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Gregory K. Bader

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# NOTES

## The *Keiretsu* Distribution System of Japan: Its Steadfast Existence Despite Heightened Foreign and Domestic Pressure for Dissolution

Gregory K. Bader\*

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### Introduction

In stark contrast to the United States, Japan openly encouraged monopolies in its economy prior to World War II.<sup>1</sup> After the War, however, Japan enacted antimonopoly legislation during its occupation by Allied forces.<sup>2</sup> This legislation dramatically reversed Japanese economic policy and resulted in more competitive Japanese markets. Despite this statutory reversal, however, Japan's enforcement of its antimonopoly policy remains inadequate by U.S. standards,<sup>3</sup> especially in regard to the Japanese corporate phenomenon known as the *keiretsu*.<sup>4</sup>

Each *keiretsu* is a transparent network of related companies that centers around a large trading company or bank, effectively interlinking whole sections of the Japanese economy.<sup>5</sup> In essence, the *keiretsu* "exist not as formal organizations in the legal world but as loosely organized

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\* J.D. Candidate, Cornell Law School, 1994; B.A., University of California, Irvine, 1991.

1. See THOMAS A. BISSON, *ZAIBATSU DISSOLUTION IN JAPAN* 23-25 (1976).

2. HIROSHI IYORI & AKINORI UESUGI, *THE ANTIMONOPOLY LAWS OF JAPAN* 31-32 (1983).

3. See generally Senior U.S. Trade Official Blasts Tokyo for Slow Trade Action, *KYODO NEWS*, Jan. 12, 1994, available in WESTLAW, JAPANCON database. See also Phase II: *Japan's Distribution System and Options for Improving U.S. Access*, USITC Publication 2327, Report to the House Committee on Ways and Means, Oct. 1990, available in WESTLAW, FINT-ITC database [hereinafter *Phase II*].

4. ELEANOR M. HADLEY, *ANTITRUST IN JAPAN* 257 (1970). The term "*keiretsu*," as defined by its component parts, means a "lineage, faction, group . . . arranged in order." *Id.* Examples include present day Mitsui, Mitsubishi, and Sumitomo. *Id.*

5. *Id.*

alliances within the social world of the [Japanese] business community."<sup>6</sup> At the most benign level, the *keiretsu* attempt to gain monopoly power in markets to benefit from economies of scale.<sup>7</sup> At a more malevolent level, many *keiretsu* use their collective power to impede international trade flowing into Japanese markets by favoring transactions with other members of their own group.<sup>8</sup> In addition, some *keiretsu* allegedly engage in international predatory pricing schemes that drive competitors out of markets, thereby allowing these *keiretsu* to establish monopolies and subsequently reap the benefits of higher prices.<sup>9</sup>

The United States, in response to *keiretsu* activities and other structural barriers to trade, launched the United States-Japan Structural Impediments Initiative (SII) in 1989.<sup>10</sup> The Bush administration targeted the *keiretsu* as a significant trade barrier and pressed the Japanese to enforce their antimonopoly laws against these groups.<sup>11</sup> Although the Japanese formally acceded to U.S. demands, this agreement remains largely unenforced.<sup>12</sup> Nevertheless, the United States continues to challenge the *keiretsu* through SII's successor, the Clinton administration's bilateral trade negotiation framework.<sup>13</sup>

This Note focuses on the historical formation of present day *keiretsu* groups in part I and examines the cohesive elements of *keiretsu* behavior in

6. MICHAEL L. GERLACH, *THE KEIRETSU: A PRIMER* 8 (1992).

7. K. BIEDA, *THE STRUCTURE AND OPERATION OF THE JAPANESE ECONOMY* 210 (1970). See also *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 42 (1964) (testimony by Professor Corwin D. Edwards). Professor Edwards testified that:

A big firm has advantages over a smaller rival just because it is big. Money is power. A big firm can outbid, outspend, and outlose a small firm. It can advertise more intensively, do more intensive and extensive research, buy up inventions of others, defend its legal rights or alleged rights more thoroughly, bid higher for scarce resources, acquire the best locations and the best technicians and executives. If it overdoes its expenditures, it can absorb losses that would bankrupt a small rival.

8. Kozo Yamamura & Jan Vandenberg, *Japan's Rapid-Growth Policy on Trial: The Television Case*, in *LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY* 238, 245-47 (Gary Saxonhouse & Kozo Yamamura eds., 1986).

9. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The plaintiffs in *Matsushita* claimed that 21 Japanese corporations were involved in a predatory pricing scheme that set television prices below their fair market value in the United States while recouping losses with higher prices in Japan. *Id.* at 577-78. Plaintiffs alleged that these 21 corporations intended to drive American competitors out of business so the Japanese corporations could increase their market share and take over the U.S. television industry. *Id.* at 575. The Court found the alleged scheme too complex to maintain. In arriving at this conclusion, however, it virtually ignored the ineffective enforcement of Japan's antimonopoly policy, the long-run approach of Japanese businesses, and the monopolistic policies of the Japanese Ministry of International Trade and Industry (MITI). See discussion of MITI, *infra* part III.A.

10. *United States-Japan Structural Impediments Initiative: Hearings Before the Senate Subcomm. on International Trade of the Comm. on Finance*, 101st Cong., 1st Sess., pt. 2, at 1-2 (1992).

11. *Id.* at 2.

12. *Phase II*, *supra* note 3.

13. See *Japan-U.S. Trade Framework Talks to Start Sept. 10*, KYODO NEWS, Aug. 20, 1993, available in WESTLAW, JAPANECON database.

part II. Part III discusses conflicting Japanese governmental policies that affect *keiretsu* relationships, the antagonistic roles of the Ministry of International Trade and Industry (MITI) and the Japanese Fair Trade Commission (JFTC), and the inadequacies and directives of the JFTC that support *keiretsu* activities. Part IV analyzes international challenges to the *keiretsu*, who act as nontariff barriers to foreign trade entering Japan. This part discusses the Bush administration's Structural Impediments Initiative, the Clinton administration's bilateral trade negotiation framework, and the Super 301 provision of the 1988 Omnibus Trade and Competitiveness Act. Part V addresses further actions needed to remedy the *keiretsu* dilemma. This Note concludes that the *keiretsu* function as structural and sectoral barriers to trade entering Japanese markets, that they eliminate the beneficial effects of competitive markets in favor of monopolistic power, and that they violate Japan's antimonopoly laws. Japan, therefore, must dismantle the *keiretsu* groups into individual competitive companies that comply with Japan's Antimonopoly Act.

### I. Historical Background—The Formation of Present Day *Keiretsu*

The historical and cultural development of the *keiretsu* over the past century provides a basis for understanding and challenging the *keiretsu* of today. Prior to World War II, imperial Japan promoted the existence of large scale monopolies known as *zaibatsu*.<sup>14</sup> These monopolies consisted primarily of four structural levels: the *zaibatsu* family, the central holding company, the greater operational subsidiaries, and the lesser subsidiaries.<sup>15</sup> Through this elaborate structure, the *zaibatsu* asserted monopolistic control over whole sections of industry and used their strong financial positions to keep out smaller competitors in furtherance of their monopolistic power.<sup>16</sup>

In addition, Japan's Imperial Government encouraged and supported the *zaibatsu*, such as Mitsui and Mitsubishi.<sup>17</sup> In fact, strong ties existed between these *zaibatsu* and the Meiji royal family, and each benefitted respectively.<sup>18</sup> The royal family and Japan itself benefitted from strong multinational corporations expanding into the international market-

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14. HADLEY, *supra* note 4, at 40. The term "*zaibatsu*," as defined by its component parts, means a "wealth . . . estate, group, clique." *Id.* It denotes large corporate monopolies composed of a central holding company or bank that directs smaller diversified companies thereby monopolizing whole sections of the economy. *Id.* Examples include pre-World War II Mitsui, Mitsubishi, and Sumitomo. *Id.* The Mitsui *zaibatsu* was the largest of the *zaibatsu* and was only rivaled in power and size by a relative newcomer, the Mitsubishi *zaibatsu*. JOHN G. ROBERTS, *MITSU* 119 (2d ed. 1989). Throughout the history of the two conglomerates, the competition between them has been fierce and continues to this day. *Id.*

15. G.C. ALLEN, *THE JAPANESE ECONOMY* 125 (1981); BISSON, *supra* note 1, at 24.

16. BISSON, *supra* note 1, at 24-26.

17. *Id.* at 36-37.

18. For example, the Mitsui *zaibatsu* was controlled by the Mitsui family for over 270 years and had beneficial marital links to the Meiji royal family. ROBERTS, *supra* note 14, at 224-25.

place.<sup>19</sup> The *zaibatsu*, in return, benefitted from supportive legislation and royal favors.<sup>20</sup> In essence, this system advanced the interests of Japan's elite and the goals of the Japanese nation at the expense of fair trade and to the detriment of foreign and smaller domestic competitors.

The *zaibatsu*, however, experienced a dramatic reversal in policy during the American occupation following Japan's defeat in World War II.<sup>21</sup> The monopolistic nature of the *zaibatsu* directly conflicted with the U.S. policy of competitive markets, and the United States consequently initiated their dissolution.<sup>22</sup> The United States accomplished this by dissolving "large industrial and banking combines" through Japan's Holding Company Liquidation Commission (HCLC).<sup>23</sup> Although the Japanese government officially created and staffed the HCLC, General MacArthur, the Supreme Commander Allied Powers (SCAP), conceptualized and influenced the HCLC's formation.<sup>24</sup> Under SCAP's direction, Japan empowered the HCLC to dissolve combines in accordance with the newly enacted Deconcentration Act<sup>25</sup> and Antimonopoly Act.<sup>26</sup>

The Deconcentration Act reflected American economic values.<sup>27</sup> It encouraged more competitive Japanese markets and provided greater opportunity for outsiders to enter markets by giving the HCLC the power to reorganize the *zaibatsu* into smaller, individual corporations.<sup>28</sup> The Jap-

19. IYORI & UESUGI, *supra* note 2, at 2. Examples of other *zaibatsu* multinational corporations include Sumitomo, Yasuda, Asano, Furukawa, Kawasaki, Otani, and Okura. ROBERTS, *supra* note 14, at 119-20.

20. IYORI & UESUGI, *supra* note 2, at 4. During the Meiji rulership, the *zaibatsu* acquired property owned by the government. *Id.* For example, Mitsubishi received the Nagasaki Dockyard, Japan's largest dockyard, and Mitsui acquired the Miike Coal Mine, Japan's largest coal mine. *Id.*

21. Authorities of the Allied Occupation implemented dramatic *zaibatsu*, land, and labor reforms in the Japanese economy. TAKAFUSA NAKAMURA, *ECONOMIC DEVELOPMENT OF MODERN JAPAN* 58 (1985).

22. The concept of an economy based on competition was quite foreign to Japan. BISSON, *supra* note 1, at 40-41. Both the Liberal Party and the Democratic Party, the two major conservative political parties, were historically devoted to the *zaibatsu* and monopolistic business practices. *Id.* The other two main parties, the Social Democrats and the Communists, also did not support a competitive economy. *Id.* Thus, for Japan to be converted to a competitive economy, occupation forces had to institute the change. *Id.*

23. HADLEY, *supra* note 4, at 20.

24. *Id.*

25. Law for the Elimination of Excessive Concentrations of Economic Power, No. 207 (1947) [hereinafter Deconcentration Act].

26. Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, No. 54 (1947) (amended on July 23, 1982) [hereinafter Antimonopoly Act].

27. HADLEY, *supra* note 4, at 110-11. "[The Deconcentration Act's] broad intention is to establish a reasonable basis for competition and freedom of enterprise through the elimination of those concentrations of economic power which stifled efficiency as well as freedom." (quoting a SCAP release in the *Nippon Times*, Dec. 18, 1947).

28. HADLEY, *supra* note 4, at 110-11. The Deconcentration Act empowered the HCLC to reorganize excessive concentrations of economic power which were defined by Article 3 as follows:

any private enterprise conducted for profit, or combination of such enterprises, which by reason of its relative size in any line or the cumulative power of its position in many lines, restricts competition or impairs the opportunity for

anese strongly opposed such measures, but these policies were necessary to restrict the former Imperial Government's expansionist tendencies and to substitute a competitive market economy.<sup>29</sup>

Although the Deconcentration Act provided immediate measures for dismantling the *zaibatsu*, the Antimonopoly Act contained the long-term restrictions on monopolies.<sup>30</sup> Japan's Antimonopoly Act followed American models—the Sherman Act<sup>31</sup> and the Clayton Act<sup>32</sup>—by prohibiting the formation or existence of private monopolies and the unreasonable restraint of trade.<sup>33</sup> Article 1 of the Antimonopoly Act expresses the Act's purpose:

This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology, and the like, and all other undue restriction of business activities through combinations, agreements and otherwise, aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.<sup>34</sup>

Not surprisingly, the initial enforcement of the Antimonopoly Act centered on dissolving the power structure of the *zaibatsu*. Initially, the Antimonopoly Act strictly outlawed monopolistic activities in the private sector, but in combination with the Deconcentration Act, it effectively dissolved *zaibatsu* central holding companies.<sup>35</sup>

The Japanese, however, did not readily accept the Antimonopoly Act since monopolized markets were customary under Japan's Imperial Government.<sup>36</sup> Even some Americans opposed the Act's perceived rigidity.<sup>37</sup> In response, Japan's legislature reformed the Antimonopoly Act through the 1949 Amendment<sup>38</sup> and the more substantial 1953 Amendment.<sup>39</sup>

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others to engage in business independently, in any important segment of business.

Deconcentration Act, *supra* note 25, art. 3.

29. HADLEY, *supra* note 4, at 12-14.

30. See Antimonopoly Act, *supra* note 26.

31. Sherman Act, 15 U.S.C. §§ 1-7 (1990).

32. Clayton Act, 15 U.S.C. §§ 12-27 (1990).

33. See Antimonopoly Act, *supra* note 26, art. 3.

34. *Id.* art. 1.

35. IYORI & UESUGI, *supra* note 2, at 10. The *zaibatsu* employed two main forms of centralized control: central banks and central holding companies (*honsha*). Central holding companies were the centers of control within the *zaibatsu*. They provided financial services to the subsidiaries, dictated policies of the *zaibatsu*, and were typically controlled by the *zaibatsu* family. BISSON, *supra* note 1, at 24-25. Although the Antimonopoly Act limited the power and influence of both central holding companies and central banks, only central holding companies were strictly illegal. Antimonopoly Act, *supra* note 26, art. 9.

36. HADLEY, *supra* note 4, at 107.

37. *Id.*

38. Second Amendment Act to the Antimonopoly Act, No. 214 (1949).

39. Fourth Amendment Act to the Antimonopoly Act, No. 259 (1953).

The 1949 Amendment to the Antimonopoly Act relaxed restrictions on interlocking directorates and intercorporate shareholding, both of which were used by the former *zaibatsu* to maintain control within their groups.<sup>40</sup> The 1949 Amendment, however, retained a level of restriction significantly greater than accepted levels in the United States.<sup>41</sup> As a consequence, the 1953 Amendment further relaxed the Antimonopoly Act by allowing exceptions for depression and rationalization cartels,<sup>42</sup> repealing prohibitions on the establishment of control organizations and particular concerted activities,<sup>43</sup> and deleting restrictions on unjustified substantial differences in economic power and debenture holding.<sup>44</sup> The combination of these two amendments significantly weakened the Antimonopoly Act and created the opportunity for the former *zaibatsu* companies to reunite and transform into the present day *keiretsu*.<sup>45</sup>

Although the SCAP had divided the *zaibatsu* into numerous smaller companies, made holding companies illegal, and replaced *zaibatsu* upper management with middle level managers, the fact remained that large corporate entities gain significant economic benefits from economies of scale.<sup>46</sup> The *keiretsu* consequently attempted to obtain these benefits by slowly rebuilding ties with their former *zaibatsu* group members.<sup>47</sup> They joined into loose conglomerates based on past and present mutual interests and formalized these relationships by exchanging directorate members and shares of corporate stock.<sup>48</sup>

Despite the illegality of central holding companies under the Antimonopoly Act,<sup>49</sup> the *keiretsu* achieved centralized control over companies within their network through either of two nonmutually exclusive *keiretsu* arrangements: central bank *keiretsu*<sup>50</sup> or distribution *keiretsu*.<sup>51</sup> The central bank *keiretsu* formed around significant commercial or city banks that primarily benefit group members through easily attainable

40. IYORI & UESUGI, *supra* note 2, at 14.

41. *Id.* at 14-15.

42. The depression cartels exception allows for the approval of cartels in an industry during economically grievous times. Antimonopoly Act, *supra* note 26, art. 24-3. The rationalization cartel exception provides for the allowance of cartels to promote fledgling industries. *Id.* art. 24-4. See *infra* notes 149-53 and accompanying text.

43. Under the original Antimonopoly Act, the establishment of a control organization was strictly prohibited. IYORI & UESUGI, *supra* note 2, at 15-16. This restriction provided a means for preventing the reformation of *zaibatsu*. In 1953, however, law makers believed that such a prohibition was overly broad and therefore repealed it. *Id.*

44. Restrictions on economic power and debenture holding were originally intended to inhibit *zaibatsu* reformation but were deemed overly restrictive in regard to the Japanese economy of 1953. *Id.* at 16.

45. *Id.* at 16-17.

46. BIEDA, *supra* note 7, at 210.

47. CHICARA HIGASHI & G. PETER LAUTER, THE INTERNATIONALIZATION OF THE JAPANESE ECONOMY 50 (1990).

48. *Id.*

49. Antimonopoly Act, *supra* note 26, art. 9(1).

50. The central bank form of *keiretsu* is known as a *kinyu keiretsu*. BIEDA, *supra* note 7, at 212.

51. The distribution company form of *keiretsu* is known as a *sangyo keiretsu*. *Id.*

loans, reduced interest rates, and access to a distribution system.<sup>52</sup> The banks provide this third benefit through an associated trading company that focuses on distribution of group member products.<sup>53</sup> The result is a horizontal grouping of large national firms in diversified markets.<sup>54</sup> Presently, the six largest central bank *keiretsu*<sup>55</sup> unify over fifty of the hundred largest corporations in Japan, including Japan's automobile and electronics industries.<sup>56</sup>

The second type of *keiretsu*, the distribution *keiretsu*, organized around a substantial company at the center of the *keiretsu*. This central company is the primary buyer of subsidiary group member products and provides access to reduced rate financial services.<sup>57</sup> The subsidiaries each compose part of a vertical distribution chain that spans whole sections of the Japanese economy from manufacturing to retailing.<sup>58</sup> In many instances, the substantial corporation in the distribution *keiretsu* also holds membership in a central bank *keiretsu* in order to secure beneficial financial services for its subsidiaries.<sup>59</sup>

Through the development of these two *keiretsu* forms, *zaibatsu* styled links from the largest central banks to the smallest subsidiaries reemerged and provided *keiretsu* group members with a long-run, exclusionary infrastructure in which to conduct business.<sup>60</sup> As the *keiretsu* increasingly reassembled the pieces of the old *zaibatsu*, political opposition to the *keiretsu* increased. In 1977, the Japanese government responded with another amendment to the Antimonopoly Act.<sup>61</sup> This Amendment empowered the Japanese Fair Trade Commission (JFTC) to impose a surcharge on cartels to the extent of illegal profits, to require entrepreneurs in certain instances to transfer part of their business to restore competition, to require entrepreneurs to justify parallel price increases, and to restrict stock holdings of large firms and financial entities.<sup>62</sup>

Despite the more restrictive 1977 Amendment, the *keiretsu* to this day continue to flourish due to a combination of relaxed restrictions under the 1949 and 1953 Amendments, liberalized exceptions for depression and rationalization cartels,<sup>63</sup> inadequate enforcement of antimonopoly

52. *Id.*

53. For example, the Mitsui *kinyu keiretsu* is formed around the Mitsui bank and Mitsui Bussan trading company. *Id.*

54. GERLACH, *supra* note 6, at 4-5.

55. Listed by size, the six central bank *keiretsu* are as follows: Mitsubishi, Mitsui, Sumitomo, Dai-Ichi Kangyo, Fuyo, and Sanwa. *Id.* at vii.

56. *Id.*

57. BIEDA, *supra* note 7, at 212.

58. GERLACH, *supra* note 6, at 5-6.

59. For example, Toshiba, an electronic products company, is a member of the Mitsui *kinyu keiretsu* while also being the main company in its own *sangyo keiretsu*. *Id.*

60. GERLACH, *supra* note 6, at vii.

61. Amendment Act to the Antimonopoly Act, No. 63 (1977).

62. IVORI & UESUGI, *supra* note 2, at 29-30.

63. Antimonopoly Act, *supra* note 26, arts. 24-3, 24-4.



laws by the JFTC,<sup>64</sup> and underlying pro-monopoly policies dating back to the pre-World War II period.<sup>65</sup> The empirical evidence supports this conclusion since the six largest *keiretsu* control roughly twenty-five percent of the Japanese economy's total assets, and their positions remain relatively unchanged from the 1960s.<sup>66</sup> Consequently, the underlying cultural and economic disposition of Japanese business favors monopolistic enterprise.<sup>67</sup>

## II. Cohesive Elements of *Keiretsu* Behavior Functioning to Restrict Trade

The *keiretsu* system forms an almost transparent interlinking of Japanese companies that unites large sections of the Japanese economy.<sup>68</sup> This internally linked structure, however, necessarily impedes foreign and domestic trade in Japan.<sup>69</sup> The *keiretsu*, therefore, restrict trade by the very means they use to maintain their existence.<sup>70</sup>

The *keiretsu* unify their group members through interlocking directorates, presidential councils, group-member shareholding, lending preferences, few intra-group direct competitors, group-wide projects, and intra-group trading.<sup>71</sup> The *zaibatsu* formerly used both interlocking directorates<sup>72</sup> and group member shareholding<sup>73</sup> as a means to assure control over their group members. The original Antimonopoly Act, however, flatly prohibited competing companies from interlocking directorates and restricted intercorporate stock holdings to financial institutions.<sup>74</sup> Nevertheless, the 1953 Amendment relaxed these restrictions in favor of a new standard that prohibits interlocking directorates and intercorporate shareholding only if such activity functions "substantially to restrain competition in any particular field of trade."<sup>75</sup> This relaxed standard allows the *keiretsu* to engage in controlling mechanisms similar to their *zaibatsu* predecessors.

64. Seichi Yoshikawa, *Fair Trade Commission vs. MITI: History of the Conflicts Between the Antimonopoly Policy and the Industrial Policy in the Post War Period of Japan*, 15 CASE W. RES. J. INT'L L. 489 (1983). See *infra* part III.B.

65. See *infra* part III.A.

66. GERLACH, *supra* note 6, at 9-11.

67. Yoshikawa, *supra* note 64, at 503.

68. HADLEY, *supra* note 4, at 257.

69. Yamamura & Vandenberg, *supra* note 8, at 245.

70. *Id.*

71. GERLACH, *supra* note 6, at 16.

72. The practice of interlocking directorates existed where a corporate officer in one group member company would hold one or more similar positions simultaneously in other group member companies thereby uniting control over those companies. HADLEY, *supra* note 4, at 82.

73. The practice of intercorporate shareholding, known as *kabushiki mochiai*, vested equity control of group members in the hands of other group members thereby increasing the power of the collective group over individual corporations. GERLACH, *supra* note 6, at 16. Typically, the shareholding was relatively reciprocal. *Id.* at 18.

74. IYORI & UESUGI, *supra* note 2, at 12. Even financial companies were prohibited from holding more than 5% of another company's stock. *Id.*

75. Antimonopoly Act, *supra* note 26, arts. 10(1), 13(1).

In light of the 1953 Amendment, the *keiretsu* have taken a relatively conservative stance towards the interlocking of directorates and have engaged primarily in management interlocks and presidential councils.<sup>76</sup> Presidential councils provide a forum for top corporate officers to discuss business with officers of other *keiretsu* group members.<sup>77</sup> Management interlocks are simply collaborations between lower level managers.<sup>78</sup> Both presidential councils and management interlocks can restrain trade by providing a forum for collective activity between competitors, but their potentially legitimate business purposes are likely to satisfy the Antimonopoly Act.<sup>79</sup> Although both of these practices exert less power over group members than did the *zaibatsu*, they nonetheless afford the *keiretsu* a significant degree of coordination and control within their groups.<sup>80</sup>

Intercorporate shareholding, on the other hand, has remained a more basic form of control in the *keiretsu* system.<sup>81</sup> The *keiretsu* use intercorporate shareholding quite extensively and to nearly the same degree as their *zaibatsu* predecessors.<sup>82</sup> In 1986, for example, members of the six largest *keiretsu* groups<sup>83</sup> controlled at least 28% of the equity in their fellow *keiretsu* group members.<sup>84</sup> Moreover, Mitsubishi, Mitsui, and Sumitomo, the former *zaibatsu* of the six, retained over 51% of the equity within their individual *keiretsu*.<sup>85</sup> In contrast, the equity ownership across different *keiretsu* groups remains relatively insignificant. For example, the Mitsubishi, Sumitomo, Fuji, and DKB *keiretsu* each held less than 2% of Mitsui *keiretsu* stock in 1986 while unconnected entities held 33.7% of Mitsui stock.<sup>86</sup> *Keiretsu* members thus retain a significant amount of available equity within their respective groups.

The *keiretsu* augment and, in most respects, supersede equity control through debt control. Debt control comes in the form of reduced rate

76. HADLEY, *supra* note 4, at 249.

77. *Id.* For example, the Mitsui *keiretsu* has two councils: the Second Thursday conference (*Nimoku-Kai*) and the Monday conference (*Getsuyo-Kai*). *Japan's Keiretsu System: Hearing Before the Senate Comm. on Finance*, 102d Cong., 1st Sess. 87 (1991) [hereinafter *Japan's Keiretsu System*]. The Second Thursday conference is attended by the presidents and chairmen of 24 Mitsui companies. *Id.* The Monday conference is attended by the directors of 75 Mitsui companies. *Id.*

78. HADLEY, *supra* note 4, at 250.

79. *Id.*

80. *Id.* at 249. It is also important to note that membership in a presidential council is usually mutually exclusive. GERLACH, *supra* note 6, at 12. For example, in 1982 there were only four companies that were members of multiple councils out of 187 total memberships. *Id.*

81. HADLEY, *supra* note 4, at 212.

82. *Japan's Keiretsu System*, *supra* note 77, at 83-84.

83. The six largest *keiretsu* are Mitsubishi, Mitsui, Sumitomo, Fuji, Sanwa, and DKB. GERLACH, *supra* note 6, at 18.

84. *Id.*

85. In 1986, the percentages of equity ownership held by members within the *keiretsu* were 51.4% for Mitsui, 63.4% for Mitsubishi, 63.9% for Sumitomo, 38.1% for Fuji, 28.0% for Sanwa, and 31.6% for DKB. *Id.*

86. *Id.*

loans issued through a *keiretsu* central bank or trading company.<sup>87</sup> Typically, banks provide loans for the *keiretsu* companies and look after financial interests while the companies utilize the banking services provided by the *keiretsu*.<sup>88</sup> Since most companies rely far more heavily on debt financing over equity financing, the debt relationship between central banks and subsidiary companies provides a significant, if not the primary, means of control within the *keiretsu*.<sup>89</sup>

Allocation controls are also used in the *keiretsu* system.<sup>90</sup> A primary example of an allocation control is the "one-set principle,"<sup>91</sup> which denotes the horizontal *keiretsu*'s behavior of having only one vertical group of member companies per major industry.<sup>92</sup> Of the six largest *keiretsu*, each is diversified into several product lines with only an insignificant amount of overlap within any individual *keiretsu*.<sup>93</sup> Consequently, the *keiretsu* experience relatively little competition from associated group members.<sup>94</sup> Allocation controls, therefore, promote cohesion and simulate the atmosphere of one united company.

The *keiretsu* also reinforce their control over group members through group-wide projects involving many different group companies.<sup>95</sup> Since the late 1950s, the use of group-wide projects has steadily increased among the *keiretsu*.<sup>96</sup> These projects encourage cohesion and assert the interests of the *keiretsu*,<sup>97</sup> while also providing the *keiretsu* with a means for venturing into new fields.<sup>98</sup> Group-wide projects thus aid the *keiretsu* in accomplishing two goals—group unity and *keiretsu* expansion—which explains their increasing use.<sup>99</sup>

Despite the various means of control within the *keiretsu*, intra-group trading remains the largest concern for outsiders attempting to trade in Japanese markets.<sup>100</sup> Intra-group trading is a natural result of the aforementioned cohesive mechanisms.<sup>101</sup> Defenders of *keiretsu* behavior assert

87. HADLEY, *supra* note 4, at 219. The 1953 Amendment repealed the Antimonopoly Act's restriction on debenture holding which allowed debt control to reemerge as a form of *keiretsu* control. IYORI & UESUGI, *supra* note 2, at 16.

88. With rare exception, the centralized city bank was the primary bank for group member companies in the six largest horizontal *keiretsu*. GERLACH, *supra* note 6, at 16.

89. HADLEY, *supra* note 4, at 219-20.

90. GERLACH, *supra* note 6, at 12.

91. This "one-set principle" (*wan setto-shugi*) is more strongly adhered to by former *zaibatsu* (i.e., Mitsubishi, Mitsui, and Sumitomo). *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 13. See also YUSAKU FUTATSUGI, ENTERPRISE GROUPS IN CONTEMPORARY JAPAN: FOCUSING ON AN ANALYSIS OF LARGE FIRMS 64 (1976) (in Japanese).

96. GERLACH, *supra* note 6, at 13.

97. *Id.* The *keiretsu* even utilize group-wide projects in the social context in addition to the business context. *Id.* at 15. In the extreme, the *keiretsu* promote marriages between employees of different *keiretsu* group members to facilitate cohesion. *Id.*

98. *Id.* at 13.

99. *Id.* at 12-15.

100. Yamamura & Vandenberg, *supra* note 8, at 243-47.

101. *Id.*

that the *keiretsu* transact only about 10% of their business with other members in the *keiretsu*.<sup>102</sup> To some degree, however, this figure underestimates the extent of intra-group trading. The Japanese Fair Trade Commission's definition of affiliation trading, on which the 10% figure is based, takes a narrow interpretation of affiliation and thereby excludes relevant intra-group transactions<sup>103</sup> such as transactions between vertical suppliers and distributors that do not rely on a trading company for distributional sales.<sup>104</sup> After adding these transactions to the definition of affiliation trading, the percentage of intra-group trading rises to roughly 30% of total transactions by *keiretsu* groups.<sup>105</sup> This revised percentage is significant considering that the six largest *keiretsu* control roughly 25% of the total assets in the Japanese economy.<sup>106</sup> At the very least, such exclusionary trading, in combination with the aforementioned cohesive elements of *keiretsu* behavior, makes the *keiretsu* formidable competitors in most Japanese markets. More plausibly, however, the *keiretsu* impede competitive trade and operate in violation of Japan's Antimonopoly Act.<sup>107</sup>

### III. The Japanese Government's Response to *Keiretsu* Behavior

With the development of a world economy and the growth of Japan into a world economic power, the exclusionary business practices of the Japanese have increasingly been called into question. Challenges to these practices have ranged from changing economic sentiment within Japan itself to high level trade negotiations initiated by other nations. These negotiations include the United States-Japan Structural Impediments Initiative<sup>108</sup> and the Clinton administration's bilateral trade negotiation framework.<sup>109</sup> Japan's seemingly inadequate response to these negotiations is due to conflicting forces within the Japanese government and economy, but the underlying conflict is one of policy.<sup>110</sup> The two conflicting policies are the politically favored industrial policy, which encourages monopolistic markets, and the antimonopoly policy, which promotes competitive

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102. GERLACH, *supra* note 6, at 19.

103. *Id.*

104. Kozo Yamamura, *Will Japan's Economic Structure Change? Confessions of a Former Optimist*, in JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE? 13, 31 (Kozo Yamamura ed., 1990). Trading company transactions with group members account for 11.5% of total purchases and 4.6% of total sales of the *keiretsu*. HIGASHI & LAUTER, *supra* note 47, at 51. Manufacturing company transactions with group members, however, account for 12.4% of total purchases and 20.4% of total sales of the *keiretsu*. *Id.*

105. Hiroshi Okumura, *Seito-ka Dekinai 'Keiretsu' no Gorisei [The Unjustified Rationality of the 'Keiretsu']*, EKONOMISUTO, July 10, 1990, at 78-89.

106. GERLACH, *supra* note 6, at 9-12.

107. See Antimonopoly Act, *supra* note 26.

108. See Yoshikawa, *supra* note 64, at 489.

109. *White House Reacts Warmly to New Hosokawa Government*, KYODO NEWS, Aug. 6, 1993, available in WESTLAW, JAPANCON database [hereinafter *New Hosokawa Government*]. See *infra* part IV.

110. Yoshikawa, *supra* note 64, at 489.

markets.<sup>111</sup>

#### A. Japanese Industrial Policy and the Ministry of International Trade and Industry (MITI)

The Japanese industrial policy, a product of the Meiji restoration period, refers to the "planning required for optimum growth in the Japanese economy."<sup>112</sup> This policy evolved from the combination of Japan's unique economic situation<sup>113</sup> and its culture.<sup>114</sup> The policy focused on maximizing the population's real income by allocating scarce resources to the sectors of the economy that could use the resources most productively.<sup>115</sup> The result was a dramatic increase in Japan's competitive advantage in the area of international trade and a historical policy supporting *keiretsu* behavior.<sup>116</sup>

The primary governmental entity effectuating Japan's industrial policy is the Ministry of International Trade and Industry (MITI).<sup>117</sup> MITI is one of two governmental ministries that leads, directs, and advises the business sector.<sup>118</sup> MITI implements the industrial policy through its "regulation of production and distribution of goods and services."<sup>119</sup> From the outset, MITI's policy directives fundamentally conflicted with Japan's antimonopoly policy and the directives of the Japanese Fair Trade Com-

111. *Id.* The Ministry of International Trade and Industry is considered one of the Japanese government's most prestigious and powerful ministries, equaled only by the Ministry of Finance and the Ministry of Foreign Affairs. *Japan Trade Concessions: Hearing Before the Senate Comm. on Finance*, 102d Cong., 2d Sess. 137 (1992).

112. DANIEL METRAUX, *THE JAPANESE ECONOMY AND THE AMERICAN BUSINESSMAN* 89 (1989).

113. As a country with few agricultural prospects, Japan turned to industrialization during the Meiji restoration in 1868. MIYOHEI SHINOHARA, *INDUSTRIAL GROWTH, TRADE, AND DYNAMIC PATTERNS IN THE JAPANESE ECONOMY* 23 (1982). Japan ceased its economic isolation from world trade and began to encourage economic and financial concentration in industry. *Id.* The Japanese viewed such concentration as economically sound and beneficial to Japan on the whole. *Id.* The result was large trading conglomerates—the *zaibatsu*. *Id.* After World War II, the war-ravaged industrial sector of Japan was in disarray, but MITI, in keeping with past policies, resumed "relentless concentration on . . . industrial growth" despite the existence of antimonopoly laws and policy. ALLEN, *supra* note 15, at 86.

114. The industrial policy grew out of the very close relationship between business and government in Japanese culture. METRAUX, *supra* note 112, at 86-89. The Japanese people traditionally viewed the nation as one extended family, and therefore both business and government were united as part of a "family." *Id.* This expansive view of family was derived from a fundamental duty of loyalty to one's lord as espoused by Confucius. *Id.* As a result, loyalty to the national family united government and business in a complimentary relationship. *Id.*

115. The Japanese, in essence, take an economic approach to allocative efficiency. *Id.* at 89-91. Instead of producing a wide range of products, they focus their resources on industries in which they can produce quality, competitive goods. *Id.*

116. *Id.*

117. *Id.* at 93. There are six special responsibilities of MITI: supervising Japan's international trade; smoothing the flow of goods in Japan's economy; promoting manufacturing, mining, and distribution; assuring a steady supply of resources; administering small business policies; and promoting and guiding small business growth. *Id.*

118. The other ministry is the Ministry of Finance (MOF). *Id.* at 92.

119. *Id.* at 93.

mission (JFTC).<sup>120</sup> For example, in 1952 the price of cotton began to drop, and MITI responded by limiting the output of each cotton mill to 150,000 bales per month.<sup>121</sup> MITI enforced the restriction on output by threatening to reduce the amount of imported cotton to be allocated to the noncomplying mill.<sup>122</sup> This action resulted in a cartel that furthered the objectives of the Japanese industrial policy at the expense of competition in the marketplace and violated the antimonopoly policy.

MITI's primary objective is to implement the industrial policy, and in so doing, MITI utilizes its power of "administrative guidance."<sup>123</sup> This guidance typically aids corporations in failing industries and entails analyzing a corporation's business situation and suggesting a remedy.<sup>124</sup> Although administrative guidance is relatively informal in nature and lacks direct statutory authority, MITI uses it as a powerful internal mechanism to bring failing businesses in line with Japanese industrial policy.<sup>125</sup>

Through the administrative guidance of MITI and Japan's dedication to its industrial policy, the *keiretsu* have drawn support in opposition to the antimonopoly policy. In addition, MITI's power to exempt companies from the application of the Antimonopoly Act,<sup>126</sup> the widespread political support for the industrial policy from the Japanese people,<sup>127</sup> and MITI's implicit veto power over the actions of the JFTC each lend support to the *keiretsu*.<sup>128</sup> As a result, the *keiretsu* thrive in a favorable environment that not only tolerates *keiretsu* behavior but also encourages it.<sup>129</sup>

## B. Antimonopoly Policy and the Japanese Fair Trade Commission

The *keiretsu* are supported by the Japanese industrial policy, but their existence is strengthened by the weaknesses of Japan's antimonopoly policy and the Japanese Fair Trade Commission (JFTC).<sup>130</sup> The antimonopoly policy, an import of American economic values, has never meshed with Japanese culture for several reasons.<sup>131</sup> First, the establishment of cartels in the Japanese economy dates back to the nineteenth century and is con-

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120. The MITI promotes the concentration of resources which violates, at the very least, the purpose of the Antimonopoly Act. See *supra* Section I.

121. Yoshikawa, *supra* note 64, at 494.

122. *Id.*

123. Toghiaki Nakazawa & Leonard W. Weiss, *The Legal Cartels of Japan*, 34 ANTITRUST BULL. 642 (1989). Administrative guidance or *gyosei shido* "involves the use of influence, prestige, advice, and persuasion to encourage both corporations and individuals to work in particular directions that the government sees desirable." METRAUX, *supra* note 112, at 94. It is also much more than the "carrot and stick" approach. *Id.* It is a tradition of government working together with business toward a common goal. *Id.*

124. Nakazawa & Weiss, *supra* note 123, at 642.

125. ELLIOTT J. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 131-43 (1984).

126. HADLEY, *supra* note 4, at 376; IYORI & UESUGI, *supra* note 2, at 19.

127. METRAUX, *supra* note 112, at 86-89.

128. Yoshikawa, *supra* note 64, at 503.

129. METRAUX, *supra* note 112, at 86-89.

130. Yoshikawa, *supra* note 64, at 495.

131. See *supra* note 36 and accompanying text.

sequently ingrained in Japanese culture.<sup>132</sup> Second, the Japanese prefer cooperation over competition, which directly contradicts the basic premise behind Japan's antimonopoly policy.<sup>133</sup> In their view, collaboration with a business competitor to achieve a common goal is not criminal in nature. Third, the Japanese business culture supports lifetime service to, and employment by, one corporation, which dramatically reduces the mobility of the work force.<sup>134</sup> Consequently, the bankruptcy of a Japanese corporation is relatively severe for the company's employees and results in the need for a supportive infrastructure as found in the *keiretsu* system.<sup>135</sup> This established business system, therefore, works against the enforcement of Japan's antimonopoly policy and provides a far greater obstacle to enforcement than do mere individual offenders.

Enforcement of the Japanese antimonopoly policy also suffers due to the weakness of the Japanese Fair Trade Commission (JFTC), the agency entrusted with enforcing this policy.<sup>136</sup> In particular, the method used to appoint JFTC Commissioners and staff significantly biases the JFTC against stringent enforcement of the antimonopoly policy.<sup>137</sup> For the most part, JFTC Commissioners have not been lawyers, judges, or law professors since the early 1950s.<sup>138</sup> Instead, Commissioners were appointed from opposing governmental ministries such as the Ministry of Finance (MOF) and MITI.<sup>139</sup> Of the five Commissioner positions, including the chairman, officials from MITI, MOF, and the Ministry of Justice customarily fill three of these positions,<sup>140</sup> while members of the Ministry of Foreign Affairs or the Bank of Japan typically account for the remaining two positions.<sup>141</sup> These leaders of the JFTC tend to bring strong biases from their former ministry positions that favor Japan's industrial policy and impede the enforcement of antimonopoly legislation. As a result, the JFTC is unlikely to adequately enforce Japan's antimonopoly policy against the powerful and politically supported *keiretsu*.

Political opposition to the JFTC from organized industry and the bureaucracy further inhibits enforcement of the antimonopoly policy.<sup>142</sup> In contrast, MITI and other opponents of the JFTC have traditionally received strong support from the Liberal Democratic Party, Japan's ruling

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132. The first cartel was the Paper Manufacturing Federation formed in 1880. IYORI & UESUGI, *supra* note 2, at 2.

133. Yoshikawa, *supra* note 64, at 495.

134. *Id.* at 496.

135. *Id.*

136. Antimonopoly Act, *supra* note 26, art. 27(1).

137. Yoshikawa, *supra* note 64, at 497.

138. *Id.*

139. The Ministry of Finance (MOF) is the business sector's counterpart to MITI. MOF is responsible for the monetary and financial policies of the Japanese economy that include the national budget. MOF also effectuates the Japanese industrial policy. METRAUX, *supra* note 112, at 92-93.

140. Yoshikawa, *supra* note 64, at 497.

141. *Id.*

142. ALLEN, *supra* note 15, at 42.

party since the post-war occupation.<sup>143</sup> The Liberal Democratic Party's thirty-eight year rule ended, however, with Morihiro Hosokawa's election as Prime Minister of Japan in August 1993.<sup>144</sup> Hosokawa was the candidate from a seven-party coalition, but his term in office was cut short when he resigned amid allegations of financial scandal. On April 28, 1994, Tsutomu Hata succeeded Hosokawa as the new prime minister and coalition leader. Whether Hata's election will lead to a stronger JFTC and Japanese antimonopoly policy remains uncertain, but the change of political parties in Japan may signal wavering support for MITI and the Japanese industrial policy. The United States, nevertheless, does not expect a dramatic change in Japan's traditional policies.<sup>145</sup>

### C. Recession, Rationalization, and Other Cartels That Enhance *Keiretsu* Behavior

During the rule of the Liberal Democratic Party, the JFTC also acted in its own way to support *keiretsu* behavior through its power to authorize special cartels.<sup>146</sup> The 1953 Amendment empowered the JFTC to exempt industries from application of the Antimonopoly Act based on the presence of certain economic conditions in the industries.<sup>147</sup> This amendment authorized the JFTC to exempt both depression and rationalization cartels as well as other cartels under so called "bypass statutes."<sup>148</sup>

The JFTC may exempt depression cartels if "there exists an extreme disequilibrium of supply and demand for a particular commodity."<sup>149</sup> To qualify for exemption, the commodity's price must be below the average cost of production and a considerable portion of the producers must be in jeopardy of being forced out of business.<sup>150</sup> In such a situation, the JFTC may approve an exemption to alleviate the harmful effects of excessive competition.<sup>151</sup>

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143. Yoshikawa, *supra* note 64, at 496. For example, in 1968 the JFTC refused to allow a merger between Yawata Steel and Fuji Steel. *Id.* In response, the Liberal Democratic Party threatened to "reorganize" the JFTC Commission on constitutional grounds and in the end the JFTC yielded to the pressure. *Id.* at 496-97. The Liberal Democratic Party's threat of "reorganization" was based on an alleged violation of Article 65 of the Japanese Constitution. *Id.* Article 65 mandates that the Cabinet shall have all executive power. *Id.* Since the Antimonopoly Law (Article 28) grants the JFTC power independent from the Cabinet, the Liberal Democratic Party asserted that the JFTC violated Article 65 and could be reorganized on that basis. *Id.*

144. *New Hosokawa Government*, *supra* note 109.

145. See generally *U.S. Defers Decision on Trade Steps Against Japan*, KYODO NEWS, May 1, 1994, available in WESTLAW, JAPANCON database.

146. The definition of "cartel" includes all "concerted activity" of entrepreneurs to restrain production, sales, or price of a commodity. See generally Antimonopoly Act, *supra* note 26, arts. 24-3, 24-4.

147. IYORI & UESUGI, *supra* note 2, at 15-16.

148. Antimonopoly Act, *supra* note 26, arts. 24-3, 24-4. Yoshikawa, *supra* note 64, at 492.

149. Antimonopoly Act, *supra* note 26, art. 24-3(1).

150. *Id.*

151. *Id.*



In addition, the JFTC may approve rationalization cartels "where they are particularly necessary for effecting an advancement of technology, an improvement in the quality of goods, a reduction in costs, an increase in efficiency and other rationalization of enterprises."<sup>152</sup> These exempted cartels are meant to further industry and to reflect the underlying industrial policy of Japan. In other words, the exemption demonstrates the Japanese belief that cooperation supersedes competition and that cooperation serves to promote innovation better than competition.<sup>153</sup>

In addition to exemptions for depression and rationalization cartels, individual statutes, known as "bypass statutes," allow more exceptions to antimonopoly laws.<sup>154</sup> These statutes derive support from the business community and MITI as a means for advancing the industrial policy.<sup>155</sup> These exemptions extend to enterprises of small and medium size, to governmentally regulated businesses, and to import and export enterprises.<sup>156</sup>

The exemptions for depression, rationalization, and "bypass statute" cartels codify a broader range of exceptions than those found in American antitrust law.<sup>157</sup> In 1963, for example, empirical data showed that legal cartels accounted for about 28% of Japanese exports of manufactured goods.<sup>158</sup> Although this percentage subsequently dropped to around 10%, these percentages ignore the possible rise in illegal cartels.<sup>159</sup> Legalized cartel exemptions, nevertheless, allow a significant number of industries to conduct business without antimonopoly barriers.<sup>160</sup> Through approval of legalized cartels, the JFTC furthers monopolistic activity that would be illegal under American standards, and the *keiretsu* experience a favorable environment for their monopolistic behavior.<sup>161</sup> Whether this favorable environment will change under the Hata administration remains to be seen and will undoubtedly depend upon negotiations with foreign nations, particularly the United States.<sup>162</sup>

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152. *Id.* art. 24-4(1).

153. METRAUX, *supra* note 112, at 83-86, 89.

154. Yoshikawa, *supra* note 64, at 492.

155. *Id.*

156. *Id.* Two of the primary exemption statutes have been the Stabilization of Specific Small and Medium Enterprise Temporary Measures Act, which allowed depression cartels for certain small businesses, and the Export Trading Act, which authorized export cartels. IVORI & UESUGI, *supra* note 2, at 19.

157. Iyori Hiroshi, *Antitrust and Industrial Policy in Japan: Competition and Cooperation*, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY 56, 66 (Gary Saxonhouse & Kozo Yamamura eds., 1986).

158. Nakazawa & Weiss, *supra* note 123, at 643.

159. *Id.*

160. *Id.*

161. *Id.*

162. See *New Hosokawa Government*, *supra* note 109.

#### IV. Bilateral Trade Negotiations and Super 301—International Challenges to *Keiretsu* Power

In 1989, the United States faced a mounting trade deficit, most of which was owed to Japan, and complex nontariff barriers to U.S. products entering Japanese markets.<sup>163</sup> The Bush Administration, in an effort to open Japanese markets and reduce the trade deficit, launched the United States-Japan Structural Impediments Initiative (SII) on May 25, 1989.<sup>164</sup> Under this initiative, U.S. negotiators "aimed at addressing the underlying structural barriers to balance of payments adjustment and promoting more efficient, open, and competitive markets in Japan and the United States."<sup>165</sup> According to Senator Max Baucus, Chairman of the Senate Subcommittee on International Trade, negotiators identified the *keiretsu* as a significant structural impediment to U.S. trade in Japan. Consequently, the United States challenged the *keiretsu* under SII.<sup>166</sup>

The United States asserted that *keiretsu* relationships must be made "more open and transparent" regarding intercorporate shareholding, directorate practices, and other anticompetitive behavior.<sup>167</sup> Japan formally agreed with the fundamental U.S. position and committed itself to examine, and revise where necessary, its governmental policies regarding anticompetitive practices of the *keiretsu*.<sup>168</sup> Japan later reaffirmed formal commitments to monitor the six major *keiretsu* groups through the Japanese Fair Trade Commission (JFTC) to take required measures for making the *keiretsu* "more open and transparent," to expand the scope of corporate disclosure, and to improve shareholder's rights.<sup>169</sup> Despite this signed agreement, enforcement of these policies has lagged far behind Japan's formal assurances to the United States.<sup>170</sup>

In evaluating Japanese progress under SII, Senator Baucus asserted in 1992 that SII failed to address the *keiretsu* problem.<sup>171</sup> He stated: "We don't need another meaningless negotiation followed by another declaration of victory."<sup>172</sup> Senator Baucus believed we should reinstate the Super 301 provision of the 1988 Omnibus Trade and Competitiveness Act.<sup>173</sup>

163. Yamamura & Vandenberg, *supra* note 8, at 245.

164. *United States-Japan Structural Impediments Initiative*, *supra* note 10, at 1.

165. *Full Text of U.S. Comments on Japanese Reports on SII-1*, KYODO NEWS, May 22, 1991, at 1, available in WESTLAW, JAPANECOM database [hereinafter *Japanese Reports*].

166. *United States-Japan Structural Impediments Initiative*, *supra* note 10, at 2.

167. *Japanese Reports*, *supra* note 165, at 3.

168. *Phase II*, *supra* note 3, at 1. According to a Hong Kong business association president, "it's all right in [Japanese] culture to lie to a foreigner," and thus the United States should continue pressing Japan to fulfill its commitments. *Id.* at 4.

169. *Highlights of SII Report on Japan's Commitments*, KYODO NEWS, July 30, 1992, available in WESTLAW, JAPANECOM database.

170. *Phase II*, *supra* note 3.

171. *Structural Impediments Initiative (SII) Review: Hearings Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 102d Cong., 2d Sess. 3-5 (1992).

172. *Id.*

173. *Id.*; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301, 1988 U.S.C.A.N. (102 Stat.) 1164-68 (amending 19 U.S.C. § 2411).

Super 301 expired in 1990 after a two year reinstatement.<sup>174</sup> While in effect, Super 301 required the United States Trade Representative to identify major foreign trade barriers and distortion practices, to enter negotiations in an attempt to alleviate those restraints on trade, and if negotiations failed, to initiate sanctions equal to the restraint's cost to the United States.<sup>175</sup> Super 301, during its two year viability, effectively opened markets in Japan and other countries for U.S. satellites, forest products, supercomputers, agricultural products, and other commodities.<sup>176</sup> The Bush Administration, however, remained committed to SII negotiations as a superior means of securing Japanese concessions and subsequent action.<sup>177</sup>

After President Clinton's election in 1992, he reaffirmed his support for the policy of pressing Japan to open markets through continuing negotiations.<sup>178</sup> Initially, however, President Clinton did not come out in full support of Super 301.<sup>179</sup> Instead, the President's top economic advisor, Laura Tyson, suggested that bilateral negotiations for individual product markets might be initiated, specifically citing the *keiretsu* dilemma as an issue to be addressed.<sup>180</sup> According to Tyson, the best policy was a "multi-track approach," uniting sectoral negotiations with existing multilateral efforts.<sup>181</sup>

During 1993, trade negotiations continued with Japan, but the framework for negotiation changed to a "results-oriented" approach. In July of 1993, President Clinton and then Prime Minister of Japan, Kiichi Miyazawa, agreed to a new framework for bilateral trade negotiations.<sup>182</sup> Under this agreement, trade negotiations will focus on sectoral and structural barriers to trade between the two countries, which includes the *keiretsu*. Japan and the United States will subsequently evaluate the effectiveness of "measures and policies taken in each sectoral and structural area based on 'sets of objective criteria, either qualitative or quantitative or both.'"<sup>183</sup>

According to U.S. Treasury Secretary Lloyd Bentsen, the agreement utilizes "quantitative benchmarks" to achieve specific trade results and provides for "sector-by-sector" accords.<sup>184</sup> The Miyazawa Administration, however, asserted that Japan only agreed to a standard of "tangible pro-

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174. *Structural Impediments Initiative (SII) Review*, *supra* note 171.

175. 139 CONG. REC. S1506 (1993).

176. 139 CONG. REC. S1030 (1993).

177. *Id.*

178. *U.S. to Keep Pressing Japan on Opening Markets*, KYODO NEWS, Feb. 1, 1993, available in WESTLAW, JAPANECOM database.

179. 139 CONG. REC., *supra* note 176, at S1030.

180. *Highlights of SII Report on Japan's Commitments*, *supra* note 169.

181. *Id.*

182. *Japan, U.S. Agree on Numerical Benchmarks, Bentsen Says*, KYODO NEWS, available in WESTLAW, JAPANECOM database.

183. *Id.*

184. *Id.*

gress" and refused to accept specific target criteria.<sup>185</sup> Japanese officials also stressed that the agreement on "objective criteria" was not binding and would not subject Japan to sanctions if measurable targets were not achieved.<sup>186</sup> Although bilateral trade negotiations continue with Japan, according to Joan Spero, U.S. Undersecretary of State for Economic, Business and Cultural Affairs, "progress to date has been disappointing."<sup>187</sup>

In March 1994, President Clinton responded to the slow progress by issuing an executive order reinstating the Super 301 trade measure.<sup>188</sup> According to U.S. Trade Representative Mickey Kantor, the reinstatement of Super 301 is not targeted at any country in particular and will not lead to immediate sanctions.<sup>189</sup> The newly revived trade measure does not even require the U.S. Trade Representative to specify targeted countries until September 30, 1994, which is six months after the disclosure of the annual National Trade Estimate report.<sup>190</sup> At that time, however, the Trade Representative will identify "priority foreign country practices" which if eliminated would provide the greatest potential for U.S. exports to expand.<sup>191</sup> Twenty-one days after identifying a country's practices, the United States will attempt to negotiate a sufficient reduction or elimination of these identified trade practices over a twelve to eighteen month period.<sup>192</sup> Only after the failure of these negotiations will sanctions be imposed.<sup>193</sup>

As expected, President Clinton's reinstatement of Super 301 incited protests from the Hosokawa administration.<sup>194</sup> Prior to Super 301's revival, Japan expressed a willingness to contain the Clinton administration's inclination to revive Super 301 for retaliation purposes<sup>195</sup> and also reaffirmed its rejection of U.S. demands for setting specific target levels on trade.<sup>196</sup> After the reinstatement, Japan challenged Super 301 as discordant with dispute settlement rules of the soon to be established World Trade Organization (WTO).<sup>197</sup> Japan further emphasized that the United

185. *Hosokawa, Clinton May Meet Around September 27 in New York*, KYODO NEWS, Aug. 11, 1993, available in WESTLAW, JAPANECON database.

186. *Japan, U.S. Agree on Numerical Benchmarks, Bentsen Says*, supra note 182.

187. *Senior U.S. Official Blasts Tokyo for Slow Trade Action*, supra note 3.

188. *U.S. Reinstates Super 301 Trade Weapon*, KYODO NEWS, Mar. 3, 1994, available in WESTLAW, JAPANECON database. Senator Max Baucus praised the reinstatement as sending "a clear message to Japan—negotiate with good faith, open your market or face sanctions." *Congress Hails Clinton's Super 301 Decision*, KYODO NEWS, Mar. 3, 1994, available in WESTLAW, JAPANECON database.

189. *U.S. Reinstates Super 301 Trade Weapon*, supra note 188.

190. *U.S. Statement on Executive Order Reinstating Super 301*, KYODO NEWS, Mar. 3, 1994, available in WESTLAW, JAPANECON database.

191. *U.S. Reinstates Super 301 Trade Weapon*, supra note 188.

192. *Id.*

193. *Id.*

194. *Japan's Statement on Super 301*, KYODO NEWS, Mar. 4, 1994, available in WESTLAW, JAPANECON database.

195. *Hosokawa Willing to Stop U.S. Threat of Trade Sanctions*, KYODO NEWS, Jan. 12, 1994, available in WESTLAW, JAPANECON database.

196. *Id.*

197. *Japan's Statement on Super 301*, supra note 194.

States should proceed in a "sensible manner" and should realize the necessity of a "restrained response."<sup>198</sup> The Hosokawa administration, however, did reconfirm Japan's intent to implement voluntary measures that would increase access to Japanese markets.<sup>199</sup>

Whether President Clinton's multitrack approach, complimented by the reinstatement of Super 301, will provide an effective means of suppressing *keiretsu* activities remains to be seen. Nevertheless, it is clear that *keiretsu* behavior must be reduced to equalize the trade imbalance between the United States and Japan. In this regard, the United States-Japan bilateral trade agreement offers no guarantees that the *keiretsu* will be affected, but the agreement's focus on tangible results suggests that the Japanese may now be more willing to take action than in the past.

## V. Suggested Actions to Remedy the *Keiretsu* Dilemma

The *keiretsu* remain strong despite the increasing power of the Japanese Fair Trade Commission and Japan's antimonopoly policy.<sup>200</sup> Additional foreign pressure and internal change is necessary to address the fundamental problem—the dominance of the Japanese industrial policy which encourages *keiretsu* behavior. To remedy this problem, Japan must largely abandon its industrial policy and strengthen its antimonopoly policy in order to bring Japanese business practices in line with international norms.

Negotiations between Japan and the United States should continue through a multitrack approach that focuses on alleviating structural impediments to international trade. Sectoral negotiations should complement these talks by reducing nontariff barriers in difficult markets. For example, U.S. negotiators should negotiate specific bilateral treaties to suppress *keiretsu* activities in certain industries such as the automotive industry, which accounts for 70% of Japan's roughly \$49 billion surplus with the United States.<sup>201</sup> Not surprisingly, the *keiretsu* dominate the Japanese automotive industry and act as a significant barrier to foreign automotive products entering Japan.<sup>202</sup> Strong bilateral agreements covering

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198. *Id.*

199. *Id.*

200. IVORI & UESUGI, *supra* note 2, at 20-21.

201. *Japan Trade Concessions: Hearing Before the Senate Comm. on Finance, supra* note 111, at 76. Micheline Maynard, *Poling Talks Tough on Trade*, USA TODAY, Feb. 24, 1993, at 2B.

202. The 1990 U.S. automotive trade deficit with Japan was \$31.1 billion which accounted for 76% of the U.S. deficit with Japan and 28% of the overall U.S. deficit. *Oversight of U.S. Trade Policy with Japan: Hearing Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 102d Cong., 1st Sess. 158 (1991). In 1989, U.S. auto parts companies exported \$638 million in auto parts to Japan; however, Japanese companies exported approximately \$11 billion in auto parts to the United States. *FTC and International Antitrust Laws: Hearing Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 92-93 (1990). Furthermore, there is concern that as Japanese auto makers produce more vehicles in the United States the *keiretsu* behavior will be replicated in the United States as well. *Id.*

automotive parts and other difficult markets, therefore, would be highly beneficial in opening Japanese markets.<sup>203</sup> The United States-Japan bilateral trade negotiation framework should provide an appropriate forum for generating these bilateral agreements without abandoning concern for generalized structural challenges.

Although the Structural Impediments Initiative and the Clinton administration's bilateral trade negotiation framework have motivated the discourse of change, the reinstatement of the Super 301 provision should focus necessary pressure against the *keiretsu* and should achieve tangible results.<sup>204</sup> Formerly, during Super 301's two-year viability, the United States successfully used the measure to pressure foreign nations into opening their markets to U.S. goods and services.<sup>205</sup> Additional successes should occur under Super 301's present reinstatement provided the United States does not allow the flexibility of Super 301 to undermine the provision's effectiveness.<sup>206</sup> To avoid impairing Super 301, the United States should remain committed to imposing sanctions if negotiations fail and should negotiate for actual results, not mere promises. If used correctly, Super 301 should add sufficient pressure to secure needed action within an appropriate time frame.<sup>207</sup>

Although Japan has already committed itself to suppressing *keiretsu* behavior, it must now take action—action that throughout history it has been unwilling to take.<sup>208</sup> In general, the United States should pressure Japan to effectuate business competition and not policy competition. Specifically, the United States should press the Hata administration to reduce Japan's exceptions for legalized cartels, to enforce a stronger antimonopoly policy, and to allocate more power to the JFTC to keep the industrial policy and MITI in check. The United States should also encourage the Japanese to realize the importance of Japan's role as the second largest economic power in the world today, to suppress Japan's heightened export orientation, and to divide the *keiretsu* into competitive companies. Without these measures, the *keiretsu* will continue to exist in violation of Japan's antimonopoly policy, and they will continue to suppress foreign trade in Japanese markets.

## Conclusion

By American standards, Japan has failed to effectuate its antimonopoly policy and the *keiretsu* illustrate this failure. The *keiretsu* are transparent networks of companies that maintain their collectivity through exclusionary trade practices, exclusive financing arrangements, few intra-group direct competitors, one group member per major industry, group-wide

203. See generally *Oversight of U.S. Trade Policy with Japan*, *supra* note 202, at 154-283.

204. See generally 139 CONG. REC., *supra* note 175, at S1503.

205. 139 CONG. REC., *supra* note 176, at S1030.

206. See *U.S. Statement on Executive Order Reinstating Super 301*, *supra* note 190.

207. *Id.* See also *Baucus Says Executive Order May Revive 'Super 301'*, KYODO NEWS, Nov. 23, 1993, available in WESTLAW, JAPANCON database.

208. See *supra* part III.

projects, intercorporate shareholding, presidential councils, and interlocking directorates. Although these practices suggest antitrust violations, the *keiretsu* receive strong support from Japan's underlying industrial policy, the powerful Ministry of International Trade and Industry, and an ineffective Japanese Fair Trade Commission.

Throughout Japanese history, Japan has encouraged and even idealized the methods and motivations of the *keiretsu*.<sup>209</sup> *Keiretsu* behavior carried the Japanese economy from the devastation of World War II to the second most powerful economy in the world today. Yet, despite the success of the *keiretsu*, they contradict not only Japanese national laws and policy, but international notions of commercial fairness as well. On these grounds, the United States challenged the *keiretsu* through the Structural Impediments Initiative and the Clinton administration's bilateral trade framework. Although these negotiations have succeeded in securing some concessions, Japan remains unwilling to take significant action to suppress nontariff trade barriers like the *keiretsu*. If this inaction continues, the United States should invoke sanctions against Japan through the newly reinstated Super 301 provision despite Japan's apparent readiness to counter such a measure.

In weighing its options, Japan should heavily consider its responsibilities as the world's second largest economic power and it should realize that international trading practices are premised on fundamental notions of fairness.<sup>210</sup> Due to Japan's status in international trade, it is imperative that Japan deal fairly with its international trading partners. To achieve fairness, Japan should seek to promote and maintain a competitive economy that does not unreasonably restrain either foreign or domestic trade in Japanese markets. Simply stated, Japan must learn to wield its immense economic power responsibly and in accord with international standards.

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209. See *supra* text accompanying notes 126-29.

210. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5 and 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [GATT]. Although the GATT does not specifically apply to structural impediments such as the *keiretsu*, it does provide the primary framework for international trade. *U.S. Sees Its Trade Laws Protected by GATT Accord*, KYODO News, Dec. 14, 1993, available in WESTLAW, JAPANECON database.