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Japanese View of United States Trade Laws, A

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ARTICLES

A Japanese View of United States Trade Laws

*Mitsuo Matsushita**

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I. INTRODUCTION

The United States and Japan are both partners and opponents. Japan is the second largest purchaser of United States goods, while the United States is the largest single country market for Japan. The post-World War II prosperity enjoyed in Japan has been made possible, in part, because Japanese products have found a market in the United States. Further, United States companies have been willing to license technology to Japanese companies. Above all, Japanese security and political stability have been ensured by the Security Treaty¹ between the two countries.

In spite of the complaints that the Japanese market is closed to United States products and those of other foreign countries, some large United States companies such as IBM and Coca-Cola have been quite successful in the Japanese market. Further, Japan purchases large quantities of United States agricultural products, like soybeans. Conversely, the United States market buys high quality Japanese consumer products, ranging from inexpensive televisions and microwave ovens, to higher priced automobiles, and more recently, sophisticated communications equipment. Japanese investments in the United States have also increased tremendously during the past few years, partly in response to growing sentiment in the United States that the trade imbalance between the two countries is unacceptable. Whatever the reason, the increase in financial investment links the two countries even more closely.

The United States and Japan are also competitors, with the competition becoming so intense that trade conflicts have occurred in recent years. The time period surrounding the conclusion of the Kennedy Round in 1967² signaled the start of trade problems between the United

¹ Security Treaty Between the United States of America and Japan, Sept. 8, 1951, 3 U.S.T. 3329, T.I.A.S. No. 2491 (presently incorporated in the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, June 23, 1960, 11 U.S.T. 1758, T.I.A.S. No. 4509).

² Under the auspices of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT], there have been seven major rounds of tariff and trade negotiations. The sixth round was the Kennedy Round (1962-67), which resulted in

States and Japan (though trade problems had occurred as early as 1950 in areas such as textiles and toys). Following the Kennedy Round, trade problems spread from light industries to heavier, more sophisticated industries—electronics, steel, automobiles and, more recently, to high technology areas such as semiconductor chips. Generally, it can be said that the trade problems in the 1960s and 1970s were mostly concentrated in conventional industries, but the problems in the late 1970s and 1980s have continued in those industries and have spread to high technology and other sophisticated areas.

Some United States industries have reacted strongly to the increased export of Japanese goods and have utilized various United States trade laws to protect their market in the United States. In the fields of textiles, steel, televisions, automobiles, and semiconductors, numerous legal actions have been initiated against Japanese products by the manufacturers, labor unions and, occasionally, the United States government itself. The number of cases in which United States trade laws have been applied to Japanese products has sharply increased in the past fifteen years. Some Japanese companies have complained that legal protectionism in the United States has unduly hampered their exports to the United States. They claim that their United States competitors have used United States trade laws to engage in “multiple legal harassment” to protect United States markets.³

The purpose of this Article is to present a Japanese view of United States trade laws, concentrating on the differences between the United States and the Japanese laws. This Article will address the questions of whether United States trade laws have been used for protectionist purposes and whether there are inconsistencies and conflicts within United States trade laws. Finally, this Article will discuss Japanese suggestions for the enforcement of United States trade laws. The views expressed here are neither those of the Japanese business community nor those of the Japanese government; they are solely the views of the author, who is an observer and student of Japanese-United States trade laws.

II. COMPARISON OF UNITED STATES AND JAPANESE TRADE LAW SYSTEMS

There are both differences and similarities between United States

about 35% across-the-board cuts in all tariffs (with a variety of adjustments and exceptions), as well as the 1967 Antidumping Code. Jackson, Louis, & Matsushita, *Law and World Economic Interdependence*, in *IMPLEMENTING THE TOKYO ROUND 1*, 11-12 (1984).

³ See *infra* notes 33-46 and accompanying text.

and Japanese trade law systems.⁴ Failing to understand these differences and similarities has caused unnecessary misunderstanding and confusion in the past. This section of the Article presents a comparison of the two systems.

A. Authority to Regulate International Trade

One fundamental difference between United States and Japanese trade law systems is the way in which the governments of the respective nations are authorized to regulate international trade. The Constitution of the United States vests the power to control exports and imports in the United States Congress.⁵ Although Congress has generally delegated the power to control trade to the executive branch through legislation, the basic authority still lies with Congress, creating tensions between them over control of foreign commerce.⁶

Although a separation of powers between government branches is recognized in Japan, there is a fusion between the legislative power vested in the National Diet, and the executive or administrative power vested in the cabinet. This unitary structure exists because most or usually all cabinet members are also members of the National Diet. The Prime Minister appoints cabinet members from those in the National Diet belonging to the majority political party (the Liberal Democratic Party since World War II, except for a brief interval).⁷

The legislative and executive branches are not institutional rivals under the Japanese parliamentary-cabinet system, thus endowing several institutions with the power to control trade. For example, the power to create, raise, lower, or abolish tariffs is vested in the National Diet, since such tariff changes are essentially changes in taxes.⁸ In contrast, the power to negotiate with foreign countries regarding trade matters is vested in the executive branch; however, the National Diet must approve an agreement between Japan and a foreign country before it rises to the level of a treaty.⁹ In any event, a majority of legislative proposals are prepared and introduced in the National Diet by the administration and,

⁴ For a brief account of basic Japanese public laws regulating international trade, see Matsushita, *Japan and the Implementation of the Tokyo Round Results*, in IMPLEMENTING THE TOKYO ROUND 77, 89-98 (1984)[hereinafter Matsushita, *Tokyo Round Results*].

⁵ U.S. CONST. art. I, § 8.

⁶ Jackson, *United States Law and Implementation of the Tokyo Round Negotiation*, in IMPLEMENTING THE TOKYO ROUND 139, 140-45 (1984).

⁷ Matsushita, *Tokyo Round Results*, *supra* note 4, at 78-81.

⁸ KENPŌ (Constitution) art. 30 (Japan)("A Japanese subject is liable to taxation according to the provision of law.")

⁹ *Id.* art. 73, ¶ 3. The power to conclude a treaty is vested with the Cabinet, with prior or subsequent approval by the Diet.

as long as one party controls both the National Diet and the cabinet, there is little room for serious conflict between the two.

This explanation is not meant to suggest that there are no power struggles or conflicts in Japanese trade policy. They occur among the ministries which constitute the cabinet and which wield tremendous power and influence in policy making.¹⁰ The conflicts are sometimes the result of policy differences while, at other times, they are disputes over which ministry should take a leadership role in carrying out an international negotiation or other policy. Such struggles and conflicts, however, are not a reflection of the constitutional structure of the government, as in the United States.

The ministries in Japan have recently shown an inability to cope with international trade problems, because the problems cross the boundaries of ministerial jurisdiction. As a result, the Liberal Democratic Party has taken the lead in solving trade problems (which may be viewed as essentially political problems). Thus, one may predict that the balance of power between the Liberal Democratic Party and the ministries will sway more heavily toward the party.¹¹

In the United States, in contrast, the division of authority has created inconsistencies. On occasion, the President has negotiated with foreign countries and agreed to certain matters, but Congress has disapproved them.¹² For example, before the United States-Japanese automobile negotiation in 1980, the United States International Trade Commission ("ITC") decided that the import of foreign cars was not a substantial cause of serious injury to the United States automobile industry.¹³ Consequently, there was some question as to whether the United States Trade Representative ("USTR") had the authority to negotiate with Japan and request it to initiate export controls (which would have the same economic effect as import restrictions on the United States' side). As a result of this uncertainty, it is not possible to say that the USTR's position was one of negotiating, but rather, "explaining" the plight of the United States automobile industry and expecting that Japan would take some action.

These examples indicate that, in the United States, there is an inherent instability in the constitutional decision-making process with respect

¹⁰ Matsushita, *Tokyo Round Results*, *supra* note 4, at 81-83.

¹¹ See Fukushima, *The Rise of the Liberal Democratic Party in the Policy-making Process in Japan*, in *DYNAMICS OF JAPANESE-UNITED STATES TRADE RELATIONS 57-95* (T. Schoenbaum, M. Matsushita & D. Dallmeyer, eds. 1986)[hereinafter *DYNAMICS*].

¹² J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 145* (1977).

¹³ *Certain Motor Vehicles and Certain Chassis and Bodies Therefor*, USITC Pub. 1110, Inv. No. TA-201-44 (Dec. 1980)[hereinafter *ITC Automobile Investigation*].

to foreign trade policy matters. This instability makes it difficult for foreign countries to negotiate agreements with the United States, for fear that whatever the executive branch agrees to may be overturned by Congress. On the other hand, such instability is inherent in the United States constitutional system of checks and balances.¹⁴ To criticize this system from the singular view of international trade relations does not do it justice because the principles of separation of powers and checks and balances are deeply rooted in United States constitutional history. It would be neither possible nor desirable for the United States to abandon such a system altogether. The only possibility is a compromise. The United States government is not unmindful of this problem.

In the Tokyo Round,¹⁵ carried out pursuant to the Trade Act of 1974,¹⁶ changes were made to facilitate international trade negotiation. Congress began to follow a no mark-up and fast track procedure in which the content of the authorization bill would not be changed.¹⁷ This new procedure gave foreign negotiators assurance that their agreements with the United States would not be scrapped easily by Congress. Foreign nations saw it as a welcome sign, because it showed that the United States was more committed to successful international trade negotiation, and that it placed a higher priority on international trade matters than before.

B. Basic Trade Laws in the United States and Japan

There are also similarities and differences between the basic trade laws of the United States and Japan. The basic trade laws of the United States are: 1) tariff and customs laws (e.g., customs valuation and general systems of preferences); 2) trade remedy laws (e.g., unfair trade laws and fair trade laws); 3) laws providing for national security requirements and import surcharges; and 4) laws relating to export control.¹⁸ For the purposes of this Article, trade remedy laws and laws providing for national security are the most relevant. Trade remedy laws are divided into two categories: unfair trade laws and fair trade laws. Unfair trade laws consist of: the antidumping provisions of the Trade Act of 1974 as amended

¹⁴ See Jackson, Louis, & Matsushita, *National Constitutions and the International Economic System*, in IMPLEMENTING THE TOKYO ROUND 198, 201-03 (1984).

¹⁵ See *supra* note 2.

¹⁶ Trade Act of 1974 § 121(b), as amended by the Trade and Tariff Act of 1984, 19 U.S.C. § 2131(b) (1982 & Supp. 1985).

¹⁷ 19 U.S.C. §§ 2112, 2191 (1982); see also Jackson, *supra* note 6, at 162-64.

¹⁸ See, e.g., HOUSE COMM. ON WAYS AND MEANS, SUBCOMM. ON TRADE, OVERVIEW OF CURRENT PROVISIONS OF U.S. TRADE LAWS, H.R. DOC. NO. 40, 98th Cong., 2d Sess. (1984)[hereinafter CURRENT PROVISIONS].

by the Trade and Tariff Act of 1984,¹⁹ the countervailing duty provisions of the same act,²⁰ Section 301 (“§ 301”) unfair trade practice provisions of the same act,²¹ and Section 337 of the Tariff Act of 1930 (“§ 337”).²² The major law in the category of fair trade laws is Section 201 of the Trade Act of 1974 (“§ 201”),²³ which provides the all-important “escape clause.”

There are comparable laws in Japan. Antidumping and countervailing duties laws are provided in the Customs and Tariff Law (“Customs Law”).²⁴ Although these laws have heretofore seldom been invoked in Japan, it is expected that they will be used more in the future. There is no counterpart to § 301 in Japan. However, the Customs Law does provide for a retaliatory tariff, applicable if a foreign country discriminates against Japanese products, ships, and airplanes.²⁵ Foreign products which infringe on industrial properties in Japan can be stopped at the Customs House under a provision in the Customs Law.²⁶ Several Japanese laws also provide for import regulation, such as the import quota system under the Foreign Exchange and Foreign Trade Control Law (“Control Law”),²⁷ the emergency tariff provided in the Customs Law,²⁸ and the approval of import agreements under the Export and Import Transactions Law (“Transactions Law”).²⁹ Japanese law has no provision for safeguarding national security by providing for import and

¹⁹ 19 U.S.C. § 1673 (1982 and Supp. 1985).

²⁰ For imports from members of GATT, the countervailing duty provisions, as amended by the Trade and Tariff Act of 1984, are codified at 19 U.S.C. § 1671 (1982 and Supp. 1985); for nonmembers, these provisions are codified at § 303 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, and the Trade and Tariff Act of 1984, 19 U.S.C. § 2411 (1982 and Supp. 1985). See CURRENT PROVISIONS, *supra* note 18, at 47-59.

²¹ 19 U.S.C. § 2411.

²² As amended by the Trade and Tariff Act of 1984, 19 U.S.C. § 1337 (1982 and Supp. 1985).

²³ As amended by the Trade and Tariff Act of 1984, 19 U.S.C. § 2251 (1982 and Supp. 1985).

²⁴ *Kanzei Teiritsu Hō* (Customs and Tariff Law), Law No. 54 1910, as amended arts. 8-9 [hereinafter Customs Law]. For an explanation of the Customs Law, see Matsushita, *The Legal Framework for Import Trade and Investment in Japan*, in DYNAMICS, *supra* note 11, at 24-28 [hereinafter Matsushita, *Legal Framework*].

²⁵ *Id.* art. 7.

²⁶ *Id.* art. 21.

²⁷ The import quota system is incorporated into the *Gaikoku kawase oyobi gaikoku bōeki no kanri ni kansuru hōritsu* (Foreign Exchange and Foreign Trade Control Law), Law No. 228, 1949, as amended by Law No. 65, 1979, translated in 5 EIBUN-HOREI SHA LAW BULLETIN SERIES [EHS] AA [hereinafter Control Law], and into the Cabinet Order Concerning Control of Import Trade, No. 414, 1949, as amended by No. 312, 1980, translated in 5 EHS AN [hereinafter Cabinet Order]. For an explanation of the Control Law, see Matsushita, *Legal Framework*, *supra* note 24, at 35-38.

²⁸ Customs Law art. 9-2.

²⁹ *Yushutsunyū Torihiki Hō* (Export and Import Transactions Law), Law No. 299, 1952 [hereinafter Transactions Law]. See generally Matsushita, *Legal Framework*, *supra* note 24, at 3-55. For an explanation of the Transactions Law, see *id.* at 21-24.

export control. However, general laws providing for export and import control could presumably serve the purpose.³⁰

The foregoing description of United States and Japanese trade laws suggests that both countries have basically the same type of laws. There may be some differences in the language in which those laws are couched but they are minor. The two legal systems do not differ in formal substantive law, but in enforcement and procedure. In the United States, greater emphasis is placed on the initiative of private individuals filing complaints with the government or court than in Japan. For example, under § 201, § 301, and the provision for safeguarding national security in the Trade Expansion Act of 1962,³¹ private citizens and companies in the United States are entitled to file complaints with the government and request it to initiate proceedings under those laws. In fact, some of those laws may be used simultaneously and interchangeably by United States companies in dealing with import problems. Under Japanese trade law, except for antidumping and countervailing duty laws, the government has the basic authority to decide whether or not to invoke a trade law.³²

C. Trade Remedy Actions Under United States Trade Law

The emphasis placed on private initiative in filing actions in the United States has resulted in United States companies effectively utilizing these laws when faced with the challenge of competing with imported products. Sometimes several laws are used to challenge the same import. Examples of this multiple use include cases of televisions, steel, automobiles, textiles, and, more recently, semiconductor chips. As an illustration of the potential multiplicity of actions which may be brought by United States industries against foreign products, this portion of the Article will examine several cases dealing with electronics.

The first example concerns an antidumping claim filed with the United States government in 1968 by the EIA, a United States consumer electronics trade association, against the import of Japanese tuners (a television set part). The government made an affirmative decision on this claim in 1970.³³ In a second example, a United States television manu-

³⁰ *Pekin-Shanghai Nihon Kōgyō Tenrankai v. Nihon*, 20 Gyōsei Jiken Saiban Reishū 842 (Tokyo District Court 1969). See also Matsushita, *Export Control and Export Cartels in Japan*, 20 HARV. INT'L L.J. 103, 106-08 (1979) [hereinafter Matsushita, *Export Control*].

³¹ Section 232 of the Trade Expansion Act of 1962, as amended by § 127 of the Trade Act of 1974, 19 U.S.C. §§ 1862-63 (1982 and Supp. 1985).

³² There is no provision in the Control Law or the Cabinet Order stating that an interested person may file a complaint with the government and request that an import quota be imposed.

³³ Tuners of a Type Used in Consumer Electronic Products from Japan, 35 Fed. Reg. 17,156 (1970).

facturer, Zenith Radio Corporation, filed a claim in 1970 with the Commissioner of Customs, United States Treasury Department. It was alleged that the Japanese government was giving the equivalent of a subsidy to Japanese television manufacturers by exempting exported television sets from a commodity tax while subjecting the domestic television market to it. Zenith wanted a countervailing duty to be collected, but the Acting Commissioner of Customs refused. The petitioner then sued the Treasury Department in Customs Court. Ultimately, the United States Supreme Court denied Zenith's claim in 1978.³⁴

In a third example, GTE Sylvania, a United States manufacturer of television sets, filed a complaint in 1976 with the ITC under § 337 of the Tariff Act (which prohibits unfair trade practices with respect to imports). GTE Sylvania alleged that some Japanese exporters sold television sets in the United States at prices below the cost of production. In this case, a settlement was reached and a consent decree was handed down by the ITC.³⁵

In a fourth example, several manufacturers and labor organizations in the electronics industry joined to petition the ITC in 1976 under § 201 of the Trade Act of 1974. They claimed that the United States television industry was seriously injured as a result of imported television sets. The following year, the ITC did find that an injury had occurred and recommended that the relevant tariff be raised by 20% *ad valorem*, resulting in a tariff rate of 25%.³⁶ President Carter, however, refused to accept this recommendation and chose instead to negotiate with the Japanese government in order to conclude a fair marketing agreement.³⁷ In the agreement subsequently reached, the Japanese government promised to establish a ceiling on the maximum number of television sets to be exported to the United States.³⁸ To implement this ceiling, the Japanese government directed Japanese television exporters to form an export association and limit the number of television sets exported to the United States. The government also promised to encourage Japanese television manufacturers to invest in the United States.

In a fifth example, the National Union Electric Corporation brought

³⁴ Zenith Radio Corp. v. United States, 437 U.S. 443 (1978).

³⁵ Television Receivers From Japan, 42 Fed. Reg. 39,492 (1977).

³⁶ Television Receivers, Color and Monochrome, Assembled or Not Assembled, Finished or Not Finished, and Subassembled Thereof, USITC Pub. 808, Inv. No. TA-201-19 (Mar. 1977).

³⁷ American Television Industry, Announcement of an Agreement with Japan to Limit the Number of Japanese Color Television Receivers Shipped to the U. S. Market, 13 WEEKLY COMP. PRES. DOC. 760 (May 20, 1977).

³⁸ Color Television Receiver Imports, Implementation of Orderly Marketing Agreement on Certain Color Television Receivers, 1 PUB. PAPERS 1157-61 (June 24, 1977).

a claim in 1970 against a number of Japanese television manufacturers under United States antitrust laws and an antidumping law. The complaint alleged that the defendants had engaged in predatory practices by entering into cartel agreements in Japan. In 1974, Zenith brought a similar claim. These two cases were consolidated into the *In re Japanese Electronic Products Antitrust Litigation*.³⁹ In 1986, sixteen years after the complaint was filed, the United States Supreme Court decided that the plaintiffs had not presented sufficient evidence to prove the existence of the alleged cartels designed for predatory purposes and remanded the case to the appellate court.⁴⁰

The foregoing cases are examples of the multiplicity of actions brought by United States companies against Japanese products under various United States trade laws. Similar examples exist in such other areas such as steel, in which there have been even more actions;⁴¹ textiles, in which the government applied an antidumping law despite an effective quantity restriction agreement based on the Multifiber Arrangement;⁴² automobiles, in which an agreement between the United States and Japanese governments provided a quantity restriction on the export of automobiles to the United States;⁴³ and, more recently, semiconductor chips, in which the United States government initiated an antidumping action while United States industries brought a claim under § 301.⁴⁴

Overlapping trade laws are one reason for the multiplicity of legal actions. For example, several laws can be applied to low-price exports: the antidumping provisions of the Trade Act, the Sherman Act,⁴⁵ § 337 of the Tariff Act, the § 201 escape clause of the Trade Act, the National Security Clause in the Trade Act,⁴⁶ and other laws might apply, too. It is possible that a company could use several of these laws simultaneously in an attempt to prevent foreign products from coming into the country. In addition, one company could bring an action under one law, a second company under another law, and a labor union under a third law, thereby presenting a united front to a common foe.

The multiplicity of potential legal actions in the United States reflects a diverse and pluralistic society, and the fact that each law has an exclusive objective. However, the use of such actions by United States

³⁹ 388 F. Supp. 565 (J.P.M.D.L. 1975).

⁴⁰ *Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986).

⁴¹ See *infra* notes 81-88, 93-108 and accompanying text.

⁴² See *infra* notes 76-80 and accompanying text.

⁴³ See *infra* notes 52-55 and accompanying text.

⁴⁴ See *infra* notes 109-121 and accompanying text.

⁴⁵ 15 U.S.C. §§ 1-7 (1982).

⁴⁶ 19 U.S.C. §§ 1862-63. See also CURRENT PROVISIONS, *supra* note 18, at 89.

companies and other institutions seems, at times, to be excessive. It is submitted that changes should be made to remedy such problems. For example, it might be possible to establish a system in which multiple actions by United States companies directed against the same product or enterprise could be consolidated into one proceeding. Alternatively, while one action is proceeding in one forum, other actions directed at the same product or enterprise could be stayed until the conclusion of the first proceeding. These changes would lessen the difficulties faced by foreign exporters to the United States and contribute to administrative and judicial economy.

D. Dichotomy Between Trade and Antitrust Laws

1. *Relationship Between Trade and Antitrust Laws*

As in other countries, there is a policy conflict (and sometimes a legal conflict) between trade laws and antitrust laws in the United States. Since many United States trade laws are designed to protect a particular industry, a trade problem usually occurs when the price of exports to the United States is low, or when a great quantity of goods is exported to the United States market. Regardless of the objective a trade law is designed to accomplish, the inevitable result is a restriction on an export to the United States. Foreign exporters' natural reaction to such restrictions is to avoid the restrictions by whatever means available. Often the easiest way for the Japanese government and Japanese exporters to avoid such restrictions is to agree with the United States on the terms of export (such as minimum export price and maximum export quantity).⁴⁷

Export agreements (or export cartels) are permitted in Japan under the Transactions Law. This law has been used by the Japanese government and exporters for the purpose of "orderly" marketing to the United States. However, export cartels for orderly exports to the United States may run counter to United States antitrust laws,⁴⁸ given the extraterritorial effect of the Sherman Act,⁴⁹ since they are intended to and do affect the United States market. If the United States market were not affected, another action would no doubt be filed by a United States domestic industry under the appropriate trade laws.

⁴⁷ See Matsushita, *Export Control*, *supra* note 30, at 110-24.

⁴⁸ Matsushita & Repeta, *Restricting the Supply of Japanese Automobiles: Sovereign Compulsion or Sovereign Collusion?*, 14 CASE W. RES. J. INT'L L. 47, 53-72 (1982).

⁴⁹ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

2. *Television and the Automobile Cases*

In the *Japanese Electronics Antitrust Litigation*,⁵⁰ one of the issues concerned a Japanese export cartel aimed at the United States market. Some Japanese television manufacturers and exporters agreed, pursuant to a directive of the Ministry of International Trade and Industry ("MITI"), to fix the minimum price (check price) of television sets to be exported to the United States. The purpose of this decision was to avoid a move on the part of their United States competitors to file an action for a trade law remedy. This cartel was challenged by Zenith and another United States manufacturer under the Sherman Act and other antitrust laws. In 1986, the United States Supreme Court decided that the plaintiffs had not provided sufficient evidence to prove that the Japanese defendant companies had engaged in predatory price-fixing arrangements.⁵¹

In the *Automobile Voluntary Export Restraint Case*,⁵² the United States government "explained" to the Japanese government the serious depression of the United States auto industry and implicitly requested that the Japanese government take steps to limit the export of Japanese automobiles to the United States.

Quite concerned about the possibility that measures taken to limit automobile exports to the United States might violate the Sherman Act, MITI developed an elaborate export control scheme in which the government issued a directive to each individual exporter limiting the number of automobiles to be exported to the United States. MITI also sent each exporter a statement that, should the number of automobiles exported to the United States rise above the amount set by the directive, the government would immediately invoke the export approval system under the Control Law. The exporter would be thereby subjected to a compulsory licensing system,⁵³ and thus, the entire export system would be converted into an act of state. The Japanese government asked the opinion of the United States Attorney General as to the legality of such an arrangement under United States antitrust laws,⁵⁴ and he advised that such an arrangement would be valid.⁵⁵

There are several other instances in which the Japanese government

⁵⁰ 388 F. Supp. 545; *see also* notes 39-40 and accompanying text.

⁵¹ 106 S. Ct. 1348; *see also* notes 39-40 and accompanying text.

⁵² ITC Automobile Investigation, *supra* note 13. For the letters exchanged between the Japanese and the United States governments, *see* Matsushita & Repeta, *supra* note 48, at 74-81 apps. A-C.

⁵³ *See* Letter from Yoshio Ikawara [sic], Ambassador of Japan to the United States, to the Attorney General of the United States (May 7, 1981), *reprinted in* Matsushita & Repeta, *supra* note 48, at 78 app. B.

⁵⁴ *Id.*

⁵⁵ Letter from William French Smith, United States Attorney General, to Yoshio Okawara,

has made similar arrangements to ensure that the export restraint system would not run counter to United States antitrust laws. In the 1977 Television Orderly Marketing Arrangement, the relevant agreement between the United States and Japanese governments stated that the Japanese government would direct Japanese exporters to limit the number of television sets to be exported to the United States under the Transactions Law, and, for this purpose, the Japanese government would issue directives which would be mandatory in nature.⁵⁶ Similarly, following the United States-Japanese Steel Export Restraint Agreement⁵⁷ in 1984 (in which the Japanese government promised that the export of steel to the United States would be restrained for five years), the Japanese government issued a directive to the Japanese steel industry to form an export association which would limit the quantity of steel exported to the United States. The government made it clear that, should the Japanese steel industry violate this directive, the Japanese government would be prepared to invoke its compulsory export licensing power under the Control Law and subject steel exports to the United States to tight governmental control.⁵⁸

3. *Legislative Remedies*

The foregoing examples indicate that, whenever a voluntary export restraint issue has arisen in the past, the Japanese government has tried to convert the export restraint mechanism into a scheme reinforced by governmental compulsion in order to avoid an antitrust problem in the United States. To Japanese government and industry, the simplest way to restrain exports to the United States (if exports to the United States must be restrained at all) is to form an export association and incorporate into the rules of that association the contents of the relevant United States-Japanese government agreement. Another alternative is for the Japanese government to issue an order requesting that manufacturers refrain from exporting above a certain quantity, pursuant to the Control Law. This alternative incurs additional costs to the government, as it must supervise the export controls. If several important items such as steel and automobiles were under control, the government would probably be in a difficult position to provide the necessary staff resources to monitor such activity.

Japanese Ambassador to the United States (May 7, 1981), *reprinted in Matsushita & Repeta, supra* note 48, at 80 app. C.

⁵⁶ See Jackson, *supra* note 1, at 94.

⁵⁷ TREATIES IN FORCE 102 (1986).

⁵⁸ See *infra* note 96 and accompanying text.

In the United States, export cartels directed at foreign markets are permitted under the Webb-Pomerene Act⁵⁹ and the Export Trading Company Act,⁶⁰ and cartels organized under these laws are exempt from the application of the Sherman Act. The Sherman Act exemption, however, extends only to United States export cartels directed at other countries. It does not extend to cartels aimed at United States markets, even though such Japanese export cartels are designed to carry out agreements, whether formal or informal, between the United States and Japanese governments.

The foregoing discussion suggests that a dichotomy, perhaps even a conflict, exists between the policies of United States trade and antitrust laws. This dichotomy or conflict may create difficulties in other countries, since enterprises located outside the United States may be caught between conflicting legal requirements in the United States. While recognizing that there are laws in the United States which represent different value systems, and that such diversity reflects a pluralistic United States society, foreign nations also have ways of dealing with trade-related problems through their own legal systems. The way in which the export regulation is effected in Japan reflects an inherently Japanese approach to export problems.

It is submitted that there should be some legislative remedy to eliminate the difficulties outlined above. The United States Department of Justice or the Federal Trade Commission are not likely to raise antitrust concerns about voluntary export restraints exercised by the Japanese, as long as such restraints are based on agreements between the United States and Japanese governments. (It is likely that there would be coordination among various agencies of the United States government during the USTR's negotiations with the Japanese government.) Treble damage antitrust suits filed by private persons present a more pressing problem. Several private antitrust actions have been brought against Japanese companies, including the *Japanese Electronics Antitrust Litigation*⁶¹ and the *Cascade Case*⁶² (the latter in which a United States company brought an action against a number of Japanese steel manufacturers and trading companies). The threat of treble damage awards in private antitrust suits would have a chilling effect on Japanese export associations which implement voluntary export restraints under the Transactions Law without any compulsion by the Japanese government.

⁵⁹ 15 U.S.C. §§ 62, 64 (1982).

⁶⁰ 15 U.S.C. § 4002 (1982).

⁶¹ 388 F. Supp. 565; *see also* notes 39-40 and accompanying text.

⁶² *Cascade Steel Rolling Mills Inc. v. C. Itoh & Co., Inc.*, 499 F.Supp. 829 (D. Or. 1981).

On several occasions in which orderly marketing agreements were used, the Japanese government issued statements that the government would limit exporters' price and quantity if exporters ignored the governmental directive.⁶³ Thus, the Japanese government cloaked the export arrangements in the guise of governmental compulsion. All this was done because of the risk that such arrangements might have been challenged by private individuals in the United States under its antitrust laws. It is ironic that the Japanese government had to use such a restrictive technique so that export arrangements would not run counter to United States antitrust laws, since those laws were designed to preserve free competition.

In areas such as research and development⁶⁴ and United States exports,⁶⁵ Congress has enacted laws granting such activities immunity from treble damage liability and the per se illegality rule. These activities are presumed to be legal. It seems that similar legislation in the area of foreign commerce would help eliminate the foregoing difficulty. That is, legislation could be enacted so that export restraint agreements, if negotiated between the United States and foreign governments, would be exempted from treble damage liability, judged under the rule of reason, and accorded a presumption of legality.

III. VOLUNTARY EXPORT RESTRAINT AND ORDERLY MARKETING

A. An Overview

Some of the important trade problems between the United States and Japan have been settled by voluntary export restraints or orderly marketing arrangements.⁶⁶ Although such cases have already been examined in the context of United States antitrust laws,⁶⁷ this section will deal further with general problems surrounding voluntary export restraints or orderly marketing arrangements.

In the past the United States and Japan reached agreement on certain export restraints or marketing arrangements after the ITC determined that the imports in question had caused serious injury to United States industry.⁶⁸ In other instances, negotiations between the two gov-

⁶³ See *supra* notes 53-55 and accompanying text.

⁶⁴ See, e.g., National Cooperative Research Act of 1984, 15 U.S.C. §§ 4301-05 (1982 & Supp. 1985).

⁶⁵ See, e.g., Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-03 (1982).

⁶⁶ *Orderly Marketing Arrangements*, Proceedings of the 72nd Annual Meeting of the American Society of International Law 1 (1978).

⁶⁷ See *supra* 47-57 and accompanying text.

⁶⁸ See *supra* notes 36-38 and accompanying text.

ernments took place and settlements were reached notwithstanding a finding by the ITC that there had not been an injury caused by the foreign imports,⁶⁹ or even that the ITC had even made a decision.⁷⁰ In some cases, the United States negotiated with a particular Japanese industry rather than the Japanese government.⁷¹

The United States laws on which such agreements are based vary from case to case. Sometimes it is § 201 of the Trade Act of 1974, at other times the national security provisions in the Trade Expansion Act are used. In other instances, the Steel Import Stabilization Act⁷² may be the legal basis for negotiations. In Japan, a variety of legal means are also used to enforce agreements between the two governments. Sometimes the Japanese government invokes compulsory export restraints via the Control Law.⁷³ At other times, the Japanese government directs exporters to organize export associations or reach agreements under the Transactions Law.⁷⁴ Alternately, the Japanese government dictates an export quota or other terms of business to each exporter individually.⁷⁵ Regardless of the specific legal means employed, some type of government directive is present. The remainder of this section examines in more detail some important trade agreements and their legal bases.

B. Agreements without a Finding of Injury

1. *United States-Japanese Textile Agreement*

This agreement⁷⁶ involved an export restraint by the Japanese government on textile products made of synthetic fibers. President Richard M. Nixon initially sent the Secretary of Commerce and other administration officials to Japan to negotiate an export restraint agreement between the two countries. The Japanese were uncompromising in these negotiations, however, because no injury to the United States textile industry had been established. After lengthy negotiations, the two governments failed to reach an agreement and, in 1970, the negotiations concluded.

Shortly thereafter, the negotiations reopened. While this set of ne-

⁶⁹ See, e.g., ITC Automobile Investigation, *supra* note 13.

⁷⁰ See, e.g., *Consumer's Union of the United States v. Rogers*, 352 F.Supp. 1319 (D. D.C. 1973), *modified and aff'd sub. nom.*, *Consumer's Union of the United States v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

⁷¹ *Consumer's Union*, 506 F.2d at 138.

⁷² 19 U.S.C. § 2253 (1982 & Supp. 1985).

⁷³ See *Matsushita, Export Control*, *supra* note 30, at 104-06 nn.10-13, 16.

⁷⁴ See *Matsushita & Repeta*, *supra* note 48, at 67 nn.82-89.

⁷⁵ *Id.* at 64 n.73.

⁷⁶ Arrangement on Trade in Wool and Man-made Fiber Textiles, Jan. 3, 1972, United States-Japan, 23 U.S.T. 3167, T.I.A.S. No. 7495 [hereinafter *Textile Agreement*]; see also *Matsushita, Export Control*, *supra* note 30, at 106 n.17.

gotiations proceeded, the Japanese government decided that it would be desirable for Japanese industry to establish a voluntary export restraint of synthetic textile products to the United States. Consequently, the government advised the industry accordingly. The Japanese textile industry, while not entirely satisfied with the arrangement, believed a voluntary export restraint would reduce tension between the two countries and eventually agreed to the restraint under the Transactions Law. The two governments subsequently concluded an agreement whereby the Japanese government restrained the export quantity of textile products.⁷⁷ The Japanese government then began preparations to invoke a compulsory export control order under the Control Law.

This is but a brief sketch of the long, complicated process of negotiation and conclusion of the agreement. The Japanese Federation of Textile Industries, dissatisfied with the agreement and government's decision to invoke a compulsory order, subsequently brought an action against the Japanese government in Tokyo District Court to restrain it from invoking the order.⁷⁸ The bases of the claim were that to invoke such an order would violate Article 11 of the General Agreement on Tariffs and Trade ("GATT")⁷⁹ (which prohibited export and import restrictions in general), and that such an order would violate Article 22 of the Japanese Constitution—guaranteeing freedom of trade. This action raised interesting legal points regarding the relationship between GATT and Japanese domestic law, as well as the relationship between the freedom of trade provided for in the Japanese Constitution and a government imposed export restriction. Eventually the suit was withdrawn when the Multifiber Arrangement⁸⁰ was concluded within the framework of GATT, and so the problem was solved.

2. *Steel Voluntary Export Restraint Agreement of 1969*

There have been several cases of voluntary export restraints with respect to Japanese exports of steel to the United States. These include the 1968 statement of intent, which lasted until 1971,⁸¹ the agreement of

⁷⁷ See Textile Agreement, *supra* note 76.

⁷⁸ See Textile Agreement, *supra* note 76; see also Matsushita, *Export Control supra* note 30, at 106 n.17.

⁷⁹ See *supra* note 2.

⁸⁰ Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840 [hereinafter Multifiber Arrangement]; see CURRENT PROVISIONS, *supra* note 18, at 74-76. For an explanation of the Protocol of Extension (July 1986) renewing the Multifiber Arrangement, and its comparison with the original Multifiber Arrangement, see Jacobs, *Renewal and Expansion of the Multifiber Arrangement*, 19 L. & POLY IN INTL BUS. 7-50 (1987).

⁸¹ The Steel Voluntary Export Restraint Agreement of 1969; see *Consumer's Union*, 506 F.2d at 138-39.

1974,⁸² the trigger price mechanism, introduced in 1978 and terminated in 1982,⁸³ and the 1984 agreement, which is expected to last until 1989.⁸⁴

Following the the Kennedy Round⁸⁵, there was a strong movement in the United States to restrain imports of steel through legislation. Faced with increasing sentiment favoring protectionism, the administration eventually decided that the best way to deal with it was for the Japanese steel industry to restrain voluntarily the export of steel to the United States. The Secretary of State and representatives of the Japanese steel industry subsequently held several meetings in which the Japanese representatives promised to restrain steel exports to the United States.

Soon after the agreement had been reached, the Consumers' Union of the United States filed suit against the United States government, the Japanese steel industry, and others, claiming that the United States government had overstepped its authority to negotiate and conclude an agreement. The suit alleged that such an agreement could not be reached without a determination of injury by the Tariff Commission under the Trade Expansion Act. Moreover, the suit claimed that there was a Sherman Act violation because the purpose of the arrangement was to restrain exports to the United States.⁸⁶ (The union eventually withdrew its antitrust claim, but the question of the power of the United States government to negotiate with a foreign entity without a prior determination of injury remained open.⁸⁷) In 1974, a Court of Appeals held that the power of the United States government to negotiate with a foreign entity, absent a prior finding of injury by the Tariff Commission, was vested in the President by the Constitution. Nonetheless, should a foreign government ignore its promise to restrain exports, the United States government could not enforce an import restriction. The court also determined that, as long as an import restriction was not effected in the United States, there would be no restriction of import by the government. On these grounds, the court upheld the validity of the arrangement.⁸⁸

⁸² See generally Patrick and Sato, *The Political Economy of United States-Japan Trade in Steel*, in POLICY AND TRADE ISSUES OF THE JAPANESE ECONOMY 211-36 (K. Yamamura, ed. 1982)[hereinafter Patrick and Sato].

⁸³ *Id.*

⁸⁴ See *supra* note 57 and accompanying text.

⁸⁵ See *supra* note 2.

⁸⁶ *Consumer's Union*, 352 F. Supp. at 1321-22; see *supra* text accompanying notes 70-71.

⁸⁷ *Id.*

⁸⁸ *Consumer's Union*, 506 F.2d at 142-44; see *supra* notes 70-71, 86 and accompanying text.

3. Commentary

In both the textile⁸⁹ and steel⁹⁰ agreements discussed above, there had been no injury determination by an appropriate United States agency, and no complaints by interested United States domestic parties had been filed. This same set of facts was also present in the *Automobile Voluntary Export Restraint Case*.⁹¹ In essence, no legally determined domestic interests had been identified as requiring protection, although there had been considerable pressure on the United States government by special interest groups to restrain relevant imports.

It is also important to note that the export restraints were ostensibly carried out unilaterally by foreign governments or businesses. The United States government avoided becoming an official signatory to the agreements, thereby avoiding becoming an official party to a restrictive trade agreement. Nonetheless, to argue that these export restraints were purely unilateral decisions would be too formalistic and would ignore reality. It is likely that the United States government did exert pressure on foreign governments and businesses to reach an agreement under the tacit threat that Congress might enact even more restrictive trade laws should the foreign governments or businesses fail to settle matters in a manner favorable to the United States. It is certainly questionable whether this method of dealing with trade problems is compatible with the legalistic approach to trade problems and due process protections valued in the United States.

With respect to an informal orderly marketing arrangement of the type described above,⁹² it is important to note that foreign exporters and United States consumers are deprived of the opportunity to be heard. Indeed, the process of negotiation is not disclosed sufficiently unless a court proceeding or a congressional investigation is initiated. An additional problem with this informal manner of settling trade disputes is the potential for antitrust violations. Perhaps the most important drawback is that there is no explicit record showing the United States government's position on whether the foreign government or business acted in an unfair manner, since no administrative agency made a determination of injury. If the United States government took part in negotiations for an agreement based on allegations of injury caused by what is, in fact, a fair import, such agreements would clearly violate the provisions of GATT. The United States government may claim that Japan had been in viola-

⁸⁹ Textile Agreement, *supra* note 76.

⁹⁰ *Consumer's Union*, 506 F.2d at 136.

⁹¹ ITC Automobile Investigation, *supra* notes 13, 52.

⁹² See *supra* notes 52-58 and accompanying text.

tion of GATT, since Japan agreed to restrain exports "voluntarily," but given the lack of an investigation, such an unsubstantiated claim is not persuasive.

C. The Third Voluntary Export Restraint on Steel

In 1984, Bethlehem Steel Corporation and the United Steelworkers of America filed a petition with the ITC under § 201 of the Trade Act of 1974, claiming that the United States steel industry was seriously injured by steel imports. The ITC determined that there was a serious injury with respect to five steel items and no injury with respect to four others. Based on these findings, the ITC recommended to the President an increase in tariffs on imported steel products, or quantitative restrictions.⁹³

President Ronald W. Reagan refused to adopt the measures recommended by the ITC. Instead, he released a statement in September 1984 which contained four policy directives.⁹⁴ First, the United States would adhere to the principle of free trade, and that actions designed to limit imports based on § 201 of the Trade Act would be protectionist in nature and in the national interest would not be adopted. Second, the administration determined that it was necessary to take prompt and comprehensive action to prevent unfair trade practices by steel exporting countries and industries. To this end, the third policy directive made clear that it was necessary to negotiate agreements for voluntary export restraints with foreign countries in order to tackle the sudden increase in steel imports causing injury to the United States steel industry. Finally, the President noted the necessity to construct a framework for the purpose of stabilizing imports, so that unfair trade would be inhibited and the share of the market supplied by foreign goods would be defined and stabilized.

The United States government subsequently drafted a plan of action for the benefit of the United States steel industry. The administration negotiated an agreement with the countries named in the complaint, including Japan, whose steel exports were causing the injury. The agreement was intended to prevent a sudden increase in exports to the United States, and to eliminate unfair trade practices through negotiations with countries engaged in such practices. In the event that negotiations failed to eliminate such practices, the President could file a § 301 action or take other legal steps to deal with such practices. It was assumed that if unfair practices were eliminated, imported goods (excluding semimanufac-

⁹³ Carbon and Certain Alloy Steel Products, USITC Pub. 1553, Inv. No. TA-201-51 (July 1984)[hereinafter Carbon Products]; see also CURRENT PROVISIONS, *supra* note 18, at 87-88.

⁹⁴ Steel Import Relief Determination, 49 Fed. Reg. 36,813-14 (1984).

ured goods) would share 18.5% of the United States steel market.⁹⁵

Negotiations between Japan and the United States resulted in an agreement⁹⁶ with six basic points. First, the agreement would last for five years, beginning in October 1984. Second, the agreement would not affect either country's obligations or rights under GATT. The effectiveness of the agreement was contingent on the commencement of a procedure to end antidumping activity. Fourth, continued enforcement of the agreement was contingent upon legal action not being initiated under United States trade laws, including the antitrust laws. Fifth, with respect to the total amount of steel products, the agreement limited Japanese products to 5.8% of the total United States market. Finally, restraints on steel were to be achieved through Japanese domestic law, with the Japanese government issuing export certificates.

In order to achieve the required level of export restraint established by the agreement, the Japanese government directed the steel industry in Japan to form an export association under the terms of the Transactions Law. The government also made it clear that, if the industry did not comply with the directive, the government would use the export approval system established under Article 48 of the Control Law to enforce export restraints.

The legal basis of the United States government's authority to negotiate with foreign countries was the Steel Import Stabilization Act, incorporated in the Tariff and Trade Act of 1984.⁹⁷ The President could have relied on § 201 of the Trade Act of 1974 and the determination made by the ITC. In choosing the former option, the President may have wanted to rely on the act because the administration sought to resist actions which might be perceived as protectionist in nature. It would have been inconsistent with this reasoning to rely on § 201, since the objective of that provision is to protect domestic industry. The United States government viewed the problem facing the United States steel industry as the result of unfair practices by foreign governments and industries. Nonetheless, the case was initiated as a request for relief under § 201 of the Trade Act of 1974; therefore, the injury resulted from "fair trade" rather than "unfair trade." In fact, an affirmative finding of injury and the necessity of relief were both recognized by the ITC. Despite these determinations, the President reinterpreted these findings as "unfair trade."⁹⁸

⁹⁵ CURRENT PROVISIONS, *supra* note 18, at 87.

⁹⁶ See *supra* note 57 and accompanying text.

⁹⁷ 19 U.S.C. § 2253. For a general discussion of the Steel Import Stabilization Act, see CURRENT PROVISIONS, *supra* note 18, at 86-88.

⁹⁸ See Carbon Products *supra* note 93, and 20 WEEKLY COMP. PRES. DOC. 1913 (Dec. 19, 1984).

The premise of the Steel Import Stabilization Act is that foreign steel products occupy a large share of the United States market because of past unfair trade practices. When such unfair practices are eliminated, the market share of foreign steel products will be 18.5%.⁹⁹ It is difficult to justify this figure with empirical data, since the very nature of the market is its future uncertainty. The market share of domestic and foreign products will be determined by various prevailing future economic factors; consequently the outcome is difficult to predict. It seems that the market figure in the Steel Import Stabilization Act is but an indicator by which the government measures the allocation of the market between foreign and domestic products. Another important aspect of the act is that, although the law is based on the assumption that foreign countries and industries are engaged in unfair trade practices and that their large market share is a result of such practices, the unfair practices allegedly engaged in by foreign countries and enterprises are not defined, and the procedure used to determine the existence of such unfair practices is not established.¹⁰⁰ Other trade laws dealing with unfair trade practices contain provisions for determining the existence of unfair trade practices in other ways. In this respect, one suspects that the Steel Import Stabilization Act is disguised protection of the domestic steel industry rather than the preservation of fair trade.

In any event, the United States steel industry received greater protection than it would have if the United States government had employed § 201 and the decision of the ITC. If it lasts for more than three years, trade relief under § 201 must be reduced after the third year.¹⁰¹ No such requirement exists in the Steel Import Stabilization Act and the degree of relief accorded under the act is greater. In addition, the ITC determination¹⁰² specified five steel items which had been seriously injured. The export restraint program under the act extends to more than just these items. Consequently, in this regard, the United States steel industry also obtained greater protection. Thus it is evident that both a fair trade law and an unfair trade law may be used interchangeably in the United States to achieve the same objectives, but with different results.

D. The 1983 Specialty Steel Voluntary Export Restraint

In 1983, a § 301 complaint was filed with the United States govern-

⁹⁹ CURRENT PROVISIONS, *supra* note 18, at 87-88.

¹⁰⁰ 19 U.S.C. § 2253.

¹⁰¹ An import relief for a period of more than three years must be phased down during the period of such relief. Trade Act of 1974 § 203(h)(2), 19 U.S.C. § 2253(h)(2).

¹⁰² See note 93 and accompanying text.

ment by the Tool and Stainless Industry Committee and the United Steelworkers of America on the grounds that some European countries—including Austria, Belgium, Italy, Sweden, and the United Kingdom—granted export subsidies amounting to unfair trade practices. The USTR initiated a § 301 investigation, and based on the subsequent report,¹⁰³ the President directed the USTR to request the ITC to open a § 201 action. He also directed the USTR to initiate bilateral and multilateral trade negotiations with foreign governments to eliminate these practices, and to monitor the import of the items investigated under § 201.¹⁰⁴

Following up on the President's directive, the ITC made a § 201 injury finding in March 1983,¹⁰⁵ and recommended that a three-year import quota be imposed. The President then began negotiations with several foreign governments, including Japan, which culminated in a 1983 agreement between the United States and Japan.¹⁰⁶ Under this agreement, the Japanese government directed the exporters of specialty steel products in Japan to organize an export association, and through it restrict the quantity of specialty steel exports under the Transactions Law.¹⁰⁷ However, the Japanese government soon discovered that a restriction of quantity by the export association would be ineffective because some exporters did not wish to join the association. Therefore, the Japanese government invoked an export control order under the same law and placed the export of the products in question under the compulsory export approval system.¹⁰⁸

This case is an interesting contrast to the voluntary export restraint of steel products, which became effective in 1984. In its specialty steel complaint, the United States steel industry wanted protection from subsidized exports from some European countries. The proceeding was changed into a § 201 proceeding by the President, however, and what was originally initiated as a countermeasure dealing with "unfair trade"

¹⁰³ Members of the Tool and Stainless Steel Industry Committee and the United Steelworkers of America; Initiation of Investigation on Petition Filed Seeking Relief, 47 Fed. Reg. 10,107 (1982); Tool and Stainless Steel Industry Committee and United Steelworkers of America; Initiation of Investigation, 47 Fed. Reg. 35,387 (1982).

¹⁰⁴ President's Memorandum for the United States Trade Representative, 18 WEEKLY COMP. PRES. DOC. 1489 (Nov. 16, 1982).

¹⁰⁵ Certain Steel Valves and Certain Steel Parts Thereof from Japan, 48 Fed. Reg. 52,138 (1983).

¹⁰⁶ Proclamation No. 5074, 48 Fed. Reg. 33,233 (1983), *as modified*, 48 Fed. Reg. 48,888 (1983).

¹⁰⁷ Article 28 of the Transactions Law authorizes the Ministry of International Trade and Industry to invoke an order determining the export price, quantity, or other terms of export of the commodity of which an export agreement had been entered into, and this order is binding on all exporters of the commodity.

¹⁰⁸ Yushutsu bōeki Kanrirei (Export Trade Control Order), Cabinet Order No. 378 of 1949, translated in 5 EHS AJ, *supra* note 27. See also Matsushita, *Export Control*, *supra* note 30, at 105-06 nn. 14-16.

practices, was changed into a proceeding dealing with a "fair trade." If the United States government had stayed with the request of the steel industry for § 301 relief, the countermeasures would have been directed against the subsidies of those countries named in the complaint. Consequently, the Japanese steel industry would have avoided any action taken under § 301, since the United States steel industry had not filed a complaint against Japanese government practice. Since this case was handled as a § 201 case, however, and § 201 remedies must be applied indiscriminately pursuant to Article 19 of GATT, the § 201 remedy applied to the Japanese specialty steel products as well.

IV. THE SEMICONDUCTOR AGREEMENT

Three actions have recently been raised against Japanese semiconductors under United States trade laws. The first was an action brought under § 301 by the Semiconductor Industry Association ("SIA") on June 14, 1985.¹⁰⁹ A group of United States companies initiated a second antidumping action against Japanese semiconductor chip manufacturers (the "EPROMs case") on September 30, 1985.¹¹⁰ The third was an antidumping action initiated by the United States government on December 6, 1985, against Japanese semiconductor chip manufacturers (the "256 K DRAMs case.")¹¹¹ In the EPROMs and the 256 K DRAMs cases, the Department of Commerce and the ITC made the affirmative preliminary determinations.¹¹² In the § 301 claim, the SIA claimed that the Japanese government had targeted the semiconductor industry as a strategic one, and had created a tightly knit regime in which Japanese manufacturers cooperated in research and development and other business activities. It was alleged that, because of this exclusive structure, United States semiconductor chips could not break into the Japanese market.¹¹³

After a long period of negotiation between the United States and Japanese governments and the Japanese semiconductor industry, the par-

¹⁰⁹ Initiation of Investigation Under Section 301; Semiconductor Industry Association, 50 Fed. Reg. 28,866 (1985)[hereinafter SIA Investigation].

¹¹⁰ Eraseable [sic] Programmable Read Only Memories (EPROMs) From Japan: Initiation of Antidumping Duty Investigation, 50 Fed. Reg. 43,603-04 (1985).

¹¹¹ Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan; Initiation of Antidumping Duty Investigation, 50 Fed. Reg. 51,450 (1985); Dynamic Random Access Memory Semiconductors (DRAM's) of 256 Kilobits and Above From Japan; Antidumping Investigation, 50 Fed. Reg. 51,613-14 (1985).

¹¹² Eraseable [sic] Programmable Read Only Memories (EPROMs) From Japan; Preliminary Determination of Sales at Less Than Fair Value, 51 Fed. Reg. 9087-88 (1986); Dynamic Random Access Memory Semiconductors 256 Kilobits and Above From Japan; Preliminary Determination of Sales at Less Than Fair Value, 51 Fed. Reg. 9475-77 (1986)[hereinafter 256 K DRAMs Case].

¹¹³ SIA Investigation, *supra* note 109.

ties reached a settlement in July 1986. Essentially the parties agreed that the antidumping issue would be resolved by suspension agreements between the United States government and the Japanese companies,¹¹⁴ and that the § 301 issue would be resolved through an agreement between the two governments.¹¹⁵

With respect to the antidumping issue, the United States government and the Japanese companies entered into the suspension agreements on July 30, 1986¹¹⁶ in the EPROMs case and on August 1, 1986, in the 256 K DRAMs case.¹¹⁷ The settlement¹¹⁸ provides that the United States government will suspend its antidumping investigation, and that Japanese exporters will refrain from dumping. The companies promised not to export semiconductor chips to the United States at prices below their fair market value. Both governments also agreed that the Japanese government would take measures to ensure that there would be no future dumping of semiconductor chips. The measures scheduled to be taken by the Japanese government included: the Japanese government's supervising the export prices of specified semiconductor chips agreed upon by the two governments; Japanese companies supplying information regarding the production cost and export price of semiconductor chips; and the Japanese government's furnishing such price and production cost information to the United States government.¹¹⁹

The agreement also covered the issue of third market competition. The Japanese government agreed to supervise the export prices of Japanese semiconductor companies sold to third countries, thereby ensuring that United States products will not meet Japanese ones, and that United States users would not purchase dumped Japanese semiconductor chips in those markets. The agreement also ensured that dumped Japanese semiconductor chips would not be exported to the United States market via third country markets.¹²⁰

With respect to the access of United States-made semiconductors to

¹¹⁴ Eraseable [sic] Programmable Read Only Memory Semiconductors (EPROMs) From Japan; Suspension of Investigation, 51 Fed. Reg. 28,253-54 (1986)[hereinafter EPROMs Suspension]; Antidumping; Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan; Suspension of Investigation and Amendment of Preliminary Determination, 51 Fed. Reg. 28,396-98 (1986)[hereinafter 256 K DRAMs Suspension].

¹¹⁵ Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 27,811 (1986)[hereinafter Section 301 Determination].

¹¹⁶ See EPROMs Suspension, *supra* note 114, at 51 Fed. Reg. 28,254.

¹¹⁷ See 256 K DRAMs Suspension, *supra* note 114 at 51 Fed. Reg. 28,398-400.

¹¹⁸ See EPROMs Suspension, *supra* note 114, at 51 Fed. Reg. 28,254-56; 256 K DRAMs Suspension, *supra* note 97, at 51 Fed. Reg. 28,390-400.

¹¹⁹ *Id.*

¹²⁰ See Section 301 Determination, *supra* note 115.

the Japanese market, the parties agreed that United States products should have some share of the Japanese market, and that the Japanese government could establish an organization to test foreign made semiconductor chips in order to facilitate their sales in Japan. The ITC also agreed that both governments would take the necessary steps to avoid overproduction of semiconductor chips.¹²¹

There are several problems with this semiconductor agreement. First, Japanese government supervision of the pricing of Japanese semiconductor exports to third-country markets is extraordinary. It is clear that third-country markets are not covered by the United States antidumping provisions of the Trade Act, so this part of the agreement should be interpreted as part of a § 301 scheme. However, this arrangement ignores the interests of semiconductor chip consumers in third countries. There is no basis for the assumption made by the United States and Japanese governments that consumers in third-country markets do not want to purchase the most inexpensive chips, regardless of whether they are from Japan or elsewhere. The agreement also ignores the proposition that whether Japan is dumping semiconductor chips in a third-country market should be determined by the antidumping laws of that country, not the antidumping laws of the United States. It may be that these countries have antidumping laws similar to those of the European Economic Community ("EEC"), which state that a country may not impose antidumping duties on a dumped import if it is in the public interest.¹²²

Another troubling aspect of this settlement involves the promised market access of United States semiconductors to the Japanese market. The problem here is that there is no guarantee that United States semiconductors will occupy any market share in Japan, since there are no legal means for the Japanese government to force Japanese users to purchase foreign made semiconductors. Here again, the only means available to the Japanese government is to "encourage" Japanese users to purchase United States semiconductors. Whether foreign manufactured chips are ultimately successful in Japan depends upon the marketability of the chips (that is, their price, quality, delivery terms, and other business arrangements). As long as the price and other business terms of

¹²¹ *Id.*

¹²² See [EEC] Council Regulation No. 2176/84, 27 O.J. Eur. Comm. (No. L 201) art. 12, at 12 (1984)(antidumping provisions). EEC antidumping law provides for the imposition of an antidumping duty if dumping and injury have been established and if "the interests of the Community call for Community intervention." *Id.*

United States semiconductors are more favorable, Japanese users will purchase them without any assistance necessary from the government.

A third troubling area of the semiconductor agreement is the provision stating that the Japanese and United States governments will take steps necessary to ensure that there will be no overproduction of semiconductor chips. As far as the Japanese government is concerned, the problem is how to implement such steps domestically. There are no legal means for the Japanese government to compel Japanese semiconductor manufacturers to cut back their production. The only possible way is administrative guidance.¹²³ The *Oil Cartel* decision¹²⁴ has shown, however, that if the Japanese government gives administrative guidance to an industry in order to engage in a joint cutback of production, such a scheme runs the risk of violating Japan's Antimonopoly Law.

It is unlikely that the semiconductor agreement between the United States and Japanese governments will accomplish its objective of protecting the United States semiconductor industry. It is only natural that users of chips will want to purchase them as cheaply as possible. If the export price of Japanese chips in the United States and in third-country markets is artificially high under the agreement, users will purchase from manufacturers in third countries at lower prices. In this way, both United States and Japanese semiconductor manufacturers may be losers. Another possible effect is that Japanese manufacturers will begin direct investment in the United States and initiate local production there. In this way, the United States semiconductor industry may be inviting its Japanese competitors to engage in direct manufacturing competition in the United States.

This semiconductor agreement involves several features not found in any other United States-Japanese agreements designed to deal with trade issues. First, the regulation of Japanese exports to third-country markets by the Japanese government is unprecedented. In previous cases, regulation by the Japanese government was confined to regulation of exports to the United States market. In the semiconductor agreement, government regulation extends far beyond the mere export of chips to the United States and includes the regulation of exports of Japanese chips to third-

¹²³ A number of articles have been published on Japanese administrative guidance in the English language, including: Narita, *Administrative Guidance*, 2 LAW IN JAPAN 45 (1968); Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 LAW IN JAPAN 65 (1977); Smith, *Prices and Petroleum in Japan: 1973-1974—A Study of Administrative Guidance and Economic Regulation in Japan*, 10 LAW IN JAPAN 65 (1977); Sanekata, *Administrative Guidance and the Antimonopoly Law*, 10 LAW IN JAPAN 65 (1977).

¹²⁴ *Nihon v. Sekiyu Renmei*, 1061 Hanrei Jiho (Tokyo High Court, Sept. 26, 1980); *Idemitsu Kosan v. Nihon*, 1108 Hanrei Jiho 3 (Sup. Ct. Feb. 24, 1984).

country markets. The scope of this regulation prompted the EEC to allege that this bilateral agreement restricts trade between Japan and the EEC and, therefore, violates the basic principle of GATT: free trade and nondiscrimination.

The second unique feature of the semiconductor agreement is that the Japanese government is to encourage Japanese chip users to purchase foreign products. The Japanese government is to establish an organization in Japan to promote the sale of foreign chips in Japan.¹²⁵ Whether such promotional activities will have any substantial effect on the increase of foreign chip sales in Japan is rather doubtful. If this were true, it would mean that mere national treatment is not sufficient in solving trade problems between the United States and Japan. It was argued by the SIA that the Japanese government had undertaken promotional measures to create an exclusive structure in the Japanese market. In the view of the United States government, overcoming this restrictive structure would take something more than national treatment. Nonetheless, there was no formal determination under § 301 as to the exclusivity of the Japanese semiconductor market.

The third unique feature of the semiconductor agreement is that it includes a provision that the Japanese government will take measures to avoid the overproduction of chips in Japan. The purpose of this provision is that overproduction has caused dumping in the United States market. In previous cases, regulation was limited to exports, but, in the semiconductor case, it extends to control over domestic production.

With this brief review of the semiconductor agreement, it is clear that the agreement signals the start of a new series of agreements between Japan and the United States which will limit production and exports of high technology products. As seen in the cases of steel and televisions, bilateral trade agreements designed to limit exports and imports have only a limited effect in achieving their stated purpose. More important, such agreements raise the concern that political implications of such bilateral agreements have little, if any, effect.

V. CONCLUSION

Of the world's major trading nations, the United States has the most elaborate and detailed trade laws. Compared with the trade laws of Japan and other countries, United States trade laws have a distinct feature: enforcement is generally based on detailed provisions of laws and administrative regulations. There seems to be a trend in the United States to-

¹²⁵ See *supra* note 121 and accompanying text.

ward increasing the number of detailed rules for the enforcement of trading activity, particularly since the enactment of the Trade Agreements Act in 1979.¹²⁶ In this sense, the salient feature of the United States trade law system is that it is legalistic and rule-bound,¹²⁷ and leaves comparatively little room for the discretion of government enforcement officials.

This United States trade law system has its merits, to the extent that predictability and stability are generally guaranteed by eliminating the arbitrary judgment of government officials. Familiarity with the enforcement mechanisms incorporated in such laws and regulations provides reasonable certainty. The trade law system in the United States also provides more opportunities for interested parties and the general public to participate in the enforcement of laws and regulations than in other countries. In this sense, there is probably more due process of law in the enforcement of United States trade laws than is present in other countries. These features reflect a society in which the role of law as a means of social control is central and the rule of law, rather than the rule of man, is a fundamental value.

Recent trade disputes between the United States and Japan, and settlements resolving those disputes, signal that the United States has deviated somewhat from the traditional, legalistic, and stable approach to resolving trade problems. In the *Consumer's Union*¹²⁸ and the *Automobile Voluntary Export Restraint Cases*,¹²⁹ the United States government had no legal authority to enforce import restrictions of the commodities in question, since there was no finding of injury by relevant administrative agencies. The United States government approached these problems politically and negotiated with the Japanese government to achieve a result similar to an import restriction. As noted by the court in the *Consumers' Union* case,¹³⁰ it is probably not unlawful for the United States, in the absence of an affirmative injury finding by an appropriate authority, to negotiate with a foreign country to persuade that government to enforce a voluntary export restraint. Such practice may be regarded as one way in which the United States government may circumvent strict legal requirements necessary to enforce import restrictions.

The interchangeable use of "fair trade laws" and "unfair trade laws"

¹²⁶ Trade Agreements Act of 1979, 19 U.S.C. 2501 (1982 and Supp. 1985).

¹²⁷ See Jackson, *Perspective on the Jurisprudence of International Trade: Costs and Benefits Legal Procedures in the United States*, 82 MICH. L. REV. 1570 (1984).

¹²⁸ See *supra* notes 70-71, 86-88 and accompanying text.

¹²⁹ See *supra* notes 13, 52, 91 and accompanying text.

¹³⁰ *Consumer's Union*, 506 F.2d at 142-44.

also creates problems.¹³¹ The conversion of § 201 cases to cases under the Steel Import Stabilization Act, and § 301 cases into § 201 cases, have provided United States industry with more protection than would otherwise have been available. The frequent switch by the United States government from one trade law to another to deal with trade issues, and the consequent increase in the remedy as a result, undermines the stability and fairness which have always been cornerstones of the United States trade law system. In so doing, the United States government may be granting more protection than the industries requested initially. Although some flexibility is necessary for any trade law system to cope with changing circumstances, too much flexibility may cause confusion. There is a growing and potentially unhealthy relationship between export control and domestic production control, particularly regarding third-country market exports. The potential long range consequences of such restrictive arrangements are ominous.

¹³¹ See *supra* notes 103-08 and accompanying text.