Antitrust Aspects of U.S.-Japanese Trade

Wilbur L. Fugate
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I. INTRODUCTION

In recent years, controversy has intruded upon the historically open and amicable U.S.-Japan trade relationship. Japanese trade practices have been blamed by many sectors in the United States for the growth of the U.S. $20 billion annual trade deficit with the Japanese (out of a total annual trade volume of nearly $60 billion). Foremost among the complaints, according to U.S. Trade Representative William E. Brock, is the alleged existence of a coordinated strategic industries policy by the Japanese which uses "legally sanctioned cartels designed . . . to restrain competition."

As a result of this and analogous allegations, legislative attempts to protect favored industries from "unfair" competition have occurred in both the United States and Japan. The House of Representatives in the last Congress passed a "domestic content" bill to increase the percentage of American made parts in Japanese automobiles sold in the United States. Similarly, the Japanese maintain strict quotas against the importation of certain agricultural products to protect their small yet valued agricultural industry.

Both countries' actions underscore a deviation from the spirit of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan. This treaty granted Japan Most Favored Nation status vis-à-vis bilateral trade, and both countries agreed "to consult with respect to any [unfair business] practices and to take such measures


1 Address of William E. Brock before the Electronics Industry Association of Japan (June 9, 1982).


The theme of this article is to illustrate the effect of U.S. and Japanese antitrust laws and related import trade laws on bilateral trade. Measures taken and under consideration by the United States in response to the perceived threat of unfair competition by major Japanese industries and the Japanese government will be emphasized. Japanese antitrust laws will be examined in the context of a generally contrary policy by the Japanese Ministry of Trade and Industry (MITI). An attempt will also be made to examine the nature and extent of the "unfairness" that exists in U.S.-Japanese trade relations.

II. EXPORT TRADE: THE ANTITRUST LAWS AND POLICIES OF THE UNITED STATES AND JAPAN

Both the United States and Japan have laws which exempt exports from their respective antitrust laws. The United States, since 1918, has provided a limited exemption from its antitrust laws for combinations of U.S. exporters. The Webb-Pomerene Export Trade Act (Webb Act), which is still in effect despite subsequent export legislation, is administered by the Federal Trade Commission. It exempts from the Sherman Act associations formed for the sole purpose of export trade in goods, provided that activities of such associations do not substantially restrain trade within the United States, restrain the trade of a competing exporter, "artificially or intentionally" enhance or depress U.S. prices or result in consumption or resale of the exported commodity in the United States.

In 1982, Congress also enacted the Export Trading Company Act (Trading Company Act) which created an Office of Export Trade in the Commerce Department, expanded the export exemption and included the export of services in addition to permitting bank holding companies to engage in export trade through export trading companies. The Trading Company Act provides for an "export trade certificate of review" to be issued by the Secretary of Commerce, who administers the law after con-

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4 Id.
6 Id. § 62.
9 Id. § 301, 96 Stat. at 1240.
curing approval by the Attorney General. Such a certificate affords an exemption from the antitrust laws for criminal penalties and from the trebling of damages for activities resulting in civil liability for antitrust violations. An export certificate of review may only be issued if the applicant’s proposed conduct does not violate the Webb Act. Another criteria, not in the Webb Act, requires that the activities do not constitute unfair methods of competition against competing exporters. Proposed regulations under the Trading Company Act recite that the purpose of this legislation is “to increase United States exports of products and services by encouraging more efficient provision of export trade services.” The antitrust provisions were enacted in response to criticism that export activities were not sufficiently protected from unfair competition under the Sherman Act.

In Japan, both export and import cartels are exempted from the Antimonopoly Law by the Export and Import Trading Act. Export agreements are permitted for specific commodities. Japanese exporters may enter into agreements among themselves on “price, quantity, quality, design or any other matter in domestic transactions relating to commodities of a particular kind to be exported to a specific destination,” and they also may enter into like agreements with producers or sellers of such commodities. Such agreements, however, must be noted to the Minister of International Trade and Industry, who must authorize or refuse to approve within 20 days. Japanese producers and sellers also may enter into similar agreements in domestic transactions which are related to commodities of a particular kind to be exported to a specific des-

19 Id. § 303, 96 Stat. at 1241.
20 Id. § 306, 96 Stat. at 1243.
21 Id.
18 Id.
16 Id.
20 See infra notes 66-124 and accompanying text.
19 IV OECD Guide, supra note 17, § 5-3.
21 Id. § 5-2(3).
tination by obtaining the authorization of this Minister.\textsuperscript{22}

Unlike U.S. law, the Japanese export exemption does not appear to be concerned with the anticompetitive repercussions on the domestic market that agreements between exporters or between producers or sellers of commodities to be exported might have. Another major difference, at least in the view of U.S. business as indicated by the comments cited in the Introduction, is that the Japanese Antimonopoly Law not only exempts exports, but the government agency, MITI, is itself very much involved in, and perhaps even directs, the cooperative activities of Japanese industry to penetrate foreign markets. It should be noted, however, that some degree of governmental involvement may now be perceived in the U.S. government inasmuch as the Trading Company Act is administered by the Commerce Department rather than an antitrust agency.

III. THE ANTITRUST LAWS AND POLICIES APPLICABLE TO IMPORT TRADE

A. U.S. Antitrust Laws and United States Import Trade

1. U.S. Antitrust Enforcement as Applied to Import Trade

In both the United States and Japan, antitrust considerations affect the impact of import trade on each country's domestic market. In both countries, imports furnish an independent source of competition to domestic industries. Classic international cartel cases in the United States, such as territorial divisions and allocation of national markets, have been held to violate the Sherman Act.\textsuperscript{23} One aspect of the illegality in these cases is that such cartels eliminate the competition of imports into the United States.

In \textit{Timken Bearing Co. v. United States},\textsuperscript{24} a U.S. company agreed with British and French companies that each would refer orders to the other when such orders originated in the other company's "territory." This was held to be a violation of the Sherman Act. The district court in \textit{United States v. National Lead Co.}\textsuperscript{25} stated that under that cartel "[n]o [foreign] titanium pigments enter the United States except with the consent of NL" (National Lead Company, a United States company).\textsuperscript{26} In the more recent case of \textit{United States v. Addison-Wesley Publishing Co.},\textsuperscript{27} settled by consent decree, major U.S. and British publishing companies were alleged to have agreed that whenever a copyrighted book published by one of the British companies was to be published in the

\textsuperscript{22} Id. \S 5-3.
\textsuperscript{23} Id. \S 5-3.
\textsuperscript{25} Id. \S 5-3.
\textsuperscript{26} Id. \S 5-3.
\textsuperscript{27} 1976-2 Trade Cas. (CCH) \textsuperscript{\textdagger} 61,225 (S.D.N.Y. 1976) (consent decree).
United States the British company would license a U.S. company to publish it and would not itself sell the book in the United States. A reciprocal covenant required U.S. companies to license British companies to publish books in Great Britain.

The United States has a special antitrust statute applicable to import trade in the antitrust provisions of the Wilson Tariff Act (Wilson Act). Section 73 of that act prohibits "every combination, conspiracy, trust, agreement or contract" between two or more persons or corporations, either of whom as agent or principal, is engaged in importing any article into the United States from any foreign country when intended to operate "in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States" of any article imported or intended to be imported, "or of any manufacture into which such imported article enters or is intended to enter." In United States v. Watchmakers of Switzerland Information Center, Inc. the court held illegal under the Wilson Act, as well as under Section 1 of the Sherman Act, agreements placing restrictions on the U.S. import of watches, watch parts and watchmaking machinery. The defendant companies had agreed not to sell certain types of watchmaking machines to U.S. manufacturers.

United States v. Singer Mfg. Co. dealt with arrangements whereby a U.S. company, Singer Manufacturing Company, conspired with two European companies, all having patents on zig-zag sewing machines, to keep Japanese imports of such machines out of the U.S. market. The Supreme Court affirmed the illegality of this arrangement, even though it was argued that the decisions would injure the Singer Company as the sole remaining domestic producer of zig-zag sewing machines for household use.

The U.S. Department of Justice and the Federal Trade Commission have uniformly attacked arrangements which place restrictions upon imports, and this has enabled foreign producers to import their goods and sell them freely in the American market. As one head of the Antitrust Division of the Department of Justice stated, "our antitrust enforcement seeks to provide free access to the American market as well as free marketability of American goods abroad."
The U.S. antitrust laws are also applicable to foreign manufacturers and exporters who attempt to monopolize or restrain U.S. trade. Thus, in one case, it was held that a complaint, which charged a Polish company with violating the Sherman Act and the Wilson Tariff Act by monopolizing the U.S. golf cart market through its U.S. imports, stated a cause of action.\textsuperscript{34} Another complaint, alleging that foreign distillers had conspired to monopolize the U.S. market for scotch whisky through imports, was also upheld.\textsuperscript{35} A complaint which was settled by consent decree\textsuperscript{36} alleged that the DeBeers Diamond Syndicate divided up the U.S. market in the sale of diamonds by limiting such sales to exclusive distributors in the United States. The early United States v. Sisal Sales Corp. case\textsuperscript{37} condemned activities to control foreign supply with the object of controlling U.S. imports, even though the scheme was implemented by foreign legislation. A forerunner of this case was an opinion by Attorney General Wickersham alleging that a German potash syndicate which fixed prices for imports into the U.S. market was illegal.\textsuperscript{38} This was the Attorney General’s view, even though the arrangement was pursuant to German law.\textsuperscript{39} The Sisal case and the Wickersham Opinion have a possible current analogy in the Houdaille Industries petition\textsuperscript{40} discussed infra.\textsuperscript{41}

The U.S. Department of Justice has also taken the same tack on enforcement as to Japanese or other foreign export associations. The Department of Justice, in United States v. R.P. Oldham\textsuperscript{42} (the Japanese Wire Nails case), brought suit under both Section 1 of the Sherman Act and Section 73 of the Wilson Act attacking an arrangement, between Japanese manufacturers or trading companies and U.S. importers, whereby resale prices were fixed and markets were allocated in the United States. While during one period the Department of Justice adopted a policy of forbearance as to combinations of foreign exporters similar to associations pursuant to the Webb Act\textsuperscript{43} this policy was short-lived, and the present

\textsuperscript{34} Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384 (D. Del. 1978).
\textsuperscript{36} United States v. DeBeers Industrial Diamond Division Ltd., 1976-1 Trade Cas. (CCH) ¶ 60,825 (S.D.N.Y. 1976)(consent decree).
\textsuperscript{37} 274 U.S. 268 (1926).
\textsuperscript{39} Id.
\textsuperscript{40} Houdaille Industries, Inc., Petition to the President through the Office of the United States Trade Representative for the Exercise of Presidential Discretion Authorized by the Revenue Act of 1971 § 103, 26 U.S.C. § 48(a)(7)(D) (1982) [hereinafter cited as Houdaille Petition].
\textsuperscript{41} See infra notes 102-108 and accompanying text.
\textsuperscript{42} 152 F. Supp. 818 (N.D. Cal. 1957).
\textsuperscript{43} Letter from Assistant Attorney General Donald I. Baker to Senator Edward Kennedy, 274 Trade Reg. Rep. (CCH) 15, 16-(1977).
policy is to treat such export associations the same as any other group which is in violation of the antitrust laws.\textsuperscript{44}

The Department of Justice is currently conducting a civil investigation of the marketing practices of six Japanese semiconductor manufacturers for possible price fixing in the U.S. computer chip market (64K RAMs).\textsuperscript{46} Civil Investigative Demands have been served on the U.S. subsidiaries of the Toshiba, Nippon Electric, Fujitsu, Hitachi, Oki Electric and Mitsubishi companies.\textsuperscript{46} The Department of Justice has reportedly asked for, inter alia, all documents relating to the U.S. prices of 64K RAMs made in Japan and all documents relating to communications or agreements among the Japanese manufacturers of products shipped to and sold in the United States.\textsuperscript{47} The purpose of the investigation reportedly is to determine if price fixing, supply restrictions or other restraints of trade existed from December 1981 to July 1982.\textsuperscript{48} The investigation apparently became public in Japan as a result of the arrangement, referred to earlier, between the two countries to notify each other of antitrust investigations.

2. Antitrust Aspects of Voluntary Agreements to Curtail U.S. Imports

In 1969, the U.S. State Department, on behalf of the U.S. steel industry, arranged for the steel producers of Europe and Japan to voluntarily restrain their exports of steel to the United States. A U.S. district court in Consumer Union of U.S., Inc. v. Rogers not only held that the President of the United States had no authority to exempt such agreements from the antitrust laws, but also stated that such agreements, so far as foreign producers were concerned, were illegal under the antitrust laws.\textsuperscript{49} On appeal, the D.C. Circuit affirmed the holding on the lack of presidential power, but vacated the antitrust dictum of the lower court.\textsuperscript{50} Congress, in the Trade Agreements Act of 1974, gave the President power


\textsuperscript{46} N.Y. Times, supra note 45, at D13.

\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973). Note, however, that the court does recognize that the President may enter into agreements or diplomatic arrangements with private foreign steel concerns so long as such agreements are not violative of legislation regulating foreign commerce, for example the Sherman Act.

to execute voluntary steel agreements prior to January 1, 1975.51

The governments of the United States and Japan have had a "voluntary agreement" since 1981 that Japan will restrict its export of automobiles to the United States for two years.52 This government-to-government agreement was negotiated to avoid the antitrust risks which prior industry agreements have encountered. As a result of the negotiations, Japan imposed mandatory quotas on its automobile companies.53

Attorney General William French Smith, in commenting on the U.S.-Japanese automobile agreement,64 emphasized the antitrust danger of private industry agreements. The Attorney General made the suggestion, which was later implemented, that the Japanese government should require the precise curtailment of exports by Japanese manufacturers, particularly in order to avoid antitrust suits.

General Motors Corporation, in connection with its proposed joint venture with Japanese Toyota Motor Company to build small cars, has requested a special quota of 300,000 small cars to be built in Japan by Toyota.55 Both Ford Motor Company and Chrysler Corporation have taken the position that, if the joint venture goes through, they also will have to bring in Japanese small cars to meet the competition of G.M.-Toyota and that the result may be to transfer most small-car production overseas.56

B. Japanese Antitrust Laws and Japanese Import Trade

The Japanese antitrust law and policy does not directly address the question of providing foreign goods free access to the Japanese market but rather is concerned with imports and international agreements. Further, the Japanese Export and Import Trading Act is concerned with expediting imports. Persons engaged in business in Japan are prohibited from entering into any international contract which contains arrangements constituting unreasonable restraint of trade or unfair business

56 Id.
practices.\textsuperscript{57} Such contracts must be reported to the Japanese Fair Trade Commission, the Japanese antitrust authority, within thirty days.\textsuperscript{58}

The Japanese Antimonopoly Law, as applied to the Japanese market, forbids private monopolization, e.g. controlling other enterprises, thus causing a substantial restraint of competition and an unreasonable restraint of trade as well as unfair business practices.\textsuperscript{59} "Unreasonable restraint of trade" generally encompasses horizontal arrangements to fix prices or limit production, technology, products, facilities, customers or suppliers causing a substantial restraint of competition in any particular area.\textsuperscript{60} The term "unfair business practices" includes the following among numerous practices: concerted refusal to deal, unreasonable refusal to deal by a dominant company, boycotts, discriminatory business prices or terms, unreasonably high or low prices, unreasonable exclusive dealing and restrictive vertical arrangements.\textsuperscript{61} The antitrust laws also provide for measures against monopolistic situations (e.g., where one enterprise has over 50 percent of the market or the two largest have over 75 percent).\textsuperscript{62}

The Antimonopoly Law has specific exceptions for various types of cartels. Thus, a "rationalization cartel" may be approved for manufacturers if it will result in the advancement of technology, improvement of quality of goods, reduction in cost or increase efficiency.\textsuperscript{63} The general idea of rationalization is to divide up production of various lines of products so that only one or two companies will produce a particular line. In Japan such cartels are permissible where consumer interests are not injured and the production of a particular product is not unduly concentrated in the hands of any one firm.\textsuperscript{64} "Depression cartels" are permitted for manufacturers when the price of a product is below the cost of production, some manufacturers might be forced out of business, and these circumstances cannot be overcome by rationalization of an individual enterprise.\textsuperscript{65} Since only Japanese manufacturers may join such cartels, a cartel's effect would seem to make it more difficult for importers of for-

\begin{footnotes}
\item 57 IV OECD Guide, supra note 17, § 6 at 7-8.
\item 58 Id.
\item 60 IV OECD Guide, supra note 17, § 2(6) at 5.
\item 61 Id., § 2(9) at 6, 19, § 2(19) at 1.
\item 62 Id. § 1(7) at 5-6, 10-11.
\item 63 Id. § 24(4) at 23-24.
\item 64 Id. § 24-4 at 24.
\item 65 Id. § 24-3 at 22-23.
\end{footnotes}
eign products.

IV. UNITED STATES AND JAPANESE IMPORT TRADE LAWS

Apart from the antitrust laws, both the United States and Japan have trade laws which regulate imports with the avowed object of preventing "unfair" practices in import trade. When confined to this purpose, such laws are similar to the antitrust laws. In the United States some of these laws adopt the general phraseology of the antitrust laws. In practice, however, these trade laws may be protectionist in effect; if particular imports injure a domestic industry, pressure to keep out such imports regardless of the fairness or unfairness of the competition will be applied.

Trade laws that act to prevent unfair imports are recognized and allowed under the rules of the General Agreement on Tariffs and Trade (GATT), under whose auspices multinational negotiations were last held in the "Tokyo Round" in 1979. National antidumping duties, for example, are permitted under GATT rules where there are sales to a foreign country: (a) at a price lower than the seller charges in his home market; or (b) if there are no domestic sales, either at a price lower than the highest price for a like product sold to third countries, or lower than the cost of production plus a reasonable addition for selling cost and profit. Such dumping must cause or threaten national injury to a domestic industry or materially retard the establishment of a domestic industry.

A. United States Import Trade Laws

1. Antidumping and Countervailing Duty Laws

The Antidumping Act of 1921 was repealed and replaced by provisions of the Trade Act of 1979. Under the two-part procedure of this Antidumping Act, the Secretary of Commerce must first determine whether imported goods are being sold in the United States at less than their fair value (LTFV), and, if such an affirmative finding is made, then the International Trade Commission (ITC) must determine whether a

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68 GATT, supra note 66, at art. VI.

69 Id.


U.S. industry is materially injured or threatened with such injury, or is materially retarded.\textsuperscript{72} A former head of the Antitrust Division characterized a violation of the U.S. antidumping law as "in substance an antitrust offense, while the remedy provided is through tariff machinery normally applied as an adjunct of trade policy."\textsuperscript{73}

Since 1970, the Department of Justice and the Federal Trade Commission have filed a number of briefs with the ITC calling attention to competitive aspects which, in their view, should be taken into consideration by the ITC in antidumping cases. One of the first important cases in which the Department of Justice filed a brief was an antidumping proceeding relating to large power transformers from Japan and other countries.\textsuperscript{74} There, the Department of Justice stated its view that a higher level of market penetration by imports in the U.S. market should be required to impose antidumping relief "in an industry dominated by a few firms with very large market shares than for more competitive industries."\textsuperscript{75}

In the past, enforcement of the antidumping laws by the Commerce Department had caused it to establish a "trigger point" mechanism for steel imports, as linked to steel prices in Japan. If an importer's customs declaration for a particular steel product was lower than that of Japan, considered the most efficient national steel producer, a presumption of dumping existed and an antidumping investigation would be initiated.\textsuperscript{76} The mechanism was suspended in January 1982 when the U.S. steel industry filed the antidumping and countervailing duty petitions referred to infra.\textsuperscript{77} While the Department of Commerce used this trigger point, it was pointed out by one commentator that the steel industry had a large input into the level of such a "trigger point" and that antitrust questions were inherent in the system.\textsuperscript{78} Antitrust questions have been raised about settlements of antidumping proceedings by voluntary agreement under which importers agreed to the price of the imported products.\textsuperscript{79} Such set-

\textsuperscript{72} Id.
\textsuperscript{73} Letter from Assistant Attorney General R. McLaren to Treasury Department (June 14, 1971)(concerning changes in Treasury Regulations), noted in W. Fugate, supra note 33, at 267.
\textsuperscript{74} Large Power Transformers from Italy, Japan, Switzerland and the United Kingdom, 37 Fed. Reg. 1509 (1972); 37 Fed. Reg. 3136 (1972).
\textsuperscript{75} Id.
\textsuperscript{76} See generally Mundheim, Developments in Antidumping Law, 34 Bus. Law 1831 (1979).
\textsuperscript{77} See infra notes 82-83 and accompanying text.
\textsuperscript{78} See generally Applebaum, Antitrust Aspects of Trade Law Cases, 50 Antitrust L.J. 759 (1981).
\textsuperscript{79} Address by D. Rosenthal before the Practising Law Institute, Washington, D.C. (Nov. 9, 1979) (discussing Antitrust Risks in Abusing Import Relief Laws) noted in W. Fugate, supra note 33, at 266.
tlements are provided for in the law under "extraordinary circumstances,"\(^{80}\) but the Justice Department has warned of collusion by any such settlements.\(^{81}\)

In 1982 U.S. steel companies filed over 100 antidumping and countervailing duty petitions. In a major ruling, the ITC held that imports of government-subsidized steel from six European nations, constituting about 11% of imported steel, had injured the U.S. steel industry.\(^{82}\) Subsequently, the United States and European Communities agreed to a three-year steel accord covering eleven carbon steel products and alloys and restricting European imports to about 5.12% of the total U.S. steel market.\(^{83}\) There is also a 5.9% ceiling on European pipe and tube steel used in oil drilling. As a result of the accord, most of the antidumping suits were terminated.

The United States also has a Countervailing Duty law which provides that, when a foreign exporter is aided by a subsidy from his government in importing goods to the United States and the exporter is injuring U.S. producers, a duty may be levied on such goods equal to the subsidy.\(^{84}\)

2. Escape Clause Actions

"Escape Clause" actions are those brought before the ITC under Section 201 of the Trade Act of 1974.\(^{85}\) The "escape clause" is an exception from the usual GATT rules.\(^{86}\) Under this procedure, a U.S. industry may petition the ITC by alleging that imports are a substantial cause of serious injury to that industry. No unfair practices need be alleged. The ITC may make a determination of such injury if it finds that imports are increasing, that a domestic industry has suffered or is threatened by serious injury and that imports are a substantial cause of serious injury no less than any other cause. If it concludes that injury has been proved, the ITC recommends import relief to the President who can then impose quotas, increase duties, or negotiate orderly marketing agreements with foreign governments.\(^{87}\)

A much publicized escape clause petition was brought by the United

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\(^{80}\) 19 U.S.C. § 1673(2)(A) & (B).

\(^{81}\) Rosenthal, supra note 79.

\(^{82}\) ITC Rules for U.S. on Steel, Washington Post, Oct. 16, 1982, at 1, col. 1. See also Certain Steel Products from Belgium, France, Italy, Luxembourg, the Netherlands, Romania, United Kingdom and West Germany, USITC Pub. 1221 (1982).

\(^{83}\) Accord is Reached with Europeans on Steel Exports, Washington Post, Oct. 22, 1982, at 1, col. 5.


\(^{86}\) GATT, supra note 66.

\(^{87}\) Id. § 201.
Auto Workers and Ford Motor Company, alleging that the U.S. automobile industry had been injured by Japanese auto imports.\textsuperscript{88} While the ITC did find injury from increased Japanese imports, it concluded that Japanese imports were not the primary cause of the U.S. auto industry's injury.\textsuperscript{89}

3. Section 337 of the Tariff Act

Section 337 of the Tariff Act\textsuperscript{80} makes "unfair methods of competition and unfair acts in the importation of articles into the United States" unlawful when the effect or tendency of a method or act is to destroy or substantially injure a U.S. industry that is "efficiently and economically operated," or to prevent the establishment of such an industry, or "to restrain or monopolize trade or commerce in the United States."\textsuperscript{91} The administration of this law is the responsibility of the ITC which, if it finds such unfair importation, may order the exclusion of such articles or issue a cease and desist order.\textsuperscript{92} Prior to the Tariff Act's amendment in 1974,\textsuperscript{93} it was mainly used to curb the importation of articles which infringed upon a U.S. patent.\textsuperscript{94} The 1974 Trade Act expanded its coverage and added authority for the ITC to issue a cease and desist order. When the Commission makes a determination of injury, this goes to the President who has 60 days to disapprove such determination "for policy reasons."\textsuperscript{95}

Since 1974 the ITC has had several cases before it involving alleged unfair trade practices by Japanese companies in the importation of Japanese products.\textsuperscript{96} The Department of Justice has suggested that the ITC use great caution in excluding foreign products because of its chilling effect on the competition of importers.\textsuperscript{97} The Department of Justice filed a brief in the ITC case of \textit{Welded Stainless Steel Pipe and Tube from Ja-

\textsuperscript{89} Id.
\textsuperscript{90} 19 U.S.C. § 1337(a)-(j) (1976).
\textsuperscript{92} 19 U.S.C. § 1337(d), (e) & (f).
\textsuperscript{94} W. Fugate, \textit{supra} note 33, at 268-271.
\textsuperscript{95} 19 U.S.C. § 1337(g)(2) (1976).
\textsuperscript{97} \textit{See generally} Rosenthal & Sheldon, § 337: \textit{A View within the Department of Justice, 8 GA. J. INT'L & COMP. L. 47 (1979). See also Musrey, Tariff Act's Section 337: Vehicle for the Protection and Extension of Monopolies, 5 LAW & POL. IN INT'L BUS. 56 (1973).
arguing against ITC sanction as relief against antitrust type claims in that case (unreasonably low pricing with intent to destroy a competitor).\textsuperscript{99} Section 337 particularly illustrates the fine line between the antitrust laws and import trade laws. While the language is certainly antitrust language, the ITC is not usually in the role of enforcing the antitrust laws.

4. Other Import Actions

Section 301 of the Trade Act of 1974, as amended by the Trade Act of 1976, authorizes the President, inter alia, to take appropriate steps to eliminate any act, policy or practice of a foreign country which “is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce.”\textsuperscript{100} Under this authority, the President may suspend or withdraw from a trade agreement or impose duties or import restrictions.\textsuperscript{101}

An interesting petition for import relief relying on antitrust considerations was filed under a similar provision of the Internal Revenue Code by Houdaille Industries in May 1982.\textsuperscript{102} The allegations are described in some detail since they are similar to U.S. business complaints in other industries that the Japanese government has combined with Japanese industry to “target” particular markets in foreign countries. This petition sought to invoke Section 103 of the Revenue Act of 1971, which authorizes the President to suspend investment tax credits granted to importers of foreign goods if he determines that U.S. commerce has been unjustifiably restricted by non-tariff trade barriers or if a foreign country engages in “discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce.”\textsuperscript{103}

The Houdaille petition asked that the President suspend investment tax credits for specific Japanese-made machine tools, namely “NC machining centers” and “NC punching machines.” The petition alleged that a Japanese machine tool cartel had taken nearly 50\% of the U.S. market away from American manufacturers in the first case and nearly 40\% in the latter. Furthermore the petition maintained that the U.S. market share of the Japanese cartel members for machining centers increased from 3.7\% in 1976 to 50.1\% in 1982, and the Japanese share of the U.S. market for punching machines jumped from 4.7\% to 37.6\% in

\textsuperscript{99} Certain Welded Stainless Steel Pipe & Tube, supra note 96.
\textsuperscript{99} Id.
\textsuperscript{101} Id. § 2411(b) (1976).
\textsuperscript{102} Houdaille Petition, supra note 40.
the same period.\textsuperscript{104}

According to the complaint, the machine tool cartel was formed in response to three successive Japanese special laws for the promotion of the machine tool industry. While labelled “temporary,” such laws have remained in effect since 1956. The rationalization of this industry was allegedly carried out by the Japanese Ministry of International Trade (MITI). Each firm whose production of a particular machine tool was less than 5\% of the Japanese market in that tool and less than 20\% of the company’s total production was directed to stop making these tools. Such market share was allocated to a limited number of more successful manufacturers. The petition further stated that, under MITI’s guidance, these companies then exploited the consequent economies of scale and specialization to penetrate foreign markets, particularly the U.S. market, “secure in the knowledge that these advantages would be protected against competitive erosion in the Japanese market.”\textsuperscript{105}

Joint activities of such companies in or affecting the U.S. market were alleged, including price fixing on exports to the United States and notification by each company to the others of an intention to produce new machine tools with consultation on such production. It was said that the price fixing was “formally immunized” under Japan’s Antimonopoly Law and that MITI had also accorded it informal immunity for other joint activities.\textsuperscript{106}

The antitrust complaint was the main focus of the petition, but it was also alleged that the Japanese government aided and subsidized its export industries, including the machine tool industry by giving them valuable licenses to import raw sugar to compensate them for losses attributable to dumping in foreign countries. The petition also alleged that proceeds from wagering on bicycle and motorcycle races in Japan were funnelled into export industries, including the machine tool industry. It was further charged that for a considerable period of time Japan did not permit the importation of machine tools for which there were Japanese equivalents.\textsuperscript{107}

The petition stated that relief probably was not available under the U.S. antitrust laws because of the participation by the Japanese government in the alleged anti-competitive activities and that the sovereign immunity or Act of State doctrines might be involved. Further, while some of the cartel conduct might be violative of the Japanese Antimonopoly Law, it was said that the Japanese Fair Trade Commission had indicated

\textsuperscript{104} Houdaille Petition, supra note 40.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
that it did not intend to pursue the matter.\textsuperscript{108}

The National Association of Manufacturers (NAM) had given its support to the \textit{Houdaille} petition.\textsuperscript{109} Moreover, the Senate in an unusual resolution in December 1982 urged the President to heed the \textit{Houdaille} petition and to deny the investment tax credit to the Japanese manufacturers and importers of machine tools.\textsuperscript{110}

Japanese International Trade and Industry Minister Sadanori Yamanaka denied that Japan's machine-tool exports violate the U.S. antitrust laws. He also stated that the Senate Resolution "will seriously discourage joint efforts of the U.S. and Japanese governments to maintain the free trading system" and that it "violates the GATT rule and the Japan-U.S. Treaty of Friendship, Commerce and Navigation."\textsuperscript{111}

The U.S. Trade Administrator, William E. Brock, announced in April 1983 that the petition had been denied\textsuperscript{112} but that he would begin consultations with Japan concerning the alleged practices. He said, "It is important that these discussions effectively deal with these problems, making further action unnecessary."\textsuperscript{113}

The \textit{Houdaille} petition indicates that trade laws are sometimes used as an alternative to an antitrust suit where there may be jurisdictional or sovereign immunity questions raised and where the action is likely to be protracted and expensive. Here, it may be questioned whether the alleged Japanese cartel is actually an "international" cartel. The gist of the complaint appears to be that a Japanese domestic cartel has received immunity from the Japanese antitrust laws and, because of the rationalization in the domestic market, has been able to undercut prices in the U.S. market. The NAM was obviously dubious of the antitrust count when it stated:

The petitioner might as well have said it [the increased U.S. market share] was achieved as a result of Japanese industrial policy. Presumably it did not because a foreign industrial policy \textit{per se} provides no explicit basis for a petition under U.S. law, but one that involves "tolerance of international cartels" does.\textsuperscript{114}

\textsuperscript{108} Id.

\textsuperscript{109} Lawrence A. Fox, Vice-President for International Economic Affairs, Comments of the National Association of Manufacturers on the Houdaille Industries Petition (July 30, 1982) [hereinafter cited as NAM Comments].


\textsuperscript{112} Press release of U.S. Trade Representative William E. Brock, Apr. 22, 1983.

\textsuperscript{113} Id.

\textsuperscript{114} NAM Comments, supra note 109.
The antitrust charges, however, might have some merit in themselves if price fixing or monopolization in the U.S. market were charged. That appears to be the basis of the Department of Justice investigation of computer chips, discussed supra.\footnote{116} Even though part of a conspiracy originates in a foreign country and even though aided by foreign law, a violation of U.S. law may still occur. This was the holding of both the Sisal case\footnote{116} and the Japanese Wire Nails\footnote{117} complaint. As has been noted, foreign government sanction for an export association does give it immunity under U.S. law.

B. Japanese Trade Laws Relating to Unfair Import Practices or Cartels

Japan has both an antidumping law\footnote{118} and countervailing duty law.\footnote{119} Any person may make a request to the government to levy antidumping or countervailing duties, respectively, by providing the Minister of Finance written information of manufacturer, type, model and features of the goods, the exporter, exporting country and a summary of the facts regarding such importation. Evidence must be presented to the Minister showing material injury to an industry in Japan caused such importation. The Minister of Finance may then make an investigation of such facts and evidence, and both the exporter and importer of the goods subject to investigation, or other party having an interest therein, may present to the Minister written or oral evidence regarding the importation. If the Minister decides that action should be taken, he shall refer to the matter to the Customs Tariff Council, or he may take provisional steps, if urgently necessary, to protect an industry and report this to the Council.\footnote{120} Contrary to the many antidumping actions in the United States, Japan has rarely, perhaps only one time recently, used its antidumping or countervailing laws.\footnote{121}

Provisions of Japanese law regarding imports are contained in the Export and Import Trading Act, which was previously referred to regarding exports.\footnote{122} This act is concerned more with MITI's extensive regula-

\footnote{115} Supra notes 45-48 and accompanying text.
\footnote{118} Cabinet Order Relating to Antidumping Duty (May 25, 1980).
\footnote{119} Cabinet Order Relating to Countervailing Duty (May 25, 1980).
\footnote{120} See Cabinet Orders, supra notes 118 and 119.
\footnote{121} Advice from A. Uesugi, First Secretary of the Embassy of Japan, Washington, D.C. According to Mr. Uesugi, Japan has not invoked this law because it might injure its image as a country with a free trade policy under GATT. Id.
\footnote{122} Act No. 299, Aug. 5, 1952, reprinted in IV OECD Guide, supra note 17, pt. III-II (Agreements Concerning Imports) and in H. Ivory & A. Uesugi, supra note 17, at 318.
tion of imports and exports than it is with provisions regarding unfair practices. Because of such regulation and because up to this time tariffs and other regulations have served as a substantial brake on imports except for particular commodities, it may be that Japan has not considered it necessary to invoke its antidumping or countervailing duty laws or to provide in its laws for other relief from unfair trade practices.

Yet, Japan's Antimonopoly Law is not applicable to price fixing and other agreements among importers if they are approved by MITI. Importers may, when sufficient cause exists as set out below, "enter into agreements on price, quantity, quality or other matters in regard to import trade, in commodities of the same or a similar kind . . . by obtaining the authorisation of the Minister of International Trade and Industry, or may . . . enter into an agreement with customers or sellers" with such authorization if an agreement among themselves will not eliminate such cause.123

The Antimonopoly Law permits such agreements when disadvantageous import trade conditions for commodities from a particular foreign country (or domestic trading in such country is substantially restrained or excessively competitive) exist, when import prices of commodities from a particular country may be much higher than those of other countries due to intergovernmental agreement or when continued importations of commodities produced from exploited resources in a foreign country may be uncertain.124

V. Comments and Conclusions

The above survey of U.S. and Japanese antitrust and trade laws indicates the following effects on U.S.-Japanese trade:

(1) The U.S. antitrust laws and policies are designed to facilitate imports of foreign goods, including Japanese goods, as well as to prevent restraint of trade or monopolization of that trade by either U.S. or foreign companies. This policy has been pursued even where U.S. companies are injured, as was argued in the Singer case. The Japanese antitrust laws do not appear to be so directed.

(2) The exemption of Japanese export cartels from the Japanese Antimonopoly Law, together with the exemption of some domestic cartels aimed at export, appear to have an important bearing on the Japanese penetration of the U.S. market and the imbalance of U.S.-Japanese trade in favor of Japan. Contrary to this, the U.S. exemption for export groups (or cartels) does not appear to be of importance in U.S.-Japanese trade, both because U.S. firms have been slow to use the exemption and because

123 Id.
124 Id. at 214-15.
Japan has not opened up its market as has the United States.

(3) The U.S. trade laws against unfair practices in import trade have only been of importance in recent years. Such laws have a legitimate basis when they are directed to actual unfair practices, but they have sometimes been used as a political or regulating device, e.g., the “trigger point” mechanism for U.S. steel imports.

United States-Japanese trade is of paramount importance, as has been pointed out, not only to the two countries but also to the world since they account for one-third of total world production and in several vital industries they are the world’s largest producers. The general trend has been for both countries to reduce barriers to trade, including non-tariff barriers, and this was the purpose of the January 1983 talks between President Reagan and Prime Minister Nakasone. If the two countries were to reverse this trend, the result would be disastrous for each and for the rest of the world.

However, measures to eliminate anticompetitive practices and truly unfair practices should not deter but advance this trade. The U.S. antitrust laws seek to prevent barriers to foreign imports, usually by domestic interests. On occasion these laws have also been invoked against combinations of foreign exporters. Such rare cases have been based on restraints of trade.

When we come to trade laws based on unfair practices, U.S. authorities should be careful not to extend such laws beyond their proper scope. Department of Justice officials have pointed out that foreign competitors charged with antidumping may be doing nothing more unfair than engaging in vigorous competition. The Department of Justice has taken the view before the ITC that sometimes the levying of dumping duties would have an anticompetitive effect.

The U.S. Trade Representative, however, has complained of Japanese cartels formed to exploit the U.S. market. The General Counsel of the Trade Representative’s Office has also said that “U.S. exports are disadvantaged all over the world not only by what we regard as unfair practices, but what foreigners have acknowledged to be unfair practices.” He cited price fixing and market division in third countries and also di-

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127 Rosenthal & Sheldon, supra note 97, at 52.
129 Brock, supra note 1.
130 DeKeiffer, supra note 52, at 785.
rect foreign government subsidies.\textsuperscript{131}

Japan extensively regulates its export and import companies and also in some cases rationalizes domestic competition for export purposes. Activities by Japanese companies following MITI directives or approval, e.g., targeting of certain industrial markets are exempt from the Japanese Antimonopoly Law. The active role of the Japanese government also makes such activities difficult to attack under U.S. antitrust law.

The Reagan Administration has developed a legislative package to improve U.S. industry competitiveness, the stated objective of which is to "significantly increase the incentives for investment in R & D [research and development] and for the efficient exploitation of new technologies."\textsuperscript{132} One important part, as described by Assistant Attorney General William H. Baxter, would clarify that joint research and development may not be condemned as per se illegal under the antitrust laws and that joint ventures which are fully disclosed to the government would be immunized from all private antitrust suits and from government antitrust damage suits.\textsuperscript{133} Secretary Baldrige has said that the Reagan Administration is studying possible changes such as allowing the major steel companies to merge and permitting certain industries to pool their research and development efforts.\textsuperscript{134} The steel industry presents a special situation. It is an industry essential to the United States both from industrial and national defense standpoints. Yet, many of its plants have become outmoded and it has fallen far behind foreign industry, particularly Japan's, in technology and efficiency. Cooperation between U.S. steel companies in an effort to revive the industry, with U.S. government help, may be necessary. However, new plants and technology and the cooperation of management and labor to produce more efficiently would appear to be much more important in reviving this essential industry. As to other industries pooling their research and development efforts, cooperation in research and development is already allowed subject to competitive considerations;\textsuperscript{135} however, it may be helpful to clarify the law in this respect.

Japan and other countries often permit under their antitrust laws some types of rationalization and specialization. This, indeed, is one of the factors singled out in Japan's successful export effort. U.S. Trade Representative Brock has referred to this,\textsuperscript{136} and the \textit{Houdaille} petition cites it as a main factor in the penetration of the U.S. machine tool mar-

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} Statement of Assistant Attorney General William F. Baxter before the Senate Committee on the Judiciary, June 29, 1983.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Protectionist Mood Grows at White House,} Wall St. J., Nov. 23, 1982, at 4, col. 1.

\textsuperscript{135} \textit{Dep't of Justice, Research Guide Concerning Joint Ventures (1980), reprinted in \textit{Trade Reg. Rep.} (CCH) No. 466 (1980); FUGATE, supra note 7, § 11.9.}

\textsuperscript{136} Brock, \textit{supra} note 1.
Rationalization and specialization agreements are usually thought of as only being necessary in smaller or developing countries and not in countries with large industries like the United States. In general, such agreements are those in which members of an industry agree either to limit the number of products or agree that some companies will produce one product and some another product. Another type of agreement relates to joint efforts to save overhead or other costs for greater efficiencies, including joint research and development. Perhaps the idea should be studied in the United States but it does not seem to be appropriate in a country having such large size units of production. General Motors can rationalize its own production, for example by using the same engine in cars manufactured by different divisions. Companies in difficulty can voluntarily cut down on the number of models they produce. The public may not demand that a manufacturer produce a dozen models of what is essentially the same car, and the automobile companies appear to finally realize this.

United States industry is presently having trouble competing with Japan. To the extent that this is caused by unfair practices, these should be eliminated. The best way would seem to be by negotiations by the U.S. government with the Japanese government, and progress is being made in that direction. At the same time our industry must be willing to accept the fair, vigorous competition of Japanese industry. U.S. industry which has been the most creative, innovative and technologically proficient in the world has the ability to meet this challenge. The U.S. automobile industry, with management and labor cooperation, is already staging a comeback against Japanese imports.

137 Houdaille Petition, supra note 40, at 5 (Introduction and Summary).
138 L. Skeoch & B. McDonald, Dynamic Change and Accountability in a Canadian Market Economy, Proposals for a Further Revision of Canadian Competition Policy 176-177 (1976); The Industrial Council for Social and Economic Studies, Structural Rationalization (1980); Address by W. Fugate, at the Conference on Canadian Competition Policy, Queens University (Sept. 7-9, 1976) (on Specialization and Export Agreements).
139 A Joint Task Force Report of the Japan-U.S. Businessmen's Conference, "Agenda for Action" in July 1983, after noting the close relationship between the economies of the United States and Japan, refers to the clash of business and legal cultures as a general long term impediment to trade, and to the imbalance between the dollar and the yen as a major short term difficulty.

Other factors affecting the trade which are discussed in the Report include U.S. businessmen's perception of the Japanese government's "administration guidance" and the role of Japan's business groups and cartels as barriers to the operation of market forces, Japan's policies affecting access to its market, the complexity of U.S. trade law and what is seen in Japan as unfairness in antidumping laws and the extra-territorial aspects of U.S. antitrust laws. Chamber of Commerce of the United States, Advisory Council on Japan-U.S. Economic Relations, A Joint Task Force Report of the Japan-U.S. Businessmen's Conference, "Agenda for Action" (1983).