefit to be derived by those alleged to have violated this section, if such evidence is otherwise relevant.

(b) In any action based on section 2 of this Act, including an action brought by the United States or by a State Attorney General, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act which alleges that a person has monopolized, attempted to monopolize or combined or conspired with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations by preventing, eliminating or barring the entry of any person from engaging in such trade or commerce through predatory practices, including predatory pricing practices, the fact that the defendant in such action intended to prevent, eliminate or bar the entry of the plaintiff from engaging in such trade or commerce and at such time either (i) possessed monopoly power or (ii) possessed the intent to attain monopoly power and the dangerous probability of succeeding or (iii) conspired with others to monopolize, shall constitute a violation of such section, whether or not the plaintiff in such action can demonstrate the economic benefit to be derived by those alleged to have violated this section, except that nothing in this Act shall be construed to prevent the parties to such action from introducing evidence regarding the economic benefit to be derived by those alleged to have violated this section, if such evidence is otherwise relevant.

(c) For the purposes of this Act, the court shall presume, subject to rebuttal, the existence of predatory pricing and/or intent to prevent, eliminate or bar the entry of the plaintiff from engaging in trade or commerce when the trier of fact has found that the defendant (i) has engaged in substantial sales below average variable cost or (ii) substantial sales below the prices charged for such articles of trade or commerce in their country of origin. For the purposes of this section prices shall be measured exclusive of taxes or other surcharges required by law.

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1 Matsushita Electronic Industries Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)

2 The Japanese FTC established a case against the Japanese Television manufacturers but did not vigorously prosecute it because it would have supported the plaintiffs' position in the Matsushita litigation. Conservation between Lloyd Constantine and Mitsuo Matsuo Matsushita, Prof. of Law at Univ. of Tokyo (May 23, 1989). Professor Matsushita was a consultant for the defendants in Matsushita.

3 See 15 U.S.C.§ 72..