COMMENT AND ANALYSIS

REFUSALS TO DEAL

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Introduction

The new look in competition law is largely attributable to two factors: the introduction of the Competition Tribunal and its jurisdiction over reviewable practices; and the rejuvenated Bureau of Competition Policy. While mergers and dominant positions may seem more exciting, in fact the Tribunal has already decided two contested applications by the Bureau involving refusals to deal. The Bureau won both, hands down. The present paper intends not only to explain the existing jurisprudence, but also to examine the concept of "refusal to deal" and when it should be used or avoided.

Two initial facts should be borne in mind. Firstly, no offence is committed by a party who is found by the Tribunal to have committed an offensive reviewable practice. The remedy is prospective only: don't do it again. Secondly, only the Director can decide to bring an application to the Tribunal. Thus if the Bureau finds a party's behaviour is acceptable, the Tribunal will never be involved. This is most important. In most cases, the Director hears a complaint and then launches an investigation. If the alleged harmful practice is shown to be pro-competitive, the Director will stop right there. If the Director is not convinced, it may still be possible to convince the Tribunal that the party's activity is not anti-competitive. Even if the party is unsuccessful at both these levels, it still need only alter its behaviour in the future.

On the other hand, there is a major point which is still commonly overlooked. If the competitive thrust of the party under examination is being blunted by the actions of others, the Bureau should be advised. The federal purse is deep, despite the deficit. Competition law can be made to work for a business whose competitive ability is being impaired.

The Statutory Concept of Refusal to Deal

Refusals to deal are dealt with in section 75 of the *Competition Act*. That section gives the Tribunal power to order a supplier to accept a specified person as a customer on usual trade terms, but only in limited circumstances. There are four preliminary statutory hurdles that the Tribunal must jump before it has the authority to make any order. If the Bureau can be convinced that the hurdles cannot be jumped, there will be no further action.

The first hurdle is that the person who wants to be supplied (target) must be substantially affected in his business because he is unable to obtain adequate supplies of a product anywhere in a market on usual trade terms. One can easily see that this one hurdle involves at least five factors: "substantially affected", "adequate supplies", "product", "anywhere in a market" and "usual trade terms". Two of these factors are addressed specifically in the statute. Firstly, "trade terms" means specifically, and only terms in respect of payment, units of purchase and reasonable technical and servicing requirements. If a target is required to advertise extensively and the target refuses, the Tribunal can object to a complaint of refusal to deal on the grounds that the target will not advertise because that is not a "usual trade term" in the statutory sense. Secondly, the statute provides that articles differentiated by trade-marks are not separate products unless the product of which the target

was refused supply is in a dominant position in the market. A refusal to supply a target with Humpty Dumpty Potato Chips is not reviewable under this section: the target can buy Hostess or Murphy's or Miss Vickie's. Humpty Dumpty can cut off retailers if it wants to, assuming it is not in a dominant position in the market. As a result, targets are vulnerable in most cases.

The second hurdle is that the target's inability to obtain adequate supplies must be the result of insufficient competition among suppliers of the product in the market. If there are competitors who will supply the target product, even under terms, there can be no action by the Tribunal under this section. Thus, to extend the potato chips analogy, if, once Humpty Dumpty refused, Murphy would only supply if the target agreed to deal with him exclusively, the target would have no complaint.

The third hurdle is that the target must be willing to meet usual trade terms. He must be willing to provide reasonable service and technical requirements. He must be willing to buy in bulk and to pay promptly, if those are normal terms in that industry.

Finally, the product must be in ample supply, which appears to mean that the person who is requested to supply the target must have adequate inventory or at least excess capacity.

Tribunal Decisions

The 1976 amendments to the *Competition Act* are now fifteen years young, but remain very unclear to practitioners because of the dearth of precedents that have been publicly adjudicated. It was recognized in the 1960s that a major shift away from criminal law was required if matters that were economically undesirable were to be effectively prohibited without unduly strangling acceptable business practices. This shift in priorities was recognized in the 1976 amendments so far as refusal to supply situations were concerned. But the first cases were only decided in 1990 and these were almost *a fortiori* situations to many observers. In addition, the Tribunal has a wide discretion to make or refuse to make an order, with nothing to guide it but the legislative purpose section. Nevertheless, both of the refusal to supply cases are on appeal.

The first of the two decided refusal cases was *Chrysler*, which involved the termination of a long-standing relationship with an individual Brunet, who purchased automotive parts for export. While Chrysler had encouraged Brunet prior to 1986, in that year Chrysler U.S. decided to handle all export part sales itself and Brunet was cut off. Brunet then bought from other dealers in Canada until Chrysler told them to stop supplying him. At that point Brunet sought and obtained the assistance of the Director. The parts involved were mainly "captive", that is parts made only by Chrysler for specific models of its automobiles. The same parts were sold to dealers at somewhat different prices in Canada than in the United States, with the Canadian price often being lower. When Brunet exported the parts, he received a rebate for duty and federal sales tax, so he could afford to export more cheaply than his U.S. counterparts. Whether that would still be true today, with the *Free Trade Agreement* eliminating tariffs and the federal sales tax replaced by the Goods and Services Tax is an open question.

The first question decided by the Tribunal was that the word "product" as used in section 75 can mean Chrysler auto parts as opposed to all auto parts. Chrysler tried to rely on subsection 75(2), which provides that an article is not a separate product in a market only because it is differentiated from other articles in its class by a trademark, unless the article so differentiated occupies a dominant position in the market. The Tribunal held, however, that the customers who bought captive Chrysler parts wanted only those parts, and this was not only because of any trademark or proprietary name.

The Tribunal also dealt with what "substantially affected" meant, and agreed with Chrysler that one had to look at the whole business and not just at Chrysler parts. This may prove to be an unfortunate approach if adhered to in later cases, but it did not matter here as Chrysler parts were the mainstay of Brunet's business. The Tribunal specifically said that "substantial" meant something beyond *de minimis* and suggested the adjective "important" as an acceptable synonym, although further clarification would have to await additional situations.

The Tribunal also decided that it had no authority to award costs.

The second case involved the refusal by Xerox to continue supplying parts to a former employee who had been encouraged by Xerox to set up a business in second-hand copier machines. This business Xerox now wished to shut down. Perhaps not surprisingly, the Tribunal held that Xerox must continue to supply parts for all models for which parts were previously supplied. What was surprising was that Xerox was not required to supply parts for any new models (thereby ensuring the eventual death of that competitor) unless a renewed application was brought successfully at a later date. There has to be some balance between evergreen supply obligations and a supplier's prerogative to run its own business. But when the supplier is clearly the dominant player in the market and that supplier sets up a marketing arrangement, then it would seem to be incumbent on the supplier to advance some reason to cut off the former customer, and that reason would need to have some efficiency or business rationale other than getting rid of a competitor. In Europe this reason is called an "acceptable objective justification".

In coming to its conclusion to require supply in the *Xerox* case, the Tribunal did look at the purpose of the statute as set out in section 1.1 and the specific attention given to small business. Again it is to be hoped that cutting off a relatively small piece of a larger business, such as Canadian Tire, if Canadian Tire were providing the same service as Brunet in *Chrysler* or Exdos in *Xerox*, would still result in an order to continue to supply. But that hope is not consistent with the words in the two Tribunal decisions.

Two further practical points emerge from the decisions, particularly the *Xerox* decision. The first is that experts should be used as witnesses with great care, if at all. There seems to be a widely held belief that experts speak the truth, rather than express their own educated opinions about matters on which there are other educated opinions. Experts have been often criticized by name in Tribunal decisions but rarely praised. It may be better to have the expert explain concepts to counsel and then show counsel how to marry the literature to the facts, which marriage the counsel can then put forth to the Tribunal. Experts are useful but the Tribunal has not been kind to them. As well as the *Xerox* case, reference should be made to the *NutraSweet* decision in this regard; experts should be required to read both of these decisions before appearing on the witness stand. Counsel should also participate directly in the manner of presentation in the expert's written brief, and design a cross-examination which will isolate flaws. It is no favour to any expert to allow him or her to be pilloried by the Tribunal.

The second practical point is the willingness of the Tribunal to consider both European and American jurisprudence. It is now accepted that the Director and the Tribunal will be more interventionist than the Chicago school would deem appropriate, but counsel will find very useful and well-articulated arguments in the foreign case law. In *Xerox* the Tribunal referred to the *Hugin Kassaregister* case from Europe and the *Image Technical Service* case from the United States. Both cases related to manufacturers refusing to sell proprietary parts and, in the American case, involved the refusal to sell copier equipment parts to independent service organizations. This is indicative of how close a case on the facts can often be found in foreign jurisdictions. If courts in Europe or the United States have condemned the same practice, the Canadian Tribunal is likely to follow, especially in refusals to deal. Fortunately, both the European and U.S. cases are easy to find.

Appeals

There are no reported cases dealing with substantive questions in the reviewable practices area, so it is difficult to know what approach the Federal Court of Appeal might take. The polar positions are between the "correctness" test, which allows for reversal if the Court is not convinced that the decision is right, and the "patently unreasonable" test, which incorporates a considerable degree of deference to the Board's expertise, even on questions of law. As stated by Wilson J. in *National Corn Growers:*

> There is a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.

The "correctness" approach is seen in jurisdiction cases particularly and was expressed this way by the Federal Court of Appeal in *Re Syndicat des Employés and the CLRB.*

> Once a question is classified as one of jurisdiction, and has been the subject of a decision by an administrative tribunal, the superior court exercising the superintending and reforming power over that tribunal cannot, without itself refusing to exercise its own jurisdiction, refrain from ruling on the correctness of that decision, or rule on it by means of an appropriate criterion.
>
> This is why the superior courts which exercise the power of judicial review do not and may not use the rule of the patently unreasonable error once they have classified an error as jurisdictional.

It is possible that the Court of Appeal will adopt a deference approach in appeals on substantive matters if the Tribunal continues to articulate well in a fairly conservative vein. This makes it important to win before the Tribunal or, even better, before the Bureau.

Types of Refusals to Deal

Commercial Solvents was a U.S.-based multinational which was the only producer of two ingredients, both of which were used in the manufacture of ethanbutol (which in turn was used in certain drugs) and one of which was used to produce paint. An Italian manufacturer of ethanbutol stopped buying one of the two raw materials from an Italian subsidiary of Commercial Solvents when it found a cheaper source, namely paint firms that bought the material directly from Commercial Solvents. So Commercial Solvents prohibited its paint buyers from reselling ethanbutol for pharmaceutical use. Then Commercial Solvents decided to forward-integrate by starting its own production of ethanbutol for pharmaceutical use. Thus, when the Italian manufacturer tried to re-order from Commercial Solvents it was told that all of the primary product was being used internally. The Italian manufacturer complained to the European authorities. Ultimately the European Commission found that Commercial Solvents had abused its dominant position in the market for raw material by refusing to supply. In effect, Commercial Solvents had eliminated one of the three producers of ethanbutol in the European Community and the Commission rejected the argument that it only desired to integrate forward. The Commission specifically rejected the concept that Commercial Solvents needed its entire capacity for itself and that it could not economically expand that capacity. The Commission felt that Commercial Solvents should ration itself as well as its customers if that were really the case.

In another case decided by the European Court, United Brands was found to have abused its dominant position when it cut off supplies to a long-standing customer who was the largest importer of Chiquita bananas into Denmark. United Brands had refused to agree with the importer, Olesen, who requested that it be granted preferential treatment over other Danish importers. Olesen responded by becoming the exclusive distributor for a competing banana producer, Dole. Thereafter, Olesen sold fewer Chiquita bananas and deliberately pushed the sale of competing Dole bananas. As a result, United Brands terminated Olesen. The Court held that the cut-off was an excessive penalty and was a serious interference with the independence of small and medium-sized firms. This predeliction to consider the viability of small and medium-sized firms has been demonstrated in both the *Chrysler* and *Xerox* cases in Canada, especially the latter. While it may be true that there was no indication that consumers had been damaged by the behaviour of United Brands or that competition had been deterred to the detriment of consumers, nevertheless the Court protected the small importer. It might well do so in Canada.

The Bureau had to consider airline computer reservations systems in one of the merger cases that came before it. A somewhat similar situation arose in Europe relating to Sabena, the Belgian airline

which has a computer reservation system called Saphir. Normally, Sabena granted access to Saphir to any company which requested it. However, it denied such access to London European, partly because London European refused to grant a ground-handling contract to Sabena. The Commission found that 47 per cent of ticketing on a civic European route was handled by Saphir, which was enough to give Sabena a dominant position. The denial of London European was held to be an abuse of that dominant position. Once again this indicates concern for a minor player, which is hallowed in section 1.1 of our statute.

In the *Napier-Brown British Sugar* case, the European Commission examined a purported reliance on a shortage as justification for refusal to increase supply to a competitor. British Sugar, the only producer of beet sugar in the United Kingdom, refused to increase supply to Napier-Brown, the largest sugar merchant in the United Kingdom, because Napier-Brown wanted to enter the retail sugar market, where it would compete with British Sugar. The Commission found that the argument based on shortages was really a pretext, and that the quota system, although ostensibly non-discriminatory, was adopted only to justify the refusal to deal. The Commission accordingly held there was an abuse of a dominant position.

One of the interesting decisions in the United States involved the operator of one of four ski locations in Aspen, Colorado. For many years the four ski locations had offered one ticket that could be used at all four locations, and revenues had been allocated on the basis of usage. The owner of three locations then changed the deal to require the owner of the fourth location to accept a fixed percentage which was considerably lower than its historical average based on usage. When the latter found the new formula unacceptable, the owner of the three establishments refused to continue the joint arrangement. While the Court confirmed that a monopolist does not have a general duty to engage in a joint marketing program with a competitor, it affirmed a jury verdict which rested on the implicit conclusion that the defendant had no justifiable business reasons for the refusal. The Court concluded that the evidence supported an inference that the defendant was not motivated by efficiency concerns and was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival. The lesson to be learned is that a supplier must have a legitimate reason before cutting off supply.

Legitimate Refusals to Deal

The law recognizes that a supplier has the right to terminate a dealer who is not adequately representing his product. For example, a supplier of high-quality heating equipment could terminate a dealer who did not provide adequate service after installation. The law also recognizes the right of a businessman to change distribution procedure, even though this means reducing the number of dealers. Similarly, where a supplier is not the only source of goods in the market, a refusal to deal will not pass one of the statutory hurdles. Thus, in *Carbon Steel Products Corp.*, the New York District Court held that although the sole reason for a steel company's termination of supply to a wholesaler was that the wholesaler also handled imported steel, this did not constitute an illegal refusal to deal. Similarly, where a distributor of gas ranges purchased 40 per cent of the shares of the manufacturer who supplied it, the manufacturer's agreement to sell its entire output to the distributor and cancel all other sales contracts was not illegal as it did not have a dominant position in the market. Also, when a customer sued a manufacturer in an antitrust action, the manufacturer cutting off the customer would not be a reprehensible refusal to deal if there were other sources for the goods. In another case, a beer dealer complained that its supply of a certain premium-priced brew had been terminated because it would not buy regular-priced beer from that brewer. The Court said that was perfectly allowable conduct by the brewer. Similarly, when an oil company cancelled a service station dealer's lease because the dealer refused to request assistance in a price war, the Court held the refusal to be perfectly permissible.

By looking at foreign judgments and considering legitimate reasons for refusals to supply, a supplier can usually achieve its objectives without running afoul of the refusal to deal provisions. In

most cases there are business justifications behind the refusals to deal which can be articulated in a manner that is not necessarily anti-competitive.

The *Xerox* case indicates that refusals to deal in new products will not be criticized, while *Chrysler* indicates that the refusal to deal must have a substantial affect on the total business of the target before it will be acted upon. These are severely limiting conditions for the attracting of any remedy under the refusal to deal section.

Often the supplier has only itself to blame. It cuts off somebody in the chain below it because that somebody has alienated the other dealers in his geographic area. Quite often it is the other dealers who complain to the supplier about the behaviour of the maverick dealer and want the supplier to cut off the maverick. This type of group pressure can be dangerous. In these situations the real offence may not be the refusal to deal but rather the concerted action of several market actors trying to run a vigorous competitor out of town. In such a case the refusal to deal may simply cloak the more serious offence of price maintenance under section 61 of the statute.

Conclusion

A refusal to deal is commonplace, and a natural reaction by an aggrieved supplier. By examining the situation and developing legitimate reasons for such a refusal to deal, it can usually be justified within the standards now found in the literature, including the Canadian cases. But forward planning is often essential if the refusal is to be seen as anything other than a blatantly anti-competitive act.

COMPETITION POLICY ASPECTS OF THE U.S.-JAPAN STRUCTURAL IMPEDIMENTS INITIATIVE: IMPLICATIONS FOR CANADA

By:
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Introduction

The growing importance of trade and investment linkages in the Pacific basin for Canada and the world economy in the 1990s is widely recognized. The various countries of the Asia-Pacific comprise the highest growth region of the world.[1] In addition to being a key source of imports and an expanding export market, these countries are an important source of direct investment for Canada and the United States. The economic dynamism and huge population of the Asia-Pacific region is also bringing it enhanced political importance.[2] Reflecting its tremendous potential, the Asia-Pacific is the focus of several recent government and private sector initiatives to enhance Canada's presence in overseas markets.[3]

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Japan remains the economic centre and driving force of the Asia-Pacific region. Its gross domestic product substantially exceeds that of all other countries in the region, and is roughly equal to that of Britain, France and Italy combined.[4] By the year 2000, it is expected to be 85 per cent of that of the United States.[5] Japan has the world's largest stock market in both capitalization and trading volume and is a major supplier of investment capital for other Asian countries.[6] Its sophisticated consumers and capacity for innovation have made Japanese firms the international leaders in diverse high technology industries.[7]

The state of economic relations between the United States and Japan is of considerable importance to Canada. The continuing U.S.-Japan trade imbalance is a major source of protectionist pressures in the U.S. Congress— pressures that may easily have spillover effects on Canada. Indeed, during the past decade, the U.S.-Japan bilateral trade deficit and associated perceptions regarding Japanese business practices have been a key factor in the enactment of successive measures to toughen U.S. trade laws. In addition, U.S. policies or concerns respecting particular sectors of the Japanese economy can contribute to the adoption of protectionist measures by Canada, or otherwise impact on Canadian firms and consumers. For example, in the mid-1980s, voluntary export restraints imposed by the United States on Japanese autos were a key factor underlying pressures for adoption of similar measures in Canada.[8] Relations between the United States and Japan, the two leading market economies, also impact on the tone of relations throughout the international trading community.[9]

In the past year, the United States and Japan have concluded an important set of negotiations aimed at reducing bilateral trade frictions. These negotiations, known as the Structural Impediments Initiative (SII), have major implications for trade and competition policies in the 1990s. The talks have rendered obsolete traditional distinctions between international and domestic economic policies.[10] The matters dealt with in the negotiations ranged from the U.S. government budget deficit and education system to Japanese land use regulations, allegedly excessive national savings rates and exclusionary business practices in the domestic distribution sector. The SII talks also illustrate an apparent trend on the part of the United States toward aggressive bilateralism designed to remedy perceived "unfair" foreign government policies and business practices.[11]

Competition policy was a central consideration in the SII negotiations. As discussed below, the role of the Japanese "keiretsu" (industrial groups), the extent of restrictive business practices and the perceived laxity of Japanese antitrust enforcement were key concerns pursued by the United States in the talks. As a result, the agreements reached between the two countries pursuant to the talks in June 1990 incorporated detailed measures to strengthen the Japanese *Antimonopoly Act* and the role of the Japanese antitrust authority, the Fair Trade Commission (JFTC), within the Japanese economy. These measures included amendments to raise the level of fines applicable under the *Act* and the issuance by the JFTC of new Guidelines to clarify the treatment of particular business practices.[12]

This paper examines the nature and implications of these aspects of the SII talks. The next section of the paper provides background on the SII negotiations and U.S. concerns regarding Japanese industrial organization and competition policy. The following section provides an overview of key elements of the SII agreements and related activities of the Fair Trade Commission. The probable impact of the changes being implemented in Japanese competition policy on the U.S. and Japanese economies is then briefly discussed. The spillover impact of the Japanese policy changes on third countries such as Canada and the wider implications of the SII process for the international trading system are also considered.

Background to the SII Negotiations

The SII talks grew out of increasing tension between the United States and Japan during the 1980s regarding the imbalance in the two countries' bilateral trade and associated perceptions regarding unfair Japanese trade practices. Although in 1980 the deficit was only $7 billion (U.S.) in favour of

Japan, it grew rapidly to approximately $52 billion in 1987.[13] After declining somewhat in 1988 and 1989, it increased again in 1990 to a level of approximately $49 billion.[14] This level was viewed as unacceptably high by both the U.S. Congress and the executive branch.

Throughout this period, there were increasing concerns on the part of Western businesses and governments regarding allegedly unfair Japanese trade practices. These concerns related to diverse aspects of Japanese government policies and business behaviour. A key focus of concern was the Japanese practice of providing subsidies and other forms of assistance to select industries considered to have high growth potential.[15] A closely related issue was the perceived role of the Japanese Ministry of International Trade and Industry in coordinating the activities of firms in such industries.[16]

An additional focus of concern regarding the organization of Japanese industry was the role of the so-called "keiretsu" groups. Actually, the term "keiretsu" may be applied to several fairly distinct forms of inter-firm groupings. Probably the best known are the major conglomerate groups—Mitsui, Mitsubishi, Sumitomo, Fuyo, Sanwa and Daiichi-Kango. These groups typically link together a major bank, an international trading company and a number of manufacturing firms, often in diverse industries. Within each group, members exchange corporate shares, have interlocking directorates and coordinate their activities through mutual appointments and meetings of corporate officials.[17] Several of these groups are descendants, albeit in attenuated form, of the older "zaibatsu" conglomerates that dominated the Japanese economy until the conclusion of World War II.[18] The existing conglomerate groups account for up to 17 per cent of total sales in the Japanese economy.[19]

Another important type of keiretsu organization consists of corporate groups that are primarily vertical in nature. These groups usually consist of one or more large industrial concerns and several subsidiary firms (often suppliers). Examples of such vertical keiretsu include Toyota and Nissan in the automobile-related industries, Nippon Steel in metals and Matsushita and Hitachi in the electronics and electrical equipment industries.[20] Trade within the vertical keiretsu probably accounts for as high a proportion of total Japanese output as the major conglomerate groups.[21]

A third distinct form of keiretsu organization of particular concern to many U.S. producers relates to the Japanese distribution sector. Such keiretsu are organized by manufacturers to tie together their retail and wholesale outlets. Distribution keiretsu are prevalent in the automobile, consumer electronics, cosmetics, pharmaceutical, camera and newspaper industries.[22]

It should be noted that scholarly opinions differ regarding the implications of keiretsu groupings for the ease of entry by foreign firms in the Japanese economy. While some analysts assert that the groups represent a major deterrent,[23] others question whether they are more than a minor obstacle.[24] Still other analysts argue that, while keiretsu may indeed create barriers to entry by foreign (or even excluded Japanese) firms, they nevertheless serve valid efficiency-related functions. These purposes include the sharing of information and pooling of risks among member firms.[25] To some extent, this view parallels the perception of non-price vertical restraints by many Western antitrust scholars.

Western concerns respecting distribution keiretsu overlap with related issues regarding excessive layering and government regulation in the distribution sector. Japan's distribution system is viewed by many Japanese as well as foreign critics as excessively layered and fragmented.[26] The ratio of wholesale to retail sales turnover, which is a measure of the average number of tiers between manufacturers and consumers, is as high as 4.8 in Japan. This compares with 2.1 in the United States, 1.5 in West Germany and 1.3 in France. In addition, Japan has 1,350 stores per 100,000 population, roughly double the corresponding figure of 690 for the United States.[27]

The fragmented nature of the Japanese distribution system has been perpetuated by particular legislation known as the *Large Retail Stores Law*. This legislation, passed in 1974, protects small retailers by imposing extensive restrictions on the activities of all stores with floor space of more than five hundred square metres. In practice, it requires all such stores to obtain the approval of local authorities before they can open.[28] This process typically takes several years. Arguably, this legislation, rather than the keiretsu system, is the source of the most pressing problems in the Japanese distribution system.

Still other aspects of Japanese industrial organization have been criticized by Western business representatives. These include officially-sanctioned "recession cartels" and allegedly pervasive restrictive practices in the awarding of construction contracts.[29] In addition, concerns have been expressed regarding the role of authorized sole import distributors as exclusive agents for foreign suppliers in the domestic economy.

These concerns were aggravated by the (to Western observers) lax enforcement of the Japanese competition law, the *Antimonopoly Act*, by the Fair Trade Commission. The *Antimonopoly Act* was adopted by the Diet (the Japanese Parliament) in 1947, under the direction of the post-World War II U.S.-led Allied occupation régime. The *Act* was modelled, to a considerable extent, on U.S. antitrust legislation.[30] It formed a key element of a comprehensive program of economic and political reforms, to rebuild the Japanese economy and foster a democratic political order.[31]

Although the *Act* adopted in 1947 was relatively stringent, amendments were enacted early in its history to weaken some of its key provisions. These included provisions relating to cartels and dominant firms.[32] Significant exceptions were provided for "depression cartels," "rationalization cartels" and the use of resale price maintenance in regard to specified commodities. Furthermore, for many years, the application of competition policy was displaced by the role of the Japanese Ministry of International Trade and Industry in actively organizing cartels and mergers across a broad spectrum of Japanese industries. According to Caves and Uekusa, in the mid-1960s, approximately twenty per cent of the value of Japanese industrial shipments was covered by officially sanctioned cartels.[33]

In 1977, additional amendments were adopted to strengthen some aspects of the *Antimonopoly Act*.[34] At least to outward appearances, however, the application of competition policy in Japan remained weak. For example, through the 1970s and 1980s, only one major criminal case was brought under the *Act*, the petroleum price fixing case of the late 1970s.[35] There also was only one case in which the Fair Trade Commission initiated formal proceedings respecting a merger, the consolidation of the Fuji and Yawata steel companies that led to the creation of the Nippon Steel Corporation in 1969-70.[36] The vast majority of cases were resolved through informal consent proceedings or "recommendations" by the JFTC that were voluntarily accepted by the parties.

Against this background, there were a series of efforts in the 1980s to alleviate U.S.-Japan economic tensions through *ad hoc* "managed trade" arrangements. These included voluntary export restraints (VERs) in the automobile, steel and other industries. In addition, the *U.S.-Japan Semiconductor Chip Agreement* established minimum price floors in the United States and various third country markets and called for steps to open the Japanese market to U.S.-made chips.[37] These measures were not, however, successful in alleviating the overall trade imbalance. They also did not effectively address U.S. perceptions regarding Japanese business practices. U.S. frustrations regarding these matters were complemented by growing concerns relating to increasingly visible Japanese direct investment in the United States. Thus, by the late 1980s, there was growing pressure on the U.S. Administration to take retaliatory action against Japan.

The prospect of retaliation grew more real with the enactment of the Super 301 clause of the U.S. *Omnibus Trade and Competitiveness Act* of 1988. Super 301 represents a significant extension of previous U.S. legislation respecting unfair trade practices. Whereas such previous legislation focused on specific trade practices of individual countries, the Super 301 clause calls on the U.S. Trade Representative (USTR) to assess the impact of foreign countries' trade practices at an aggregate level and to identify, for purposes of remedial action, countries displaying a "consistent pattern of trade barriers and market distorting practices" that affect U.S. exports. Such countries are then exposed to various possibilities for retaliation, including suspension of applicable trade concessions or imposition of special duties or quotas in the event that they fail either to rectify the offending practices or to work out an acceptable agreement with the USTR.[38] While to some extent Super 301 was developed for the specific purpose of addressing U.S.-Japan issues, it is a formidable weapon in the U.S. trade policy arsenal which is potentially of broad application to many countries.[39]

In July 1989, as an Administration-led alternative to formal proceedings under Super 301, the United States and Japan announced their intention to enter into the Structural Impediments Initiative talks. From the U.S. perspective, the talks were intended to provide "a well-documented, comprehensive study of the 'intricacies' of the Japanese economic system."[40] Indeed, the talks covered a very broad range of matters considered relevant to U.S.-Japan trade issues. These included the U.S. government budget deficit, the budgetary process and the U.S. education system as well as diverse aspects of Japanese economic and social organization. The U.S. Department of Justice, and particularly the Assistant Attorney-General for Antitrust, James Rill, participated extensively in the negotiations. Important impetus for an agreement was provided by the March 1990 summit meeting between President Bush and Japanese Prime Minister Toshiki Kaifu. Subsequently, in April and July 1990 respectively, interim and final reports were issued by the negotiating teams.

Key Elements of the SII Agreements and Related Activities of the Fair Trade Commission of Japan

The agreements reached pursuant to the SII talks call for significant measures relating to diverse aspects of U.S. and Japanese economic and social policies. On the U.S. side, the final report commits the Administration to continued efforts to reduce the federal budget deficit, promote private saving, provide enhanced government funding for research and development and improve mathematics and science education in the United States.[41] The report also includes specific commitments for the Administration to support liberalization of U.S. antitrust rules governing joint production ventures, and move toward implementation of the metric system. It may be noted that the majority of these are matters to which the Bush Administration was committed in any case.

On the Japanese side, the final report includes a far-reaching set of commitments regarding diverse facets of the Japanese economy. Antitrust-related matters figure prominently in these commitments. In particular, the report commits the government of Japan to strengthened antitrust enforcement against anti-competitive practices in the distribution sector, issuance of specific guidelines under the *Antimonopoly Act* concerning unfair practices in distribution, "much stronger" enforcement of criminal provisions of the *Antimonopoly Act* relating to price fixing and market allocation, measures to facilitate private legal actions for damages under the *Antimonopoly Act* and more transparent and fair procedures for implementation of "administrative guidance" by the Ministry of International Trade and Industry.[42]

In addition, the report contains specific measures to ensure that the keiretsu groups do not impede fair competition, and to restrict cross-holding of shares within such groups where this leads to *Antimonopoly Act* violations.[43] It commits the JFTC to ongoing monitoring of keiretsu transactions, and regular analyses of potentially anti-competitive practices. The SII Report also contains important commitments regarding reform of land use and other regulations and increased Japanese public infrastructure spending. The latter is considered to be the best means of reducing the current excess of gross domestic saving over investment in Japan, which contributes to the imbalance in the U.S.-Japan current account.[44]

Since the SII final reports were issued, a number of steps have been taken by the Fair Trade Commission of Japan toward implementation of the agreements. In September 1990, the Commission released a draft set of *Guidelines on Sole Import Distributorship Contracts*. The *Guidelines* establish new requirements and procedures for clearance of sole import distributorships by the JFTC. In general, the Guidelines take a case-by-case approach to the evaluation of such distributorships. They note that sole import distributors can serve a useful function in facilitating the entry of foreign goods.[45]

In January 1991, the JFTC announced an intention to submit to the Diet a bill to raise the level of fines that may be levied under the *Antimonopoly Act*.[46] This announcement followed a visit to Tokyo by U.S. Attorney-General Richard Thornburgh, to re-emphasize the importance of Japanese antitrust reforms to the United States.[47] In February 1991, the Commission released another draft set of *Guidelines on Unfair Trade Practices and Distribution Systems*. The latter *Guidelines* set forth in detail

the JFTC's approach to practices such as customer allocation agreements, exclusive dealing, resale price maintenance and non-price vertical restraints.[48]

These developments were in addition to a general upgrading of the Fair Trade Commission and enhanced enforcement activities during the past two or three years. During this period, the Commission has initiated (for Japan) an unprecedented number of investigations into matters such as obstruction of parallel imports and bid rigging. In March 1991, the Fair Trade Commission ordered twelve major cement manufacturers to pay about $80 million (U.S.) in fines for price fixing.[49]

Another important development during this period was the issuance by the JFTC of new *Guidelines for the Regulation of Unfair Trade Practices with Respect to Patent and Know-how Licensing Agreements.* The *Guidelines* establish detailed standards to govern patent and know-how licensing practices such as tie-ins, field-of-use restrictions, package licensing and export restraints.[50] Although the *Guidelines* actually pre-date the SII talks (they were issued in February 1989), they clearly represent part of an ongoing effort to respond to Western demands for greater transparency in respect of antitrust policies relating to international trade and technology transfer. The new *Guidelines* replace a previous set of *Guidelines for International Technology Introduction Agreements* issued in 1968.

Impact of the Japanese Competition Policy Measures on U.S. and Japanese Interests

The changes in Japanese competition policy mandated by the SII are specifically intended to benefit U.S. exporters. In this regard, the U.S. summary text released following the final report contains a number of pertinent remarks:

> Reform of the Japanese distribution system through...strengthened antitrust enforcement...will allow imports to penetrate the Japanese market.... Vigorous antimonopoly enforcement...will provide enhanced market opportunities for foreign and domestic firms.... Loosening keiretsu relationships...would facilitate the entry of foreign goods.[51]

In addition to assisting individual U.S. exporting firms, the SII package as a whole is expected to improve the U.S.-Japan bilateral trade imbalance. This aspect of the negotiations has been emphasized by President George Bush, who hailed the final report as "a clear commitment by Japan to reduce further its current account surplus."[52]

The changes in Japanese competition policy mandated by the SII will undoubtedly help individual U.S. exporters to penetrate the Japanese market. In addition, they could be a factor in improving the U.S.-Japan trade imbalance over the long run. The competition policy changes may not, however, have a direct or immediate impact in this regard. An appreciation of this point requires further consideration of the underlying industrial organization issues and their relation to the causes of the U.S. current account deficit.

To begin with, as noted above, it remains unclear how far the keiretsu groups or close-knit links in the distribution sector would tend to systematically exclude foreign suppliers, as distinct from non-participating Japanese firms. From a structural point of view, many sectors of the Japanese economy are already highly competitive. For example, there are at least eight significant auto manufacturers, and numerous competitors (including new entrants) in the flourishing high technology industries. To compete in such markets, even keiretsu-style organizations must ultimately base their purchasing decisions principally on cost and quality considerations.[53] Thus, while "loosening" the prevailing links will undoubtedly facilitate entry by individual firms, it seems unlikely to generate a systematic shift in favour of offshore producers.[54]

In addition, as several observers have pointed out, the U.S.-Japan bilateral trade deficit is attributable principally to macroeconomic factors. In the United States, the combination of high government budget deficits and low national savings rates has necessitated a massive inflow of foreign capital. Conversely, in Japan, high savings rates (in excess of private and public investment demand) have made possible substantial net outward capital flows. These capital flows must be balanced by offsetting transactions in the respective current accounts.[55] Consequently, until the underlying

macroeconomic issues are addressed, the current account imbalance cannot be rectified. This consideration highlights the importance of the broader SII commitments respecting reduction of the U.S. federal budget deficit and expansion of Japanese public infrastructure investment.

The competition policy-related measures mandated by the SII are likely to generate significant benefits for Japanese consumers. There is strong evidence that, notwithstanding the structural competitiveness of the Japanese economy, consumer choices have been restricted and prices kept artificially high as a result of the excessively layered and restricted distribution sector. Recently, a major survey conducted jointly by the Japanese Ministry of International Trade and Industry (MITI) and the U.S. Department of Commerce confirmed the existence of significantly higher prices in the Japanese market for both domestic and foreign-made goods.[56] The new *Guidelines on Unfair Trade Practices and Distribution Systems*, in conjunction with other reforms implemented through the SII, are expected to help remedy this situation.

The need to foster competition in the Japanese domestic market and the role that imports can play in providing such competition are increasingly recognized in Japan, even outside of the SII negotiations. Indeed, these themes have figured prominently in several recent studies and reports which have examined the future of the Japanese economy and society.[57] The thrust of these reports has been to emphasize that the future growth and success of Japan should not be taken for granted, and that urgent measures are needed to promote internationalization and improve the quality of life for individual citizens.[58]

This confluence of U.S. exporter and Japanese consumer interests was a crucial factor in making possible the wide-ranging SII agreements. During the negotiations, the desirability of more competition (both foreign and domestic) and the primacy of consumer interests was stressed by Prime Minister Toshiki Kaifu.[59] This theme was picked up in numerous Japanese newspaper editorials supporting the talks.[60]

Finally, as an ironic aspect of the SII process, it is at least arguable that the measures to foster competition in the Japanese economy will also yield important long-run benefits to Japanese producers. The work of Michael Porter has emphasized the importance of vigorous competition in the domestic market as a key determinant of the long-run competitiveness of firms.[61] Competition provides an essential incentive for firms to engage in innovation, which is the most important source of competitiveness and productivity gains.

In considering the future of Japanese industry, Professor Porter has specifically stressed the need to eliminate restrictions on competition in the distribution system and to strengthen the application of Japanese competition law.[62] Thus, by requiring implementation of these measures, the SII agreements may actually contribute to the long-run vitality of Japanese industry. This is not to suggest that the agreements will not entail significant adjustment costs for many Japanese firms in the shorter term.

Implications for Third Countries and the International Trading System

In addition to their impact on the U.S. and Japan, it is important to consider the effects of the competition policy changes mandated by the SII on third countries such as Canada. In principle, the effects should be positive. Competition policy generally is non-discriminatory with respect to country of origin. Strengthened antitrust enforcement and reduced scope for restrictive business practices should make it easier for all countries' exporters to penetrate the Japanese market. Not surprisingly, therefore, in its recent analysis of Canada-Japan trade issues the Business Council on National Issues has noted the strengthening of Japanese antitrust enforcement and reforms to the distribution sector under the SII as a significant step toward opening of the Japanese market, providing a major opportunity for expansion of Canadian exports.[63] Taking advantage of this opportunity may, however, require, significant adjustments to enhance productivity in the Canadian manufacturing sector.[64]

The SII agreements may prove to be beneficial to Canada in other ways. As noted above, measures aimed at reducing the U.S. budget deficit or otherwise reducing the net capital outflow from Japan to the U.S. could help to alleviate materially the associated current account imbalance. This could help to reduce protectionist pressures in the U.S. Congress.

While recognizing these beneficial aspects of the SII process, it is also important to consider the wider implications of the negotiations for the international trading system. In this regard, Bhagwati and others have raised a number of important concerns. Bhagwati suggests that if (as in the SII) virtually all aspects of national policy are subject to negotiation, this will ultimately undermine the feasibility of a rules-based international trading system. Consequently, he argues, negotiations such as the SII will lead, eventually, to comprehensive managed trade.[65]

The basis of the concern articulated by Bhagwati must be acknowledged. In the SII, Japan has been asked by the United States (under threat of possible proceedings under Super 301) to review and modify diverse aspects of its domestic policies. The U.S. position in this regard has gone well beyond merely enforcing multilaterally agreed-upon rules, or challenging generally recognized unfair trade practices, to call for significant changes in basic aspects of Japanese social organization. Furthermore, now that the SII precedent has been set, the possibility of similar pressures being applied to other U.S. trade partners cannot be ruled out. The implications for small, open economies such as Canada's are potentially serious.

In the present environment of global competition, the inclusion of formerly "domestic" policies such as antitrust or protection for intellectual property in international trade policy negotiations is inevitable. Indeed, such policies have now become an integral element of the package of instruments through which governments attract investment and otherwise seek to create competitive advantages for their corporations and citizens. In such circumstances, pressures for international harmonization of framework policies are entirely to be expected. From Canada's standpoint, however, it is important that such issues be addressed primarily in a multilateral rather than a bilateral setting. This is the only way to ensure that the particular interests of the United States or another economic superpower such as the European Community do not displace the concerns of smaller countries.

Following the SII negotiations, the government of Japan has proposed that in future issues of policy convergence be pursued by the Organization for Economic Cooperation and Development (OECD), rather than bilaterally.[66] A related proposal has been put forward by Sylvia Ostry. As proposed by Ostry, this would involve an in-depth review by the OECD of trade, research and development and competition policies of OECD member countries, with particular attention to those of the "Triad" (the United States, the European Community and Japan). Special attention would be given to the application of such policies in "strategic" industries. On the basis of this analysis, recommendations would be developed both for short-run measures to defuse current international tensions and for a longer-run process of policy convergence. In Ostry's view, the object would *not* be to enforce uniform national tastes, institutions and corporate behaviour, but to optimize factor mobility and competition among alternative policy paradigms.[67] Clearly, Canada has an interest in supporting such a multilateral review process.[68]

Conclusions

The U.S.-Japan SII negotiations represent (to put it mildly) a major departure from the traditional style and focus of international trade negotiations. They illustrate clearly the non-sustainability in the global economy of the 1990s of traditional distinctions between domestic and international policies. In the new era, traditional domestic policies such as industrial policy and intellectual property protection will all be considered fair game for international negotiation. Competition policy will be a particularly important focus of attention, in view of its direct implications for issues of market access. In this regard, the SII process has reinforced a trend evident in the other current international economic developments—for example, the EC 1992 market integration exercise.[69] Thus, the SII negotiations

provide further evidence of the growing importance of competition policy as an economic framework policy in the global economy of the 1990s.[70]

The expanded focus of international trade negotiations in the 1990s is capable of yielding significant benefits. In the case of the SII, it appears to have had such benefits. In particular, the policy reforms sought by U.S. exporter interests coincided to a large degree with the interests of Japanese consumers. The need for such reforms had already been identified in previous studies of the Japanese economy and society. These reforms should facilitate access to the Japanese market by producers located in third countries such as Canada as well as in the United States.

In general, however, the pursuit of such reforms through bilateral as opposed to multilateral negotiations entails considerable risks. Smaller countries may be pressured into adopting policy changes that are inconsistent with their own interests or those of the international trading system as a whole. Consequently, recent pleas for issues of policy convergence to be addressed in multilateral rather than bilateral fora merit strong support from Canada and other members of the international community.

Notes

1 For a useful overview of relevant indicators, see H. Edward English, *Tomorrow the Pacific* (Toronto: C.D. Howe Institute, Observation 34, March 1991). See also Gunnar Sletmo and Susanne Holste, *Asia Pacific: A New Frontier For Canada's Shipping and Trade* (Ecole des hautes Etudes commerciales, Cahiers de la Chaire de commerce Omer De Serres, October 1990), and "A Strategic Guide to the Rim," *Fortune*, vol. 120, no. 13, Fall 1989, pp. 723-84.

2 For background, see Staffan Burenstam Linder, *The Pacific Century: The Economic and Political Consequences of Asian Pacific Dynamism* (Stanford, Cal: Stanford University Press, 1986). See also English, *supra*, note 1.

3 The federal government's Pacific 2000 initiative provides support for various export promotion activities targeted at the Asia-Pacific. Regarding other initiatives, see Sletmo and Holste, *supra*, note 1.

4 Business Council on National Issues, *Beckoning Opportunities: Towards A Stronger Canada-Japan Economic Relationship* (Ottawa and Osaka, May 1991), p. 2.

5 *Id.*, p. 2.

6 See "Empire of the sun: Japanese investment creates foundations of regional trading block," *Far Eastern Economic Review*, May 3, 1990, pp. 46-48.

7 It is noteworthy that the domestic market, not foreign markets, led industry development in the vast majority of Japanese industries. See Michael E. Porter, *The Competitive Advantage of Nations* (New York: The Free Press, 1990), pp. 384-421. See, in particular, the discussion of domestic demand conditions at pp. 401-406.

8 For a useful discussion, see Wendy Dobson, "A Canadian Perspective", in Wendy Dobson, ed., *Canadian-Japanese Economic Relations in a Triangular Perspective* (Toronto: C.D. Howe Institute, 1987), pp. 1-35, at pp. 10-11.

9 U.S.-Japan relations also affect Canada in other ways. For example, due to the close linkages between Canadian and U.S. capital markets, trade-related developments that affect U.S. macroeconomic variables (e.g., interest or exchange rates) can quickly affect the corresponding Canadian variables. This can undermine or enhance Canadian competitiveness in third country markets. See Dobson, *id.*, p. 10.

10 See Sylvia Ostry, *Governments and Corporations in a Shrinking World: Trade & Innovation Policies in the United States, Europe and Japan* (New York: Council on Foreign Relations, 1990), p. 77.

11 A preoccupation with fairness as defined by U.S. standards has been a touchstone of U.S. trade policy since the mid-1980s. For discussion, see Ostry, *id.*, pp. 26-28.

12 For details, see Part III, *infra*.

13 See Angela Helou, "Structural Impediments Initiative—An International Strategy," *World Competition*, vol 14, no. 2, December 1990, pp. 19-38.

14 See "U.S., Japan Release Final Report on SII Following Extended Negotiations," *Antitrust and Trade Regulation Report*, vol. 59, July 5, 1990, pp. 20-21.

15 For discussion, see Kozo Yamamura, "Caveat Emptor: The Industrial Policy of Japan," in Paul R. Krugman, ed., *Strategic Trade Policy and the New International Economics* (Cambridge: MIT Press, 1986), pp. 169-209.

16 See Chalmers Johnston, *MITI and the Japanese Miracle* (Stanford, Cal.: Stanford University Press,1982). It should be noted that Johnston's view of the pervasive controlling role of MITI has been challenged by other scholars. See, e.g., Gary R. Saxonhouse, "What Is All This About 'Industry Targeting' in Japan?" *World Economy*, vol. 6, no. 3, September 1983, pp. 253-273.

17 Kozo Yamamura, "Will Japan's Economic Structure Change? Confessions of a Former Optimist", in K. Yamamura, ed., *Japan's Economic Structure: Should it Change?* (Seattle: Society for Japanese Studies, 1990), pp. 13-64. See also Robert Z. Lawrence, *Do Keiretsu Reduce Japanese Imports?* (Paper prepared for the eighth international symposium of the Japanese Economic Planning Agency's Economic Research Institute on External Adjustments and Changing Trade Structure of Manufactured Goods Since 1985 in Tokyo, January 22-23, 1991(Preliminary)), p. 1.

18 For discussion, see references in note 31 and the accompanying text.

19 Estimate quoted in Yamamura, *supra*, note 17, p. 29.

20 Lawrence, *supra*, note 17, p. 1.

21 Yamamura, *supra*, note 17, p. 31.

22 Lawrence, *supra*, note 17, p. 2.

23 See, e.g. Lawrence, *supra*, note 17.

24 For discussion of this point of view, see C. Fred Bergsten and William R. Cline, *The United States - Japan Economic Problem* (Washington, D.C.: Institute for International Economics, revised January 1987), pp. 65-68.

25 For a pertinent discussion, see Masahiko Aoki, "Towards a Model of the Japanese Firm", *Journal of Economic Literature*, March 1990, pp. 1-27. See also Lawrence, *supra*, note 17.

26 See Isao Nakauchi, "The Yoke of Regulation Weighs Down on Distribution", *Economic Eye*, Summer 1989, pp. 17-19.

27 All figures quoted are from Nakauchi, *id.*

28 Nakauchi, *id.*

29 For related discussion, see "Trouble in store", *Far Eastern Economic Review*, August 3, 1989, pp. 41-42.

30 The *Act* also contained several provisions that were peculiar to the Japanese scene, notably those respecting trade associations and intercorporate shareholding by non-financial corporations. For details, see Fair Trade Commission of Japan, *The Legal Framework of Japanese Competition Policy* (April, 1986). This document is a useful, annotated overview of the *Antimonopoly Act*.

31 Apart from the *Antimonopoly Act* itself, these reforms included extensive measures to dissolve the giant family-owned Zaibatsu conglomerates, which controlled key sectors of the Japanese economy and had figured prominently in the war effort. In contrast to the subsequent application of the *Antimonopoly Act* by the Fair Trade Commission, the initial reforms are generally believed to have been highly effective. By decentralizing decision-making and facilitating the creation of new firms and industries, these measures were instrumental in the rapid recovery and growth of the Japanese economy in the 1950s and 1960s. See Masu Uekusa, "Effects of the Deconcentration Measures in Japan," *Antitrust Bulletin*, Fall 1977, pp. 687-715.

32 See Masu Uekusa and Hideke Ide, "Industrial Policy in Japan", in Hiromichi Mutoh et al., *Industrial Policies for Pacific Economic Growth* (Sydney: Allen and Unwin, 1987).

33 R.E. Caves and M. Uekusa, *Industrial Organization in Japan* (Washington, D.C.: The Brookings Institution, 1976), p.147.

34 See Fair Trade Commission, *The Legal Framework of Japanese Competition Policy*, *supra*, note 30, p. 3. In particular, provision was made for the imposition of "surcharges" (a form of civil penalty based on estimated price overcharges) in cases of illegal cartels. The amendments also restored the authority to break up large enterprises found to be in a monopolistic situation.

35 See "Freeing the watchdog", *Far Eastern Economic Review*, October 19, 1989, pp. 48-49.

36 Even in this case, the Commission ultimately withdrew its application to the Tokyo Superior Court when the parties agreed to various supplementary undertakings that limited the anti-competitive impact. Caves and Uekusa suggest that the JFTC faltered under pressure from MITI. See Caves and Uekusa, *supra*, note 33, pp. 151-52.

37 For discussion, see Ostry, *supra*, note 10, pp. 44 and 69-70.

38 Julia Christine Bliss, "The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response", *Law and Policy in International Business*, vol. 20, 1989, pp. 501-528.

39 For pertinent discussion, see Bliss, *id.*, pp. 521-23. See also Ostry, *supra*, note 10, at p. 329.

40 Remarks of David C. Mulford, U.S. Undersecretary of the Treasury for Economic Affairs, quoted in Helou, *supra*, note 13.

41 See "Key Elements of U.S.-Japan Structural Impediments Initiative Report Released by the Office of the U.S. Trade Representative on June 28, 1990", *Antitrust and Trade Regulation Report*, vol.59, July 5, 1990, pp. 28-31.

42 *Id.*

43 *Id.*

44 See the brief discussion of macroeconomic issues, *infra*.

45 For highlights, see "JFTC Unveils New Guidelines to Control Practices by Exporters and Import Agents", *Antitrust and Trade Regulation Report*, vol. 59, September 27, 1990, pp. 446-67.

46 "Japan's Plans on Antitrust Enforcement under SII Fail to Excite U.S. Officials", *Antitrust and Trade Regulation Report*, January 31, 1991, pp. 170-71.

47 "Thornburgh Urges Japan to Embrace Stricter Enforcement of Anti-cartel Law", *Antitrust and Trade Regulation Report*, vol. 59, September 13, 1990, p. 405.

48 Fair Trade Commission of Japan (February 1991).

49 *Antitrust and Trade Regulation Report*. For related background, see "Freeing the watchdog", supra, note 35.

50 For discussion, see R.D. Anderson, S.D. Khosla and M.F. Ronayne, "The Competition Policy Treatment of Intellectual Property Rights: Retrospect and Prospect", forthcoming in a volume being edited by R.S. Khemani and W.T. Stanbury to commemorate the centenary of competition policy in Canada.

51 "Key Elements of U.S.-Japan Structural Impediments Initiative Report Released by the Office of the U.S. Trade Representative", *supra*, note 41.

52 "U.S., Japan Release Final Report on SII Following Extended Negotiations", *supra*, note 14.

53 This point is emphasized in Bergsten and Cline, *supra*, note 24, at pp. 65-68.

54 But cf. Lawrence, *supra*, note 17, who argues that keiretsu do introduce a systematic barrier to the entry of foreign products.

55 See Richard G. Lipsey and Murray G. Smith, *Global Imbalances and U.S. Policy Responses: A Canadian Perspective* (Toronto: Canadian-American Committee, 1987), p. 11 and Box 1 on p. 12.

56 Referred to in "Key Elements of the U.S.-Japan Structural Impediments Initiative Report Released by the Office of the U.S. Trade Representative", *supra*, note 17, at p. 30.

57 This view is associated, in particular, with the report of the *Maekawa* study groups and various follow-up analyses by the Japanese business federation, Keidanren.

58 "The great race to attract excellent businesses as well as talented individuals is just beginning." Kazuo Nukazawa (Managing Director, Keidanren), *The Essential Race: Changes in the Japanese Economy* (remarks delivered at the second annual EC Japan Conference of Journalism, Berlin, September 8, 1988).

59 "I am determined to firmly tackle structural reforms of Japan as one of the top priorities of my new cabinet, with a view to improving the quality of Japanese life, with further stress on the consumer-oriented economy." Statement of Prime Minister Kaifu at the Summit meeting with President Bush, as quoted in Helou, *supra*, note 13.

60 See "Six steps forward," *Far Eastern Economic Review*, April 12, 1990, pp. 56-57.

61 See Michael E. Porter, *The Competitive Advantage of Nations*, *supra*, note 7, chapter 3, pp. 69-130.

62 See "The Agenda For Japan", in Porter, *id.*, pp. 704-712.

63 Business Council on National Issues, *supra*, note 4.

64 See Donald J. Daly, *Japanese Imports of Manufactured Products —Changing Environment and Performance* (Ontario Centre for International Business, Working Paper No. 46, March 1991).

65 Bhagwati states:

> The path down which the United States is currently going in its negotiations with Japan under the rubric of the Structural Impediments Initiative...is the path of folly....Once one starts bringing into the trade arena issues such as even savings rates, one is essentially arguing that everything affects trade... In going down this unwise route, the American trade policy makers put the world trading system at great risk. For, if

everything becomes a question of fair trade, the only outcome will be to remove altogether the possibility of ever agreeing to a rule-oriented trading system. "Managed trade" will then be the outcome, with bureaucrats allocating trade according to what domestic lobbying pressures and foreign political muscle dictate.

Jagdish Bhagwati, *U.S. Trade Policy Today* (Paper presented at the Columbia University Conference on Trade Policy, September 8, 1989), quoted in Ostry, *supra*, note 10, at pp. 77-78.

66 See "Shuffling the deck: Japan pursues multilateral SII role in the OECD", *Far Eastern Economic Review*, July 19, 1990, p.43.

67 Ostry, *supra*, note 10, pp. 83-90.

68 Recently, Canada has proposed that issues related to the international coordination of competition policy be the focus of the work of the OECD Committee on Competition Law and Policy for the next two years. See Derek J. Ireland, *International Coordination of Competition Policy* (Notes for an address given at the University of British Columbia, June 21, 1991).

69 For a useful overview, see Mark Ronayne, "EC Competition Policy and Europe 1992: Implications for Canadian Businesses and Public Policy", *Canadian Competition Policy Record*, vol. 12, no. 1, March 1991, pp. 39-45.

70 For related discussion, see Bureau of Competition Policy, *Competition Policy in Canada: Its Interface With Other Economic and Social Policies* (Hull, Québec: Consumer and Corporate Affairs Canada, September 1989).

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