

1996

Flash of the Titans: A Picture of Section 301 in the Dispute Between Kodak and Fuji and a View Toward Dismantling Anticompetitive Practices in the Japanese Distribution System

Frank J. Schweitzer

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Schweitzer Frank J. "Flash of the Titans: A Picture of Section 301 in the Dispute Between Kodak and Fuji and a View Toward Dismantling Anticompetitive Practices in the Japanese Distribution System." *American University International Law Review* 11, no. 5 (1996): 847-875.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

FLASH OF THE TITANS:
A PICTURE OF SECTION 301 IN THE DISPUTE
BETWEEN KODAK AND FUJI AND A VIEW
TOWARD DISMANTLING ANTICOMPETITIVE
PRACTICES IN THE JAPANESE
DISTRIBUTION SYSTEM

Frank J. Schweitzer*

INTRODUCTION

The bilateral trading relationship between the United States and Japan prevails as one of the most important in the world today. As such, frequent trade disputes, not surprisingly, arise between the two economic superpowers.¹ The latest battle pits Eastman Kodak Company ("Kodak") against Fuji Photo Film Co., Ltd. ("Fuji").² The stakes are substantial. Kodak alleges \$5.6 billion in lost profits and seeks fair access to the Japanese film market³ valued at \$13.7 billion.⁴ In such trade disputes,

* Associate, International Trade Group, Dewey Ballantine. This paper was written prior to my association with Dewey Ballantine, as part of the degree requirements for an LL.M. at Georgetown University. The views, opinions and representations contained in this paper are my own and do not necessarily reflect those of either Eastman Kodak Company or Dewey Ballantine. This paper is for my parents for their guidance and for my wife, Jeannie, for her enduring support and encouragement.

1. The U.S. and Japan are presently engaged in trade rows in the aviation, construction and insurance sectors. The recent rift over renewal of the 1991 Semiconductor Agreement was only recently resolved by way of a new accord.

2. *Kodak Welcomes Investigation*, Int'l Trade Rep. (BNA) No. 12, at 1128 (July 5, 1995). This trade dispute is not Kodak's first engagement with the color film industry in Japan. The United States charged Japanese companies with dumping color negative photographic and chemical components in the United States. The International Trade Administration of the Department of Commerce made a preliminary ruling that there was dumping, with margins of 321% to 360% on Fuji photographic paper sold in the United States. The investigation ceased following a suspension agreement reached with Fuji Photofilm B.V. Ltd., Fuji Japan, and Konica Inc. *Id.*

3. The "film market" as used throughout this paper refers to both the Japanese consumer photographic film and consumer photographic paper markets.

4. Ben Dobbin, *Motorola's Strategic Ace Takes on Japan as Kodak CEO*, L.A. TIMES, Aug. 8, 1995, at D6.

the use by the United States of Section 301 of the Trade Act of 1974 ("Section 301"),⁵ sometimes called the "nuclear weapon"⁶ of the trade world, often proves controversial.

Section 301 authorizes the United States Trade Representative ("USTR") to take action against any "act, policy or practice"⁷ of a foreign country that is "inconsistent with" or "denies benefits" to the United States under international trade agreements,⁸ or that is "unjustifiable and burdens or restricts United States commerce."⁹ Section 301 also allows the USTR to take action where an act, policy or practice of a foreign country is "unreasonable" and burdens or restricts United States commerce.¹⁰ For example, Congress deemed the denial of "market opportunities" through "anticompetitive practices" "unreasonable."¹¹ Where an international agreement does not cover the trade sector at issue, or the purported anticompetitive practice constituting a trade barrier, the United States can use the threat of Section 301 as an effective tool in negotiations with foreign governments.¹²

The United States exported over half a trillion dollars worth of goods and service in 1993.¹³ The government expects that number to climb to

5. Trade Act of 1974, 19 U.S.C. §§ 2411-2420, as amended §§301-310.

6. Julius L. Katz, former deputy U.S. Trade Representative in the Bush Administration, and the president of Hills & Co., a Washington international trade consulting firm, said, "[It] is certainly useful as a threat and as a deterrent, but as with nuclear weapons, once you have been compelled to use them, you have lost both the battle and the war." Bruce Stokes, *Collision Course*, NAT'L J., Vol. 27, No. 33-34. In 1986, during testimony before the Senate Committee on Finance, Ambassador Clayton Yeutter, then U.S. Trade Representative, remarked that "Section 301 is the H-Bomb of trade policy; and in my judgment, H-bombs ought to be dropped by the President of the United States and not by anyone else." Judith Hippler Bello & Alan F. Homer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, AGGRESSIVE UNILATERALISM (Jagdish Bhagwati & Hugh Patrick, eds. 1990) at 52, citing *Presidential Authority to Respond to Unfair Trade Practices: Hearing on Title II of S. 1860 and S. 1862 Before the Senate Committee on Finance*, 99th Cong., 2d Sess. 19 (1986).

7. Trade Act of 1974, 19 U.S.C. § 2411(a)(1)(B).

8. *Id.* § 2411(a)(1)(B)(i).

9. *Id.* § 2411(a)(1)(B)(ii).

10. *Id.* § 2411(b)(1).

11. *Id.* § 2411(d)(3)(B)(i)(IV).

12. Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case For Section 301*, 23 LAW & POL'Y INT'L BUS. 263, 316 (1991-92).

13. David A. Gantz, *A Post-Uruguay Round Introduction To International Trade Law In The United States*, 12 ARIZ. J. INT'L & COMP. L. 1, 1 (1995), citing *Message*

\$1.2 trillion by the year 2000.¹⁴ Consequently, great political pressure exists to use Section 301 to afford U.S. industries fair and meaningful access to foreign markets presently laden with trade barriers.¹⁵ Section 301 persists as a resonating voice in trade diplomacy. Critics often proclaim it a rogue instrument when it is used to address the acts, practices and policies of foreign governments which Congress deems “unreasonable,” even if they do not violate United States’ rights under international trade agreements.¹⁶

This paper focuses on the discretionary use of Section 301 in response to Kodak’s claim of denied access to the Japanese film market because of “unreasonable” acts of the Japanese Government in its “toleration” of anticompetitive trade practices by Fuji. In addition, this paper considers the utility of Section 301 in response to private trade barriers which fall outside the scope of international trade agreements, and the prospects of summoning Section 301 in future trade disputes with Japan.

I. SECTION 301 OF THE TRADE ACT OF 1974, AS AMENDED

A. FOCUS ON JAPAN

Section 301, enacted by Congress with the intent to open foreign markets to United States exports, was

pursued by exceptionally aggressive means, a product of the egregious trade imbalance and frustration at foreign unfairness, real and perceived. And its most important single target was Japan. The administration

From the President Transmitting the Uruguay Round Trade Agreements to the U.S. Congress, H.R. Doc. 316, 103d Cong., 2d Sess. 1 (1994). United States goods and services exported in 1993 were in excess of \$660 billion, representing more than ten percent of the United States gross domestic product. *Id.*

14. Jeffrey E. Garten, *Is America Abandoning Multilateral Trade?*, FOREIGN AFF., Nov.-Dec. 1995, at 50, 52.

15. Gantz, *supra* note 13, at 111.

Between 1975 and February 1994, the Office of the U.S. Trade Representative initiated a total of ninety-one [Section 301] investigations. Of these, forty were terminated by the USTR—usually after the conclusion of an agreement with the respondent country—eighteen resulted in retaliation through the denial of trade benefits, and the rest were suspended, withdrawn, or resolved through on-going negotiations. *Id.*

See Thomas O. Bayard and Kimberly Ann Elliott, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY, 355-465 (1994) (providing a summary table and case summaries of the ninety-one Section 301 cases filed through 1994).

16. See Bello & Homer, *supra* note 6.

worked, for policy and political reasons, to spread the pain among countries, but there was no doubt which country Congress had most in mind.¹⁷

Analysts deemed Section 301 a matter of "export politics."¹⁸ This law starkly contrasts with almost all other United States trade remedies, which are designed to protect United States markets from increasing imports and unfair foreign competition.¹⁹ One author labeled the policy rationale forming the foundation of Section 301 "aggressive unilateralism."²⁰ A former Vice Minister of International Trade in Japan, in referring to Section 301, commented that "the U.S. uses its own criteria to determine unfairness, prosecutes the case itself, and hands down the sentence."²¹ Notwithstanding this perception of the United States as prosecutor, judge and executioner, it should be noted that Japan wields its own version of Section 301. The Japanese counterpart to the U.S. law provides the Japanese Government with the authority to impose additional duties on products from a foreign country that discriminates against Japanese goods, shipping, or airlines.²²

B. OVERVIEW OF SECTION 301

The USTR controls the proceedings under Section 301 from start to finish, subject to any direction of the President.²³ The USTR retains the discretion to decide whether it will undertake an investigation and to determine what terms, if any, of Section 301 apply and, if so, whether

17. I.M. Destler, *AMERICAN TRADE POLITICS*, 127 (3d. ed. 1995).

18. *Id.*

19. Gantz, *supra* note 13, at 13.

20. Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM* 11 (Jagdish Bhagwati & Hugh Patrick, eds. 1990). Jagdish Bhagwati coined the phrase.

21. Makota Kurada, *We've Had Enough of John Wayne*, *INT'L ECON.*, Nov.-Dec. 1988, at 67, *quoted in* *BREAKING NEW GROUND IN U.S. TRADE POLICY: A STATEMENT BY THE RESEARCH AND POLICY COMMITTEE OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT* 52 (Westview Press 1991).

22. MITSUO MATSUSHITA & THOMAS J. SCHOENBAUM, *JAPANESE INTERNATIONAL TRADE AND INVESTMENT LAW* 89 (1989). One can find the law in Article 7 of the Customs and Tariff Law. *Id.* The European Union also has a version of Section 301. The measure is found in Council Regulation 2641/84. Wolfgang W. Leirer, *Retaliatory Action In United States And European Trade Law: A Comparison Of Section 301 Of the Trade Act of 1974 And Council Regulation 2641/84*, 20 *N.C. J. INT'L L. & COM. REG.* 495 (1995).

23. Trade Act of 1974, 19 U.S.C. §§ 2411-2420.

to retaliate and what form the retaliation should take.²⁴ Countries confronted with a Section 301 investigation have the option to settle the dispute with the United States or face retaliatory measures.²⁵

1. Investigation By The USTR

Any interested person may file a petition with the USTR requesting that it take action under Section 301.²⁶ The USTR reviews the allegations and determines within 45 days after receipt of the petition whether or not to initiate an investigation.²⁷

The USTR may self-initiate an investigation after consulting with appropriate private sector advisory committees.²⁸ On July 3, 1995, the USTR announced that it would investigate the alleged anticompetitive business practices in the Japanese film market.²⁹ The USTR has up to one year to conclude the investigation and make a determination.³⁰

2. Mandatory Action Under Section 301

Under Section 301, if the USTR determines that a foreign country act, policy, or practice "violates, or is inconsistent with" a "trade agreement," to which the United States is a party³¹ or is "unjustifiable and burdens or restricts U.S. commerce,"³² then the USTR takes "mandatory" action, subject to any specific direction of the President, to enforce the American trade agreement rights or to obtain the elimination of the act, policy or practice. Section 301, however, does not require the USTR to take action in certain instances.³³ With respect to the manda-

24. *Id.* § 2411(c).

25. *Id.* § 2411(a)(2)(B).

26. *Id.* § 2412(a)(1).

27. *Id.* § 2412(b).

28. *Id.* In addition, the statute requires public notice of determinations. Trade Act of 1974, 19 U.S.C. §2412(a)(4). The statute requires publication of a summary of the petition and an opportunity for the presentation of views, including a public hearing if timely requested by the petitioner or any interested person, in the case of decisions to initiate an investigation. *Id.*

29. *Acting On Kodak Complaint, USTR To Investigate Japanese Film Market*, Int'l Trade Rep. (BNA) No. 12, at 1128 (July 5, 1995).

30. Trade Act of 1974, 19 U.S.C. § 2414(a)(2)(B).

31. *Id.* § 2411(a)(1)(B).

32. *Id.* § 2411(a)(1)(B)(ii).

33. *Id.* § 2411(a)(2). The statute does not require the USTR to take action if the Dispute Settlement Body of the World Trade Organization adopts a report or issues a

tory action provision, Kodak alleges violations of the Organization for Economic Cooperation and Development Code of Liberalization of Capital Movements and the United States-Japan Friendship, Commerce and Navigation Treaty.³⁴

Section 301 is perhaps most justifiable when used to protect rights of the United States under international agreements.³⁵ The policing of international agreements and the Kodak allegations of treaty violations, however, are not the subject of this paper. Rather, the paper considers Kodak's allegations of the anticompetitive practices of Fuji amounting to unfair trade practices under the Japanese Antimonopoly Act, and the toleration by the Japanese Government of those practices, even though they may not per se violate any United States' rights under international trade agreements.

3. Discretionary Action Under Section 301

If the USTR determines that the act, policy or practice is "unreasonable or discriminatory and burdens or restricts United States commerce"³⁶ and requires action by the United States, the USTR has dis-

ruling that countries have not violated U.S. trade agreement rights *Id.* In addition, the USTR need not act if the foreign government has agreed to an imminent solution to the burden or restriction on U.S. commerce, or has agreed to provide satisfactory trade benefits; or where the USTR finds, in "extraordinary cases," that action would have an adverse impact on the economy of the United States substantially out of proportion to the benefits of action, or finds that action would cause serious harm to the national security of the United States. *Id.*

34. Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063.

35. See Sykes, *supra* note 12, at 269-91.

36. Trade Act of 1974, 19 U.S.C. §2411(b)(1). The Act defines "unreasonable" to include the following:

(3)(A) An Act, policy, or practice is unreasonable if the act, policy while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.

(B) Acts, policies, and practices that are unreasonable include, but are not limited to any, act, policy, or practice, or any combination of acts, policies, or practices, which—

(i) denies fair and equitable

(I) opportunities for the establishment of an enterprise,

(II) provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade Related Aspects of Intellectual Property Rights referred to in section 3511(d) of this

cretion to take all "appropriate and feasible action,"³⁷ subject to the specific direction, if any, of the President, to obtain "the elimination of the act, policy or practice."³⁸ Congress vests the USTR with the discretion to determine whether action under Section 301 would be effective in addressing the petitioner's grievance.³⁹

4. Negotiating With Japan And Section 301 Looming Overhead

Section 301 requires the USTR to initiate consultations with the foreign government on the same date that an investigation is initiated.⁴⁰ Recently, high profile bilateral disputes with Japan have taken a predictable pattern in which "Japan appears intransigent and defensive and doesn't move. America demands major changes . . . An eleventh-hour deal is reached."⁴¹ Foreign governments, however, need not negotiate with the United States if they consider the costs of settling the dispute to be greater than the imposed retaliatory measures.

The Japan External Trade Organization published a report in which they criticized the "U.S. tendency to resort to policies and measures based on unilateral judgments [in which] determinations under Section

title,

(III) nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection, or

(IV) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market,

(ii) constitutes export targeting, or

(iii) constitutes a persistent pattern of conduct that-

(I) denies workers the right of association,

(II) denies workers the right to organize and bargain collectively,

(III) permits any form of forced or compulsory labor,

(IV) fails to provide a minimum age for the employment of children, or

(V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.

Trade Act of 1974, § 301(d), 19 U.S.C. § 2411(d)

37. Trade Act of 1974, 19 U.S.C. §2411(b)(2).

38. *Id.*

39. *Id.* § 2411.

40. *Id.* § 2413(a).

41. *Comments of Commerce Undersecretary for International Trade Jeffrey Garten, Garten Proposes New Framework In Trade Negotiations With Japan*, Int'l Trade Rep. (BNA) No. 12, at 1312 (Aug. 2, 1995).

301 are made unilaterally by the United States, and recipients are without recourse to dispute settlement procedures provided in international agreement."⁴² In the Kodak-Fuji dispute, the Japanese Government insists that it will not negotiate with the United States under the threat of unilateral trade sanctions and would prefer to use multilateral mechanisms, such as the World Trade Organization, the U.S.-Japan Framework for a New Economic Partnership talks, or the Organization for Economic Cooperation and Development.⁴³

5. Retaliation And Proportionality

The power of Section 301 lies in its ability to deny access to the United States market. Upon the determination that retaliation is appropriate, the USTR may only impose sanctions affecting goods or services of the foreign country. These sanctions must be equivalent in value to the burden or restriction imposed by that country on United States commerce.⁴⁴ Section 301 authorizes the USTR to take several types of actions.⁴⁵ The USTR must make any action, taken pursuant to Section 301, consistent with United States obligations under international agreements.⁴⁶

42. INDUSTRIAL STRUCTURAL COUNCIL, 1993 REPORT ON UNFAIR TRADE POLICIES BY MAJOR TRADING PARTNERS 19 (Jetro 1993).

43. *Fuji Officials Deny Kodak Charges of Japanese Trade Barriers For Film*, Int'l Trade Daily (BNA) (Aug. 1, 1995). See *International Trade, U.S., Japan Begin Discussion on Kodak Section 301 Petition*, INT'L TRADE DAILY (BNA) (Oct. 6, 1995) (noting that the Japanese Government has stated it prefers the World Trade Organization forum to handle the dispute).

44. Trade Act of 1974, 19 U.S.C. § 2411(a)(3).

45. *Id.* The USTR can (1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to carry out a trade agreement with the foreign country involved; (2) impose duties or other import restrictions on the goods of, and notwithstanding any other provision of law, fees or restrictions on the services of, the foreign country for such time as the USTR deems appropriate, Trade Act of 1974, §301(c)(1)(B), 19 U.S.C. §2411(c)(1)(B); (3) withdraw or suspend preferential duty treatment under certain U.S. trade agreements, Trade Act of 1974, §301(c)(1)(C), 19 U.S.C. §2411(c)(1)(C); or (4) enter into binding agreements that commit the foreign country to eliminate or phase out, the act, policy or practice which burdens or restricts U.S. commerce, Trade Act of 1974, §301(c)(1)(D), 19 U.S.C. §2411(c)(1)(D); or provide the United States with compensatory trade benefits that are satisfactory to the USTR. *Id.*

46. *Id.* If the USTR determines that its action will be in the form of import restrictions, it must give preference to tariffs over other forms of import restrictions. It must also consider substituting, on an incremental basis, an equivalent duty for any

C. SECTION 301 AND THE WORLD TRADE ORGANIZATION

U.S. obligations under the Agreement Establishing the World Trade Organization ("WTO"),⁴⁷ influence Section 301 and the statute incorporates by reference the Dispute Settlement Body of the WTO.⁴⁸ In the past, the filing of GATT complaints became part of the Section 301 process. The statute, however, did not require the United States to wait for the final results of GATT dispute resolution proceedings before taking unilateral action.⁴⁹ The Uruguay Round debate centrally focused

other form of import restriction imposed. Any action with respect to export targeting must reflect, to the extent possible, the full benefit level of the targeting over the period during which the action taken has effect. Trade Act of 1974, 19 U.S.C. §2411(c)(5).

47. *Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 14, 1995, reprinted in H.R. Doc. 316, 103d Cong., 2d Sess. 1326 (1994).

48. Trade Act of 1974, 19 U.S.C. § 2411(a)(2)(A). Section 303 requires the United States to exercise international procedures for dispute resolution. These international mechanisms must proceed parallel to the domestic investigation. The same day that the USTR makes its determination, it must initiate an investigation and request consultations with the foreign country concerned, regarding the involved issues. The USTR may ask to delay its request for up to 90 days in order to verify or improve the petition to ensure an adequate basis for consultation. Should consultations with the foreign government fail and the dispute involves issues covered by a trade agreement, the agreement obligates the USTR to request formal dispute settlement under the agreement before the earlier of the close of that consultation period or 150 days after the beginning of the consultation. The USTR must seek information and advice from the petitioner, and from appropriate private sector advisory committees in preparing presentations for consultations and dispute settlement proceedings. Trade Act of 1974, § 303, 19 U.S.C. § 2413. When a Section 301 investigation begins, the U.S. government undertakes consultations with the foreign government of the involved country. These negotiations take place at the WTO headquarters in Geneva when the alleged violations relate to GATT 1994 or any of the Uruguay Round Agreements. *Id.*

49. G. Richard Shell, *Trade Legalism And International Relations Theory: An Analysis Of The World Trade Organization*, 44 DUKE L.J. 829, 844 (1995). In the past, under the GATT, when a GATT panel found a government's complaint concerning an alleged violation of GATT justifiable, the violating country could indefinitely "block" adoption of the panel's report, leaving the dispute unresolved and the petitioning member of GATT without recourse. *Id.* That scenario changed as of January 1, 1995, with the implementation of the Uruguay Round Agreements. Countries found violating GATT provisions are no longer able to "block" adverse panel reports. *Id.* In addition, the Agreement now authorizes countries successful in bringing GATT claims to withdraw Uruguay Round trade benefits from the violating country, if following review by the Dispute Settlement Body or the Appellate Body of the WTO, the matter cannot be resolved in a satisfactory manner. *Id.* at 848-51.

on this unilateral action. The debate appeared to produce "a general desire by all nations to stem growing reliance on unilateral threats and trade sanctions and replace this free-for-all with a stable dispute resolution system that could be relied on to eliminate protectionist trade rules."⁵⁰

The WTO agreements expanded coverage to other trade sectors including services, intellectual property protection, industrial goods and agricultural goods.⁵¹ No multilateral means, however, were crafted to redress certain types of anticompetitive practices. Japan "continues to practice highly managed trade that runs counter to the spirit of the WTO."⁵² The Clinton Administration believes that

many of the barriers in Japan—lack of antitrust protection, interlocking relations among companies that block entry by foreign firms, collusion between suppliers and manufacturers, and suffocating regulations—are not yet within the competence of the World Trade Organization, nor is there a consensus on creating and enforcing rules to deal with them.⁵³

Although the WTO agreements do not contemplate such private barriers to trade, the effectiveness of Section 301 remains in these areas.⁵⁴ An examination of Japanese trade barriers, past and present, places the present dispute between Kodak and Fuji in context and provides insight into the dynamics of the bilateral trading relationship between the United States and Japan.

II. JAPANESE TRADE BARRIERS

A. HISTORICALLY

Commodore Matthew Perry landed his American fleet of warships in Japan in July of 1853. Perry arrived not as a warrior, but as an envoy

50. *Id.* at 845.

51. See Gantz, *supra* note 13, at 18-21.

52. Jeffrey E. Garten, *Is America Abandoning Multilateral Trade?*, FOREIGN AFF., Nov.-Dec. 1995, at 50.

53. *Id.* at 55.

54. Aubry D. Smith, *Bringing Down Private Barriers—An Assessment Of The United States' Unilateral Options: Section 301 Of The 1974 Trade Act And Extraterritorial Application of U.S. Antitrust Law*, 16 MICH. J. INT'L L. 241, 284 (1994). "[T]he scope for retaliation not authorized within the GATT is greatly reduced, but the private barriers potentially attacked with Section 301 are not correspondingly reduced; the reduction in unilateral means of securing market liberalization has not been matched with an increase in multilateral means to achieve the same ends." *Id.*

with a request from the United States Government that Japan open its borders to commerce.⁵⁵ In the feudal era, the Japanese perceived the invitation to engage in commerce as a prelude to control of Japan by foreign powers.⁵⁶ Japan, however, opened itself briefly to commerce but then slowly closed and remained shut to world trade for the most part until after World War II.⁵⁷

Following World War II, trade barriers in Japan consisted of foreign exchange allocations and other quantitative restrictions.⁵⁸ The Japanese Government primarily concerned itself with the protection and promotion of indigenous industry.⁵⁹ Japan forged this objective in the face of severe foreign exchange shortages.⁶⁰ The Japanese Government accomplished its objective by placing restrictions on both the type and amount of imports, in addition to the number of importers.⁶¹ These restrictions impacted imports of raw materials, finished products and advanced technology.⁶² "Allocation of foreign exchange for imports competing with the products of the infant industries in their development throes as well as for luxury goods was severely restricted."⁶³

This highly effective system of foreign exchange allocations and import quotas formed the center of Japan's protectionist policy until the early 1960's.⁶⁴ Following Japan's accession to the IMF in 1952 and GATT in 1955, import quotas dropped significantly⁶⁵ which forced Japan to turn to other barriers, including tariffs.⁶⁶ During the 1960's and 1970's Japan imposed higher tariffs than those imposed by either the United States or the Member States of the European Economic Community.⁶⁷

55. MALCOLM KENNEDY, *A SHORT HISTORY OF JAPAN*, 131-38 (1963).

56. MATSUSHITA & SCHOENBAUM, *supra* note 22, at iii.

57. *Id.*

58. Motoshige Itoh & Kazuhara Kiyono, *Foreign Trade and Direct Investment, in INDUSTRIAL POLICY OF JAPAN*, 155, 158-60, 166-67 (Ryutaro Komiya et al. eds., 1988), *reprinted in* YUKIO YANAGIDA ET AL., *LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS*, 189-91 (1994) [hereinafter YANAGIDA].

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. YANAGIDA, *supra* note 58, at 189.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

Japan's rising trade surplus sparked world-wide criticism of its trade practices and resulted in trade tensions with the United States with respect to certain industries, including textiles, color televisions, iron and steel.⁶⁸ This criticism forced Japan to remove its trade barriers more quickly during the late 1960s and early 1970s.⁶⁹ The items affected by trade liberalization included color film in 1971.⁷⁰ "The indigenous industries on the way to growth were thus protected for quite a long time."⁷¹

B. TRADE BARRIERS TODAY

In general, foreign trade barriers to the United States include five groups:⁷² formal,⁷³ regulatory,⁷⁴ strategic, business and cultural. To-

68. YANAGIDA, *supra* note 58, at 189.

69. *Id.*

70. *Id.*

71. *Id.* at 190.

72. K. Blake Thatcher, Comment, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government*, 81 NW. J. INT'L L. & BUS. 492, 495, n.205 (1987) *citing*, CONG. RESEARCH SERV., MARKET ACCESS IN JAPAN: THE UNITED STATES EXPERIENCE, No. 85-37, at CRS 8-9 (1985) indicating that:

Formal barriers include tariffs, quotas and investment controls; regulatory barriers include a broad range of regulatory practices that block or obstruct trade such as product standards, government procurement, and customs approval; strategic barriers include industrial policy and administrative guidance practices; business barriers include aspects of the distribution system and business structure; and cultural barriers include buy-national attitudes.

Id.

73. *Id.* Section 301 petitions filed against formal trade barriers in Japan include the following:

USTR Petition Regarding Japan Tobacco, No. 301-50, 50 Fed. Reg. 37,609 (1985) (tariffs on tobacco products); Petition of Semiconductor Indus. Ass'n, No. 301-48, 50 Fed. Reg. 28,866 (1985) (past foreign investment restrictions preventing entry of United States semiconductor firm into Japanese market and past tariffs and quotas on semiconductor imports); Petition of Footware Indus. of Am., Inc., No. 301-36, 47 Fed. Reg. 56,428 (1982) (leather footware quota); Petition of Associated Tobacco Mfrs., No. 301-12, 44 Fed. Reg. 19,083 (1979) (import duties on pipe tobacco); Petition of Cigar Ass'n of Am., Inc., No. 301-17, 44 Fed. Reg. 19,083 (1979) (import duties on cigar tobacco); Petition of Tanners Council of Am., No. 301-13, 42 Fed. Reg. 42,413 (1977) (quantitative restrictions of leather imports).

Id. at 519 n.206.

74. *Id.* In one case, the threat of filing a Section 301 petition was used as lever-

day, it appears that the last two categories present the most difficulty for American producers seeking entry to the Japanese market and, not surprisingly, form the heart of Kodak's Section 301 Petition. Current Japanese barriers include "investment barriers, buy-Japanese policies, legalized cartels, licensing restrictions, financial support for research and development, and administrative guidance."⁷⁵

1. Administrative Guidance

The phrase "administrative guidance" is not a legal term of art and it appears nowhere in Japanese statutory law.⁷⁶ "Administrative guidance (*gyōsei shidō*) is a common Japanese regulatory technique that, although generally nonbinding, seeks to conform the behavior of regulated parties to broad administrative goals."⁷⁷ Informal regulation of Japanese business, by way of administrative guidance, is an important aspect of the government-business relationship to which Japanese companies show great deference.⁷⁸

Japanese businesses often prefer administrative guidance over formal approaches which result in legal decisions because it "preserves the important values . . . of harmony and consensus between government and industry."⁷⁹ Inherent problems exist with administrative guidance, such as the "arbitrary and capricious exercise of de facto governmental power and the infringement of individual rights . . . [as well as] the lack of transparency of the process."⁸⁰

age to compel Japan to modify its testing and certification procedures at American factories. These methods consisted of unreasonable uncrating and destruction procedures. *Id.* at 527. The Semiconductor petition alleged that "the Japanese Government had discriminated unreasonably against United States semiconductor manufacturers in its procurement policies and that such discrimination had created a burden on United States commerce." *Id.*

75. *Id.* at 528. See Garten, *supra* note 14, at 50 (discussing Japanese trade barriers).

76. MATSUSHITA & SCHOENBAUM, *supra* note 22, at 31.

77. Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 926-32, reprinted in YANAGIDA, *supra* note 58, at 125.

78. *Id.*

79. MATSUSHITA & SCHOENBAUM, *supra* note 22, at 31.

80. *Id.* at 40-41.

2. *Keiretsu*

*Keiretsu*⁸¹ are Japanese industrial or corporate groupings, which include two types: horizontal and vertical.⁸² “[A]s of 1983 the six major horizontal *keiretsu* and their related companies accounted for 34 percent of all corporate assets in Japan.”⁸³ Until World War II Japan had *zaibatsu*, the predecessors to the *keiretsu* today, which consisted of early forms of commercial and industrial combinations.⁸⁴ A typical *zaibatsu*, often controlled by a single family, consisted of a central holding company which joined a bank, a trading company and several industries.⁸⁵ Japan, however, ordered these powerful combinations dissolved in the wake of World War II and the United States occupation of Japan.⁸⁶

While the *zaibatsu* formally dissolved, many of them continued to work closely with one another and today three major horizontal *keiretsu* trace their origin to *zaibatsu* that existed prior to World War II.⁸⁷ The other large horizontal *keiretsu* sprang from large banks: Fuji, Daiichi-Kangyo and Sanwa, which provided needed capital after the war.⁸⁸ In addition to a presence in the manufacturing sector, *keiretsu* are also found in the Japanese distribution system.⁸⁹

3. The Distribution System In Japan

Many business executives agree that the complex distribution system in Japan poses one of the most difficult barriers to the Japanese market.⁹⁰ Several million small stores coupled with some larger chains and department stores, along with neighborhood and specialty shops form the base of the Japanese retail system.⁹¹ One author described the distribution system as the most dramatic difference between the way the United

81. *Id.* The issue of *keiretsu* was one of the major areas of contention between the United States and Japan during the Structural Impediments Initiative (SII) trade discussions of 1989-1990. *Id.*

82. YANAGIDA, *supra* note 58, at 83.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. See YANAGIDA, *supra* note 58, at 88 (noting that the Mitsubishi, Mitsu and Sumitomo *keiretsu* each stem from an early *zaibatsu*). *Id.*

88. *Id.*

89. *Id.* at 110.

90. *Id.* at 2.

91. MATSUSHITA & SCHOENBAUM, *supra* note 22, at 55-57.

States and Japan do business.⁹² An important consequence of the Japanese distribution system is that

the Japanese manufacturer is conditioned to a market situation where he has a network of some fifty to five hundred primary wholesalers who are exclusively his. Their livelihood depends on his ability to continue to provide products that will compete successfully against rival chains of distributors. The distribution network is therefore an extension of the company itself, and is of primary concern to the Japanese manufacturing company.⁹³

Enactment of the Large Retail Store Law has protected the distribution system, by maintaining the status quo of the thousands of smaller mom and pop shops which dominate the Japanese commercial landscape.⁹⁴ The nature of the distribution system poses several obstacles to foreign firms attempting to sell their products, including the limitations inherent in the capacity of small stores, the long-term business and personal relationships that the Japanese value and the added costs of multiple layers of wholesalers and processors.⁹⁵ Furthermore, "[r]ebates are commonly paid [by manufacturers] on the basis of the number of goods sold in order to motivate wholesalers and retailers."⁹⁶ Therefore, the manufacturer must always consider the profit margin expectations of wholesalers and retailers.⁹⁷ In many sectors in Japan, manufacturers control the distribution system which enables them to block the distribution and sale of imports.

92. YANAGIDA, *supra* note 58, at 104, citing MARK A. ZIMMERMAN, *HOW TO DO BUSINESS WITH THE JAPANESE: A STRATEGY FOR SUCCESS* 134-40 (1985).

93. *Id.* at 106.

94. *Id.* at 114-21 (discussing the Retail Stores Act).

95. MATSUSHITA & SCHOENBAUM, *supra* note 22, at 55-57. Matsushita and Schoenbaum describe five major problem areas for foreign suppliers:

First, smaller stores, because of their limited space, tend to carry a limited selection of goods. Second, Japanese business people desire stable long-term business relationships in which a great deal of emphasis is placed upon human relationships. Third, for many products there are several layers of wholesalers or processors between the manufacturer and the retail levels, which tends to drive up the prices of certain goods. Fourth, in Japan it is customary for wholesalers and manufacturers to take back unsold goods. Fifth, marketing goods in Japan usually requires the producer to employ a detail force to call on wholesalers and retailers, establish personal relationships, and provide payments to enable the retailer to display and sell products effectively.

Id. at 56.

96. *Id.*

97. *Id.*

III. IS JAPAN DIFFERENT?

Japan imports a relatively small percentage of manufactured goods from foreign countries, including the United States.⁹⁸ In addition, Japanese corporations operating outside of Japan account for a substantial share of all Japanese imports.⁹⁹ Imported products in Japan generally cost more than in other countries and foreign investment in Japan tends to be comparatively lower.¹⁰⁰ Japanese manufacturers and producers outside of Japan favor buying materials, parts and components from Japanese firms within Japan.¹⁰¹

A. THE REVISIONIST

The Japan "Revisionists" believe that a multilateral approach that applies pressure coupled with reliance upon market-oriented trade measures will "not work in Japan, that Japanese trade does not respond to macroeconomic adjustment pressures through exchange rates, and that Japanese markets are not made more open through rules-oriented negotiations."¹⁰² Those who favor such an approach to trade with Japan believe that in the past "Japan only opened its markets when confronted with external threats, be they Commodore Perry's black ships, trade retaliation, or international opprobrium as an unfair trading partner."¹⁰³

Japanese private barriers are an important source of the trade deficit with Japan.¹⁰⁴ Furthermore, Japanese trade barriers are viewed with particular acrimony because of Japan's relatively free and unobstructed access to the United States market.¹⁰⁵ Japan is a "reactive state," whereby it engages in endless negotiation and will only offer conces-

98. AN AMERICAN TRADE STRATEGY: OPTIONS FOR THE 1990s 35 (Robert Z. Lawrence & Charles L. Schultze eds., 1990) [hereinafter AN AMERICAN TRADE STRATEGY].

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. THOMAS O. BAYNARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 33 (1994).

104. *Id.*

105. *Id.* Although many argue that this view does not consider U.S. barriers to Japanese exports, including "voluntary" export restraints in the auto, steel and machine tool industry. *Id.* at 33, n.8.

sions when confronted with formidable pressure.¹⁰⁶ The so called "trade hawks" look for results rather than liberalization concessions and strive for actual increase in United States market share in foreign countries with barriers, creating a relationship with Japan based upon "managed trade."¹⁰⁷

The Revisionists suggest that the United States should adopt a different approach to trade with Japan, and that the Japanese market should be opened without compromise.¹⁰⁸ The proposition that import penetration in Japan remains very low and that, while after each successive round of the GATT negotiations, import penetration increased in other industrialized countries, it did not increase in Japan, supports this view.¹⁰⁹ Low import penetration in the Japanese market relates directly to business-government collusion, and as such, the U.S. Government should challenge these restrictive arrangements.¹¹⁰

B. THE CRITICS OF THE UNILATERAL APPROACH

Critics contend the Revisionists exaggerate the "Japan problem" or they fail to attribute the source of the problem to other factors, including those within the exclusive control of United States industry.¹¹¹ They offer explanations for the trade deficit with Japan, and do not believe that it is "per se a detriment to the American economy."¹¹² Furthermore, they argue that it is difficult to see the benefit of the United States acting unilaterally and excluding Japan, the world's second largest market economy, from the global trading order without severely disabling that system.¹¹³ In addition, they see cooperation between the United States and Japan as a useful foil to European Union protectionism.¹¹⁴ They also maintain that benign reasons exist for the trade defi-

106. BAYNARD & ELLIOTT, *supra* note 103, at 35.

107. See C.V. PRESTOWITZ, *TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD 50-70* (1988) (detailing the negotiation efforts to increase the market share of U.S. companies in the Japanese semiconductor market).

108. Rudiger W. Dornbusch, *Policy Options for Freer Trade: The Case for Bilateralism*, in *AN AMERICAN TRADE STRATEGY*, *supra* note 98, at 106, 120.

109. *Id.*

110. *Id.*

111. See Sykes, *supra* note 12, at 303 (asserting that those factors impeding U.S. sales to Japan include: language barriers, quality problems and marketing ineptitude on the side of the United States).

112. I.M. DESTLER, *AMERICAN TRADE POLITICS* 297 (3d. ed. 1995).

113. *Id.*

114. *Id.* The Japan Revisionist argue that the European Union would not make a

cit, such as consumer loyalty to Japanese products and a corresponding willingness to pay higher prices.

IV. ANALYSIS OF KODAK'S ANTICOMPETITIVE PRACTICES ARGUMENT

A. SUMMARY

On May 18, 1995, Kodak filed a Section 301 petition¹¹⁵ alleging, *inter alia*, that Fuji engages in "anticompetitive practices" which prevent Kodak from fairly competing in the Japanese film market.¹¹⁶ Kodak asserts that the Japanese Government "tolerates" Fuji's denial of market opportunities to Kodak, and, as such, its actions are "unreasonable."¹¹⁷ Fuji counters that it has neither created an exclusionary market nor engaged in any unfair trade practices.¹¹⁸ Fuji claims that Kodak simply exploits existing tensions between the United States and Japan and relies on trade politics, rather than improving both its product design and marketing in Japan.¹¹⁹

B. DENIAL OF MARKET OPPORTUNITIES BY ANTICOMPETITIVE PRACTICES

While Kodak alleges a host of violations and unlawful practices, the essence of Kodak's petition focuses on the alleged exclusionary film market in Japan, which Fuji has fashioned by way of its distribution system.¹²⁰ Fuji's distribution engine allegedly consists of the following

suitable ally in the effort to pry open the Japanese market because of the E.U.'s ambivalence about discriminating against Asia. Therefore, the United States should act unilaterally to set targets for the growth rate of U.S. product market share in Japan. Rudiger W. Dornbusch, *Policy Options for Freer Trade: The Case for Bilateralism*, in AN AMERICAN TRADE STRATEGY, *supra* note 98, at 106, 120.

115. See *Kodak Memorandum in Support of a Petition Filed Pursuant to Section 301 of the Trade Act of 1974*, as amended, "Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Consumer Photographic Paper" (on file with Office of U.S. Trade Representative) [hereinafter *Kodak Petition*]. But see "Rewriting History: Kodak's Revisionist Account of the Japanese Consumer Photographic Market" (on file with the Office of U.S. Trade Representative) (responding to the *Kodak Petition*) [hereinafter *Fuji Response*].

116. *Kodak Petition*, *supra* note 115, at 75-147.

117. *Id.* at 184-239.

118. *Fuji Response*, *supra* note 115, at 61-106.

119. *Id.*

120. *Kodak Petition*, *supra* note 115, at 33-57.

mechanisms: horizontal price coordination; "tatan" (retail and resale price maintenance); rebates; and monitoring and discipline.¹²¹ Kodak alleges the foundation of Fuji's market structure is four primary wholesalers ("tokuyakuten")¹²² who distribute a single brand while colluding with Fuji to perpetuate an exclusionary structure on lower levels of the sales chain, all the way down to the retail level.¹²³

Fuji points out that it holds about a 10% market share of the United States market and that Kodak maintains about the same share of the Japanese market and attributes the respective market shares to consumer identity with the national manufacturer in the respective countries.¹²⁴ Fuji maintains that Kodak officials never raised the alleged anticompetitive practices when they took place.¹²⁵ Specifically, Fuji asserts that Kodak failed to bring these issues to the attention to the United States government during the Structural Impediments Initiative and Framework negotiations. Kodak counters that when the Japanese dismantled formal trade barriers¹²⁶ in response to pressure from the U.S. Government and the OECD, the Japanese Government implemented "liberalization countermeasures" which they "designed to create an anticompetitive structure in the consumer photographic market and block the expansion of Kodak's sales after liberalization of formal barriers."¹²⁷ Kodak buttresses this contention with a mountain of evidence.

121. *Id.* at 42-57.

122. *Id.* at 9. The four dealers are Asanuma, Kashimura, Misuzu and Omiya. *Id.* The Kodak Petition states:

The term *tokuyakuten* (literally "special contract agent") is applied throughout Japan's distribution system in reference to wholesalers with exclusive distributive arrangements with manufacturers. In the photosensitive materials industry, the term is used with respect to the four specialized wholesalers of photographic products, Asanuma, Kashimura, Misuzu, and Omiya, who have exclusive supply contracts with Fuji for consumer photographic film.

Id. at 16.

123. *Kodak Petition, supra* note 115, at 33-57.

124. *Fuji Response, supra* note 115, at 23-24. According to Fuji, Kodak failed in its marketing operation in Japan by failing to focus on large retail outlets in large Japanese cities, whereas Fuji attempts to visit as many shops as possible across Japan with emphasis on personal assistance in sales promotion, advertising and individual technical assistance. *Id.*

125. *Fuji Response, supra* note 115, at 3.

126. "After World War II, the Japanese Government prevented Kodak from achieving a significant presence in Japan by governmental mechanisms, including: high tariffs, import licensing requirements through 1971, and a prohibition on inward investment until 1976." *Kodak Petition, supra* note 115, at i.

127. *Id.* As one of its most touted pieces of evidence, Kodak quotes the action

Fuji maintains that Kodak has not exhausted its local remedies and taken its case to the Japanese Government and the Fair Trade Commission. With respect to the tokuyakuten and Fuji's distribution system, Fuji maintains that its relationship with its four primary distributors dates back to the founding of the company.¹²⁸

Kodak maintains that the Fuji distribution system "remains in place today with the complicity of the Japanese Government, and acts as a continuing barrier to the expansion of Kodak's market presence."¹²⁹ Kodak argues a lack of access to the four main wholesalers in the Japanese film market, the tokuyakuten that carry Fuji products on a single brand basis,¹³⁰ prevents it from fairly competing in the Japanese market. Kodak asserts that access to the four main wholesalers remains an "essential facility" in gaining access at the retail store level, and therefore, the Japanese consumers.¹³¹ Kodak maintains that Fuji purposefully acted to cut off all of its competitors from the four primary wholesalers as a "liberalization countermeasure" when Japan removed formal barriers to trade.¹³² Kodak contends that the consolidation of the Japanese film

taken by MITI:

There is a fear that Kodak will control the Japanese market when the country undergoes 100 percent capital liberalization; MITI thus plans to prepare with the members of this industry a system which can counteract Kodak's global strategy. MITI, first of all, will thoroughly study Kodak's marketing strategies in France, West Germany, and Great Britain, and then, based on this study, design a countermeasure specifically for Japan . . . MITI has focused on the fact that the film industry and the camera industry have experienced growth independently in Japan, but Kodak has combined these two industries as an inseparable entity in launching its aggressive movement with respect to capital. MITI believes that if Japan also systematically intertwines the camera and film industries, the country will not easily yield to Kodak's global strategy . . . Upon completion of the actual survey concerning the various European countries, MITI will embark upon the designing of a viable system. If necessary, MITI will request the involvement of the camera industry. The intention is for the three parties—MITI, the film industry, and the camera industry—to work in unison in solving this issue.

In Preparation of Capital Liberalization: MITI Also Examining Countermeasure, NIHON SHASHIN KOGYO TSUSHIN, July 1, 1973, at 32, quoted in *Kodak Petition*, *supra* note 115, at 14.

128. *Fuji Response*, *supra* note 115, at 8.

129. *Kodak Petition*, *supra* note 115, at i.

130. *Id.* at 33-42.

131. *Id.*

132. *Id.* at 85.

distribution sector consisted of three major elements.¹³³ First, Kodak maintains that the distribution relationships underwent a process called "*keiretsu-ka*," in which formerly independent retailers, laboratories, and wholesalers became the Fuji and Konica distribution *keiretsu*.¹³⁴ Next, the existing system of rebates was changed to serve two goals: to enable manufacturers to extract more cash from the distribution system and to maintain and enhance the use of rebates as a means of controlling wholesalers and retailers and excluding outsiders' products.¹³⁵ Finally, a "tokuyakuten bottleneck" was created between the film and camera manufacturers on one side and secondary wholesalers and retailers on the other side to enhance the controlling power of the tokuyakuten.¹³⁶

The touchstone of Kodak's position rests on its alleged inability to build its own effective distribution base in Japan. Fuji contends that its distribution system has evolved from "normal, market" driven forces.¹³⁷ In addition, Fuji maintains that it neither grants exclusive sales rights to its distributors, nor prevents them from selling other brands of film.¹³⁸ Fuji asserts that Kodak created its own distribution system by acquiring several Japanese primary wholesalers and bringing them into the Kodak family as Kodak Japan Ltd.¹³⁹ With regard to a rebate system, which Kodak alleges is an elaborate scheme to keep tight control over its distributors, Fuji asserts no grounds exist to support the allegations.¹⁴⁰

Even assuming the truth of Kodak's allegations, the purported anticompetitive practices may not amount to violations of United States antitrust laws. *Keiretsu* and other "vertical" arrangements between Japanese manufactures and distributors may not be actionable under U.S. law.¹⁴¹ However, such vertical relationships raise suspicion when they

133. *Id.*

134. *Kodak Petition*, *supra* note 115, at 85.

135. *Id.*

136. *Id.*

137. *Fuji Response*, *supra* note 115, at 12.

138. *Id.*

139. *Id.*

140. *Id.* at 10-12.

141. Smith, *supra* note 54, at 259-60. While Section One of the Sherman Act prohibits agreements, combinations, and conspiracies in restraint of trade, "[a]s a nonprice vertical restraint, exclusive dealing is not a per se violation." *Id.* at 260. In addition, as for horizontal *keiretsu*:

In terms of basic structure, the *keiretsu* generally seems to escape U.S. antitrust law, at least when located abroad. The *keiretsu* is structured through cross-ownership and interlocking directorates. The relevant antitrust provision, Section 8 of the Clayton Act, applies to cross-ownership and interlocking directorates

descend to the retail level. Some critical of lax U.S. Department of Justice scrutiny in this area argue that "vertical boycotts, reciprocal dealing, and exclusive dealing are examples of actionable arrangements that might be practiced by *keiretsu* and which might impede exports."¹⁴² Such vertical arrangements may constitute unfair trade practices under the Japanese Antimonopoly Act.¹⁴³

For purposes of Section 301 a foreign government's act, policy or practice becomes "unreasonable," if while not necessarily inconsistent with the international legal rights of the United States, it otherwise remains unfair and inequitable.¹⁴⁴ In 1988, Congress expanded the orbit of the definition of "unreasonableness" to include foreign government toleration of anticompetitive activity that restricted United States exports. In 1994, Congress once again refined the definition: Foreign government acts, policies, or practices which deny fair and equitable¹⁴⁵ "market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market" ¹⁴⁶

With the expansion of the definition of unreasonableness, it becomes clear that Congress intended private party anticompetitive conduct to be actionable under Section 301.¹⁴⁷ The Statement of Administrative Action reveals the process of implementation of the provision:

Among the foreign government practices that section 301(d)(3)(B) defines as "unreasonable" are those that deny fair and equitable market opportunities, including the toleration by a foreign government of systematic

among competitors. But the "horizontal" *keiretsu* is not a grouping of competitors but rather a conglomeration of noncompeting entities from different sectors Therefore, the structure of *keiretsu* does not appear to be subject to legal attack under the Clayton Act.

Id. at 259. (footnotes omitted).

142. *Id.*

143. *Shitekidooken No Kinshi Oyobi Koseitorihiki No Kakuho Ni Kansura Horitsu (Law to Prohibit Private Monopolization and to Maintain Fair Trade) Law 54, 1847*, is the actual title of the Antimonopoly Law. *Kodak Petition, supra* note 115, at 186, n.431.

144. Trade Act of 1974, §301(d)(3)(A), 19 U.S.C. §2411(d)(3)(A).

145. Trade Act of 1974, §301(d)(3)(B)(i), 19 U.S.C. §2411(d)(3)(B)(i).

146. Trade Act of 1974, §301(d)(3)(B)(IV), 19 U.S.C. §2411(d)(3)(B)(IV).

147. *Statement of Administrative Action*, H.R. Doc., No. 103-316, 103d Cong., 2d Sess. 656-896 (1994) [hereinafter *SAA*].

anticompetitive activities. The Administration will enforce vigorously the "toleration of . . . anticompetitive activities" provision in section 301 when appropriate to address foreign anticompetitive behavior. The practices covered by the provision include, but are not limited to, toleration of cartel-type behavior to toleration of closed purchasing behavior.¹⁴⁸

This language expressly covers foreign government action that takes the form of "toleration of cartel-type behavior to toleration of closed purchasing behavior (including collusive coercion of distributors or customers) that precludes and limits U.S. access in a concerted and systematic way."¹⁴⁹ The question then becomes whether the Fuji distribution system consists of anticompetitive practices. Only one party previously filed a Section 301 petition solely against foreign anticompetitive practices.¹⁵⁰ Another petition contained allegations of anticompetitive practices.¹⁵¹

The Japan Fair Trade Commission (JFTC) administers Japan's competition law, The Antimonopoly Act,¹⁵² and prohibits three types of con-

148. *Id.* at 367, cited in *Kodak Petition*, *supra* note 115, at 185.

149. *Id.*

150. Japan Auto Parts (P-21), Office of the United States Trade Representative Section 301 Table of Cases 3 (Apr. 1, 1994) (filed May 9, 1988; withdrawn June 30, 1994), cited in Smith, *supra* note 54, at 287, n.173. The case involved the sale of spare automobile parts sold at higher prices to suppliers who were not the designated car dealers of the Japanese manufacturers. *Id.* at 287.

151. Another case which alleged anticompetitive business practices was the Japanese Semiconductor Case. Japan Semiconductors, 52 Fed. Reg. 43,146 (1987). This hybrid case focused partly on strategic trade barriers in the Japanese semiconductor industry and on private barriers, even before Congress amended Section 301 to include the anticompetitive practices clause. Smith, *supra* note 54, at 288. In that case the Japan Fair Trade Commission was allegedly lax in the enforcement of the Japanese Antimonopoly Law with respect to cartels. *Id.* The investigation ultimately resulted in an agreement between the two governments in 1991, which the Japanese Government indicated it will decline to renew in 1996. *Hashimoto Says New U.S. Chip Pact Is Unnecessary, Market Forces Working*, 12 Int'l Trade Rept. (BNA) No. 42, at 1759 (Oct. 25, 1995). Japanese Minister for International Trade and Industry, Ryuttaro Hashimoto said that "We believe the objectives of the agreement have already been fulfilled. There is no need for a government-to-government arrangement. Our market is already open." *Id.* This was in respect to Japan's position as to the renewal of the 1991 semiconductor, which is due for renewal in mid-1996. The agreement provided that the U.S. semiconductor industry expected to capture a 20 percent market share of the semiconductor industry in Japan by 1992, where the agreement added, however, that the 20 percent goal was not a guarantee, a ceiling or a floor on market share. *Id.* According to the U.S. government, for the second quarter of 1995, foreign industry enjoyed a 22.9 percent share of the Japanese semiconductor industry. *Id.*

152. See *supra* note 143 and accompanying text (providing the full name of the

duct: private monopolization; unreasonable restraint of trade; and unfair trade practices.¹⁵³ Section 2(9) of the Antimonopoly Act defines the phrase "unfair trade practices" to mean anything "which tends to impede fair competition . . ."¹⁵⁴ The JFTC sets forth a "General Designation on Unfair Trade Practices" which lists 16 types of conduct that amount to unfair trade practices. Kodak maintains that Fuji engages in several of these unfair practices, including resale price maintenance,¹⁵⁵ vertical exclusive dealing (exclusive dealing arrangements, dealing on restrictive terms, discriminatory treatment), refusal to deal (refusal to deal by a single firm, concerted refusal to deal).¹⁵⁶ Assuming that Kodak could prove such arrangements to exist in the Fuji distribution system, the United States may appropriately use Section 301.

V. A MESSAGE TO THE PACIFIC RIM

"By all accounts Asia will be the most dynamic part of the world economy in the next twenty years."¹⁵⁷ One expert draws an analogy between the United States' relationship today with the Pacific nations to that of the British Empire's relationship to the United States and Germany during the end of the nineteenth century.¹⁵⁸ The fall in Great Britain's status as the dominant force in world trade created pressure on the British government to move away from free-trade principles to protectionism.¹⁵⁹ This "diminished giant syndrome"¹⁶⁰ appears to the critics of Section 301 to be one of the statute's underlying policy bases.

Countries in the Eastern Pacific Rim, such as Japan, Korea, and Taiwan rely upon the imports of raw materials from the developing countries in Southeast Asia and upon the United States for the export of their manufactured products.¹⁶¹

Antimonopoly Act and its citation).

153. *Id.*

154. *Id.*

155. "Resale price maintenance is when the manufacturer's suggestion that economic disadvantage imposed on the distributor causes distributors to sell at the indicated prices." *Kodak Petition, supra* note 115, at 193-94. Kodak alleges that Fuji has been successful in resale price maintenance with its tokuyakuten. *Id.*

156. *Id.* at 33-57, 184-205.

157. AN AMERICAN TRADE STRATEGY, *supra* note 98, at 131.

158. Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in AGGRESSIVE UNILATERALISM, *supra* note 6, at 11-12

159. *Id.* at 12.

160. *Id.* at 11.

161. Robert E. Baldwin, *Commentary*, in AN AMERICAN TRADE STRATEGY, *supra*

As such, access to the huge United States market endures as the weapon within Section 301. The present pressure on the United States Government to retaliate against foreign nations which engage in unfair trade stems from several sources, including, the large trade deficits of the 1980s and 1990s, the success of Japan and other rising industrial countries in the United States market and third world markets in addition to concerns for the future competitiveness of American high-technology industries.¹⁶²

In pressuring Japan in cases such as Kodak, the United States sends a message to the emerging economies of Asia and the Pacific Rim: Korea, Thailand, India, Malaysia, Indonesia, Vietnam and China should follow the free trading path rather than construct protectionist fences as their economies develop. "Insofar as the Pacific Rim is concerned, U.S. interests lie in integrating the countries of the rim into the global trading system and making them a force for constructing a stronger, more effective multilateral system."¹⁶³

Japan-like barriers to trade could arise if any of these emerging economies attempt to nurture "infant" industries by means of domestic protection, by fashioning distribution systems which mirror those in Japan and prevent fair competition from foreign enterprises. "The United States cannot afford to wait that long. The trade pressures are too great, as are the temptations for other nations to emulate Japan."¹⁶⁴

CONCLUSION

The United States remains justified in demanding that foreign markets provide unfettered access to American exports, as long as the United States maintains an open market to foreign competition.¹⁶⁵ Section 301 can be used "constructively," affording the United States with a vehicle to bring trade barriers that do not fall within the WTO scheme to the negotiating table.¹⁶⁶ In negotiating the removal of such trade barriers,

note 98, at 201.

162. Bruce K. MacLaury, *Foreword*, in *AN AMERICAN TRADE STRATEGY*, *supra* note 98, at vii.

163. Committee for Economic Development, *BREAKING NEW GROUND IN U.S. TRADE POLICY: A STATEMENT BY THE RESEARCH AND POLICY COMMITTEE OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT* 10 (1991).

164. Garten, *supra* note 14, at 55.

165. *AN AMERICAN TRADE STRATEGY*, *supra* note 98, at 33.

166. *See* Sykes, *supra* note 12, at 269-91 (discussing the advantages of using Section 301 to negotiate the opening of closed markets).

the objective remains liberalizing trade. When trade barriers fall, not just Kodak or the United States enjoy the benefits, but the entire world on a multilateral basis.¹⁶⁷

Many formidable barriers exist to trading with Japan.¹⁶⁸ The Japanese Government continues to recognize industrial cartels, sanction *keiretsu*, and tolerate anticompetitive practices in the distribution system.¹⁶⁹ While these practices may not amount to violations of United States antitrust laws, the USTR may deem some "unreasonable" because they constitute unfair trade practices under the Japanese Antimonopoly Law.¹⁷⁰ If the Japan Fair Trade Commission will not address them, Section 301 may remain the only way of subjecting the practices to close scrutiny. The Kodak-Fuji dispute highlights private barriers to trade which do not fall within the competence of the WTO.

Serious international legal considerations, however, constrain unilateral action by the United States taken outside of the WTO scheme, to redress private trade barriers.¹⁷¹ The "most-favored nation" principle, a central element of GATT law, persists as a particular concern.¹⁷² Fur-

167.

Identifying and dealing with nontraditional trade barriers establishes a precedent on which multilateral law can build, just as the environmental and labor talks with Mexico can be guideposts for the WTO, which is now taking up those issues. Moreover, as Japan opens its market, every other country is eligible to compete for the benefits. In other words, the United States and Japan negotiated a bilateral agreement but the results were multilateralized. That is exactly what happened with the agreement between the United States and China on intellectual property rights earlier this year. As soon as the ink dried, the agreement's provisions became available to the EU, Japan, and all other comers.

Garten, *supra* note 14, at 56.

168. Thatcher, *supra* note 72, at 528. See Garten, *supra* note 14, at 55 (discussing meetings between President Clinton and Prime Minister Koichi Miyazai concerning economic cooperation).

169. *Id.*

170. SAA, *supra* note 147, at 656-896.

171. See Smith, *supra* note 54, at 281-84 (discussing retaliation under Section 301 within the WTO).

172. Gantz, *supra* note 13, at 18-21. "The core principles of both GATT 1947 and GATT 1994 are unconditional "most-favored-nation" (MFN) treatment . . . Under MFN, each member country automatically extends the benefits afforded to any other member country to all WTO members." *Id.* at 20-21. Thus, if the United States raised tariffs on certain Japanese products as permitted by Section 301 in retaliation for the anticompetitive practices of Fuji, Japan would undoubtedly challenge the U.S. action and take the case to the WTO, alleging violation of its MFN rights under GATT 1994. *Id.* The U.S. would probably lose the case because the purported

thermore, the United States invokes unilateral measures in too many cases rather than taking the appropriate cases to the fledgling World Trade Organization, the United States possibly sends the message that it does not respect the very mechanism for trade unity which it helped to establish. The United States must continue to embrace both a bilateral and multilateral approach to trade problems.¹⁷³

Such approaches are not mutually exclusive and, in fact, are necessary to confront the market access problems such as those that plague Kodak. In addition, with 1996 as an election year, Presidential politics certainly will play a role in how the Kodak-Fuji dispute evolves, with the likely issues being United States sovereignty in the face of the WTO, the trade deficit with Japan, and the unwillingness of the United States to cower to Japan in trade disputes.

Unless and until the WTO expands its orbit to cover private barriers to trade, United States manufacturers and producers must rely upon Section 301, the only instrument capable of addressing these concerns. As for the aspects of the Kodak Petition alleging anticompetitive practices in the Japanese distribution system, resort to the WTO becomes impossible. Bilateral negotiations with Japan, with the threat of Section 301 sanctions looming in the background, may help achieve the desired results.

In the modern international trading arena, the use of tariffs and quotas has steadily declined. In their place disguised barriers have emerged, with effects far more pernicious than any overt restriction. As the era of the WTO will see increased trade liberalization, it is also certain to see reengineered and innovative forms of non-tariff barriers. Without Section 301 to address such barriers, trade liberalization becomes a meaningless endeavor.

anticompetitive practices do not fall within the WTO scheme. The case would then require the U.S. to lower the tariffs it raised as to the Japanese products or increase tariffs on like product imports from all countries, or face countermeasures from Japan authorized by the WTO. *Id.*

173. Garten, *supra* note 14, at 59.

EPILOGUE

At the time of publication of this paper, the Kodak-Fuji dispute has evolved considerably. By the time this article appears in print, yet more developments are certain. Nevertheless, the primary theme of this paper—that Section 301 can be used effectively to bring attention to, and possibly combat, private party anticompetitive practices—has been validated by the USTR's determination following its investigation of trade barriers in the Japanese film distribution system.

The USTR, for the first time, made its Section 301 determination of unfair trade practices based upon the Japanese Government's "toleration" of "systematic anticompetitive practices."¹ The USTR's office declared that "[t]he government of Japan is responsible for creating substantial barriers in the market and for supporting or tolerating actions by private companies that reinforce those barriers."²

While the United States has reserved its right to retaliate under Section 301, it is currently pursuing a formal complaint under the auspices of the World Trade Organization.³ In addition, at the behest of the United States Government, Kodak has also submitted a case to the Japan Fair Trade Commission.⁴ The JFTC has promised a full investigation.

On June 13, 1996, the USTR instituted formal dispute resolution proceedings in the WTO against Japan in connection with trade barriers to the Japanese film market.⁵ The WTO case has three central pillars and the United States has requested consultations with Japan regarding all three. First, the U.S. contends that Japan violated GATT Article III, which requires that imported products receive national treatment, and GATT Article X, which mandates transparency in the publication and

1. *U.S. to Seek Resolution in WTO of Japan Film Market Complaint*, INT'L TRADE REP. (BNA) Vol. 13 at 1001-02 (June 19, 1996).

2. *Id.* at 1002.

3. *See U.S. Launches Broad WTO Case Under GATT, GATS Against Japan on Film*, INSIDE U.S. TRADE, at 22 (June 14, 1996) (discussing elements of Kodak WTO case).

4. *See Kodak Submission May Prompt Full JFTC Investigation of Film Sector*, INSIDE U.S. TRADE, at 8 (June 21, 1996) (detailing Kodak decision to submit case to JFTC).

5. *U.S. Launches Broad WTO Case Under GATT, GATS Against Japan on Film*, INSIDE U.S. TRADE, at 22 (June 14, 1996).

administration of trade laws and regulations.⁶ Also part of this pillar, the U.S. maintains that Japan has nullified and impaired U.S. benefits under GATT Article XXIII.⁷

The second pillar of the WTO case is buttressed by U.S. assertions that Japan violated GATS Article III, which requires that all measures affecting trade in services be transparent, and GATS Article XVI, the most-favored nation provision which prevents members from adopting trade restrictive measures.⁸ Finally, the third pillar was fashioned from a 1960 GATT Working Party Report, which addresses business practices that restrict competition in international trade.⁹

The United States is confident that its case against Japan will succeed. It seems unlikely that the United States Government would have initiated WTO dispute resolution proceedings had Kodak not filed a Section 301 petition. Regardless of how the WTO case matures, or what the JFTC declares following its investigation, Section 301 has demonstrated its utility in this case.

The USTR's determination of unfair trade practices in the Japanese film market because of the Government of Japan's toleration of systematic anticompetitive practices has been put on record and Japan's unfair trade practices are now subject to multilateral scrutiny. Should the WTO proceedings, or the JFTC investigation, however, fail to temper the now unmasked anticompetitive practices, Section 301 retaliatory measures sit poised and ready to be implemented.

6. *Id.*

7. *Id.*

8. *Id.* at 23.

9. *Id.*