North Carolina Journal of International Law

Volume 3 | Number 2 Article 6

Spring 1978

The Orderly Marketing Agreement with Japan: Implications for U.S. Trade Policy

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Notes and Comments

The Orderly Marketing Agreement With Japan: Implications For U.S. Trade Policy

The postwar world has witnessed phenomenal growth in international trade. Until recently, this increase in trade has accompanied generally widespread economic growth and rising standards of living throughout much of the world. Increased world trade has not come about, however, without dislocating side effects in industrialized countries. Many industries in the United States have suffered severe losses as they have been unable to compete with less expensive imports. The competition of imports has forced many U.S. firms to close down their manufacturing facilities or to move them abroad in search of cheaper labor.

One nation that has been particularly effective in penetrating the U.S. market to the detriment of domestic U.S. companies has been Japan. Following the Second World War, Japan embarked on a massive program to develop industries that would manufacture products for export. Receipts from these exports were intended to counterbalance the large overseas expenditures required to purchase necessities such as food and raw materials for industry. Japan encouraged this growth by not burdening the businessman with vigorous antitrust enforcement and by erecting tariff barriers to protect his products from import competition.[1] The Japanese imported foreign technology and improved upon manufacturing processes in order to increase technical efficiency and ultimately to hasten growth.[2]

In addition to national policies encouraging competitive exports, Japanese business practices encourage maximum production and make exports important in maintaining a healthy economy. For instance, labor in Japan is a "fixed" cost in that workers are typically not laid off in times of recession.[3] Also, Japanese corporations generally operate with

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[1] Myerson, *A Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANSNAT'L L. 167, 198 (1976).

[2] G. ALLEN, JAPAN AS A MARKET AND SOURCE OF SUPPLY 4 (1967).

[3] W. HUNSBERGER, JAPAN AND THE UNITED STATES IN WORLD TRADE 161 (1964).

a "high debt/equity ratio; *i.e.*, they depend heavily upon borrowed capital, which, as opposed to equity, bears a fixed charge."[4] These factors mandate that Japanese corporations produce at their maximum capacity, even if inventory grows or the price on some export items must be lowered. Japanese policies and business practices work together to expand export sales.

During the past several years Japanese manufacturers have been particularly effective in expanding the sale of color televisions in the United States. Over eighty percent of the color televisions imported by the United States are manufactured in Japan.[5] The number of color sets imported from Japan jumped from 1.0 million in 1975 to 2.7 million in 1976.[6] This increase continued into 1977 as the level for the first six months of 1977 totaled eighteen percent higher than the same period in 1976.[7] This drastic increase in imports has caused severe problems in the U.S. economy; one estimate is that 70,000 jobs have been lost because of color television imports.[8]

I. The Orderly Marketing Agreement

Television manufacturers in the United States reacted vigorously to this loss of market share and loss of jobs. Throughout the past decade they have pursued many of the remedies provided under U.S. law.[9] However, their most successful effort began on October 21, 1976 when several interested parties[10] filed a petition with the International Trade Commission. They sought relief from increased imports of color televisions from Japan under Title II Section 201 of the Trade Act of 1974.[11] This action ultimately resulted in the negotiation of an orderly marketing agreement with the Government of Japan whereby Japan agreed to limit the number of color receivers shipped to the United States for a

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[4] Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 L. & POL'Y INT'L BUS. 85, 114 (1973).

[5] Announcement of an Agreement with Japan to Limit the Number of Japanese Color Television Receivers Shipped to the U.S. Markets, 13 WEEKLY COMP. OF PRES. DOC. 760 (May 23, 1977) [hereinafter cited as Japanese Agreement Announcement].

[6] *Id.*

[7] U.S. Dep't of Commerce Statistics, *reprinted in* COMMERCE NEWS (Press Release), Sept. 15, 1977, at 1.

[8] *N.Y. Times*, May 18, 1977, § D, at 11, col. 1.

[9] The manufacturers sued to obtain antidumping duties, to obtain countervailing duties and to prohibit unfair import practices. *See* text at note 46 *infra*.

[10] These parties were: Industrial Union Dep't, AFL-CIO; American Flint Glass Workers Union of North America; Allied Industrial Workers of America; Communications Workers of America; Glass Bottle Blowers' Association of United States and Canada; Independent Radionic Workers of America; International Association of Machinists; International Brotherhood of Electrical Workers; International Union of Electrical, Radio and Machine Workers; United Furniture Workers of America; United Steelworkers Union of America; Corning Glass Works; GTE Sylvania Inc.; Owens-Illinois, Inc.; Sprague Electric Co.; and Wells-Gardner Electronics Corp.

[11] 19 U.S.C. § 2251 (1975).

three year period, beginning July 1, 1977.[12] Although this agreement may not represent a total victory for U.S. television manufacturers, it did please many industry executives.[13]

The orderly marketing agreement, however, was not the relief that the International Trade Commission had recommended. After five months of hearings and investigations, the six commissioners announced that they all found that there had been injury, but they split three ways in their recommendation of appropriate relief.[14] Chairman Minchew and Commissioners Leonard and Moore determined that color and monochrome television receivers, assembled or not, finished and unfinished, and subassemblies thereof were causing substantial injury and recommended raising the existing rate of duty from five percent to twenty-five percent for the first two years, to fifteen percent for the third and fourth years and to ten percent for the fifth year. In the report of their views, the three commissioners discussed many economic factors indicating serious injury to the American industry. These factors included increased levels of imports, significant unemployment in the U.S. industry, and the decreasing net operating profit of eleven U.S. producers. They also explained how they determined the amount of increase in the rate of duty to relieve the serious injury. They calculated this figure on the basis of the then existing price advantage to the importer. They chose the tariff remedy because it is easier to administer than a quota, would eliminate the possibility of importers making windfall profits, and is less inflationary than quotas. This remedy did not eliminate the possibility that the affected industry and firms could apply for adjustment assistance.

The second recommendation for relief came from Vice Chairman Parker and Commissioner Bedell, who also found that the imports were causing serious injury. They limited their relief to the imports of color televisions for several reasons. First, the petitioners had contended only that color televisions were causing the injury. Second, the commissioners mentioned that production of monochrome receivers is a small and declining part of the domestic industry. They recommended the same rates of duty as Chairman Minchew and Commissioners Leonard and Moore.

Commissioner Ablondi was the only member of the Commission to recommend quantitative restrictions as the appropriate relief. He found that the level of annual imports must be limited to 1,272,000 units per

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[12] Japanese Agreement Announcement, *supra* note 5, at 760.

[13] John Nevin, Chairman and President of Zenith Radio Corp., remarked, "I've got a lot more confidence in this matter than I did six months ago." *Wall St. J.*, June 27, 1977, at 1, col. 6.

[14] ITC Report on Investigation of Importation of Television Receivers and Injury to Domestic Television Manufacturers, 42 Fed. Reg. 16,489 (1977); 16 INT'L LEGAL MATERIALS 542 (1977).

annum on a global basis in order to remedy the injury. The excess capacity and inventories of U.S. manufacturers were the Commissioner's reasons for seeking a quota. He calculated the quota firgure from the approximate average of color television receiver imports for the years 1973, 1974 and 1975.

The Commission's unanimous determination of injury to the color television industry obligated President Carter to act. The President accepted that determination although he did not accept the determination of three commissioners that the monochrome television industry was injured.[15] More importantly, the President decided that an orderly marketing agreement would be a more effective remedy than increasing the tariff. He contended that increasing the duties would expose the United States to retaliation, would result in injustifiably higher prices to consumers, and would not discriminate between imports from Japan and those from other countries.[16] Special Representative for Trade Negotiations Robert S. Strauss was directed to negotiate and to conclude the agreement.

After three negotiating sessions, Strauss successfully completed the negotiations with the Japanese on May 20, 1977. The orderly marketing agreement placed limits of 1.56 million "complete" color television receiver units per year imported from Japan and 190,000 units per year on "incomplete" receivers.[17] Japan agreed to supply the U.S. government with monthly reports on export volumes and to endeavor to space actual exports over the twelve month period. The agreement became effective on July 1, 1977 and runs for three years.

While the orderly marketing agreement with Japan is important for the U.S. television industry, the agreement is more significant for two other reasons. First, the agreement illustrates the subtle, yet profound, changes wrought in the import relief mechanism by the Trade Act of 1974. Second, the use of the orderly marketing agreement has serious implications for U.S. trade policy in the coming years. An exploration of these issues should lead to a deeper understanding of the orderly marketing agreement and its varied consequences.

II. The Trade Act of 1974

The Trade Act of 1974 is a complex piece of legislation covering many aspects of U.S. international trade policy. One author has written that the Act is "the latest truce in the never-ending battle between proponents of freer trade and those preferring higher levels of trade

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[15] Pursuant to § 330(d) of the Tariff Act of 1930, 19 U.S.C. § 1330 (1936) as amended, the President may accept, in the case of an evenly divided vote on injury determination, the determination of either set of commissioners on the question of injury.

[16] Japanese Agreement Announcement, *supra* note 5, at 761.

[17] *Id.* Attachment A contains definitions of "complete" and "incomplete."

restriction."[18] The Act does not resolve the battle; indeed, the stated purposes of the Act include phrases that would satisfy either side.[19] The section of the Act that merits study for an understanding of the orderly marketing agreement is Title II, which provides relief from injury caused by import competition. Here Congress followed its protectionist inclination and made it easier for U.S. manufacturers to gain relief.

The import relief provisions of Title II of the Trade Act of 1974 are not entirely new but modify procedures set forth in previous statutes. The Trade Expansion Act of 1962[20] also provided for relief but set strict requirements for those seeking relief. Two causality requirements in the 1962 Act seriously crippled attempts to obtain relief. First, the petitioner had to prove that the increase in the imported product resulted "in major part" from "concessions granted under trade agreements."[21] Second, the petitioner had to prove that the increase in imports was a "major factor" in causing serious injury to domestic industry, firm or worker. Only if these two requirements were met could the Tariff Commission[22] find that there had been injury and recommend appropriate relief. These requirements were so onerous that "it took seven years for the first affirmative finding of serious injury by the Tariff Commission."[23]

The Trade Act of 1974 changed both of these requirements. The most crucial change is the elimination of the requirement of proof that the increased imports resulted from concessions under trade agreements. This had been the most difficult obstacle to relief. The Trade Act also relaxed the requirement that imports be a "major factor" in causing serious injury by only requiring that the increased imports be a "substantial cause of serious injury, or the threat thereof."[24] The term "substantial cause" is defined as "a cause which is important and not less

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[18] Cornell, *Problems of International Trade Regulation: Commentary on the Trade Act of 1974*, 1 N.C.J. INT'L L. & COMM. REG. 26, 27 (1976).

[19] 19 U.S.C. § 2102 (1970) providing, "The purposes of this Act are, through trade agreements affording mutual benefits —

1) to foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries through open and non-discriminatory world trade;

2) to harmonize, reduce, and eliminate barriers to trade on a basis which assures substantially equivalent competitive opportunities for the commerce of the United States; ....

4) to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and assist industries, firms, workers, and communities to adjust to changes in international trade flows; ...."

[20] Pub. L. No. 87-794, 76 Stat. 884, § 301(b)(1) (1962), (codified in scattered sections of 19, 26 U.S.C.).

[21] *Id.*

[22] The Tariff Commission was renamed the International Trade Commission by the Trade Act of 1974, 19 U.S.C. § 2231 (1975).

[23] Levinson, *Title II of the Trade Act of 1974: What Changes Hath Congress Wrought to Relief from Injury Caused by Import Competition?*, 10 J. INT'L L. & ECON. 197, 212 (1975).

[24] 19 U.S.C. § 2251(b) (1) (1975).

than any other cause."[25] The International Trade Commission, previously called the Tariff Commission, is directed to take into account all economic factors in making its determinations.[26] These changes have made it easier for petitioners to prove, and for the Commission to find, that industry has suffered serious injury because of increased imports.

Within six months of the date on which the petition for relief is filed, the Commission must report its findings to the President. If the Commission finds serious injury or the threat thereof, it may recommend two types of remedies. It may recommend "any duty or import restriction on such article which is necessary to prevent or remedy such injury."[27] The Commission may also recommend adjustment assistance for injured industries, firms or communities. The adjustment assistance program makes "generous amounts of funds and other federal help available to workers, firms, and whole communities whose economic woes can be traced importantly (but not necessarily even substantially) to rising imports."[28] This relief is designed for the situation in which the industry, in general, is competitive with imports, but individual firms are not and is predicated on the concept that "the United States economy should bear the costs to individuals of a national trade policy that benefits the population as a whole."[29]

The Trade Act also severely restricts the options of the President in responding to a Commission finding. Under the Trade Expansion Act of 1962, the President was not required to provide tariff adjustment to the seriously injured industry despite an affirmative finding by the Tariff Commission.[30] The Trade Act, however, makes relief mandatory unless the President "determines that provision of such relief is not in the national economic interest of the United States."[31] The Senate Finance Committee justified this provision by explaining that import relief "ought not to be denied for reasons that have nothing whatever to do with the merits of the case as determined under U.S. law. In particular, the Committee feels that no U.S. industry which has suffered serious injury should be cut off from relief for foreign policy reasons."[32]

The Act allows the President great leeway in the type of relief to be granted. He shall:

> 1.) proclaim an increase in, or imposition of, any duty on the article causing or threatening to cause serious injury to such industry;

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[25] *Id.* § 2251(b) (4).

[26] *Id.* § 2251 (b) (2).

[27] *Id.* § 2251(d) (1) (A).

[28] Cornell, *supra* note 18, at 52.

[29] Note, *A Roadmap to the Trade Act*, 8 L. & POL'Y INT'L BUS. 125, 156 (1976).

[30] 76 Stat. 885 (codified in scattered sections of 19, 26 U.S.C.).

[31] 19 U.S.C. § 2252(a)(1)(A) (1975).

[32] S. REP. No. 93-1298, 93d Cong., 2d Sess. 120, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7268.

2.) proclaim a tariff-rate quota on such article;
3.) proclaim a modification of, or imposition of, any quantitative restriction on the import into the United States of such article;
4.) negotiate orderly marketing agreements with foreign countries limiting the export from foreign countries and the import into the United States of such articles; or
5.) take any combination of such actions.[33]

If the President decides not to provide relief because he believes that relief would not be in the national interest or he takes action which differs from that recommended by the Commission, he must transmit to Congress a report stating his reasons for the difference.

Within ninety days Congress may disapprove the President's action by passing a concurrent resolution by a majority vote of the members of each House present and voting.[34] A danger lurking in the Trade Act provisions is that there is no check on congressional abuse of the procedures for reversing a President's decision. "[T]here is nothing in the Act to prevent Congress from using the disapproval procedure against the President for a non-germane or harassment purpose."[35]

The effectiveness of the Trade Act constraints on Presidential action was vividly demonstrated by the color television case. Important policymakers within the Carter Administration were opposed, or at least reluctant, to granting protection. Secretary of the Treasury, W. Michael Blumenthal explained that "Clearly, this isn't something we would like to see spread to many other industries."[36] Some even attacked the television agreement as protectionist and likely to be inflationary.[37]

Despite its generally free trade outlook, however, the Administration was forced to provide some type of relief. Congressional disapproval of a Presidential decision not to provide any relief was highly likely. Senate Majority Leader Robert Byrd criticized the orderly marketing agreement as not dealing with predatory pricing practices.[38] In this instance the Trade Act procedures worked as Congress intended and forced the President to provide some type of relief.

III. OTHER STATUTORY REMEDIES

Although the changes in the import relief mechanism brought about by the Trade Act of 1974 were significant alone, the true impact of the changes on U.S. trade practices can only be understood by comparing other statutory methods that U.S. manufacturers can use to combat

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[33] 19 U.S.C. § 2253(a) (1975).

[34] *Id.* § 2253(c)(1).

[35] Levinson, *supra* note 22, at 231.

[36] *Wall St. J.*, June 15, 1977, at 2, col. 3.

[37] These officials were W. Michael Blumenthal, Secretary of the Treasury; Charles L. Schultze, Chairman of the Council of Economic Advisors; and Richard N. Cooper, Under-Secretary of State for Economic Affairs. Bus. WEEK, June 6, 1977, at 27.

[38] *N.Y. Times*, May 21, 1977, at 27, col. 1.

import competition. Laws providing for antidumping duties, countervailing duties, and prohibitions of unfair import practices are potent weapons in the hands of U.S. firms. The fact that U.S. television manufacturers have used them all in their battle against Japanese imports provides a convenient point of comparison.

A. *Antidumping Duties*

In 1921 Congress passed legislation to provide U.S. firms with a remedy against predatory dumping and illegal price discrimination practices by foreign manufacturers. This legislation was intended to remedy the ineffectiveness of a 1916 statute. The Antidumping Act of 1921[39] prescribes several determinations which must be made before an antidumping duty may be assessed. The U.S. producer faces an initial economic burden in collecting the data necessary to initiate an antidumping procedure. The U.S. firm "must specify detailed information concerning the description of the goods involved, the fair value of the goods in the exporting country or third market countries, and injury information relating to the impact on the American market."[40] The Treasury Department must then determine whether a class of goods is being or is likely to be sold at less than fair value.[41] If the Treasury finds affirmatively, the case is turned over to the International Trade Commission to determine whether an American industry is being injured by the importation of such merchandise.[42]

American firms have benefited from two recent changes in Commission procedures. First, the Trade Act of 1974 amended the procedures to provide "for equal hearing rights during the proceedings for affected domestic interests as well as the importing interests."[43] The more important change, however, has come about in the test used by the Commission to determine whether an industry has been injured. Prior to 1967 the Commission required that the injury be material, but since then, the Commission has only required a *de minimis* injury. Since changing the criteria, the Commission has made twenty-four affirmative findings of injury in thirty-three cases.[44] The Commission's findings are not reviewable, and if the Commission finds injury, the Treasury Department must assess a duty on the goods equal to the "dumping margin," *i.e.*, the difference between the imported price and the fair value of the product.[45]

The Antidumping Act has been particulary effective for U.S. manufacturers seeking to stem the tide of Japanese imports. There have been

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[39] 19 U.S.C. § 160 (Supp. 1975).
[40] Myerson, *supra* note 1, at 192.
[41] 19 U.S.C. § 160(a) (1970).
[42] *Id.*
[43] Cornell, *supra* note 18, at 53.
[44] Fisher, *supra* note 4, at 105.
[45] 19 U.S.C. § 161(a) (1970).

more findings of less than fair value sales from Japan than from any other nation.[46] The main reason for this is the fact that the Japanese have protected their home market by excluding foreign exports. "The insulated home market permits the Japanese corporation to follow a two-tier price strategy; high home market prices to recover costs and low export prices designed to capture high market shares abroad."[47] The Antidumping Act was enacted to counteract precisely this type of predatory price cutting by foreign exporters.

American television manufacturers successfully alleged that Japanese manufacturers were dumping televisions in the United States. On March 8, 1971, the Secretary of the Treasury announced his determination, on the basis of a unanimous finding by the Tariff Commission, that television receiving sets from Japan "are being, or are likely to be, sold at less than fair value within the meaning of § 201(a) of the Antidumping Act, 1921."[48] Despite this affirmative finding of injury, dumping duties have not been levied against the products being dumped.[49]

B. *Countervailing Duties*

Congress has created a remedy for American manufacturers harmed by imports from a country whose government supports exports through tax breaks or rebates. Section 303 of the Tariff Act of 1930[50] provides for the imposition of a duty on an imported product whenever the country of origin "shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country." The Secretary of the Treasury is empowered to make the determination of whether to impose countervailing duties. Prior to 1975, an American could not obtain judicial review of a negative countervailing duty determination, but this was changed when section 516 of the Tariff Act of 1930 was amended by sections 321(f)(1) and 331(b) of the Trade Act of 1974.

In 1970 Zenith Radio Corp. petitioned the Secretary of the Treasury and sought the imposition of countervailing duties on a list of Japanese electronic products, including television receivers.[51] In Japan a single-stage consumption tax is levied at the manufacturing level on an

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[46] Myerson, *supra* note 1, at 197.

[47] Fisher, *supra* note 4, at 115.

[48] 36 Fed. Reg. 4597 (1971).

[49] Adams & Dirlam, *Import Competition and the Trade Act of 1974: A Case Study of Section 201 and its Interpretation by the International Trade Commission*, 52 INDIANA L. J. 535, 538 n. 19 (1977).

[50] 19 U.S.C. § 1303 (1930).

[51] These products were: television receivers, radio receivers, radio-phonograph combinations, radio-TV-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes.

extensive list of consumer goods, including those mentioned in Zenith's petition. Upon exportation, the products are exempted from payment or the tax is remitted if previously paid. Zenith contended that this exemption or remission constituted a bounty or grant as defined in the Tariff Act of 1930. The U.S. government contended that this bounty or grant is not excessive as defined by long-standing administrative interpretation and thus should not be countervailed. On January 7, 1976, the Secretary of the Treasury announced his determination that "no bounty or grant is being paid or bestowed, directly or indirectly."[52]

Zenith petitioned the Customs Court for judicial review of the Secretary's determination, which was the first such petition under the amended act. In a unanimous opinion, the Customs Court agreed with Zenith and held the Japanese procedures to be a bounty or grant within the meaning of section 303.[53] The court relied on past decisions that had construed the language of the statute broadly and held the administrative interpretation of the statute to be in conflict with the decisions of the U.S. Supreme Court.

This decision was recently reversed by a divided U.S. Court of Customs and Patent Appeals.[54] Chief Judge Markey wrote that "[u]ntil lawfully changed, the administrative practice of the Treasury Department, uniformly considering a nonexcessive remission of an excise tax as failing to constitute a bounty or grant, must stand as a lawfully permissible interpretation of § 303. On this record, that interpretation is fully applicable to the Japanese Commodity Tax Law."[55] This decision has been appealed to the U.S. Supreme Court.[56]

Although this particular question is not finally settled, the case does show how the Trade Act of 1974 has increased the possibility of imposing countervailing duties. The American manufacturer may now seek judicial review of a negative determination by the Secretary of the Treasury. Before enactment of the Trade Act the Secretary's determination would have foreclosed Zenith from further attempts to have countervailing duties imposed on Japanese electronic products.

C. *Unfair Import Practices*

Congress has provided a remedy for U.S. manufacturers who feel that they have suffered from unfair import competition. Section 337 of the Tariff Act of 1930[57] declares illegal those import practices that 1) destroy or substantially injure an industry, efficiently and economically operated, in the United States; or 2) prevent the establishment of such an industry; or 3) restrain or monopolize trade and commerce in the

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[52] 41 Fed. Reg. 1298 (1976).
[53] Zenith Radio Corp. v. United States, 430 F. Supp. 242 (Cust. Ct. 1977).
[54] United States v. Zenith Radio Corp., 562 F.2d 1209 (C.C.P.A. 1977).
[55] *Id.* at 1223.
[56] 46 U.S.L.W. 3263 (1977).
[57] 19 U.S.C. § 1337(a) (Supp. 1975).

United States. The original legislation was intended to extend to import trade the same prohibition against unfair competition that the Federal Trade Commission Act provided against unfair competition in interstate commerce.[58]

The International Trade Commission is empowered by the statute to investigate any illegal violation of the section and to make its determination within eighteen months.[59] If the Commission finds that there has been a violation of the section:

> it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.[60]

In the alternative the Commission may issue a cease and desist order.[61] Upon receipt of the Commission's determination, the President has sixty days to disapprove such determination and the action taken will have no effect.[62]

Despite its broad language, section 337 has not proven to be an effective means of combating unfair import practices. For years it was used mainly in international patent cases.[63] However, since the enactment of the Trade Act of 1974, several non-patent cases have been initiated. GTE Sylvania Inc. and Philco Consumer Electronics Corporation filed a complaint alleging that several Japanese companies [64] violated this statute by their practices in importing color televisions. The International Trade Commission initiated an investigation into the complaint and on July 29, 1977 announced that all of the parties agreed to the entry of a Consent Order.[65] The Consent Order did not constitute a determination or admission that the respondents had violated the law, but it did prohibit the respondents from engaging in certain unlawful conduct. The prohibited actions are: (1) selling products at a predatory price; (2) giving monetary inducements to purchase, which result in the reduction in the price of color television receiving sets sold in the United States, for

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[58] [1922] TARIFF COMM'N ANN. REP. 4; *see also* Fisher, *Protection Against Unfair Foreign Competition: Section 337 of the Tariff Act of 1930*, 13 VA. J. INT'L L. 158, 160 (1972).

[59] 19 U.S.C. § 1337(b)(1) (Supp. 1975).

[60] *Id.* § 1337(d).

[61] *Id.* § 1337(f).

[62] *Id.* § 1337(g)(2).

[63] de Kieffer & Hartquist, *Unfair Trade Practices and Section 337 – Promises and Uncertainties*, 2 N.C.J. INT'L L. & COMM. REG. 107 (1977).

[64] These companies were: Tokyo Shibaura Electric Co., Ltd.; Toshiba America, Inc.; Hitachi, Ltd.; Hitachi Haden Hanbai Kabushiki Kasha; Hitachi Sales Corp. of America; Sharp Corp.; Sharp Electronics Corp.; Sanyo Electric Trading Co., Inc.; Mitsubishi International Corp.; and Mitsubishi Electric Sales Corp.

[65] 42 Fed. Reg. 39, 492 (1977).

which appropriate descriptive financial records are not maintained; and (3) interfering in the sales of color televisions in a manner that has an effect on U.S. commerce. The Consent Order also prohibited concerted action to fix prices and divide markets.

Although the Commission did not declare that the Japanese companies had violated the law, and the articles concerned were not excluded from entry into the United States as provided in section 337(d), the Japanese companies were forced to terminate any illegal activities in which they were engaged. The Consent Order requires the companies to report to the Commission for the next five fiscal years and allows the Commission to inspect their records. This ensures compliance with the law for at least five years.

IV. Conclusions on the Import Relief Mechanism

Overall, U.S. manufacturers of color televisions have been successful in combating Japanese imports through the administrative procedures provided by U.S. law. Antidumping duties have been assessed against the products; Japanese companies have been forced to terminate unfair import practices in which they have been engaged; and the countervailing duty question is still being litigated despite a recent setback. All three of these remedies were designed to combat some unfair national economic policy or business practice in a foreign country that makes their products more competitive with U.S. products selling in the United States.

Prior to 1975, the so-called escape clause in the Trade Expansion Act of 1962 provided a different type of relief; it aided manufacturers who could prove they were injured by increased levels of imports resulting from "concessions granted under trade agreements." This nexus between concessions and increased imports was impossible to prove, so Title II of the Trade Act of 1974 eliminated the requirement. However, the exact problem that Title II is now designed to counteract is difficult to determine. The basic causality test has now become whether imports are causing or are threatening to cause serious injury to a U.S. industry. The drafters of the Act did concede that "[t]he escape clause is not intended to protect industries which fail to help themselves become more competitive through reasonable research and investment efforts, steps to improve productivity and other measures that competitive industries must continually undertake."[66] However, no provisions in the statute ensure that uncompetitive industries will not obtain relief.[67] In effect, an inefficient American firm could obtain relief under Title II by showing an

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[66] S. REP. No. 93-1298, 93d Cong. 2d Sess. *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7266.

[67] Section 337 dealing with unfair import practices is available only to efficient U.S. industries. The other remedial procedures provided by U.S. law do not force U.S. manufacturers to prove their competitiveness, but they do require proof that the foreign manufacturer is engaged in some condemned business practice.

increased level of imports, its own declining employment levels, and its declining profit ratios, even though the foreign manufacturers acted properly.

This defect in the recent reforms has been demonstrated by the orderly marketing agreement with Japan. One writer has insisted emphatically that the U.S. color television industry, in general, is less efficient than the Japanese industry. "Today there is no doubt that the Japanese are the most efficient color-TV manufacturers in the world. According to a recent American analysis of two comparably sized TV plants, one in the U.S. and one in Japan, labor productivity in the Japanese plant was approximately double that in its U.S. counterpart."[68] Moreover, on September 27, 1977, four months after the agreement was concluded, Zenith Radio Corp., a leader in the production of color televisions, announced that it would permanently lay off 5,600 U.S. employees, twenty-five percent of its workers, and move much of its television assembly operations to Mexico and Taiwan.[69] John Nevin, chairman of Zenith, argued that Japanese imports caused the problems which forced the move and the lay-offs. However, the *Wall Street Journal* suggested that Zenith's explanation was too simplistic:

> Some of Zenith's problems clearly are of its own making, including some overly ambitious production and marketing plans that backfired and some strategic decisions on research and development that misfired badly. Some securities analysts, in fact, trace Zenith's troubles to some major decisions made shortly after Mr. Nevin joined the company as president.[70]

If this analysis is correct, it illustrates the flaws in the Title II causation requirements.

Whatever the explanations for Zenith's problems, the United States is now in the anomalous position of limiting the number of color television receivers shipped to the United States in order to protect a domestic industry whose leader has moved its production facilities abroad. One of the reasons for protecting U.S. industry and for negotiating the orderly marketing agreement is to preserve jobs for U.S. workers. Whether the orderly marketing agreement on color televisions will achieve that goal is highly questionable in light of Zenith's action.

V. Current U.S. Policy and Practice

During recent years, the United States has increasingly turned to the orderly marketing agreement as a means to protect U.S. industry.[71] The device has been especially effective in dealing with the problems of

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[68] Rose, *The Secret of Japan's Export Prowess*, FORTUNE, Jan. 30, 1978, at 56, 60.

[69] *Wall St. J.*, Sept. 28, 1977, at 2, col. 2. Robert Strauss termed the announcement "dramatic and shocking." *Wall St. J.*, Oct. 25, 1977, at 1, col. 6.

[70] *Id.*

[71] Bergsten, *Crisis in U.S. Trade Policy*, 49 FOREIGN AFF. 619 (1971).

Japanese imports.[72] The Japanese enter the agreements to prevent the imposition of stricter sanctions on their products. "Japan has claimed that many of her 'voluntary' restraints imposed on exports to the United States reflect actual threats or pressures growing out of antidumping or escape clause investigation, boycott campaigns and the introduction of import restriction bills in Congress."[73] Clearly in early 1977 Japan faced a host of these pressures with regard to televisions, especially after the International Trade Commission determined that imported televisions were causing serious injury to U.S. manufacturers and recommended that the tariff be increased. In effect, Japan had the choice of concluding an orderly marketing agreement with the United States or suffering an increase in the duty from five percent to twenty-five percent. In this light, the agreement would be more accurately classified as coerced rather than voluntary.

Although the orderly marketing agreement has proved to be an effective tool in protecting U.S. firms, as a nontariff trade barrier it has questionable implications for the international economy and U.S. international trade policy. Nontariff trade barriers have become increasingly important in recent years and include such devices as quotas, subsidies and border tax adjustments. Generally, these barriers are considered to have a depressing effect on the overall world economy. "Nontariff trade barriers reduce the world's real income level by diverting productive resources from their most efficient uses. They erect obstacles to international trade which prevent countries from trading for those products which are more efficiently produced abroad, thereby forcing inefficient production at home."[74] Devices such as the orderly marketing agreement lead to domestic inefficiency by reducing "the market pressures on producers to seek new and improved products and more efficient managerial techniques as well as the pressures on workers to acquire higher levels of skills."[75] The orderly marketing agreement in particular encourages the domestic manufacturer to expect that it is *entitled* to a share of the domestic market.

Aside from the inefficiency and stagnation that the orderly marketing agreement encourages, the negotiation of such agreements constitutes a violation of U.S. committment to GATT.[76] The United States led the effort to eliminate import barriers in GATT. In fact, in 1947 the Department of State claimed that "quotas are one of the most serious

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[72] The device first had significance in the cotton textile trade between Japan and the United States. W. HUNSBERGER, *supra* note 3, at 353.

[73] 5 U.S. TARIFF COMM'N, TRADE BARRIERS REPORT TO THE COMMITTEE ON FINANCE OF THE UNITED STATES SENATE AND ITS SUBCOMMITTEE ON INTERNATIONAL TRADE 241 (1974).

[74] Allison, *The Nontariff Trade Barrier Challenge: Development and Distortion in the Age of Interdependence*, 12 TULSA L.J. 1, 5 (1976).

[75] R. BALDWIN, NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE 241 (1970).

[76] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, T.I.A.S. 1700, 55 U.N.T.S. 187.

obstacles to an expansion of world trade."[77] Article XI of the agreement now bans the use of quantitative restrictions on trade, but the sanction has not been enforced against voluntary export restraints, such as the orderly marketing agreement.

> First, producing nations [*e.g.*, the United States and Japan] will not complain since they are the contracting parties which either have imposed the restraints or have sought the erection of the restraints in order to insulate their domestic producers from import competition. Second, the consuming nations [*e.g.*, the rest of the world] do not have the incentive to complain because they enjoy the lower prices for the restricted product since the supply of the restricted product in their markets is increased by the quantity of the restricted product which the export restraints prevent from being exported to producer nations.[78]

Furthermore, other producing nations will not complain since the orderly marketing agreement, to which they are not a party, enables them to increase their exports. For instance, Taiwan's exports of color televisions to the United States rose by ninety-four percent during 1977. Thus, Taiwan has no incentive to complain. The orderly marketing agreement has enabled the United States to violate GATT with impunity.

Perhaps the most significant development illustrated by the orderly marketing agreement with Japan, is the gradual shift away from the traditional free trade policy followed by the United States since World War II. The Carter Administration contended that the orderly marketing agreement with Japan is a way to "defuse domestic protectionism,"[80] and is "a small step to buy political and economic time to enable the United States to continue towards the goals of a free and open trading system."[81] Despite Administration claims that the orderly marketing agreement is a short term measure, the agreement could well have the opposite effect and encourage more protectionism at home and abroad. "Ironically, by its frequent demands for voluntary controls, the United States has legitimized a device that conflicts with long-range U.S. trade policy and, ultimately, may be used against its own export industries."[82]

These results would have severe consequences for the United States and international economies. Trading partners and traditional allies warn the United States that its veering from the course of liberal free trade could cause a chain reaction of protectionism, international busi-

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[77] U.S. DEP'T OF STATE ANALYSIS OF GATT 198 (1947).

[78] Allison, *supra* note 74, at 28 n. 143.

[79] BUS. WEEK, Feb. 27, 1978, at 45.

[80] *N.Y. Times*, June 13, 1977, at 46, col. 3.

[81] Speech by Frank A. Weil, Assistant Secretary of Commerce for Domestic and International Business, Conference Board International Business Outlook Luncheon, *reprinted in* COMMERCE NEWS (Press Release), Nov. 16, 1977, at 11.

[82] Smith, *Voluntary Export Quotas and U.S. Trade Policy – A New Nontariff Barrier*, 5 L. & POL'Y INT'L BUS. 10, 14 (1973).

ness contraction, and depression.[83] If this unfortunate chain of events occurs, the changes of the Trade Act of 1974 will have been a contributing factor. The orderly marketing agreement with Japan illustrates this dangerous potential.

— ROBERT C. KLOSE

[83] *N.Y. Times, supra* note 80.