1. Introduction

The Japanese market is rigged, I'm telling you. The son of a bitch is rigged! It's rigged!
-Lee Iacocca.¹

The widening trade deficit and the perceived or actual impenetrability of the Japanese market have led to public outcry among American businesspersons and politicians.² In response to this outcry, the United States has attempted to correct these problems by negotiating changes in the internal structures and policies of both trading partners' political and legal systems.³ The trade negotiations between Japan and the United States have resulted in the Joint Report of the United States-Japan Working Group on the Structural Impediments Initiative (SII).⁴ SII contains agreements in principle and detailed commitments

¹ Playboy Interview: Lee Iacocca, PLAYBOY, Jan. 1991, at 55, 66 (Iacocca explained that as the dollar devalued relative to the yen he was able to increase sales in Korea and Taiwan by 5,000 units each and to bring sales up to 50,000 units in Europe. Logically, sales in Japan should have increased similarly, however, they only rose by a thousand units.).
² See America, You Lost the Economic War!, N.Y. Times, Sept. 6, 1990, at B2 (An advertisement by Boone Co.) (The advertisement asserts that American industry is losing the economic war because Japanese corporations are able to take advantage of the open American markets but refuse to give American corporations access to their markets. The advertisement further alleges these unfair practices: 1) Koito Manufacturing, a company allegedly in Toyota's keiretsu (supply cartel), denies an American investment company with a 26% ownership interest in Koito a seat on the board of directors but allows Toyota, a 19% owner, three such seats; 2) Japanese direct investment in the United States totals $32.5 billion, but the United States is restricted to $1.6 billion direct investment in Japan; 3) Japanese companies are "exporting their cartel-like keiretsus to America, in violation of U.S. antitrust laws.").
³ See W. H. Cooper, JAPAN-U.S. TRADE: THE STRUCTURAL IMPEDIMENTS INITIATIVE, Cong. Research Serv., Sept. 15, 1990, at CRS-1 (This observer believes that the Initiative goes beyond the previous negotiations that dealt with overt barriers such as "import quotas, high tariffs, and government regulations.").
⁴ Joint Report of the U.S.-Japan Working Group on the Structural Impediments Initiative, June 28, 1990 [hereinafter SII]. See also Hearing of the
which the United States hopes will significantly reduce its $49 billion trade deficit with Japan. The SII dialogue, which continued throughout 1991, has presently identified six Japanese and seven American market impediments which the two countries have each agreed must be corrected. The impediments are interrelated and have varying degrees of effect on the creation of the trade imbalance. This comment will analyze Japan’s agreements on the keiretsu and Exclusionary Business Practices. The analysis will focus on the effects of these economic phenomena on the Japanese market from the perspective of the formation and operation of postwar Japanese private industry, the Japanese government’s enforcement of anti-monopoly laws and its promulgation of national industrial policy. This comment will begin this analysis by first discussing the problems confronting Western businesses doing business in Japan and explaining the regulatory practices and laws relating to these problems. Following this, there will be an examination of SII agreements and the sections of the Japanese Antimonopoly Act that are relevant to the keiretsu or cartel problems and the possible obstacles to attaining SII’s goals. This comment will conclude by presenting effective solutions which should be incorporated into the continuing SII dialogue.

2. MOTIVATION FOR THE PROMULGATION OF SII

The proponents of SII have articulated their commitment to achieving “more efficient, open and competitive markets, promot[ing] sustained economic growth and enhanc[ing] the quality of life in both Japan and the United States.” United States Trade Representative

International Trade Subcommittee of the Senate Finance Committee, Fed. News Serv., Mar. 5, 1990 at Commerce and Trade [hereinafter Hearing] (witness S. Linn Williams, Deputy United States Trade Representative (USTR), stating that SII is a unique, iterative bilateral negotiation between sovereign governments with no set patterns or benchmarks, and with each nation responsible for its own competitiveness.).

6 Id.
7 COOPER, supra note 3, at CRS-1.
8 SII, supra note 4, at § V. The term keiretsu in Japan specifically refers to groupings of companies tied together either by cross-shareholding or by financial obligations. Some of the keiretsu have origins in pre-World War II family-owned corporate combines called zaibatsu, but others were created after the war usually with a bank as the principal institution. The definition of the term keiretsu in western usage has come to include cartels or cartel-like practices. This paper will use this current definition and, for the purposes of this paper, will draw only minor distinctions between the keiretsu and cartel.
9 Id. at § IV.
10 Id. at 1; see also Kanabayashi & Brauchli, Rebuilding Japan Prompted by the U.S., Tokyo States Trillions in Domestic Spending, Wall St. J., Jan. 3, 1991, at A1, col. 1 (The article asserts that the increase in Japanese public spending required by SII
(USTR) Carla Hills believes that the substantial markets which are presently closed could provide "alternative engines for growth" that would ultimately have global benefits by expanding trade and fostering economic growth. An additional benefit may accrue if the elimination of trade restrictions from the Japanese market does in fact curtail the build up of anti-Japan sentiment. The participants in these talks hope to actualize these goals by creating a "parity of opportunity" — providing the same opportunities in Japan that the Japanese enjoy in the rest of the world. USTR Hills maintains that these SII policies, which attack the keiretsu and other barriers to the Japanese market, will benefit the Japanese economy and its consumers. Hills believes that individual Japanese consumers and at least eighty percent of the Japanese business community also support these policies. If her belief is correct will result in overall improvement in the country's infrastructure, including roads, railroads, and sewage treatment. The improvements should not only benefit the general populace, but will have the serendipitous benefit of increasing Japan's competitiveness. This side effect will occur because the appropriations will avoid Japan's pork-barrel politics which have provided well in some areas of the country but left other areas like "less-developed countries." The article also characterizes previous attempts by Washington to solve the trade imbalance as benefiting Japan more than the United States. In one case, "when Japanese semiconductor makers were slashing prices to win market share, the U.S. extracted an agreement that in effect put a floor under chip prices; but since many U.S. chip makers had already lost their markets, the benefit of supported prices mainly flowed back to Japan." A second case occurred "when the U.S. . . . began fighting its trade deficit by letting the dollar depreciate, the stronger yen gave Japanese companies the ability to gobble up American assets cheaply.").


12 Id. (USTR Hills stating, "[a]nd if that parity of opportunity is not given, I'm afraid that the protectionist forces will tend to raise barriers and again create imperfections in our multilateral trading system.").


Yomiuri News, in a commentary entitled, 'Why Couldn't We Resolve These Matters Earlier?,' why the Japanese government moved on SII only when pushed strongly by the US, even though most of the US suggestions were on target and exactly what Japan should be doing on its own. Similarly, Nikkei editorialized that, quote, 'US requests better represented the interests consumers and urbanites than did Japan and every political party.').

But see Playboy Interview: Shintaro Ishihara, PLAYBOY, Oct. 1990, at 59, 63 (Mr. Ishihara, author of THE JAPAN THAT CAN'T SAY NO, maintains that much of the
and SII can maintain public support, the remaining obstacles to SII implementation should be minimal. History and politics, however, provide little optimism for a successful voluntary elimination of the structural impediments to an open Japanese market.

2.1. Keiretsu and Exclusionary Business Practices

2.1.1. Keiretsu

The Japanese look with approval upon the formation of *keiretsu*, or business cartels. Japan’s Fair Trade Commission’s (JFTC) findings during the period from 1972 to 1976 indicated the prevalence of *keiretsu* activity in Japan: “out of one hundred leading manufacturing and mining companies, forty-five [were] respondents in at least one cartel decision, thirty-two were respondents in at least two cartel decisions, twenty-four in more than three decisions, and twelve in more than five decisions.”14 Such “legal” cartels are formed with JFTC approval, created by legislative order, or permitted to exist due to Japan’s lax antitrust enforcement.

The American government has identified the inadequacy of Japan’s antitrust enforcement and the legality of certain types of cartels as major factors in the success of Japan’s export efforts.15 These public sector-based problems are compounded by private sector problems: “U.S. officials argue that Japanese business practices fence U.S. companies out of the market while allowing Japanese firms to charge high prices and build resources for export battles in America.”16 Japanese business leaders, seeking to refute this contention, have maintained that the *keiretsu* do not purposely close the markets to imports and explain that “if keiretsu were anti-competitive, [they] would raise prices and be deserted by consumers.”17 Despite the denial of any intent to close the

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market, the traditional practice of buying from long-standing Japanese suppliers in the context of preferential trading relationships has had the effect of eliminating foreign goods from Japan’s market. The keiretsu enable trading partners to pay above market prices for the other’s materials, thereby rendering official formal protection from cheaper imports unnecessary.

While vertical restraints of trade, such as exclusive dealing and territorial restrictions on dealers, are supposedly prohibited when such practices obstruct fair competition, Japan regularly uses these techniques to realize its industrial policy. Until the first JFTC investigations in 1985, exclusive dealing and territorial restrictions had been established practices of the “distribution networks of manufacturers in oligopolistic industries such as automobiles and electrical appliances.” The government had actively promoted the restrictive distribution contracts of these networks to increase efficient distribution. The practice is still deeply rooted in the Japanese system, causing detrimental effects to consumers, the companies subservient to the keiretsu parent, and other companies attempting to enter the market.

The United States argues that the keiretsu have the effect of restricting imports into Japan. Conversely, the Ministry of International Trade and Industry (MITI) claims that the cartels actually increase imports by curtailing production, thereby raising Japanese prices and giving imported goods competitive advantages. These apparent

Note] (MITI's cartelization policy during the 1960s had several adverse consequences, including price inflation, for consumers and those businesses outside MITI’s programs.); Playboy Interview: Shintaro Ishihara, supra note 13, at 66 (The interview supports the proposition that Japan should open its market for the good of the Japanese consumer. Ishihara cites a study showing that costs are 40% higher in Tokyo than in New York and asserting that most products would be cheaper and of higher quality in a free market.).


19 Id. (Mr. Ahearn stating that intergroup trading can account for 20 to 30% of total sales for some group members.).

20 Sanekata, supra note 14, at 381.

21 Id.

22 Id. at 383.

23 Id. (The JFTC challenged these practices only in response to increased pressure from domestic consumers and international concerns.).

24 See Hearing May 3, supra note 13 (testimony of Mr. X explaining that keiretsu kickbacks, exclusionary agreements and price manipulation hurt everyone except the keiretsu parent.).


26 Id.
advantages are illusory, however, as the preferential arrangements in Japan's business and government practices prevent foreign companies from entering the market and profiting from the price disparity. These practices have the additional consequence of permitting Japanese companies to charge higher prices at home than abroad.\(^{27}\) Some observers have noted that if the Japanese market were truly free, companies could practice arbitrage, buying the goods abroad at a cheaper price and reselling them in Japan at the higher price; however, the "barriers to arbitrage . . . [provide] implicit evidence that the market remains closed . . ."\(^{28}\)

These practices also directly impact the American domestic economy because Japanese manufacturers limit their American business to their *keiretsu*-related American-based branches. In the words of one prominent American businessperson addressing the dangers of the *keiretsu*: "[b]usting Japan's trusts is essential to free trade but with more and more Japanese investment in the United States it is critical to the preservation of our own free enterprise system of open competition."\(^{29}\) Along these lines, a United States Department of Commerce report states: "[c]urrent US suppliers to Japanese companies manufacturing in the United States have been told that they will no longer be a supplier once traditional Japanese suppliers have located in this country. . . . [or the American suppliers will be] forced into a joint venture with the traditional Japanese supplier in order to obtain transplant contracts."\(^{30}\)

Trade statistics manifest the comparatively excessive extent to which Japanese firms control Japanese international trade.\(^{31}\) In 1986, American companies shipped 37% of all exports entering Europe while European companies controlled approximately 30% of Europe's exports to the United States. By contrast, American firms controlled only 14% of American exports to Japan,\(^{32}\) while Japanese affiliated firms controlled 60% of the American exports to Japan.\(^{33}\) This exportation of

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\(^{27}\) *Hearing, supra* note 18 (testimony of Mr. Robert Lawrence, Senior Fellow, Brookings Institute, stating that structural impediments prevent foreign corporations from practicing arbitrage with Japanese goods.).

\(^{28}\) *Id.* (testimony of Mr. Ahearn, Trade Relations Specialist, Congressional Research Service.).

\(^{29}\) *Senate and American Business Debate Whether SII is Enough, Kyodo News Serv., Nov. 7, 1989.*

\(^{30}\) *Hearing May 3, supra* note 13 (Julian C. Morris, President, Automotive Parts & Accessories Association, Inc., quoting a Department of Commerce report on Japanese trade practices.).

\(^{31}\) *Hearing, supra* note 18 (testimony of Mr. Robert Lawrence, Senior Fellow, Brookings Institute, citing 1986 statistics.).

\(^{32}\) *Id.*

\(^{33}\) *Id.*
the *keiretsu* or *keiretsu* practices can be expected to decrease competitive market procedures in the United States.

### 2.1.2. Japan's Restrictive Trade Practices

Having examined some of the macroeconomic implications of the Japanese practice of protecting domestic industries by fostering the *keiretsu* and using import restrictions to exclude foreign corporations, this comment will now examine how this policy adversely affects the Japanese consumer. As previously noted, the Japanese government has often restricted foreign access to its markets. The Japanese have proffered feeble justifications for such exclusions, claiming that the conditions in Japan are so uniquely Japanese that only Japanese firms are qualified to provide the product or service at issue. For example, American companies were not allowed to bid on the construction of Kansai International Airport's foundation because the soil and water conditions in Osaka Bay were uniquely Japanese; foreign-made skis were barred because the Japanese snow was unique; and foreign-produced beef was restricted because the "Japanese people's intestines are different from other peoples." 

Another exclusionary practice, bid-rigging, had been a widespread and tolerated practice in the public project construction industry. Although the JFTC had outlawed bid-rigging in other industries, the practice continued unabated in the construction industry until 1982 when the JFTC first took action against construction contract bid-rigging. The construction industry's large political contributions had enabled it to enlist the support of the majority government party in its campaign to continue bid-rigging, a practice which it claimed served the public interest.

### 2.1.3. Predatory Pricing and Capturing Market Share

Japan has sought to realize its economic goal — creating a trade surplus by capturing a dominant market share — by permitting exclusionary business practices and the formation and functioning of...
These restrictive industrial trade practices and the unique operation of Japanese businesses\(^\text{38}\) have led to predatory pricing prevalence and acceptability.\(^\text{39}\) For a predatory pricing scheme to be effective, the manufacturer must absorb losses from low product prices for a period long enough to force a substantial number of competitors out of business.\(^\text{40}\) The predator can then recoup its losses by charging above market prices and realizing a monopolist's profit.\(^\text{41}\)

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*\(^\text{42}\), American television manufacturers alleged that 21 Japanese companies had engaged in a predatory pricing scheme in the consumer electronics market. The plaintiffs claimed that the defendants had conspired to drive them out of the market by setting artificially low prices in the United States and by subsidizing these prices with profits gained by charging artificially high prices in Japan.\(^\text{43}\) The plaintiffs further asserted that the price level set for the American market was so low that it caused the defendants substantial losses\(^\text{44}\) which would be recouped in the long run by charging American consumers monopolistic prices following the elimination of domestic competition.\(^\text{45}\) The Supreme Court rejected these claims on the basis that such a plan involving so many competitors would be extremely difficult to maintain. The Court further reasoned that it would be irrational for these companies to sustain losses without a strong guarantee of attaining their goal.\(^\text{46}\)

This holding exemplifies the inability of American antitrust law to effectively confront the seemingly incomprehensible capabilities of the Japanese *keiretsu*. The Court's premise—that predatory pricing was an irrational scheme that could not be successful and would not be attempted by a rational competitor—was based on the assumption that a manufacturer could not afford to sustain the practice long enough to

\(^{38}\) See, e.g., id.

\(^{39}\) Although antitrust laws are designed to increase competitive pricing, a violation could occur when a company attempts to eliminate other competitors by pricing the products below market prices.


\(^{41}\) Id. See also Hearing May 3, supra note 13 (Mr. T. Boone Pickens, President, Boone Co., states that the high prices in Japan are causing the middle class Japanese consumer to finance the purchase of market share in the United States. The Japanese will eventually charge the American consumer the same high prices: "the Japanese will get their pound of flesh back that they paid for when they bought the market share.")

\(^{42}\) 475 U.S. 574 (1986).


\(^{44}\) Id. at 856 (citing 475 U.S. at 578).

\(^{45}\) Elzinga, supra note 40, at 242-43.

\(^{46}\) *Judicial Tests*, supra note 43, at 859-60 (citing 475 U.S. at 590-592).
derive benefits. The Court failed to acknowledge that MITI's direction and control enabled the Japanese firms to maintain the conspiracy. The Court's assumption further failed to anticipate the Japanese government's enormous capacity to subsidize the predatory industries and grant them low interest loans. The Court also failed to comprehend the industries' ability to recoup such losses by passing the cost on in the form of above market prices charged to consumers in Japan's closed markets. These factors combined to enable the keiretsu to sustain its predatory practice long enough to achieve the goal of reducing or eliminating competitors in the American market.

Theoretically, the domestic industry could have returned to production once the predator attempted to raise prices above market levels. While, in theory, the price increase should allow the domestic industries to re-enter the market and drive prices down, in practical terms this is impossible. First, Japan has only employed predatory pricing to gain market share in industries that require extensive capital investment and technological research and development—consumer electronics, semi-conductors and automobiles. The capital and technological requirements of such industries necessitate lengthy start up periods which translate into lags in market re-entry time. During these lags the predator can recoup its losses by charging monopolistic prices. Second, when any competition attempts market re-entry, the Japanese manufacturers would resume predatory pricing until they had eliminated that challenge to market superiority. Upon securing superiority,
the Japanese manufacturers would reinstate the price increase.\textsuperscript{55} Such behavior occurred, for example, in the semi-conductor industry.\textsuperscript{56}

3. JAPAN’S ANTIMONOPOLY POLICY

\textit{Zaibatsu}, or government encouraged cartels, dominated the Japanese economy prior to 1945.\textsuperscript{57} The \textit{zaibatsu} were giant manufacturing combines with origins as merchant or moneylending firms.\textsuperscript{58} The \textit{zaibatsu} consisted of a holding company, generally owned by a wealthy family, which controlled many subsidiaries and affiliates.\textsuperscript{59} After the war, the Supreme Commander Allied Powers (SCAP) dismantled the \textit{zaibatsu} because SCAP believed that they had contributed to pre-war Japan’s imperialist and expansionist policies.\textsuperscript{60} This dismantling further served the occupational forces by fostering the superimposition of Western democratic values on the Japanese economic and political system.\textsuperscript{61}

In keeping with the attempts to Westernize post-war Japan’s economic structure and practices, the legislature enacted Japan’s Antimonopoly Law of 1947, which was modeled after, but was more stringent than,\textsuperscript{62} existing American antitrust law.\textsuperscript{63} The imposition of antitrust laws based on the Western individual-centered philosophy constituted a major departure from the existing Japanese policies rooted in government-business cooperation.\textsuperscript{64} Additionally, as the stigma surrounding the Occupational Forces became publicly attached to the antitrust legislation,\textsuperscript{65} the Japanese government quickly amended the unsatisfactory policy. Within 15 months of the end of the occupation, the government had enacted an amendment exempting certain

\begin{itemize}
  \item \textsuperscript{55} Id.
  \item \textsuperscript{56} Id.
  \item \textsuperscript{57} H. IYORI & A. UESUGI, THE ANTIMONOPOLY LAWS OF JAPAN 4 (1983) (The pre-war Meiji government bestowed various favors on the \textit{zaibatsu}, including transferring government owned properties and businesses to them.).
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} E. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 131 (1984).
  \item \textsuperscript{61} E. HADLEY, ANTITRUST IN JAPAN 12 (1970).
  \item \textsuperscript{62} Hiroshi, \textit{supra} note 17, at 56.
  \item \textsuperscript{63} \textit{Note, supra} note 17, at 1066 (citing Art. 8 which empowered the FTC to order businesses to divest a part of their operation whenever “‘undue substantial disparities in bargaining power exist’ without regard to any abuse of that power.”).
  \item \textsuperscript{64} Id. at 1065-66; \textit{see also} Sanekata, \textit{supra} note 14, at 381 (“The principles of competition policy — that is, the principles of competitive selection and individual responsibility for business enterprise — have never been widely accepted in Japanese business society.”).
  \item \textsuperscript{65} IYORI & UESUGI, \textit{supra} note 57, at 7 (The laws were viewed as punishment inflicted by the Occupational Forces.).
\end{itemize}
types of cartels from the regulation.\footnote{Nakazawa & Weiss, *The Legal Cartels of Japan*, 34 ANTITRUST BULL. 641 (Fall 1989).}

### 3.1. Japanese Governmental Structure and Response to Keiretsu

As previously noted, Japanese political and social attitudes after the country’s opening in 1867 fostered an unusually high level of cooperation between government and business.\footnote{Hiroshi, *supra* note 17 at 59-60; see also Hearing, *supra* note 4 (Deputy USTR S. Linn Williams stating that Japan controls the interest rates on bank deposits to below one percent and restricts capital spending on its infrastructure in order to give Japanese companies the benefit of lower cost of capital.).} This attitude is still reflected in the internal structure of the government which is composed of elected politicians (Diet), big business (the Federation of Economic Organizations or *Keiranden*) and the upper echelons of the bureaucracy. These groups are charged with the responsibility of reaching consensus on the most effective ways to better the nation. Despite their articulated altruism, they also work towards admittedly self-serving goals.\footnote{See HAHN, *supra* note 60, at 113-14.} The system has made the politicians dependent on both the bureaucracy and big business. The former dependence is based on the bureaucrats’ longevity and political power.\footnote{Id. at 114.} Similarly, the latter dependence derives from the need for campaign contributions. This dependency is so strong that the head of the *Keiranden* is called the prime minister of Japan’s invisible government.\footnote{Id.} The bureaucracy and the *Keiranden* cooperate closely, the former often consulting with the latter on proposed government actions in order to facilitate consensus.\footnote{Id.} Since its inception, the government has nurtured such cooperation by providing guidance, planning, and technical and financial assistance to the nation’s developing industries.\footnote{Id. at 60 (The author explains that the society’s attitude towards business affects the way the business is allowed to operate. For example, bankruptcy is to be avoided at all costs, and if a major firm (or a large number of smaller firms) goes bankrupt, the Diet holds the officials from the industrial ministries responsible. Businesses are regarded as communities providing life-time employment and supporting dependent sub-contractors; not simply as vehicles of commerce. Therefore, during recessions it is not uncommon for businesses to form recession cartels, with support from both labor unions and the government.).} Consequently, the Japanese perceive this closeness to be benevolent. This attitude reflects Japan’s belief that the consumer is industrial growth’s ultimate beneficiary.\footnote{Id. at 60 (The author explains that the society’s attitude towards business affects the way the business is allowed to operate. For example, bankruptcy is to be avoided at all costs, and if a major firm (or a large number of smaller firms) goes bankrupt, the Diet holds the officials from the industrial ministries responsible. Businesses are regarded as communities providing life-time employment and supporting dependent sub-contractors; not simply as vehicles of commerce. Therefore, during recessions it is not uncommon for businesses to form recession cartels, with support from both labor unions and the government.).}

The Japanese government’s fundamental rejection of the notion
that consumers benefit from the enhanced competition engendered by a tough antitrust policy comports with the foregoing ideology. Additionally, the government regards industrial promotion as paramount in ultimately delivering the benefit.\textsuperscript{74} This tension between antitrust policy and promoting industry has resulted in, what Western observers deem to be, an anti-competitive environment.\textsuperscript{75}

The Japanese government, through the Antitrust Act, established an independent regulatory agency, the Japanese Fair Trade Commission (JFTC), to effectuate the nation's antitrust policy.\textsuperscript{76} The JFTC, modeled after the American Federal Trade Commission, was devised to counterbalance the Ministry of International Trade and Industry (MITI), the foremost advocate of anti-competitive industrial policy.\textsuperscript{77} The creation of an independent, adversarial agency was, for Japan, an unprecedented move which lacked political support.\textsuperscript{78} In fact, Japan's anti-monopoly laws, which have only been actively enforced since the mid-1960s, did not initially interfere with industrial policy.\textsuperscript{79} Though the tensions between antitrust and industrial growth policies continue,

\textsuperscript{74} See Hiroshi, \textit{supra} note 17, at 56-57; Tanaka and Middleton, \textit{supra} note 25, at 420-21 (footnotes omitted) have contrasted the difference in philosophies:

\textit{[T]he [United States] government offers little help to mature industries suffering from, or threatened with, depressed conditions. What little help is offered is often fragmented and uncoordinated. Despite the widely-acknowledged need to shift resources from low-growth, technologically backward industries, which consume high ratios of labor, materials and energy, into high-growth, high-technology and information-intensive industries, which will provide the jobs and economic leadership of the future, government support for these leading edge industries is largely confined to defense procurement and assistance to defense-oriented and non-fossil fuel energy research and development.}

The Japanese government's approach to these issues is rooted in its own traditions and decision-making process, strives for consensus and permits a higher degree of government participation in the economy. Japan's approach tends to be more comprehensive than that of the United States. Japan provides "positive adjustment" through macroeconomic "indicative planning" and microeconomic industrial policy. Industry problems and potential, whether related to import competition, loss of comparative advantage, or the needs of an infant industry, are dealt with in their totality. Imports are not singled out as the sole factor to receive government attention.

\textsuperscript{75} See Hiroshi, \textit{supra} note 17, at 59.
\textsuperscript{76} See Note, \textit{supra} note 17, at 1066-67.
\textsuperscript{77} Sanekata, \textit{supra} note 14, at 380.
\textsuperscript{78} Note, \textit{supra} note 17, at 1067-68 (The 1953 amendments also "substituted a balancing test similar to the American 'Rule of Reason'" for the Act's per se standards which effectively gave MITI a political victory over the newly formed JFTC.).
\textsuperscript{79} Sanekata, \textit{supra} note 14, at 391-92 (Early enforcement against cartel practices was limited to consumer goods industries such as sushi restaurants and tofu (bean curd) manufacturers and not against big business cartels.).
the latter policy has clearly prevailed over antitrust enforcement.\textsuperscript{80}

One reason for the failed attempts at effective antitrust enforcement is the flawed mechanism for appointing JFTC Commissioners, a mechanism which ensures that the appointees will be pro-industry. The appointments adhere to a tacit rule that the five Commissioners should be selected, one each, from the Ministry of Finance (MOF), MITI, and the Ministry of Justice, while the other two are usually former members of the Ministry of Foreign Affairs and the Bank of Japan: \textsuperscript{81} “[t]hough in the early days several judges, lawyers and law professors were appointed to the [J]FTC, [as of 1983] no such professional has become a Commissioner since 1952.” \textsuperscript{82} Other key positions, including the post of Secretary General, are now “reserved” for officials temporarily transferred from the MOF. \textsuperscript{83} The predominance of industry-sympathetic members has permitted the JFTC to approach MITI in a conciliatory rather than adversarial manner. \textsuperscript{84} Commentators refer to the JFTC’s historic impotence, at least during the period between its inception and 1974, as a “history of humiliation.” \textsuperscript{85}

3.2. JFTC Authorization of Cartels

In a departure from the American model, the 1953 amendment empowered the JFTC to participate in authorizing industry cartels. \textsuperscript{86} This enabled the JFTC to approve the formation of recession cartels, rationalization cartels, small and medium business cartels, import cartels, export cartels and special legislative cartels. \textsuperscript{87}

Recession cartels may be authorized so that industries faced with the short term problems of a recession can avoid price cutting. \textsuperscript{88} This type of cartel will be approved if the product’s price has fallen below the average cost of production, and a considerable number of manufacturers may be forced to close due to the extreme disequilibrium in the

\textsuperscript{80} Id. at 379.


\textsuperscript{82} Id.

\textsuperscript{83} Id. (The Secretary General is a top official second only to the Commissioners.).

\textsuperscript{84} Id.

\textsuperscript{85} Id. at 495; \textit{see also Hearing, supra} note 18 (Mr. Ahearn testifying that rather than “restricting monopolies and other abuses of market power, the Fair Trade Commission tends to concentrate on regulating various kinds of sales promotions, such as coupons and service discounts.”).

\textsuperscript{86} \textit{JAPAN INDUSTRY SERIES, JAPAN ANTIMONOPOLY POLICY IN LEGISLATIVE AND PRACTICAL PERSPECTIVE A.35, 17} (1968) (Article 24-(3) authorizes the formation of cartels in industries affected by depression conditions.).

\textsuperscript{87} Nakazawa & Weiss, \textit{supra} note 66, at 641, 642, 649.

\textsuperscript{88} Id. at 641, 643; \textit{see also IYORI & UESUGI, supra} note 57, at § 24-3.
supply of and demand for the product. 99

Rationalization cartels are the "concerted activities of producers . . . [for the purpose of] effecting an advancement of technology, an improvement in the quality of goods, a reduction in costs, an increase in efficiency and any other rationalization of enterprises." 99 Rationalization cartels allow "collusive activity for the purposes of improving industrial technology, using or buying products, sharing transportation facilities and otherwise improving efficiency." 90

The JFTC may exempt other types of cartels from the Antimonopoly Act by enacting "bypass statutes." 91 Such exemptions have included cartels for small and medium businesses, cartels to avoid excessive competition in import and export industries, and cartels formed for enterprise rationalization. 92 The procedure for obtaining JFTC approval to legitimize new cartels created under a bypass statute is not rigorous. The companies need only apply to the ministry in charge of their particular industry, then the ministry consults or notifies the JFTC regarding its approval of the cartel. 93 The approval of 19,762 cartels formed under bypass statutes during the period from 1953 to 1982 compared to 265 under the prior anti-monopoly laws, evinces the ease with which JFTC approval was obtained during that period. 94

In 1982, an American machine tools manufacturer petitioned the United States government to restrict the importation of Japanese products because "the Japanese government instigated the formation of . . . [a] cartel and continues to shield its members from competition." 95 The manufacturer contended — and supported with ample documentation — that Japan had exempted its machine tools industry from the antitrust laws in order to rationalize that industry. 96 Under the rationalization plan the government ordered all firms having less than five

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99 Hiroshi, supra note 17, at 79.
90 IVORI & UESUGI, supra note 57, at § 24-4.
91 Note, supra note 17, at 1070; see also IVORI & UESUGI, supra note 57, at § 24-4.
92 Yoshikawa, supra note 81, at 492.
93 Id. (In 1983 there were 28 such bypass statutes in effect.).
94 See id. at 493 (More cartels have been formed under the bypass statutes than under the Act's exemption provisions.).
95 Id. (citing KOSEI TORITIKI INKAI (FTC) 1982 KOSEI TORITIKI INKAI NENJI HOKOKU (ANNUAL REPORT OF THE FAIR TRADE COMMISSION) 308-310-315).
97 See id., at 477-78.
percent of the Japanese market and receiving less than 20% of the firm’s revenue from machine tools to stop production. The government further supported the industry cartel by providing concessionary loans and subsidies.

The reduction in the percentage of manufacturing shipments is indicative of the diminishing power of legal cartels. According to one commentator, legal cartels produced 28% of Japan’s manufacturing shipments in 1963, 18% in 1973 and less than 10% in 1989. Yet, these figures may be misleading because they do not reflect illegal cartel production, in fact, they completely ignore the effects of the replacement of legal cartels by illegal ones. In fact, the decline in the actual number of authorized cartels is partially attributable to increasing cartel consolidation — cartels having more members or greater industrial output.

Other factors which may contribute to the deceptive statistical decline of legal cartels are the economic climate of the mid 1980s and unrecorded government assistance. During times of an expanding economy businesses do not seek protection from competition. Alternately, during a recession these businesses are more likely to seek government intervention or refuge in an industry cartel. That no new recession cartels were authorized in the period between 1982 and 1987 may be a deceptive statistic for two reasons. The first is the relative health of the economy during those years. The second concerns the method of counting such cartels — this category of recession cartels does not include the Diet-created special legislative cartels formed to help depressed industries. Nor does it factor in the effects of MITI’s administrative guidance.

3.3. Market Restriction of MITI’s Administrative Guidance

Almost since its inception, MITI has been a key player in Japan’s economic development. The government, through agencies such as MITI, implements a plan to develop national, industrial, monetary, and fiscal policies which channel investment and growth to expedite

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98 Id. (quoting Houdaille Industries, Inc., supra note 96, at 4).
99 Id. (quoting Houdaille Industries, Inc., supra note 96, at 7) (Presumably, the subsidy funds were generated from the business of wagering on bicycle and motorcycle races in Japan.).
100 Nakazawa & Weiss, supra note 66, at 643.
101 Id.
102 HAHN, supra note 60, at 113, 140.
103 Sanekata, supra note 14, at 385.
104 Id. at 381.
105 Nakazawa & Weiss, supra note 66, at 644.
106 Yoshikawa, supra note 81, at 493.
achieving long range national objectives. MITI consults representatives of government, industry, labor, and academia in drafting these ten year plans, or "MITI Visions."\(^\text{107}\)

MITI advocates policies favoring business, a position which is concordant with their articulated objective: "to protect, modernize, and promote the development of Japanese industry as a whole, [as a result of which] their programs and policies tend to further industrial cooperation and concentration and to focus on trade associations and major enterprises rather than fostering competition."\(^\text{109}\) In keeping with this anti-competitive ideology, MITI uses administrative guidance to actively encourage cartel formation. For example, in an effort to realize its industrial policies, MITI may assist the targeted industry by controlling production levels, approving monopolies and intervening in pricing by, inter alia, standardizing or otherwise directly controlling price.\(^\text{110}\) In industries with long term problems of competitiveness, MITI has resorted to "scraping excess capacity, modernization of production processes, or . . . 'reduction of capacity. . .'"\(^\text{111}\)

MITI's administrative guidance is usually provided in response to an industry's request for help. This guidance typically involves analyzing the situation and offering a solution to the industry leaders.\(^\text{112}\) MITI's guiding policy mirrors the industrial rationalization policy of 1931 which cartelized all major industries to eliminate excessive competition.\(^\text{113}\) Administrative guidance is informal and usually without any statutory authorization.\(^\text{114}\) Routine solutions include remedies such as reduction of total industry output,\(^\text{115}\) plant closing, mergers, industry cooperation, and government and business cooperation.\(^\text{116}\)

Although compliance with MITI's recommendations was supposedly voluntary, MITI may utilize various economic weapons to coerce

\(^{107}\) Tanaka & Middleton, supra note 25, at 434 (citing REPORT BY THE COMPTROLLER GENERAL TO THE JOINT ECONOMIC COMMITTEE UNITED STATES CONGRESS, INDUSTRIAL POLICY: JAPAN'S FLEXIBLE APPROACH, GAO/10-82-32 (June 23, 1982), at 73 [hereinafter GAO INDUSTRIAL POLICY REPORT]).

\(^{108}\) Id.

\(^{109}\) Hiroshi, supra note 17, at 56.

\(^{110}\) Adams & Ichimura, Industrial Policy in Japan, in INDUSTRIAL POLICIES FOR GROWTH AND COMPETITIVENESS: AN ECONOMIC PERSPECTIVE 307, 319 (Adams & Klein eds. 1984) (Other actions include requiring official permits or certificates for new entries into the market, regulating the amount of fixed investment, giving subsidies, and assuring, through the Bank of Japan, that funds are available if required.).

\(^{111}\) Tanaka & Middleton, supra note 25, at 435-36 (quoting GAO INDUSTRIAL POLICY REPORT, supra note 107, at 73).

\(^{112}\) Nakazawa & Weiss, supra note 66, at 642.

\(^{113}\) Hiroshi, supra note 17, at 57.

\(^{114}\) HAHN, supra note 60, at 113.

\(^{115}\) Nakazawa & Weiss, supra note 66, at 642.

\(^{116}\) Hiroshi, supra note 17, at 58.

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recalcitrant companies into compliance. In 1952, when a company refused to comply with MITI's recommendations, MITI threatened to curtail production at the company's spinning mills by reducing the company's import quotas for raw materials. That incident is an anomaly as companies generally willingly comply with MITI recommendations because, in addition to the undesirability of MITI sanctions, the companies generally benefit from cartelization.

MITI's seeming omnipotence became manifest in 1969 through a case in which the court condemned a MITI trade restriction. MITI characterized the court's decision as incorrect and, consequently, refused to alter its actions. The Petroleum Production Case, however, only slightly limited MITI's influence. In that case, the courts ruled that industry agreements in compliance with a MITI directive could still be declared illegal. This holding should not, however, be read too broadly as the penalties for compliance with an illegal MITI directive are mild and the chance of prosecution is small. The JFTC and the courts have maintained that cartels formed to implement MITI recommendations for output restriction or pricing control are illegal even though the advice was given to the individual companies or their trade associations. This position, however, is also not as stringent as it appears since activities "expressly authorized by the statute, [and] measures based on a statute, such as setting standard prices or establishing plant capacity plans, are not in themselves antitrust violations ..." In addition, adherence to MITI guidance designed to increase market concentration or adjust profits among firms by promoting the formation of joint sales companies or restricting market entry may not violate the law because the result may not substantially restrain competition.

The Japanese government's active role in promoting monopoly and cartel activities or in exempting such practices from their own antimonopoly laws, has made it difficult for the United States to protect its interests through American antitrust laws. For example, in In re

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117 Id. at 71.
118 Yoshikawa, supra note 81, at 494.
119 Id.
120 HAHN, supra note 60, at 121.
121 Nakazawa & Weiss, supra note 66, at 642.
122 Fair Trade Commission Plans Tough Stance on Illegal, Restrictive Business Practices, Int'l Trade Rep., (BNA) No. 7, at 229 (February 14, 1990) [hereinafter Fair Trade] (The FTC has only issued warnings and has never severely punished violating cartels.).
123 Hiroshi, supra note 17, at 69-70 (In 1981 the FTC demanded that the industrial ministries cease this type of administrative guidance.).
124 Id. at 70.
125 Id.
126 Fugate, supra note 15, at 524.
Japanese Elec. Prod. Antitrust Litig.\textsuperscript{127} the defendant Japanese companies based their defense on the "act of state doctrine" which precludes American courts from adjudicating the legality of an act if that act occurred within a foreign nation's borders and was the public act of an authority exercising sovereign power.\textsuperscript{128} The Japanese cartel's successful use of this doctrine inequitably handicaps competitors in the American market.

3.4. Cross Shareholding and Interlocking Directors

The Antimonopoly Act prohibits cross shareholding or interlocking directors when such activity "substantially restrain[s] competition in any particular field of trade."\textsuperscript{129} This provision was intended to perform a check on the traditional keiretsu and is appropriate to the traditional keiretsu's structure. The keiretsu generally takes the form of a "one set principle" — with a financial institution at the helm and various companies representing all levels of trade comprising the membership.\textsuperscript{130} While the prohibition on acquiring stock applies to a company or group of companies, ownership of stock in a competing company does not per se violate the regulation.\textsuperscript{131} The determinative condition, "substantially restrain[ing] competition in any particular field of trade," is met "if there is a probability to effect market control."\textsuperscript{132}

Holding companies, those whose primary business is controlling other companies through stock ownership, are strictly prohibited regardless of size.\textsuperscript{133} The regulations specify that large companies, with paid-in capital equal to or exceeding 10 billion yen or with net assets equal to or exceeding 30 billion yen, are prohibited from acquiring the stock of other companies in excess of their own capital or net assets\textsuperscript{134}

\textsuperscript{127} 388 F. Supp. 565 (J.P.M.D.L. 1975), rev'd, 723 F.2d 238 (3d Cir. 1983); see also HAHN, supra note 60, at 123 and accompanying notes 41-43 (American television manufacturers sued several Japanese television manufacturers for alleged violations of United States antitrust laws.).

\textsuperscript{128} Id. (MITI, testifying in support of the defendants, stated that it had directed the manufacturers to fix minimum prices for export and had also supervised the preparation and implementation of the agreement.).

\textsuperscript{129} IYORI & UESUGI, supra note 57, at 81 (citing §§ 10, 14, 13).

\textsuperscript{130} Anchordoguy, A Brief History of Japan's Keiretsu, HARV. BUS. REV. 58-59 (July - Aug. 1990) (The keiretsu have a tendency to include a company in each major industry in its group.).

\textsuperscript{131} IYORI & UESUGI, supra note 57, at 81.

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 79 (citing § 9) (This measure was designed to combat a conglomerate combine zaibatsu.).

\textsuperscript{134} Id. at 79-81 (citing § 9-2) (Various kinds of stock are exempt from this regulation including "stock of companies whose business is undertaken outside Japan, or which engage in investment business in foreign countries; companies whose business is

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and financial companies are prohibited from acquiring more than a five percent interest in another company.\textsuperscript{135}

The modern \textit{keiretsu} controls its member firms through cross shareholding, loan and credit leverage and the inter-company transfer of key officers. An example of a modern \textit{keiretsu}, the Mitsubishi group, a combine of 171 diverse firms, accounts for almost three percent of the total final sales in the Japanese economy and controls the companies of the group through cross shareholding and loan and financing agreements.\textsuperscript{136} A recent study revealed that, on average, in 1981 each member firm in the \textit{keiretsu} held between one and a half and two percent of another member firm's stock. The same study found that the average percentage of stock held by all \textit{keiretsu} members was approximately 32\%.\textsuperscript{137} This substantial ownership interest exerts significant control in light of the fact that a company can be a major shareholder in a typical large corporation with numerous shareholdings by holding only five percent of that company's stock.\textsuperscript{138}

Japanese businesses appear to frequently rely heavily on bank capital rather than equity capital for their corporate capital.\textsuperscript{139} This creates a situation where credit becomes an important tool in controlling the \textit{keiretsu} members as the \textit{keiretsu}'s member bank usually satisfies the requirements for credit.\textsuperscript{140} Because each \textit{keiretsu} bank would accommodate the firms within its group before serving any outside firms, the member firms face limited sources of capital, increased dependence on the \textit{keiretsu} bank and strengthened \textit{keiretsu} control of their firms. The Antimonopoly Act does not regulate this method of control, a method which may be more powerful than cross share holding.\textsuperscript{141}

Another form of \textit{keiretsu} control is interlocking directorships. These exist when an officer or employee of a company simultaneously acts as an officer in another Japanese company.\textsuperscript{142} The original Act prohibited interlocking directorships between competitors, but a 1953
amendment removed this restriction. Therefore, the only prohibition against officers simultaneously serving for competitors is the aforementioned statutory standard prohibiting companies from "substantially restrain[ing] competition." Companies used to circumvent the former restriction by transferring key employees and officers between member companies thereby effectively interlocking directors without the appearance of simultaneous office holding within the companies.

3.5. The Limited Success of Private Damage Suits

The successful semi-privatization of antitrust law enforcement in the United States has established such law as a necessary means of governing corporate behavior. Conversely, in Japan, where the few private antitrust actions brought are uniformly unsuccessful, antitrust law is a regulatory scheme that the JFTC ineffectively applies. Also in contrast to the American model, compromise and the avoidance of confrontation are integral parts of Japanese society and, therefore, major factors in Japanese antitrust enforcement. This cultural difference helps explain the disparity in the incidence of private antitrust actions in the two nations. From their enactment "no plaintiff has ever succeeded in Japan in getting a reimbursement of its damages under either of the two provisions of Japanese law that permit private rights of action for monopolistic acts." An understanding of why the Japanese model has neglected to incorporate this essential mechanism of the American antitrust prototype — the likelihood of prevailing in private suits — begins with an examination of the present impediments to such suits.

The limited success of private damage suits is partially due to the evidentiary requirements for proving a violation. The first of these requirements is a JFTC decision which takes the form of a final recommendation, a consent decision, a contested decision or a final surcharge order. In order to prevail, the plaintiff must show that the cartel has "substantially restrained competition in a particular field of

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143 Id.
144 See Hearing May 3, supra note 13 (Mr. Pickens testimony discussing Toyota's practice of transferring their long term employees to fill the CEO, comptroller and vice president positions at a keiretsu member auto parts manufacturing concern.).
145 Hiroshi, supra note 17, at 62.
146 Sanekata, supra note 14 at, 381-2.
147 Id.
148 Hearing, supra note 4.
149 See Sanekata, supra note 14, at 396 (Only one of the consumer suits has been successful.).
But a substantial restraint alone is insufficient. Article 3 of the revised Antimonopoly Act, which prohibits companies from unreasonably restraining trade, requires proof that the parties also "communicated their intentions to each other; that they acted in a parallel fashion; and that the restrictions imposed by the cartel applied to all cartel members, a requirement that makes only horizontal agreements illegal." Article 25, which sets out the basis for damage claims, further insulates defendants by limiting the parties who may be held liable to damage claims to individual companies. This means that the trade associations themselves cannot be sued. The plaintiff must also prove that illegal cartels were the cause of the price levels during the time period in question and what the market price of the product would have been absent the defendant's interference.

The lack of sufficient incentive for overcoming all of these obstacles further chills the likelihood of bringing a private action — the successful plaintiff can usually look forward to only a nominal award for personal damages. The amount of the damage claim is necessarily limited because there are no legal provisions for class action damage suits in Japan. The promise of low monetary return forces the private suit plaintiff to find financial support from a consumer organization and/or lawyers who will volunteer their services. The inadequacy of the potential recovery in these suits is perhaps the greatest departure from the American model which is propelled by its reward of treble damages for those private suit plaintiffs who succeed in performing this social watchdog function. The absence of a similar provision under Japanese law combined with the aforementioned obstacles to foster the cultural desire of Japanese businesses to avoid disrupting "close and intricate business relationships with their competitors" and/or customers, to effectively preclude the bringing, and consequently, the suc-

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161 JAPAN INDUSTRY SERIES, supra note 86, at 6.
162 Note, supra note 17, at 1069. (This section describes the evidentiary requirements of Art. 3's prohibition of private monopolization and unreasonable restraint of trade); see also IYORI & UESUGI, supra note 57, at 217-218.
163 Haley, supra note 150, at 501.
164 Sanekata, supra note 14, at 397.
165 Haley, supra note 150, at 502-3 (A suit failed because the plaintiff could not establish what the retail price of televisions would have been without the defendant's illegal activities.).
166 Sanekata, supra note 14, at 396.
167 HAHN, supra note 60, at 132-33.
168 Hearing, supra note 4 (S. Linn Williams, Deputy USTR, stating that a plaintiff in a kerosene price fixing case was denied damages despite the fact that the FTC had found the existence of a price-fixing cartel.).
169 HAHN, supra note 60, at 132.
cess, of such suits.\textsuperscript{160}

The systemic inadequacy of private party remediation is a prime manifestation of Japan's poor antitrust enforcement effort. Conversely, the American private right of action, independent of any discretionary ruling by a bureaucrat,\textsuperscript{161} is at the heart of America's more effective antitrust enforcement.\textsuperscript{162}

3.6. The Inadequacy of Penalties for Antitrust Violations

3.6.1. JFTC Investigations and Surcharges

The 1977 amendments to the antitrust laws require that the JFTC impose a surcharge following any investigation in which it finds a business to have participated in an illegal cartel which has affected prices by controlling output.\textsuperscript{163} Prior to these amendments the main response to such conduct was the issuance of a cease and desist order.\textsuperscript{164} The slightly more effective surcharge ranges from one half to two percent of the revenue from goods or services subject to the cartel during the time that the cartel was in effect.\textsuperscript{165} The penalty is not intended to be punitive, instead, its purpose is to assess the violator for the amount of illegal profits gained from the cartel in order to make its operation unprofitable.\textsuperscript{166} The penalty may be inadequate in the case of aggressive cartels\textsuperscript{167} and is considerably less than the treble damages assessed in the United States system.\textsuperscript{168} Despite these flaws, it seems to have been effective in deterring potential recidivists.\textsuperscript{169} The decrease in repeat offenders, however, may also be attributed to a separate JFTC practice. The JFTC handles many investigations but few of these culminate in formal proceedings.\textsuperscript{170} These informal investigations yield a large number of informal warnings, which the culprits seldom dispute.

\textsuperscript{160} Haley, \textit{supra} note 150, at 50.
\textsuperscript{161} \textit{Hearing Apr. 19, supra} note 13.
\textsuperscript{162} Id.
\textsuperscript{163} Hiroshi, \textit{supra} note 17, at 81.
\textsuperscript{164} Sanekata, \textit{supra} note 14, at 346.
\textsuperscript{165} Hiroshi, \textit{supra} note 17, at 81 (citing Art. 7-2, 8-3 of the amendments to the Antimonopoly Act).
\textsuperscript{166} Note, \textit{supra} note 17, at 1082.
\textsuperscript{167} \textit{Hearing}, \textit{supra} note 4 (S. Linn Williams stating that the fine the JFTC imposed on Japanese companies involved in bid rigging for projects at the Yokosuka Naval Base and at the Kansai Airport "was substantially less than the profits they had made from their illegal acts.").
\textsuperscript{168} \textit{Fair Trade, supra} note 122 (The Chairman of Japan's FTC acknowledges that American law provides tougher penalties.).
\textsuperscript{169} Sanekata, \textit{supra} note 14, at 397.
\textsuperscript{170} Haley, \textit{supra} note 150, at 506-7 ("Several thousand complaints are made to the Japanese FTC each year. Hardly more than 500 are fully investigated. Of these no more than a handful result in formal decisions.").
because accepting such warning avoids formal sanctions such as the surcharge.\textsuperscript{171}

The Tokyo High Court has further hampered JFTC enforcement by holding that the Antimonopoly Act only applies to collusion between businesses and not to individual businesses acting on MITI's instructions.\textsuperscript{172} This holding permits MITI to allow businesses to circumvent the law by simply advising each business entity separately. When a trade association is charged with functioning as an illegal cartel under Article 8, however, this holding is of little value to defendants. The evidentiary burden in such a case is less stringent than it is for Article 3 cases brought against individual companies, since Article 8 provides a presumption of communication of intent.\textsuperscript{173} This eliminates the loophole of individual MITI counselling in this context. This benefit is, however, somewhat offset by the insulation granted to the individual member firms as the JFTC may only prosecute the trade association itself.\textsuperscript{174}

3.6.2. Criminal Sanctions Under the Antimonopoly Law

The provision for criminal penalties has only been used two times,\textsuperscript{175} the last of which was in 1974.\textsuperscript{176} Despite the literal availability of criminal sanctions, this recourse is inadequate because of the difficulty in proving the criminal conduct and insurmountable odds of prevailing in such an action.\textsuperscript{177} These sanctions are rendered even more futile by their leniency,\textsuperscript{178} despite the fact that the penalties were raised ten-fold in 1977. Accordingly, they provide little if any deterrence:\textsuperscript{179} "[o]ne need not wonder why foreigners believe that Japanese companies collude and have every reason to continue to collude. Collusion in Japan is profitable and the bill is paid by foreign companies in the form of lost business, and by Japanese consumers in the form of higher prices."\textsuperscript{180}

\textsuperscript{171} Sanekata, supra note 14, at 397-98.
\textsuperscript{172} Note, supra note 17, at 1079.
\textsuperscript{173} Id. at 1069.
\textsuperscript{174} Id. at 1069-70.
\textsuperscript{175} Sanekata, supra note 14, at 396 (The most recent criminal proceeding was a 1974 action against a petroleum cartel.).
\textsuperscript{176} See, e.g., Hiroshi, supra note 17, at 66.
\textsuperscript{177} Sanekata, supra note 14, at 396.
\textsuperscript{178} Haley, supra note 150, at 483 (The maximum monetary fines start at two million yen. Maximum jail terms range from one to three years.).
\textsuperscript{179} Id.
\textsuperscript{180} Hearing, supra note 4.
4. SII's Impact on Keiretsu and Exclusionary Business Practices

SII's broad and ambitious proposals commit the Japanese government to changes in Japan's savings rate, product distribution system, land use policies, interlocking business relationships, and pricing policies.181 The United States' commitments affect its saving and investment patterns, antitrust reform, product liability laws, export deregulation, government support of research and development, export promotion, and work force education and training.182 This discussion will concentrate on the sections and clauses of the Japanese commitments that directly affect the existing keiretsu and exclusionary business practices.

The Japanese government has made commitments to:

1) Enhance and increase enforcement of the Antimonopoly Act by implementing mechanisms which will:

   a) Require the JFTC to expand and enhance its investigatory function and increase its proof-collecting capacity against illegal activities. The JFTC will especially target price cartels, supply restraint cartels, market allocations, and group boycotts.183
   b) Increase budgetary allocation to expand the number of personnel involved in violation detection and investigative functions.184
   c) Raise surcharges against cartels in order to deter violations.185
   d) Increase the use of criminal penalties for vicious and serious cases that impact on people's livelihoods and for repeat offenders. In conjunction with this policy the Minister of Justice has publicly requested all the chief prosecutors to cooperate with the JFTC by making available any information they may have uncovered relating to violations of the Antimonopoly Act. The chief prosecutors must also make special efforts to "vigorously pursue" cases of criminal violation of the Antimonopoly Act.186

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181 COOPER, supra note 3, at CRS-1.
183 SII, supra note 4, at IV-2.
184 Id. at IV-3.
185 Id.
186 Id. at IV-4-5. See also Japan to Revise Penal Code, Ease Consumer Suits as
e) Increase the effectiveness of the damage remedy system for individuals provided in Section 25 of the Antimonopoly Act\(^\text{187}\) by reducing the plaintiff’s burden of proof for violation and damage. The JFTC, when submitting its opinion, will describe in detail its findings on the violation, the causal relationship between the violation and damages, the amount of damages, and the measure used for its calculation. It will also append any necessary data or materials to its opinion.\(^\text{188}\)

f) Ensure that its administrative guidance “does not restrict market access or undermine fair competition.”\(^\text{189}\)

2) Minimize the use of exemptions from the general rules of the Antimonopoly Act and review existing exemptions to ensure that they enhance competition and do not impede imports.\(^\text{189}\)

3) Take steps to loosen *keiretsu* (a network of formal and informal agreements between companies in a vertical supply relationships that can “promote preferential group trade, negatively affect foreign direct

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\(^{187}\) IYORI & UESUGI, *supra* note 57, at 246, 249, 257 (The applicable sections are:

- **§25 [Absolute liability]**
  1. Any entrepreneur who has effected private monopolization or unreasonable restraint of trade or who has employed unfair business practices shall be liable to indemnify the person injured.
  2. No entrepreneur may be exempted from the liability as prescribed in the preceding subsection by proving the non-existence of willfulness or negligence on his part.

- **§26 [suit for damages and prescription]**
  1. The right to claim for damages as provided for in the preceding section may not be exercised in court until the decision pursuant to the provisions of Section 48(4), 53-3 or 54 [informal hearing and recommendation; consent decision; formal hearing and decision] has become final and conclusive or until the decision pursuant to the provisions of Section 54-2(1) has become final and conclusive in case no decision has been made pursuant to the provisions above.

- **§84 [Opinion of Commission on amount of damages]**
  1. When a suit for indemnification of damages under the provisions of Section 25 has been filed, the court shall, without delay, obtain the opinion of the Fair Trade Commission with respect to the amount of damages caused by such violation as provided for in the said section.).

\(^{188}\) SII, *supra* note 4, at IV-5; see also Japan to Revise Penal Code, *supra* note 186, at 906 (United States officials prompted Japan to list specific measures in the agreement for the encouragement of lawsuits by individuals that would enhance the law’s deterrent effect. Existing laws were too rigorous for plaintiffs to prove claims resulting in only six consumer instituted suits, all of which failed.).

\(^{189}\) SII, *supra* note 4, at IV-8.

\(^{190}\) Id. at IV-9.
investment in Japan, and give rise to anti-competitive business practices\textsuperscript{191}, including making a commitment to:

a) Strengthen the JFTC's "monitoring of transactions among members of the same keiretsu groups with cross-shareholding ties to determine whether these relationships impede competition."\textsuperscript{192} The JFTC shall also establish and publish guidelines for the enforcement of the Antimonopoly Act against keiretsu type group actions.\textsuperscript{193} Violations resulting from cross-shareholding will result in the restriction or divestiture of shares.\textsuperscript{194}

b) Make the keiretsu more open and transparent;\textsuperscript{195}
c) Issue a government policy statement affirming that the Japanese government will take steps to ensure that keiretsu relationships do not impede fair competition and at the same time request the cooperation of the keiretsu firms in achieving this policy.\textsuperscript{196}

Japanese business leaders were "stunned" by SII's unexpectedly tough agreements to strengthen the antitrust laws and regulate the keiretsu. These leaders predicted that the reforms would adversely affect economic activities and increase the level of government regulation in Japan.\textsuperscript{197} Compared to the American system, SII's provisions do not seem extraordinary. Rather it is Japan's historic reliance on the keiretsu and the government's promotion of trade and concomitant decision to permit exclusionary trade practices that make SII's measures seem draconian.\textsuperscript{198} In the context of the historically ineffective enforcement of the present Antimonopoly Act, however, these provisions would not necessarily effect any change.

5. \textbf{Probability of SII Success}

SII's success depends, in large part, on Japan's resolve to reduce the trade imbalance. With respect to this imbalance, the United States

\textsuperscript{191} Key Elements, supra note 182.
\textsuperscript{192} COOPER, supra note 3, at CRS-11.
\textsuperscript{193} SII, supra note 4, at 3.
\textsuperscript{194} Key Elements, supra note 182.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} SII Talks: Now for the Hard Part, supra note 17.
\textsuperscript{198} Cf. Hearing, supra note 18 (Clyde Prestowitz, Senior Associate, Carnegie Endowment for International Peace, testifying that the United States demands to open the Japanese market impose a social and political organization which may not be compatible with the Japanese structure, policy and social practices.).
is most concerned with nations that actively maintain trade surpluses which increase the trade deficit and impede trade growth.\(^{199}\) Even at the time SII was being issued, however, Japan’s Finance Ministry was suggesting that the trade imbalance was not as severe as many American observers believed it to be.\(^{200}\) Despite Prime Minister Kaifu’s personal assurances to President Bush that he would turn Japan into an “import superpower” by enacting the SII’s commitments, American officials have already expressed doubts about Japan’s intent to carry out reforms relating to enhancing antitrust enforcement.\(^{201}\) “Former Deputy U.S. Trade Representative Michael B. Smith dismisses the negotiations as a waste of energy, while another former U.S. Trade official warns that Washington will again be cheated by Japanese bureaucrats.”\(^{202}\)

Despite the rampant skepticism among American observers, those who are optimistic concerning SII, feel that Japan can successfully strengthen its antitrust policy, although doing so would require a change in its economy’s emphasis.\(^{203}\) Japanese economic emphasis and thought currently depart from the Western model from which Japan’s antitrust laws were fashioned and to which the world wishes Japan to conform. In the Western system, market capitalism exists to serve consumer desires.\(^{204}\) Alternatively, the Japanese system serves producers, but not for the benefit of the stockholder.\(^{205}\) The producers are seen as the “well spring of growth” — an indispensible part of the main goal of nation building.\(^{206}\)

The successful application of American antitrust law may require

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\(^{199}\) See Remarks of Ambassador Carla Hills, supra note 1. Cf. Fair Trade, supra note 122 (JFTC Chairman Umezawa believes that reform of the Antimonopoly Act alone will not help reduce the trade imbalance.).

\(^{200}\) Regional Outlook Blinded by Success, Japan Searches for a New Vision, L.A. Times, June 19, 1990, at H1, col. 2 (The Finance Ministry contended that the surplus is benevolent because it allows Japan to finance the American deficit, provide development aid for the Third World, and comprise the source of investment funds for Eastern Europe.).

\(^{201}\) Id. See also Impediments? No Problem, L.A. Times, June 30, 1990, at B6, col. 1 (This editorial questions whether President Bush or Prime Minister Kaifu will be able to institute the unpopular domestic policy changes SII requires.).

\(^{202}\) SII Talks: Now for the Hard Part, supra note 17; see also Sanekata, supra note 14, at 381 (This article asserts that previous antitrust reform was only a politically expedient step. It goes on to explain that industrial policy will eventually compromise any progress made.).

\(^{203}\) Hiroshi, supra note 17, at 56.

\(^{204}\) See Blinder, There are Capitalists, Then There are the Japanese, Bus. Wk. Oct. 8, 1990, at 21, col. 2 (The article quotes a top MITI official stating that: “We did the opposite of what American economists said. We violated all the normal concepts.”).

\(^{205}\) Id.

\(^{206}\) Id.
a change in the "philosophic outlook that provides the framework" for
Japan's market system. The United States operates on a laissez-faire
philosophy which requires firms to compete for capital and customers
and provides redress for the denial of free competition. Conversely,
because Japan had to marshal all of its scarce raw materials and fi-
nances for optimum use, it has developed a pattern of planning, subsi-
dizing and guiding targeted industries. As previously described, Ja-
pan has emphasized industrial growth at the cost of fair and free
competition. Accordingly, a free market system may only be realized
now if the Japanese redirect their goals.

SII's success, therefore, hinges on the Japanese government's abil-
ity to obtain the support of the powerful constituents that these changes
will affect. The Liberal Democrats in Japan "may favor liberalization
and economic reform, but they are nearly powerless to act" because
they have been weakened "by a popular tax revolt and by sex and
fund-raising scandals." Any attempt to fortify the antitrust laws will
probably trigger criticism and opposition from politically powerful bus-
ness organizations such as the Keirandren. The Keiranden's criti-
cism of the JFTC and its alliance with the Liberal Democratic Party
(LDP) have made it a major component of the continuing force to
weaken or, at least prevent any reinforcement of, the antitrust laws.

It is quite probable that the reforms can only occur if the con-
sumer and the disenfranchised small and mid-sized businesses recognize
the benefits of a strong antitrust policy and support the politicians com-
mitted to change.

5.1. Breakup of the Keiretsu

"[V]ery little has been said about U.S. demands to break up Ja-
pan's . . . keiretsu, and restrict cross-ownership of stock. 'There's very
little the government can do in that regard,' one Japanese official
said." This impotence arises because, inter alia, the Antimonopoly

207 Googins & Greene, supra note 96, at 485.
208 Id.
209 Id.
210 Regional Outlook, supra note 200; see also SII Talks: Now for the Hard
Part, supra note 17 (Prime Minister Kaifu does not have a strong power base even
within his own political party.).
211 Sanekata, supra note 14, at 385, 388-89 (the Keiranden, or Federation of
Economic Organizations, has advocated weakening the antitrust laws whenever it has
perceived them to have obstructed big business and industrial policy.).
212 Id. at 389-91.
213 Id. at 395 (The support of the consumer and the small- and medium-sized
business was key in passing the 1977 antitrust amendments.).
214 Japan Preparing Array of Trade Concessions; Proposals to Respond to U.S.
Act does not proscribe vertical monopolies and is inapplicable against many existing cartels.218

Additional problems may arise because the reforms apparently lack the requisite support for implementation. While Japanese business leaders have demonstrated a willingness to institute the reforms, they maintain that the keiretsu are not harmful and that western businesses should recognize the economic desirability of establishing long term business relationships and vertical keiretsu dealings.216 Similarly, government agencies such as MITI consider the existing structure to be the most effective way of addressing their concerns which prioritize industrial development and "the protection and growth of industry" over all else.217 This policy emphasis translates into a lack of political power for the JFTC and a lack of political support for augmenting present antitrust enforcement.

5.2. Stricter Enforcement of Antitrust Laws: An Empty Promise

There is a great difference between the Japanese and American perceptions of the law's function. Americans view it as protection of freedom and equality. Alternately, the Japanese see the law primarily as an "instrument of government control, especially bureaucratic control." The Japanese perspective, rooted in the cultural institutions of conducting business by negotiation and compromise, generally regards "resorting to law and litigation . . . as an undesirable . . . means of resolving disputes."218 This interplay of culture and business is but one manifestation of the impact of Japanese social custom and non-Westernness on its economic relationships.

The justifications proffered to explain Japan's propensity for keiretsu and cartels further exemplify this interplay. These justifications focus on the contention that Japanese society has uniquely non-western characteristics. One frequently mentioned characteristic is the "peculiar mentality of preferring cooperation or harmony to competition. Thus, to do something together with others (even with one's com-

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215 See Note, supra note 17, at 1069.
216 SII Talks: Now for the Hard Part, supra note 17 (Keiranden and Japan Association of Corporate Executives (Keizai Doyukai) officials stating their willingness to attempt to conform to international standards, but maintaining that the Japanese system may be a better business system.) But see Sanekata, supra note 14, at 392-93 ("After 1972 an increase in cartels among big businesses in manufacturing industries resulted in a significant increase in wholesale prices which brought a sharp rise in consumer prices.").
217 Hiroshi, supra note 17, at 56-57.
218 Id. at 62.
petitor) is a virtuous deed and is hardly considered a crime."\textsuperscript{219} Along the same lines, the government's role in leading the development of the economy and the acceptance of cartels since 1868, when the country was first opened to the West, are testament to Japan's quasi-humorous justification that these are consistent with its aforementioned professed aversion to cultural relativism in the world financial context.\textsuperscript{220}

Consistent with a more credible incarnation of this reasoning, some commentators contend that Japanese industrial policy and monopolistic practices are deeply rooted in Japan's cultural and sociological behavior. This belief, however, may be a current version of the western image of the inscrutable Japanese. Deputy USTR Williams argues that the "market access structural practices, exclusionary business practices, distribution system and keiretsu are not primarily cultural nor are they uniquely Japanese. They are practices that US or European companies would probably engage in themselves if the laws and policies of their countries or of open market economics permitted them to."\textsuperscript{221}

The main reason for the development and continuation of cartels, however, is most likely the uniquely Japanese method of business operation. Labor mobility in Japan is very low as both white and blue collar workers tend to stay with one employer throughout their careers.\textsuperscript{222} This lack of mobility in the closed labor market place imposes a considerable hardship on the laid off employee. Accordingly, Japanese companies are more reluctant than their American counterparts to layoff employees.\textsuperscript{223} The system of permanent employment and the high ratio of debt financing increase the manufacturer's fixed costs and force it to maintain market share.\textsuperscript{224} Even in a recessionary market the manufacturers will attempt to maintain previous levels of production, which can result in cut-throat price competition.\textsuperscript{226} Government initiative is often taken or private-sector reciprocal agreements are often made to avoid having to resort to such price competition.\textsuperscript{228} The pressure for continued maintenance of the market share is visible in the predatory pricing schemes that Japanese manufacturers have employed

\textsuperscript{219} Yoshikawa, \textit{supra} note 81, at 495.
\textsuperscript{220} \textit{Id}.
\textsuperscript{221} \textit{Hearing, supra} note 4 (The Under Secretary of Economic and Agricultural Affairs, U.S. Department of State, shares this opinion. SII is not an attack on the culture of Japan, the practices in Japan are basically the same as those that occurred in the United States in the 1920s.).
\textsuperscript{222} Yoshikawa, \textit{supra} note 81, at 496.
\textsuperscript{223} \textit{Id}.
\textsuperscript{224} \textit{Id}.
\textsuperscript{225} \textit{Id}.
\textsuperscript{226} \textit{Id}.
\textsuperscript{228} \textit{Id}.
6. ALTERNATIVE SOLUTIONS

Possible solutions to the trade problem include altering the American system by permitting *keiretsu* formation to encourage more integral or horizontal cartels in strategic industries. Any United States effort to imitate Japanese systems must, however, change the United States' adherence to the premise that "free trade is the best system for all: It lowers prices for buyers and helps each nation exploit its comparative advantage." Such alterations would further require the creation of an implicit American industrial policy with the government directing the economy and targeting industries for growth. In order for the United States to adopt the Japanese approach to industrial planning, it must restructure the elemental relationship between government and business. This transformation would entail elevating the bureaucracy, in terms of the prominence of the role it plays and the respect it is accorded. Such in depth revisions would create a need to cement an agreement on values and attitudes between government and business.

This agreement would also necessarily include provisions for overcoming several constitutional hurdles to such a change: "[a]dministrative guidance . . . would be unconstitutional . . . favor[ing] some industries while urging others to scale down their operations due to their lack of competitiveness would violate our strict constitutional requirements of . . . due process. . . . our constitutional system would not tolerate . . . government largesse that is available to some companies but not others." To completely adopt the Japanese system, the United States must define itself as a production and export leader and abandon its basic historic goal of cultivating a consumer protection system.

Though American and European companies already endorse SII's proposed changes, some feel that there are still many ways in which the

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228 Blinder, *supra* note 204.
231 *Id.* at 125.
232 *Cf.* Hearing, *supra* note 18 (Clyde Prestowitz's testimony:

["Any country that has an active industrial policy logically has to have barriers. If you establish it as a matter of national priority to be a leader in semiconductors . . . you will have national policies aimed at achieving that, and you will not welcome large influxes of foreign products into those markets."]
negotiations can further precipitate the advancement of the free market. While the foregoing suggestions addressed the proposals Japan should ask the United States to adopt, the following suggestions address alterations for which the United States should negotiate.

The United States should encourage the Japanese government to alter its attitude regarding the role industry plays in the national welfare. Instead of focusing on the growth of industry as the measure of the state of the nation, it should also look to the ways in which the system benefits the consumer. This fundamental change is crucial to the successful implementation of any structural change in the Japanese economy.

The United States should also urge Japan to continue strengthening the JFTC. This agency's diminished political power and prestige, however, mean that negotiators should follow additional routes to achieving this goal. The negotiators must also press for weakening and eventually dismantling MITI and the other government industry promotion agencies. This rescission of agency power should include curtailing the agency's administrative guidance powers and proscribing government authorization of trade and industry cartels. These changes are necessary because any prohibition on cartels will lack credibility as long as some segment of the government continues to engage in these practices.

The United States should also campaign for amending Japan's Antimonopoly Act. More stringent provisions should prohibit all forms of keiretsu control including the use of cross-shareholding, interlocking directors and the interchange of key officers between competitors and vertically linked companies. The keiretsu and cartel policies impede fair competition and result in above market prices in the Japanese market. As seen earlier, the windfall profits that such predatory activities generate sustain the predatory practices in the western markets and will eventually affect the prices to American consumers.

Other major revisions in the Antimonopoly Act should include an adoption of the American model's provision of a financial incentive to bring private suits for damages, which has proven to be a most effective means of enhancing enforcement. The changes must also provide for assessing punitive damages and they should enable private individuals and companies to bring class action suits. There is, at present, absolutely no incentive for private parties to take legal action against antitrust violators.

The United States should also independently alter its own antitrust law enforcement mechanism. In order to target the keiretsu and cartel type activities of Japanese companies, the United States must
eliminate the sovereign power protection afforded those Japanese government directives which foster and encourage cartel activity abroad. This would legally protect American companies which cannot adequately compete with the American extensions of Japanese cartels — cartels which are presently insulated from antitrust prosecution.

The way American courts respond to antitrust actions must also change to acknowledge that Japan’s business and government practices render predatory pricing schemes a viable option for Japanese multinational cartels. These are fundamental steps which must be taken to successfully prosecute attempts to increase market share at the expense of free competition.

7. CONCLUSION

To change the Japanese system in order to create what the West would deem an effective antitrust enforcement practice, the SII dialogue must focus on the Japanese government’s attitude towards its industries. This means that the Japanese government must discard its current goal of maintaining a trade surplus and abandon its role as a fervent promoter of industry. The trade talks should attempt to recast policies presently providing for government subsidized or protected industries. Failing these deletions and additions to Japan’s present policies, it will be extremely difficult to strengthen the laws.

In addition to these policy changes, Japan should eliminate the protective practice of government authorized cartels and enhance the prosecution of those that are illegal. This can be accomplished by stricter enforcement efforts, instituting punitive penalties for violations, and creating an incentive for private enforcement suits. In order to effectuate the opening of the Japanese market to competitive pricing Japan must also enact stricter laws prohibiting vertically integrated monopolies, forbidding the trading of key corporate officers, and removing entry restrictions for foreign competitors.

The history of Japanese business and traditional social practices is unique and distinct from western practices. Japan has been able to create a prosperous and thriving industrial nation by helping provide its companies with access to the world’s free market system. It has achieved this, however, at great cost to consumers and by burdening the process of forming new enterprises. It would be unfair for Japan to deny other trading nations the same opportunities that they themselves have exploited so successfully.